Taming the Dragon:

Rural Land Takings Law in Modern China

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Abstract

This thesis examines the theories and practices surrounding the rural land takings law in modern China. It identifies and rejects the dominant Transition Paradigm in the existing literature which treats the contemporary crisis of rural land expropriation in China as a case of unfulfilled constitutional promise and dispenses prescriptions aimed at developing the Chinese expropriation law towards the supposedly more advanced models of takings law found in other countries, especially the USA. By unearthing the long overlooked historical lineage within which the rural land takings law evolves over the past century in China, including the almost forgotten original takings clause in the 1954 PRC Constitution and the foundational theories propounded by both the communist and nationalist parties, this thesis offers a much richer picture on how and why the Chinese expropriation law has become the way it is today. It shows that the widely recognized phenomenon of "land finance" is a symptom rather than cause of the problem, which lies in the deeply entrenched tradition of rural land takings for the party-state's social transformative programmes, rendering the Chinese experience incomparable to that of any other countries. The current takings clause in the 1982 PRC Constitution and the present law in this area, despite the relevant reforms over the past decade, remain to faithfully reflect such a tradition characterized by the state's plan-based top-down control over rural land and the presumption of state expropriation in non-agricultural use of rural land. Since these have been the paramount features of the Chinese land regime for over half a century and are unlikely to change in the foreseeable future, most of the reform recommendations made in the existing scholarship are either irrelevant or unfeasible. However, this is not to say that no change is possible. A more modest yet more realistic reform proposal will be put forward.

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I have imagined for countless times how exciting and exhilarating it will be when I finally put my pen to paper to write the acknowledgement, as a sign of my success in finishing the doctoral thesis. Now the time has come but I am in a peaceful mood filled not with joy over what I have achieved personally but gratitude to those who have made this journey possible and fruitful for me.

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Prologue China's New Enclosure Movement

In March 2007, a photo went viral in China and abroad: a two-story brick building perched over a huge 17-meter deep excavated pit, like an isolated island in the ocean. The house, located in Chongqing, the largest Chinese metropolis in the southwest, belonged to a couple who refused to back down in face of local government's expropriation. Until then, they had held out for more than two years when the other 280 households in the same area all gave up, moved out and made way for a commercial development project. Regarded as a symbol of grassroots courage and perseverance, the house was then widely applauded online as the "coolest nail house in history".[1]

The reason that the house was called a nail is obvious: it persisted against the government's decision to expropriate the property just like a nail against the hammer. Yet the coolest nail house was anything but cool. The picture soon attracted extensive media coverage and stirred up a heated public outcry: In defense of their house, the owners put up two banners around the building: one reads that "citizens' lawful private property must not be violated" and the other "the state respects and protects human rights", both of which are quoted from the 2004 Amendment to the 1982 PRC constitution (Articles 13 and 33). This effectively made the nail house a public test case of whether the "fundamental law of the country" really holds "supreme legal authority"[2] and whether the first-of-its-kind Property Law (*wuquan fa*) just passed by the National People's Congress then would make a change.

[1] Jeremy Goldkorn, 'Property Rights: the Coolest Nail House in History' March 22, 2007 <http://www.danwei.org/bbs/property_rights_the_coolest_na.php> accessed December 21, 2012.
[2] Preamble of the 1982 Constitution.

The outcome of this test case was that the nail was ultimately pulled out after a satisfactory compensation package was settled.[3] However, even to someone remotely interested in contemporary China, stories of this kind have frequently been headline grabbers over the years.[4] It has been widely recognized that they are symptomatic of an era.

"The increase of pasture...by which your sheep, which are naturally mild, and easily kept in order, may be said now to devour men, and unpeople, not only villages, but towns…the nobility and gentry…stop the course of agriculture, destroying houses and towns…and enclose grounds that they may lodge their sheep in them…the owners as well as tenants are turned out of their possessions, by tricks, or by main force, or being wearied out with ill-usage, they are forced to sell them."[5]

The denunciation of the sheep-devour-man tragedy by Thomas More in the 16th century is still relevant to China four hundred years later, not only because it is incorporated into the school history textbooks read by most Chinese,[6] thanks to Karl Marx's famous argument that the enclosure movement in England facilitated the brutal primitive accumulation of capitalism by forcing the peasants to be separated from the land and become proletarianized.[7] More importantly and somewhat ironically, widely observed is that the socialist China itself has been undergoing a "New Enclosure Movement" (NEM hereinafter, *xin quandi yundong*) since the late 1980s.[8]

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[3] 'Nail House' in Chongqing Demolished' April 3, 2007 <http://www.chinadaily.com.cn/china/2007-04/03/content_842221.htm> accessed December 26, 2012.

[4] For a partial collection of the nail house incidents in other parts of China along the years, see 'Cases of the Coolest Nail House in Various Localities (*pandian gedi zui niu dingzi hu*)' November 23, 2012 <http://bbs.tianya.cn/post-worldlook-621557-1.shtml> accessed December 21, 2012.

[5] Thomas More, *Utopia (originally published in 1516)* (Arc Manor LLC 2007), p 20.

[6] Research and Development Center for History Textbook (ed) *History (Compulsory Course)*, vol 2 (People's Education Press 2007), p 30.

[7] Karl Marx, *Capital: A Critique of Political Economy*, vol 1 (Charles H. Kerr and Co. 1909), pt VIII.

[8] As an academic term, the NEM was initially coined by the now exile Chinese intellectual Qinglian He. See Qinglian He, 'Enclosure Movement in the 1990s' 29 The Twenty-first Century, pp 1-11; Qinglian He, *The Pitfalls of Modernization: Economic and Social Problems in Contemporary China (xiandaihua de xianjing: dangdai zhongguo de jingji shehui wenti)* (Jinri Zhongguo Press 1998), ch 2.

What is the NEM? From a legal standpoint, since the 1982 Constitution, only two types of land ownership exist in China—state-owned urban land and collective-owned rural land. In this context, land can be "enclosed" in two scenarios: 1) transfer of use-rights of state-owned land from its current users back to the state; 2) transfer of ownership of rural land from collectives to the state. The first is the state power to withdraw (*shouhui*), the current legal basis of which lies in Article 58 of the 2004 Land Administration Law.[9] Yet it should be noted that people are usually much more familiar with the term "demolition and relocation" (*chaiqian*), which according to the 1991 and 2001 Regulation on the Management of Urban House Demolition and Relocation (*chengshi fangwu chaiqian guanli tiaoli*) stands for both the withdrawal of use-rights of state-owned land and the concomitant takings of ownership of any private-owned property above the land. As a legal term, *chaiqian* was officially abandoned in the 2011 Regulation on Expropriation and Compensation of Houses above State-owned Land (*guoyou tudi shang fangwu zhengshou yu buchang tiaoli*), which uses "expropriation" (*zhengshou*) to refer to the takings of private property over state-owned land. On the other hand, the state power to take the collective-owned land is enshrined in Article 10 of the 1982 Constitution[10] and is also called expropriation.[11] Therefore, broadly conceived, China's NEM involves both the state's withdrawal of use-rights of the land it owns and the state expropriation of the ownership of collective land.

This then distinguishes the Chinese enclosure movement from its English counterpart. On top of its drastically different social and economic context, the English enclosure movement was not initiated by the state but by individual landowners. Although since the 18th century, parliamentary

[9] The Land Administration Law was initially enacted in 1986 and subsequently revised in 1988, 1998 and 2004. The term first appeared in Article 19 of the 1986 and 1988 versions of the law and then in Article 58 of the 1998 version.
[10] The People Republic of China has four Constitutions to date which were passed in 1954, 1975, 1978 and 1982. The 1982 Constitution is the one that is in effect today and has been subject to four amendments in 1988, 1993, 1999 and 2004.
[11] Over the years there have been changes in the meaning and usage of this term. An authoritative clarification was finally arrived at in the 2004 Constitutional Amendment, which will be discussed in the following texts.

acts became crucial in legalizing enclosures, the initiators of these bills remained private landowners. Moreover, while enclosures had once been based on private agreements in England,[12] state power is always implicated in the Chinese case.[13] Therefore, it may well be dismissed that any analogy between the two is ill-founded and the idea of China's NEM is a complete misnomer.

Nonetheless, the parallel has been drawn and with good reasons. To begin with, the magnitude of enclosures in China lives perfectly up to the name of "movement", considerably dwarfing the English counterpart. From 1604 to 1914, there were in all 5265 enclosure acts in England, affecting little over 6.75 million acres of land, almost 21 percent of the total area.[14] In China, according to an official record published by the Ministry of Land, between 2004 and 2010, the total amount of rural land taken by the state was 2350450.1 hectares, i.e. almost 5.81 million acres.[15] This means that it took China only seven years to accomplish 86% of what took England more than three centuries to do. Yet this is just part of the story as the enclosures in rural China started way before the 2000s. An often-quoted finding from a 2003 report by a research team at the State Council Development Research Centre suggests that between 1987 and 2001, 33.946 million *mu* or 5.59 million acres of cultivated land was converted for construction, over 70% of which was done through expropriation. This is to say that at least 23.76 million *mu* or 3.8 million acres of cultivated land was expropriated during this period,[16] which is nevertheless an underestimate of the total amount of rural land

[12] Before the 18th century, the prevalent form of enclosure in England was by private agreements amongst all parties concerned. From then on, landowners sought to conduct enclosures more through getting private bills through the Parliament, i.e. Parliamentary Enclosure that could take effect even when the majority of small proprietors opposed. However, enclosure by agreement still persisted well into the 18th and 19th century. See Michael Reed, *The Landscape of Britain: From the Beginning to 1914* (Routledge 1990), p 242; Roderick Floud and Paul Johnson (eds), *The Cambridge Economic History of Modern Britain, Volume I: Industrialisation, 1700-1860* (Cambridge University Press 2004), p 99.

[13] For a more thorough comparison between enclosure movements in these two countries, see Yuhe Zhang, 'A Comparison Between Enclosure Movement in China and England (*zhongying quandi yundong zhi bijiao*)' August 7 Economic Highlights (*jingjixu xiaoxi bao*).

[14] Reed, p 242.

[15] Calculated from data in China Ministry of Land Resources (ed) *China Land Yearbook 2011* (Dizhi Press 2011), p 89.

[16] Xingsan Jiang and Shouying Liu, 'Nanhai Model: Let the Peasants Participate in Industrialization with Land Rights (*nanhai moshi: rang nongmin yi tudi quanli canyu gongyehua*)' *China Economic Times* (May 15, 2003). Yu

expropriated. This is because China's land is legally categorized by use into three types: agricultural land (*nongyong di*), construction land (*jianshe yongdi*) and unused land (*wei liyong di*).[17] Agricultural land is directly used for agricultural production, including cultivated land (*gengdi*), forest land (*lindi*), grassland (*caodi*), etc. Construction land is used for non-agricultural purposes, including urban and rural housing, factories and infrastructure and so on. Therefore, rural land can be both agricultural and construction land and cultivated land is but one type of agricultural land. Even so, just adding the amount of expropriated cultivated land between 1987 and 2001 to the afore-mentioned 2004-2010 data, we have an overall scale of 9.61 million acres of rural land expropriated over roughly 22 years, 42% more than the 6.75 million acres enclosed in England over 300-odd years. Meanwhile, withdrawal of urban land by the state is by no means lesser in size and pace over the past three decades. On this front, data is even scarcer. In August 2004, it was required by several central ministries that each province shall submit quarterly report on the total amount of urban land withdrawal, which means that since 2004 there must be a national sum on this issue.[18] However, nothing has been published since and it is impossible to pin down the exact magnitude of urban land withdrawal in China over the years. In this respect, a complaint by the Vice Minister of Construction in 2010 is much revealing: the average expected life span of China's buildings is said to be around 30 years while in Britain it is 132 years and 74 years in the US.[19] In a subsequent

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Jianrong came up with an even higher estimate that between 1990 and 2002, 47.36 million *mu*/7.8 million acres of cultivated land were taken for non-agricultural construction. See Jianrong Yu, 'Land Loss and Job Loss by the Peasants is a Serious Political Problem (*nongmin shidi shiye shi yige yanzhong de zhengzhi wenti*)' 1 Exploration and Free Views (*kaifang yu zhengming*), p 10.

[17] Article 4, 2004 Land Administration Law.

[18] Ministry of Construction and others, *Circulation on the Implementation of the State Council Office Circulation on Controling and the Scale of and Improving the Management of Urban Housing Demolition and Relocation (guanyu guanche guowuyuan bangongting guanyu kongzhi chengzhen fangwu chaiqian guimo yange chaiqian guanli de tongzhi de tongzhi)* (August 1, 2004).

[19] Wang Qian, 'Short-lived Buildings Create Huge Waste' April 6, 2010 <http://www.chinadaily.com.cn/china/2010-04/06/content_9687545.htm> accessed January 7, 2013. For the full text of the minister's speech, see Baoxing Qiu, 'Six Areas of Greatest Potential in Energy Consumption Reduction in Construction in China and its Prospects (*woguo jianzhu jieneng qianli zuida de liu da lingyu jiqi zhanwang*)' April 12, 2010 <http://www.mohurd.gov.cn/jsbfld/201004/t20100408_200306.html> accessed January 7, 2013.

media brief, the Ministry of Construction clarified that the culprit for such short life span of buildings in Chinese cities was not poor quality but frequent demolition and relocation.[20] A 2013 report by the China Data Centre at Tsinghua University discloses that 16% of or totally 64.3 million households in rural and urban China have experienced land takings during the past 20 years.[21] While it is nearly impossible to reach a definitive conclusion on the scale of China's NEM, the point here is not about the accuracy of statistics. Already demonstrated is that rural and urban land takings have been "destroying houses and towns" at a massive scale in contemporary China.[22]

Second, compared with the English enclosures that had "unpeopled not only villages but towns", massive land enclosures in China have displaced an even larger number of population. As to the total number of displaced peasants, no authoritative data has been published yet. More problematically, there is no agreed definition on what is "displacement".[23] Over the years, leading party newspapers[24] and officials at the central level[25] have supplied different estimates of the number of land-losing peasants, increased from 20 million between 1997 and 2001 to 40 million in 2004 and then to 40-50 million in 2012. Meanwhile, mass media and academia have also contributed estimates

[20] 'Ministry of Housing and Urban and Rural Development: Inappropriate Large-scale Demolition and Construction Results in Short-lived Buildings (*zhujianbu: budang dachai dajian zaocheng fangwu duanming*)' May 17, 2010 <http://news.xinhuanet.com/politics/2010-05/17/c_12110447.htm> accessed January 7, 2013.

[21] 'Prelimiary Findings of Urbanization Survey' (*China Data Centre, Tsinghua University*, October 27, 2013) <http://www.chinadatacenter.tsinghua.edu.cn/news.php?id=309> accessed March 5, 2014

[22] For an comprehensive documentation of this process, see You-tien Hsing, *The Great Urban Transformation: Politics of Land and Property in China* (Oxford University Press 2010).

[23] Sally Sargeson, 'Villains, Victims and Aspiring Proprietors: Framing 'Land-losing Villagers' in China's Strategies of Accumulation' 21 Journal of Contemporary China. It was rightly pointed out that land-losing peasants may not necessarily lose all their land and become utterly displaced or dispossessed.

[24] In 2001, a People's Daily report revealed that from 1997 to 2000, nearly 20 million peasants who experienced land expropriation need relocation and settlement. See Jun Xia, 'No More One-off Compensation for Land Acquisition (*tudi zhengyong buzai shixing yicixing buchang*) ' *People's Daily* (October 25, 2001) 5. In 2004, an essay published on People's Daily suggested that there were 40 million land-losing peasants and the annual increase was two million. See Yong Gao, 'How do Land-losing Peasants Live: Theoretical Discussion about the Problem of Land-losing Peasants (*shiqu tudi de nongmin ruhe shenghuo: guanyu shidi nongmin wenti de lilun tantao*)' *People's Daily* (February 2, 2004) 9. In 2012, another report on People's Daily claimed that there were 40-50 million land-losing peasants while the increase per year is 3 million. See Yongping Zhao, 'Land Acquisition and Demolition and Relocation: Why in a Hurry (*zhengdi chaiqian hetaiji*) ' *People's Daily* (July 15, 2012) 5.

[25] In 2011, a member of the National People's Political Consultative Committee suggested that the total number of land-losing peasants was no less than 40 million. See 'Committee Member Zhang Yuanfu: according to Expert Estimate, Land-losing Peasants in China at the Moment are no less than 40 Million (*zhang yuanfu weiyuan: ju zhuanjia cesuan, muqian zhongguo shidi nongmin leiji bu shaoyu 4000 wan ren*)' March 9, 2011 <http://2011lianghui.people.com.cn/GB/214392/14099239.html> accessed January 8, 2013.

that vary greatly or even contradict one another, ranging from 20 million till 2004[26], 47 million between 1987 and 2001[27], 40-50 million to 2011[28], 40.82 million between 1997 and 2009[29], 50.93-55.25 million between 1987 and 2001[30], 66.3 million until 2002[31], 80 million till 2003[32] and 120 million in 2011[33] to 200 million in 2010.[34] Various predications were made from 70 million in 2021[35] to 100 million in 2020[36]. Again hardly are any of these figures accurate because some were founded on questionable statistical methods and others do not even specify the method used.[37] It was not until 2012 that the Ministry of Land disclosed for the first time that between 2008 and 2011 more than 25 million peasants received social security support after expropriation.[38] Therefore, we could finally conclude with confidence that at least 25 million peasants have gone through expropriation over the four-year period. As to the number of displaced urban residents, it was suggested that the figure is somewhere between eight to ten million until 2010. At least one million

[26] Rujiang Ge, Haiping Pan and Xinya Wang, 'Who Produces 20 Million Land-losing Peasants: Investigation of the New Disadvantaged Group in the Waves of Urbanization (*shui zhizao le liangqian wan shidi nongmin: chengshihua langchao zhong de xin ruoshi qunti diaocha*)' [2004] 1 China Reform (Rural).

[27] Haibo Zhang and Xing Tong, 'The Adaptability to Urban Context and Self-identity in Acquired Modernity of Groups Forced to be Urbanized (*beidong chengshihua qunti chengshi shiyingxing yu xiandaixing huode zhong de ziwo rentong*) ' [2006] 2 Journal of Sociological Research.

[28] China Academy of Social Sciences (ed) *Annual Report on Urban Development of China 2011 (zhongguo chengshi fazhan baogao 2011)* (China Social Science Academic Press 2011).

[29] Yaping Li, *Reserach on the Problem of Land-losing Peasants in China's Urbanization Process (woguo chengshihua jincheng zhong shidi nongmin wenti yanjiu)* (Master Thesis, Shandong University 2011), p 21.

[30] 'Scholar's Count of China's Landless and Land-losing Peasants to be Over 1.8 Billion (*xuezhe tuisuan woguo wudi shidi nongmin zongshu zai 1.8 yi yishang*)' [2004] Information for Leader's Policy-making (*lingdao juece xinxi*).

[31] Yu, p 10.

[32] 'Worries about Land in China (*zhongguo tudi yousi lu*)' September 3, 2003 <http://www.southcn.com/finance/picture/200309030072.htm> accessed January 8, 2013.

[33] Qinglian He, 'How Many Land-losing Peasants are There in China? (*zhongguo shidi nongmin zhi duoshao*)' January 9, 2011 <http://www.voafanti.com/gate/big5/www.voachinese.com/articleprintview/776030.html> accessed January 8, 2013.

[34] Lihua Tong, 'Land-losing Peasants across the Country should be over 100 Million at Present (*dangqian quanguo shidi nongmin yingdang chaoguo yi yi ren*)' October 20, 2010 <http://blog.legaldaily.com.cn/blog/html/20/2443320-9538.html> accessed January 9, 2013.

[35] Hui Wang and Ran Tao, 'How to Achieve a Systematic Breakthrough in the Reform of Land Acquisition System: Recommendations to the Draft Amendments to Land Administration Law (*ruhe shixian zhengdi zhidu gaige de xitongxing tupo: jianlun dui tudi guanli fa xiugai cao'an de jianyi*) ' [2009] 8 Leaders (*lingdaozhe*) .

[36] 'Democratic and Progressive Party Centre: Number of Land-losing Peasants over 100 Million by 2020 (*minjin zhongyang: 2020 nian shidi nongmin shuliang jiang chaoguo yi yi*)' March 14, 2009 <http://news.163.com/09/0314/05/54BHBOPP000136K8.html> accessed January 8, 2013.

[37] The widely-cited finding of Yu Jianrong at 66.3 million was based on dividing the total expropriated area of 47.36 million *mu* between 1990 and 2002 by the average cultivated land per peasant of 0.7 *mu*.

[38] 'Ministry of Land Resources: Compensation for Land Expropriation in 3.5 Trillion in Four Years (*guotu ziyuan bu: zhengdi chaiqian buchang 4 nian zhichu 3.5 wan yi*)' December 26, 2012 <http://news.xinhuanet.com/fortune/2012-12/26/c_124148072.htm> accessed January 8, 2013.

were displaced in Beijing between 1996 and 2008 and about four million in Shanghai between 1991 and 2006.[39] Again there is no reliable and accurate statistics but it is obvious that China's NEM has affected more people than its English counterpart ever did, making the case for an analogy even stronger.

There is a third and probably the more substantial reason that NEM in contemporary China is compared with the English enclosures centuries ago. As a result of indoctrination via the state-run educational system, Marx and More have left upon most Chinese a strong impression that enclosures in England were fraught with "tricks" and "main force". Therefore, to call massive land takings in China enclosures is in essence a social critique against it as something to be lamented, condemned, and a historical lesson China should prevent from repeating. The following three examples are illustrative of the widespread discontent with massive land takings in China today.

Released in January 2009, the sci-fi blockbuster *Avatar* quickly captured the Chinese audience. Despite of its popularity, it was soon pulled from screen by the Chinese film authority. The reason was never disclosed but speculations were that this Hollywood fantasy set in an imaginary alien planet had cut across the political fault-lines in the People's Republic.[40] Parallels had been drawn between the plight of the indigenous on Na'vi and that of Chinese facing land takings. The netizens even mockingly observed that the only reason that the local Na'vi tribes could successfully hold out against the invaders from earth was that the all-powerful Chinese authority was not involved. As satirical and cynical that may be, it nevertheless reflects a solemn reality that ordinary Chinese are

[39] Hsing, p 4.
[40] Ben Child, 'Avatar Smashes Chinese All-time Box-office Record' January 19, 2010 <http://www.theguardian.com/film/2010/jan/19/avatar-smashes-chinese-record> accessed January 9, 2013.

often too vulnerable and helpless in land takings, with their last resort reduced to suicidal violent protests.[41]

The social frustration of and indignation against land takings in China were tapped into in 2010 by an online game called *Nail Household vs. Demolition Team*, a copycat of the international hit *Plants vs. Zombies* with the two opposing sides changed to a Chinese family in an isolated house like the one in Chongqing against a flood of demolition crew. Within two weeks the game was played 1.8 million times[42] and ranked the third most popular game monthly in China.[43]

Perhaps the best epitome of an era marked by massive land takings is the word "China" itself. Split into "*Chi*" and "*Na*", the country's English name has been re-interpreted and turned into a Chinese phrase literally meaning "what to demolish" or "tear that down".[44] Although sarcastic, it demonstrates that land taking is broadly considered to be a salient feature of China as a country today. A huge amount of ink has been spent on the causes and cures of this problem, to which the next chapter is devoted. Yet it should be made clear from the outset that this thesis will focus primarily on rural land takings. Besides the formal reason that the space is limited, there are substantive reasons for narrowing down the scope. One is that rural land takings have a much longer history in modern China than its urban counterpart and the other is that we expect to witness more of it in the near future as China continues to urbanize and industrialize. Therefore, to focus on rural land takings, which in the reform era refers to state expropriation of collective land, does not only

[41] For a summary of expropriation violence, see Sally Sargeson, 'Violence as Development: Land Expropriation and China's Urbanization' (2013) 40 Journal of Peasant Studies 1063, p 1065.
[42] Tania Branigan, 'China Embraces Web Game Depicting Family's Fight with Demolition Crew' September 16, 2010 <www.theguardian.com/world/2010/sep/16/china-game-family-fight-demolition> accessed January 9, 2013.
[43] Qingshu Zhou, 'The Game Nail Household v. Demolition Team gone Viral on the Internet (*dingzi hu da zhan chaiqian dui youxi baohong wangluo*)' September 15, 2010 <http://news.17173.com/content/2010-09-15/20100915093022315,1.shtml> accessed January 10, 2013.
[44] Ni Tao, 'Ugly Urban Buzzword Chai Na, Tear it Down' August 16, 2010 <http://www.shanghaidaily.com/Opinion/chinese-perspectives/Ugly-urban-buzzword-chai-na-tear-it-down/shdaily.shtml> accessed January 10, 2013.

offer us a longer-run historical perspective but also the opportunity to envision the future development.

The rest of this thesis is divided into six chapters. The first two chapters present the existing expropriation law and the relevant reforms over the last decade. The third chapter deals with China's original takings clause in 1954 which has hitherto been overlooked in the existing literature. The fourth chapter discusses the theoretical foundations of land takings laid down in the first half of the 20th century. Chapter 5 offers an in-depth analysis of the current constitutional takings clause enacted in 1982. Chapter 6 documents the evolution of the law in the reform era, explains the status quo, and looks into the future. Apparently, the time span of this thesis covers the entire 20th century, to which the term "modern China" refers.

Chapter 1 Chinese Rural Land Expropriation Law in Crisis: Diagnosis and Prescription

For years the NEM in rural China has been considered a thorny problem with a series of grave consequences. For one thing, as mentioned before, displacing and dispossessing millions, it has led to a widespread occurrence of what is called "domicide" across the country[1], characterized by appalling deprivation, dislocation and destitution of those expropriated[2]. Consequently, it becomes a hotbed to intensive contention, resistance and protests against state expropriation by the peasants, a phenomenon typically seen as the primal threat to the much-cherished social stability in China.[3] For another, since rural land expropriation is usually followed by land use conversion, the NEM has resulted in the loss of agricultural land (cultivated land in particular) to residential, industrial and commercial development at worrying scale and pace,[4] causing grave concerns about China's food security and ecological integrity.[5] From a legal standpoint of view, the NEM in rural China has been taken as a testimony to the failure of the law in this area to effectively restrain the government's power to expropriate. The point of departure for relevant legal analysis has invariably been the third paragraph of Article 10 in the current PRC Constitution enacted in 1982, which stipulates that "the state may, in the public interest, expropriate land and make compensation in accordance with the law."

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[1] John Porteous and Sandra Smith, *Domicide: The Global Destruction of Home* (McGill-Queen's Press 2001). The Chinese manifestation of domicide in Shanghai is documented by Qin Shao, *Shanghai Gone: Domicide and Defiance in a Chinese Megacity* (Rowman & Littlefield Publishers 2013).

[2] Hsing, ch 7.

[3] The most cited finding is from Yu Jianrong who estimated that 65% of rural "mass incidents" were triggered by governments' forceful and violent land expropriation. See Jianrong Yu, 'Rural Land Conflicts will Influence China's Social Development (*nongdi chongtu jiang yingxiang zhongguo shehui de fazhan*)' in Jianrong Yu (ed), *Perspective from the Bottom Stratum (diceng lichang)* (Shanghai: Sanlian Shudian 2010), pp 45-48.

[4] Samuel Ho and George Lin, 'Non-Agricultural Land Use in Post-Reform China' (2004) 179 The China Quarterly 758.

[5] Erik Lichtenberg and Chengri Ding, 'Land Use Efficiency, Food Security, and Farmland Preservation in China' (2006) 18 Land Lines 2.

There are three key terms in China's constitutional takings clause—"public interest", "compensation" and "in accordance with the law". Article 42 of the 2007 Property Law (*wuquan fa*) provides that rural land expropriation shall be carried out "in accordance with legally determined authority and procedures". Accordingly, "in accordance with law" is typically seen as an overarching requirement of legality over the exercise of and compensation for expropriation. In this sense, at least on the constitutional level, the Chinese state power of land expropriation seems to be placed under constraints not so dissimilar to those found in other countries, most notably the United States.

The Fifth Amendment to the American Constitution reads that "nor shall private property be taken for public use, without just compensation". Despite the difference in exact wording, the similarity between the two constitutional takings clauses is hard to be overlooked. Present in both are the prerequisite of some public purpose ("public interest" in China and "public use" in America) and the requirement of compensation ("compensation" in China and "just compensation" in America). Unsurprisingly, this turns out to be a perfect starting point for many of those concerned with the failure of Chinese takings law to juxtapose it against the American counterpart, resulting in a prevalence of the Sino-US comparative approach in both the academia and policy circles in China.

To be sure, this is not to say that the US is the only country with which China has been compared in terms of the takings law. There have been comparative studies between China and other countries as well.[6] But the field is dominated by Sino-America comparison, of which two examples are particularly indicative. By skimming the titles, one will find that most works translate "土地征收/征地" as "eminent domain", a term used mainly in the US.[7] China's Ministry of Land Resources

[6] See e.g. Li Zhang, 'The Scrutiny Mechanism of Public Purpose in Land Expropriation in France and the Lessons for China (*faguo tudi zhengshou gongyixing shencha jizhi jiqi dui zhongguo de qishi*) ' (2009) 1 Administrative Law Studies (*xingzheng faxue yanjiu*); Zhijie Yuan, 'Public Interest in Land Expropriation in Germany (*deguo tudi zhengshou zhong de gonggong liyi*)' (2010) 2 Administrative Law Studies (*xingzheng faxue yanjiu*).

[7] The term used in continental Europe is expropriation and compulsory purchase in the UK.

(hereinafter the MLR) organized a special conference in 2008 to help Chinese top decision-makers and scholars to learn from the American legal experience of eminent domain, which is so far the only conference held at such a high official level.[8]

The fascination with American takings jurisprudence in China can be explained by a set of factors. To start with, English being the most important foreign language studied in China and the dominant influence of American law around the globe have definitely assisted and motivated the effort to seek American inspiration to solve Chinese problems. Moreover, the active involvement in Chinese legal reforms by American partners, especially non-governmental organizations and academic institutions has also been a facilitating factor, to which the just-mentioned 2008 conference is but one testimony. Yet most importantly, no other developed country in the world has witnessed such heightened controversy surrounding and heated public debate about land takings than the US[9], a situation reminiscent of what has been taking place in China. The large amount of takings jurisprudence generated by American courts over a long period of time is also unparalleled, seen by many as a fertile ground for comparative legal studies and a rich resource to draw lessons from to reform China's own takings law.

Consequently, the third paragraph of Article 10 of the 1982 PRC Constitution has almost uniformly been compared to the American Fifth Amendment. Explicitly or implicitly, the study of Chinese expropriation law has centred on explaining why and how these two similar constitutional takings clauses play out so differently in practice.

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[8] For a synopsis of the conference, see Jing Wang, 'A Synopsis of the Conference on Eminent Domain and Land Dispute Resolution Mechanism in China and America (*zhongmei tudi zhengshou he tudi jiufen jiejue jizhi yantaohui zongshu*)' [2008] 4 Administrative Law Review (*xingzhengfa luncong*).

[9] Rachelle Alterman (ed) *Takings International: A Comparative Perspective on Land Use Regulation and Compensation Rights* (American Bar Association 2010).

The overall finding of the existing literature is that the promise made on rural land expropriation in the 1982 PRC Constitution is largely broken. More specifically, this is because the present Chinese takings law is considerably underdeveloped than its American counterpart in checking the takings power and protecting property rights. Present Chinese takings law is defined in this chapter to include both relevant constitutional and statutory provisions. The former refers to the third paragraph of the 1982 PRC Constitution, which has largely remained unchanged throughout the four Constitutional Amendments during the reform era in 1988, 1993, 1999 and 2004. The latter primarily refers to the relevant prescriptions in the 2004 Land Administration Law (hereinafter the LAL). Since it is basically the same as the previous 1998 version except for the terminological change from requisition to expropriation mentioned in the Prologue, the 1998 LAL and its accompanying Regulation on Implementation of Land Administration Law promulgated in the same year are also considered as part of the present takings law in China.[10]

The rest of this chapter proceeds in two parts. The first part presents my key findings in two sections: the public interest prerequisite and the requirement of compensation. Section 1 introduces the triple challenge that China's constitutional takings clause is widely perceived to face. While a lack of statutory and judicial definition of what qualifies as public interest leaves a huge room of discretion for the government to expropriate, the present land ownership and use system actually makes land expropriation the only way through which rural land can be turned into urban land or non-agricultural land under most circumstances in China. This naturally puts question marks on the public interestedness of many expropriation decisions, especially those leading to private use or development of the expropriated land. To make matters worse, those expropriated lack the

[10] N.B. The 1998 Regulation on Implementation of Land Administration Law was revised in 2011 to reflect the terminological change from requisition to expropriation.

opportunity to have any input into the decision-making of the government concerning expropriation. Section 2 examines the standard of compensation for expropriation, which has been commonly criticized as inadequate and unjust. Moreover, it is very difficult for the expropriated to challenge the compensation decisions.

The second part of this chapter presents the reform proposals on China's takings law. Unsurprisingly, in one way or another, the proposals are modeled on the American experience of eminent domain, calling for better and narrower definition of public interest, adopting fair market value as the compensation standard and enhancing public participation in expropriation decision-makings. However, despite the groundswell of support for reform, the last decade witnessed little progress.

1. Diagnosis: A Broken Constitutional Promise

I. The Public Interest Prerequisite: A Triple Challenge

(1) The Definitional Challenge

As one would expect, the constitutional prerequisite of "public interest" is central to justifying government decisions of expropriation. For example, in the US, much ink has been spilled by judges and scholars on the appropriate interpretation of "public use" in the Fifth Amendment. State legislatures have also played an active role in delineating the four corners of the public purposes the takings power can serve.[11] By way of contrast, in the People's Republic, the remit of public interest

[11] For instance, after the contentious 2005 *Kelo v. City of New London* case in which the US Supreme Court ruled in favour of eminent domain for the sake of economic development, there was a widespread backlash among many state

has never been demarcated. On the one hand, although the constitutional public interest requirement has been echoed in a set of statutes including the 2007 Property Law (Article 42), 2007 Urban Real Estate Management Law (Article 6) and 2004 LAL (Article 2), its meaning has not been specified by any of those legislations. Neither the national nor the local people's congress has ever defined, generally or *ad hoc*, what public interest means as far as expropriation is concerned.

On the other hand, and perhaps more shockingly, Chinese courts have so far remained silent on the public interest prerequisite. This is in direct contrast with the American situation where both federal and state courts have been, for decades if not centuries, spelling out and fine-tuning the remit of the constitutional public use clause in judicial review over individual takings cases. Yet there is so far neither judicial interpretation from the Supreme People's Court nor any rulings from local courts on what public interest stands for in expropriation cases. This is because the government decision to expropriate has generally been held to be non-justiciable because it is seen either as an administrative decision made with finality (*xingzheng zhongju caijue*)[12] or an abstract administrative act (*chouxiang xingzheng xingwei*)[13]. According to Article 12 of the 1989 Administrative Litigation Law, both these types of government decisions are immune to administrative litigation, the Chinese version of judicial review. Hence there is no judicial elucidation of the meaning of the public interest prerequisite.

To be sure, few expect that a concept as nebulous as public interest can ever be defined with precision in each and every scenario. As well manifested in other jurisdictions, the legitimate scope

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legislatures which amended the state law on eminent domain to provide more stringent definition of public purpose of eminent domain. See The Castle Coalition, '50 State Report Card: Tracking Eminent Domain Reform Since Kelo' (2009) <http://www.castlecoalition.org/index.php?option=com_content&task=view&id=2412&Itemid=129> accessed August 1, 2013.

[12] Jie Cheng, 'Procedural Anomy and Reconstruction in Land Expropriation and Requisition (*tudi zhengshou zhengyong zhong de chengxu shifan yu chonggou*)' [2006] 1 Legal Studies (*faxue yanjiu*) 62, p 72.

[13] Eva Pils, 'Peasants' Struggle for Land in China' in Yash Ghai and Jill Cottrell (eds), *Marginalized Communities and Access to Justice* (Routledge 2010), p 142.

of public purpose for land takings is often highly contested. Nevertheless, it is not a logical necessity that an absence of judicial or statutory definition of public interest will unavoidably open the floodgate of expropriation. This is because the indeterminacy or "open textureness" of public interest is not without boundaries. There may well be borderline cases where it is hard to lay judgment on the public interestedness of a specific decision of expropriation. But it is unlikely that every case is a hard case. It is fair and reasonable to expect that in many, if not most instances there is a generally accepted line between public interest and non-public interest and that the government will refrain from expropriating for the latter, even when there is no clear-cut and authoritative definition of the term offered by the legislature or judiciary.

Unfortunately, however, as already suggested above, the reality is the opposite in contemporary China. Widely observed is that massive rural land expropriation has been used by the government to serve almost all kinds of purposes, many of which barely qualify as public interest understood in any sensible way.[14] A 2003 report of the Ministry of Land admitted that between 2000 and 2001, in the 16 provinces surveyed, 21.9% of the expropriated rural land was subsequently used for profit-making development such as golf courses, shopping malls, sports stadiums, commercial housing and so on.[15] What drives Chinese government to do so?

[14] Chenglin Liu, 'The Chinese Takings Law from a Comparative Perspective' 26 Washington University Journal of Law & Policy 301, pp 318-20; Chenglin Liu, 'Informal Rules, Transaction Costs, and the Failure of the Chinese "Takings" Law' (2005) 29 Hastings International and Comparative Law Review 1, pp 6-7; Jianlin Chen, 'China's "Ding Zi Hu", U.S.'s Kelo and Singapore's En-bloc Process: A New Model For Economic Development Eminent Domain From a Giving's Perspective' (2008) 24 Journal of Land Use, pp 115-16; Annette M. Kim, 'Land Takings in the Private Interest: Comparisons of Urban Land Development Controversies in the United States, China, and Vietnam' (2009) 11 Cityscape.

[15] Xinshe Lu (ed) *Studying the Problem of Land Expropriation, Exploring the Road of Reform (yanjiu zhengdi wenti tansuo gaige zhi lu)*, vol 2 (China Dadi Press 2003), p 46.

(2) The Structural Challenge

There are many factors behind this nationwide fervor of land expropriation, among which the legal one is to be found in two unique features of the current land system in China. Simply speaking, with very few exceptions, whenever rural land is turned into urban land or non-agricultural land, state expropriation is required. This can be called the dual structural challenge to the public interest prerequisite—the "urbanization challenge" and the "de-agrarianization challenge". It is in stark contrast to the American case, where eminent domain is generally used as a tool of last resort when negotiations with the landowners fail to yield any agreement.[16]

Before we move on to explain these two challenges, a word or two is needed to define "urbanization" and "de-agrarianization". Urbanization generally refers to the social-economic transformation of human society characterized by large-scale migration of people from the countryside to live and work in cities. Similarly, de-agrarianization was first introduced in the developmental economics literature to describe the process of social-economic change involving economic activity reorientation, occupational adjustment and spatial realignment of human settlement.[17] In our context however, these two terms first and foremost stand for the change in the legal categorization of land. Urbanization means the conversion of land legally classified as rural into land legally classified as urban. De-agrarianization means the conversion of land legally designated for agricultural uses into all kinds of non-agricultural purposes—the industrial, commercial, military, governmental, infrastructural, cultural, environmental, etc. Of course, such legal changes are usually driven by and in turn drive broader social-economic changes that are also

[16] Scott J. Kennelly, 'Florida's Eminent Domain Overhaul: Creating More Problems than it Solved' (2008) 60 Florida Law Review 472.
[17] Deborah Fahy Bryceson, 'Deagrarianization and rural employment in sub-Saharan Africa: a sectoral perspective' (1996) 24 World Development 97, p 99.

called urbanization or de-agrarianization. Without specification, these two terms will be used in the former sense.

The urbanization challenge exists by virtue of the land ownership regime enshrined in the existing Chinese Constitution. The first two paragraphs of Article 10 of the 1982 PRC Constitution prescribe that urban land is owned by the state and rural land belongs to the collectives. The fourth paragraph stipulates that voluntary transaction of land ownership is strictly forbidden. The third paragraph is the constitutional takings clause cited above. Taken together, these provisions have typically been understood to mean the next two things. 1) If land is to change hands from the collectives to the state, expropriation must be involved because such land cannot be sold by the collective to the state. 2) Whenever rural land is converted to urban land, it must be expropriated by the state, which is supposed to own all urban land in China. In this way, urbanization and expropriation are necessarily tied together.

The de-agrarianization challenge arises mainly because the present Chinese law places rural land under stringent, if not draconian land use control. The default position is that rural collective-owned land should be used just for agricultural purposes.[18] There are only five exceptions where rural collective-owned land may be used for non-agricultural ends: 1) for peasant household residential plots (*zhaiji di*); 2) for township and village enterprises (TVEs); 3) for township/village public utilities and social welfare facilities;[19] 4) for joint-ventures established by rural collectives with other parties using the rural land use-rights as in-kind contribution[20] and 5) in case of bankruptcy or

[18] Article 14, 2004 LAL.

[19] Article 43, 2004 LAL. Peasant household residential plots are the land allocated by the collectives to their member peasant households to build family houses on. This is a legacy of China's collectivization campaign starting from the 1950s and was first enshrined in a 1962 Central Party document. In the post-reform era, it became formally recognized by law. See Article 21, CCP Central Committee, *Revised Draft Regulations on the Work in the Rural People's Communes (nongcun renmin gongshe gongzuo tiaoli xiuzheng cao'an)* (September 27, 1962); Article 8, 2004 LAL; Ch 13, 2007 Property Law.

[20] Article 60, 2004 LAL.

merger of the above-mentioned TVEs and joint-ventures, the relevant land may continue to be used for the original purposes even if the use-rights get transferred to non-collective parties.[21] For such permissible cases, the rural collectives should still obtain government authorization.[22] Except for these scenarios, rural collective land cannot be used for non-agricultural purposes unless being expropriated by the state and turned into state-owned land in the first place.[23] To put it in another way, non-collective parties can only use rural land for construction after it is expropriated and converted into state-owned land.[24] I call this the "presumption of state expropriation in non-agricultural use of rural collective land".

Binding expropriation with urbanization and de-agrarianization is of paramount importance for us to make sense of the law and practice of rural land expropriation in China. While the afore-mentioned definitional challenge to the public interest prerequisite has made massive expropriation *possible*, this structural challenge has effectively made it *necessary*. Whenever rural land is needed to make way for urban expansion or non-agricultural development, the government is legally obligated to expropriate it. It is therefore not difficult to see why a rapidly urbanizing and industrializing society such as China has witnessed the so-called New Enclosure Movement for decades.

This naturally raises concerns about the public interestedness of expropriation. The eminent Chinese economist Zhou Qiren once famously suggested that there is a "Paradox of Expropriation" embedded in Chinese takings law.[25] His example is that if a private factory occupies a piece of rural

[21] Article 63, 2004 LAL.
[22] Article 44, 2004 LAL. For what is worth, it is further stipulated in Article 41 of the 2007 Urban and Rural Planning Law that the rural collectives ought to obtain planning permission from the government when initiating the permissible conversion of their agricultural land.
[23] Ibid.
[24] Article 43, 2004 LAL.
[25] Qiren Zhou, 'Property Rights on Rural Land and the Land Acquisition System: A Critical Choice for China's Urbanization (*nongdi chanquan yu zhengdi zhidu: zhongguo chengshihua mianlin de zhongda xuanze*)' [2004] 4 China Economic Quarterly 193.

land without expropriation, this is unlawful because it breaks the legal limitation over non-agricultural uses of rural land. To avoid this, the government then has to expropriate such rural land for the private factory, which is nevertheless unconstitutional for violating the public interest prerequisite. On a more general level, Zhou's point is that since the post-expropriation land development cannot possibly be carried out all by the state alone, it is inevitable that the expropriated land will be transferred by the state to private users or developers and ends up generating profits for them. Expropriation of this kind should be regarded to be in the private interests rather than the public interest.

While he is definitely right in pointing out the danger, if not the reality, of expropriation being deployed to benefit private parties in the process of urbanization and de-agrarianization, Professor Zhou goes too far in implying that private interests should never be involved in the process of promoting public interest. The state does not have a monopoly over the undertakings that contribute to the public interest—a case in point is that a market comprising of private parties oftentimes does much better a job than the state in boosting economy and raising people's living standards. It is both reasonable and legitimate for the government to think that urbanization and de-agrarianization as social-economic processes are better achieved through private use and development of the expropriated land. This is of course not to suggest that the state can do whatever it likes with the expropriated land. For example, it is hard to justify expropriation purported to rob Peter to pay Paul simply because Peter the peasant uses his land for agricultural production and Paul the industrialist will put such land to more profitable ends. Rather, this is to say that private use and development of the expropriated land does not by definition defy the public interestedness of expropriation. There is a line and sometimes a very fine one to be drawn. In America it is for the judiciary to step in to fulfill

that task.[26] In contrast, as mentioned before, courts in China have not performed a similar function. Absent an arbitrator charged with the task to decide on the public interestedness of individual expropriation initiatives, the public interest prerequisite is, in effect, rendered structurally redundant.

To make matters worse, those expropriated have not been offered the opportunity to participate in the decision-making process. In other words, the public interest prerequisite has not been operationalized in the procedural sense, which further reduces the likelihood that the expropriation decisions reflect public interest of the community.

(3) The Procedural Challenge

Since a consensus on substantive definition of public purpose of land takings is hardly achievable, a procedural approach has been taken by many developed countries including the US to require rather extensive public consultation and participation in the process of land takings. In contrast, however, the decision-making of expropriation in China is confined within the government system through a review and approval mechanism.

Administrative hierarchy in China is divided into five tiers: under the national government, there are provinces, prefectures, counties and townships. According to the 2004 LAL, land expropriation is to be initiated by the prefectural and county governments, which submit their application to the provincial or national government for authorization.[27] The expropriated will be notified only after the applications are approved and the decisions of expropriation made. During this process, local governments are not required either to solicit the opinions of the expropriated about the

[26] The 2005 *Kelo* case is but one of the most famous and controversial examples in the US.
[27] Articles 21, 44, 45, 1998 and 2004 LAL.

expropriation initiatives or to address their objection against the initiatives. In this way, those to be expropriated can do nothing but passively accept the decisions initiated by their local governments and authorized by the government at higher levels. Therefore, to say the least, the procedural guarantee for expropriation decisions to reflect public interest or even just public opinion is insufficient. As will be shown later in this chapter, the expropriated can only object to the compensation and resettlement arrangements. It has been suggested that this effectively turns, if not downgrades public participation to mere bargaining over the "prices" of expropriation.[28]

The preceding discussion has shown that as the constitutional public interest prerequisite for expropriation has neither substantive nor procedural guarantee in China. Under the existing law, the decision to expropriate is effectively an administrative prerogative exercised within the government hierarchy without legislative scrutiny, judicial check or public participation. This results in public interest being vague at best and vain at worst in reality, leaving the government with an enormous room of discretion in exercising the takings power. Against this background, one can only hope that the other element of the constitutional takings clause—the requirement of compensation will provide some solace since it is supposed to place a layer of financial constraint over government expropriation. However, as will be shown in the next section, due to problems in the standard of compensation and the mechanism through which compensation decisions can be challenged, this is not the case in China.

[28] Xiangmin Liu, 'A Comparative Study of the Important Issues in Eminent Domain Systems in China and America (*zhongmei zhengshou zhidu zhongyao wenti zhi bijiao*)' [2007] 6 China Legal Science (*zhongguo faxue*).

II. Compensation for Expropriation: Inadequate and Unfair

(1) The National Statutory Compensation Standard

To start with, compared with the American counterpart, Chinese law has been considered as defective for missing the adjective "just" before "compensation".[29] The concern here is more substantial than formal: absent the qualifier of "being just", the state is conferred too broad a discretion to establish whatever standard it sees fit, which is exactly what happens in practice.

Article 47 of the 2004 LAL is the national statutory compensation standard, which lists out three kinds of expropriation compensation: land compensation fee (*tudi buchang fei*), compensation fee for fixtures and standing crops (*dishang fuzhuo wu ji qingmiao buchang fei*) and resettlement fee (*anzhi buzhu fei*). There are three central elements to this national statutory standard. First, as a matter of principle, expropriation compensation should be calculated based on the original use (*yuan yongtu*) of the expropriated land. Accordingly, if it is cultivated land, the land compensation fee should be 6-10 times the land's "average annual yield" (*pingjun nianchan zhi*, hereinafter "average yield") of agricultural products over three years prior to expropriation. The resettlement fee per person is 4-6 times the average yield with a maximum per hectare set at 15 times of such value.[30] The standard of compensation for fixtures and standing crops and expropriation of other types of land is to be set at the provincial level.[31] If other kinds of land are expropriated, the power to formulate compensation standard is also devolved to the provincial governments, though they must

[29] Ibid.

[30] Total resettlement fee per hectare=average yield×4-6×number of people resettled per hectare. If 4-6×number of people resettled per hectare>15, the resettlement fee will still be 15×average yield. The number of people resettled per hectare is determined, regardless of the actual number, by determined by dividing the quantity of land expropriated by the amount of land per capita of that particular collective. This means that the scarcer land is in a particular location (i.e. low amount per capita and higher number of people per hectare), the higher the total compensation per hectare is.

[31] In practice, the provincial governments in China typically delegate such rule-setting powers further down to prefectural and county governments within their respective jurisdictions.

consult such standard of cultivated land as prescribed in the national law. In practice, the annual average of cultivated land usually serves as the benchmark for calculating the compensation for other kinds of collective-owned agricultural land and construction land. For example, most provincial rules prescribe that the compensation for construction land is the same as that of the adjacent cultivated land.[32] Second, Article 47 demands that if land compensation fee plus resettlement fee together is inadequate to maintain the "original living standards" (*yuanyou shenghuo shuiping*) of the expropriated peasants, provincial governments may increase the amount of resettlement fee, but the sum is capped at 30 times the average yield.[33] Third, Article 47 adds the exception that the State Council may, considering the level of social and economic development and under special circumstances, raise the standards of land compensation fee and resettlement fee with respect to cultivated land expropriation.

The above national statutory compensation standard provides only the general framework. It is up to the local governments, especially the expropriation-initiating prefectural and county governments, to decide on how much compensation is actually to be paid in individual expropriation cases using the statutory formula "average yield of a piece of land×multiplier". This has been criticized on the following grounds. On the one hand, without concrete guidelines, the statutory standard has been considered as granting too wide a discretion upon the local governments, which have often made arbitrary, inconsistent and unfair compensation decisions.[34] For example, since the local government was responsible for assessing and determining the average yield, it was not uncommon that they intentionally underestimate the figure in order to suppress the compensation. Moreover, they could

[32] Maohui Qu and Zhifang Zhou, 'A Study on Compensation Standards for Land Expropriation in China: An Analysis based on Local Legislative Texts (*zhongguo tudi zhengshou buchang biaozhun yanjiu: jiyu difang lifa wenben de fenxi*)' [2009] Legal Studies (*faxue yanjiu*) 163, p 169.

[33] As the maximum of land compensation fee is set at 10 times the average yield, at most the provincial governments may increase the resettlement fee from 15 times to 20 times the average yield.

[34] Chengri Ding, 'Policy and Praxis of Land Acquisition in China' (2007) 24 Land Use Policy, p 8.

also manipulate the multiplier, which often hinged on the future use of the expropriated land, resulting in parcels of land adjacent to each other being expropriated with different compensation merely because they were expropriated for different purposes.[35]

On the other hand and more importantly, the national statutory compensation standard as prescribed in Article 47 of the 2004 LAL has been broadly seen as unfairly low for two related but distinct reasons.

It has been argued that capped at 30 years' worth of agricultural yield, it falls short to reflect even the current value of rural land limited to agricultural use.[36] The underlying reasoning is as follows. As the time limitation of peasants' tenure over rural cultivated land is prescribed at 30 years,[37] one can assume that the fair value of thirty-year use-rights in agricultural land is the discounted value of the foreseeable income from the land over thirty years, which may simply be set at 30 times the average annual agricultural yield over the past three years.[38] Agricultural economists have calculated that the value of thirty-year use-rights constitutes around 75% to 95% of the value of full ownership,[39] which means that the capitalization rate is 2.5%-3.1%.[40] Therefore the fair

[35] See e.g. the survey done by Zhejiang provincial government in 2002. Zhejiang Province Rural Investigation Group, 'Opinions and Demands concerning Land Expropriation of Village Cadres in Zhejiang (*zhejiang cun ganbu dui zhengdi gongzuo yijian he yaoqiu*)' (September 19, 2002) <http://www.sannong.gov.cn/v1/fxyc/ncjjfx/200209260183.htm> accessed December 10, 2012. Empirical research has shown that the amount of compensation paid for land to be used for public purposes is estimated to have been significantly lower than land to be used by private investors. See Klaus Deininger and Songqing Jin, *Securing Property Rights in Transition: Lessons from Implementation of China's Rural Land Contracting Law* (World Bank Policy Research Working Papers, 2008).

[36] Valerie Jaffee Washburn, 'Regular Takings or Regulatory Takings?: Land Expropriation in Rural China' (2011) 20 Pacific Rim Law & Policy Journal 71, pp 86-88.

[37] Article 20, 2002 Rural Land Contracting Law. Note that the tenure terms for grassland and forest land are longer at 30-50 years and 30-70 years respectively. Thirty-year term is used for the sake of convenience.

[38] Washburn, p 87. It generously assumes that the annual rate of growth of the yield will suffice to cancel out whatever the appropriate discount rate is, and that the thirty-year term of the present use-rights holder has just begun. It should be noted though that in 2008, the central authority declared that the peasants' rights to contract management would "remain unchanged for a very long time", understood by many as to extend the term of such rights from 30 years to infinity. This change does not affect calculating the ownership value through dividing annual net return by the capitalization rate. See Part 3, Point 1, CCP Central Committee, *The Decision on Major Issues on Promoting Rural Reform and Development (guanyu tuijin nongcun gaige fazhan ruogan zhongda wenti de jueding)* (2008); Point 17, CCP Central Committee and State Council, *Opinions on Promoting Agricultural Development and Peasants' Income Increase (guanyu cujin nongye fazhan nongmin zengshou ruogan yijian)* (2009). For relevant analysis, see Robin Dean and Tobias Damm-Luhr, 'A Current Review of Chinese Land-Use Law and Policy: A "Breakthrough" in Rural Reform? ' (2010) 19 Pacific Rim Law & Policy Journal 121, pp 138-39.

[39] Keliang Zhu and others, 'The Rural Land Question in China: Analysis and Recommendations based on a

compensation for expropriating collective ownership of agricultural land in its current use should to be 31.6-40 times the average annual agricultural yield, higher than the legal standard even when the upper limit is reached.[41] However, this is not just a rough estimate as admitted by its author—it is erroneous for basing the true value of use-rights on the gross income it generates (average yield) rather than its net income, i.e. gross income less cost. In the Chinese agricultural sector, cost of production may be set quite generously at 50% of the income, making the annual return half the annual income or the average yield.[42] In this case, when the capitalization rate is held at 2.5%-3.1%, the true value of rural agricultural land ownership is about 15.8 to 20 times the average yield.[43] The point here is not accuracy of calculation but to show that in fact the statutory compensation is not necessarily lower than the true value of full ownership in rural agricultural land in its original use.[44]

That said, the present statutory compensation standard remains under heavy criticism for being unfairly low. This is because it denies the collectives and individuals peasants any share in the value increase when the land is expropriated to be state-owned urban land which can then be used or transferred for more profitable non-agricultural purposes. This is generally seen as the crux of the entire case against China's statutory compensation standard, i.e. the government reaps most of if not all "expropriation surplus" without sharing it with the peasants.[45] From a legal perspective, "expropriation surplus" refers to the additional rights brought about by the very process of

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17-province Survey' (2006) 38 NYU Journal of International Law and Politics, p 784, footnote 47.

[40] Average yield×30÷75%-95%=Average yield÷2.5%-3.1%.

[41] If the local government choose, in a fully lawful manner, the lowest ends of the compensation scale, i.e. 6 times of annual yield for land compensation fee and 4 times for resettlement fee, the total compensation for rural land ownership stands at 10 times the average yield, which is merely one-third or one-fourth of the true fair value.

[42] Chengri Ding, 'Compensation for Land Expropriation in China: Economic Analysis and Policy Recommendation (*zhongguo zhengdi buchang zhidu de jingji fenxi ji zhengdi gaige jianyi*)' (2007) 21 China Land Science (*zhongguo tudi kexue*) 4, pp 5-7.

[43] Under the capitalization approach, value of land=annual net operating income÷capitalization rate. Alternatively the rate was set at 3%-5%. Ibid. Then the true value of full ownership would be even lower at 10-16.7 times the average yield.

[44] If the local governments choose the lowest ends of the compensation scale at 10 times the average yield, it will be lower than the true value. But if a compensation worth over 20 times the average yield is paid, it is higher than the true value.

[45] Washburn, pp 84-88.

expropriation which lifts all the land use restrictions over the rural land. Once collective-owned rural land is expropriated by the state and converted into state-owned urban land, unlike collectives who are under stringent land use restrictions, the new owner, i.e. the state has a broad leeway in converting the land for non-agricultural purposes. From an economic point of view, against the background of rapid urbanization and de-agrarianization in China, this usually results in enormous land value increase that is to be harvested by the state as the owner. Numerous empirical evidences point to the wide gap between expropriation compensation and the revenue governments get. One estimate is that only 5% of all revenue generated from converting rural agricultural land to urban construction land since 1979 were paid to the peasants as compensation.[46] The 17-province empirical survey cited above demonstrates that 65.5% of the peasants whose land has been expropriated are dissatisfied with the amount of compensation received.[47] There are also countless cases where Chinese peasants petition and protest, sometimes violently, out of a sense of being treated unfairly when they witness the huge difference between their paltry compensation and the enormous gain accrued to the government and private developers.[48]

(2) Challenging Compensation and Resettlement Decisions

Different from the expropriation decisions, under the existing law, compensation and resettlement arrangements in individual expropriation cases can be challenged by the expropriated at the post-approval and post-implementation stages.

[46] Ibid, footnote 67.
[47] Zhu and others, pp 782-83.
[48] The famous *Wukan* protest in 2011 was an example in point. See Michael Bristow, 'Wukan Unrest: Why do Chinese Farmers Riot?' (*BBC News, Beijing*, December 15, 2011) <http://www.bbc.co.uk/news/world-asia-china-16193089> accessed March 15, 2014.

First, compensation can be challenged after the expropriation application is approved. Within 10 working days of receiving the approval from the central or provincial government, the initiating prefectural/county government shall serve an expropriation notice to the expropriated, detailing the approving authority, scope and proposed use of the expropriated land as well as the approved compensation standards and resettlement plan. The affected collective and member peasants should then go to the local land administration departments, i.e. land resources bureaus at the county/prefectural level, to register for compensation with proof of land rights. Within 45 days since serving the expropriation notice, the county/prefectural land bureau shall make and publish a detailed compensation and resettlement plan detailing who gets what. The expropriated collective and peasants may then lodge objections or request a public hearing within 10 days after the publication of the detailed compensation plan. If requested, the relevant land bureau should hold a public hearing, consider the objections and comments raised both at and outside the hearing, and submit an updated compensation and resettlement plan to the initiating local government for approval. Once approved, the detailed compensation and resettlement plan shall be published and started to be executed.[49]

Challenging the detailed compensation and resettlement plan at this stage suffers from two problems. For one thing, failure to hold public hearings does not affect the validity of the detailed compensation plan, except that responsible officials may face internal disciplinary actions.[50] For another, since the land bureau is not required to provide any feedback to the expropriated after the

[49] Articles 4-5, 7-10, 15, Ministry of Land Resources, *Measures of Notice of Land Expropriation (zhengyong tudi gonggao banfa)* (2002); Article 25, 2011 Implementation Regulation of Land Administration Law; Articles 45-48, 2004 LAL.

[50] Article 34, Ministry of Land Resources, *Rules on Public Hearings of Land Resources (guotu ziyuan tingzheng guiding)* (2004).

public consultation or public hearing process, there is no guarantee that the opinions of the expropriated are heeded and taken seriously.

When the implementation of the expropriation decision and its accompanying approved detailed compensation and resettlement plan starts, if there remains any dispute about compensation and resettlement, it should be first mediated by the initiating government and then in case of impasse submitted to the government for adjudication.[51] Exhaustion of the mediation-adjudication process is the precondition to filing administrative reconsideration or litigation to challenge detailed compensation and resettlement plans.[52]

Four problems have been identified with this post-implementation challenge against the compensation and resettlement arrangements. First, as the local governments are themselves the mediating and adjudicating bodies, the impartiality and effectiveness of the mediation-adjudication process are dubious.[53] Second, as the compensation arrangements could be made by the prefectural or county government in the form of "red letterhead" document (*hongtou wenjian*), local courts had

[51] It should be noted that there are competing interpretations of Article 25 of the 1998 Implementation Regulation of Land Administration Law, which stipulates that disputes of compensation should be first be mediated by the initiating government and then adjudicated by the expropriation-approving government. The Ministry of Land Resources holds that adjudication is an independent dispute resolution mechanism separate from administrative reconsideration. Therefore, it shall be carried out by the expropriation-approving government, i.e. the provincial or central government. See Ministry of Land Resources, *Notice on Accelerating the Establishment of the Mediation and Ajudication System for Disputes on Land Expropriation Compensation and Resettlement (guanyu jiakuai tuijin zhengdi buchang anzhi zhengyi xietiao caijue zhidu de tongzhi)* (June 21, 2006). In contrast, the State Council Office of Legal Affairs is of the opinion that adjudication here actually means administrative reconsideration. The 1999 Administrative Reconsideration Law prescribes in Article 13 that application for administrative reconsideration should be lodged with the government at the next higher level above the one making the administrative decisions. Since compensation plan is considered a specific administrative act undertaken by the county or prefectural government, adjudication/administrative reconsideration should then be filed to the prefectural or provincial government at one level above, not the expropriation-approving governments. See Office of Legal Affairs of State Council, *Notice on Administrative Reconsideration on Disputes of Land Expropriation Compensation and Resettlement (guanyu yifa zuohao zhengdi buchang anzhi zhengyi xingzheng fuyi gongzuo de tongzhi)* (May 23, 2011). In practice, most provinces have set adjudication by the provincial government as the procedural condition for further administrative reconsideration or litigation. See Office of Legislative Affairs of Anhui People's Government and Anhui Department of Land Resources, 'Study on Land Expropriation Compensation and Resttlement Disputes Settlement and Adjudication System (*zhengdi buchang anzhi zhengyi xietiao caijue zhidu yanjiu*)' March 13, 2013 <http://www.ahfzb.gov.cn/content/news_view.php?ty=194&id=32284> accessed February 6, 2014.

[52] Article 10, Supreme People's Court, *Rules on Issues of Hearing Administrative Cases related to Rural Collective Land (guanyu shenli sheji nongcun jiti tudi xingzheng anjian ruogan wenti de guiding)* (2011).

[53] Xiaohui Mo, 'An Reassessment of the Land Expropriation Compensation Disputes Settlement and Adjudication System (*zhengdi buchang anzhi zhengyi xietiao caijue zhidu de zai shenshi*)' [2011] Administrative Management Reform (*xingzheng gaige guanli*) 32.

ruled that they were abstract administrative acts with "general binding effect" immune to judicial review.[54] As has been rightly pointed out, whatever the form, compensation arrangements in individual expropriation cases should not be treated as abstract administrative acts. This is because according to the Supreme People's Court judicial interpretation, abstract administrative acts are "all documents of a normative character issued to address unspecified subjects and can be applied repeatedly".[55] Therefore, compensation arrangements for specific expropriation cases should have been treated as concrete administrative acts since they are directed at specified subjects and will only be applied once.[56]

Third, even if the courts do apply the law correctly and review the compensation decisions, it is hardly any solace. This is because administrative litigation in China is limited in the scope of review. According to Article 5 of the Administrative Litigation Law, courts are only empowered to inquire into the legality, not the merits or appropriateness of an administrative act. This means that the courts can only examine whether or not the compensation decisions in particular expropriation cases are in line with the compensation standards established in the national law and provincial rules[57], which are themselves unreviewable abstract administrative acts. As already shown, a wide discretion is granted upon the prefectural and county governments to make specific compensation decisions within the four corners of the statutory compensation standards. Being unable to question the standards, the courts have thereby very limited room to question the compensation decisions. Fourth, any pending

[54] Eva Pils, 'Land Disputes, Rights Assertion and Social Unrest: A Case from Sichuan' (2006) 19 Columbia Journal of Asian Law 235, pp 263-64.
[55] Article 2, Supreme People's Court, *Interpretation on Several Questions regarding the Implementation of the PRC Administrative Litigation Law (guanyu zhixing zhonghua renmin gongheguo xingzheng susong fa ruogan wenti de jieshi)* (2000).
[56] Pils, 'Land Disputes, Rights Assertion and Social Unrest: A Case from Sichuan', p 264; Jie Cheng, 'Judicial Review Power in Land Expropriation Disputes (*tudi zhengyong jiufen de sifa shenchaquan*)' [2004] 2 Legal Studies (*faxue yanjiu*), p 52.
[57] Junfeng Yang, 'Administrative Litigation or Civil Litigation: Resolution of Disputes on the Amount of Expropriation Compensation (*xingzheng susong haishi minshi susong: zhengshou buchang shu'e zhengyi zhi jiejue*)' [2014] Global Law Review (*huanqiu falv pinglun*) 88.

administrative reconsideration or litigation over compensation and resettlement decisions does not affect the execution of the approved expropriation project.[58] This means that the expropriated cannot use challenging the compensation arrangements as a way to delay the implementation of expropriation.

Overall, the foregoing discussion has demonstrated that the compensation and resettlement regime established by law and policy in China is beset by a series of problems such as unjust standard and lack of effective mechanism for the expropriated to challenge the compensation decisions. To be sure, there is more to the problem of the compensation regime than what has been covered so far. For example, a particularly vexing issue is the payment of compensation. Article 25 of the 1998 Implementation Regulation of Land Administration Law requires that compensation fees must be paid in full within three months upon the approval of the detailed compensation and resettlement plan. Yet an official report conceded that between 1999 and 2004 local governments defaulted on, held back and misappropriated compensation fees of 17.5 billion *yuan* across the country.[59] To solve the payment problem, starting from 2003, the central authorities have reiterated time and again that full amount of compensation must be paid on time.[60] The State Council stated in 2004 that if the compensation and resettlement package is not delivered according to the plan, the peasants may refuse to convey the land.[61] In 2010, the central authorities issued two rescripts within a month demanding timely and full payment of compensation fees.[62] Unfortunately, however, these efforts

[58] Article 25, 2011 Implementation Regulation of Land Administration Law.
[59]Guanshi Qiu, 'China Sorting out Payment Arrears of Land Compensation Fees to Expropriated Peasants (*zhongguo qingli tuoqian zhengyong nongmin tudi buchang fei*)' December 31, 2004 <http://www.chinanews.com/news/2004/2004-12-31/26/523273.shtml> accessed March 25, 2014.
[60]'State Council Vigorously Disciplines the Land Market (*guowuyuan dali zhili tudi shichang*)' September 28, 2003 <http://news.sina.com.cn/c/2003-09-28/2249835092s.shtml> accessed March 25, 2014; General Office of State Council, *Urgent Notice on Further Regulating Land Market and Strictly Controlling Land Administration (guanyu shenru kaizhan tudi shichang zhili zhengdun yange tudi guanli de jinji tongzhi)* (2004); Points 8 and 11, State Council, *Decision on Deepening Reform and Enhancing Land Administration (guanyu shenhua gaige yange tudi guanli de jueding)* (2004); Article 49, 2004 LAL; Article 42, 2007 Property Law.
[61] Point 15, State Council.
[62] Point 2, General Office of State Council, *Urgent Notice on Further Tightening the Administration of Expropriation*

appear to fall short of being an effective cure as local governments' defaulting on or withholding compensation remains a common occurrence in recent years.[63]

To summarize, Chinese takings law has long been regarded as in deep crisis, manifested not least by the massive scale and astonishing speed at which the NEM is taking place in rural China. It is generally considered that on both the public interest prerequisite and the requirement of compensation, the constitutional promise made in the 1982 PRC Constitution has not been delivered by the existing land takings law. Over the last decade, a plethora of proposals have made on the legal reform in this area, to which we now turn.

2. Prescription: Towards the Chinese Fifth Amendment

Since 2003, there has been a dramatic increase of media and scholarly attention to the problem of massive rural land takings, which coincided with the leadership transition in China that year not out of accident. Departing from the growth-focused and inequality-enhancing policies of the previous government, the then incoming President, Hu Jintao, and Premier, Wen Jiabao, assumed office with the promise to emphasize 'people-centered' governance, integrated rural–urban development, social justice and the security of citizens' property, all of which signaled a change of national strategy towards the then ongoing enclosure movement in rural China.[64] As the first and foremost sign of

and Demolition and Effectively Protecting Legal Rights and Interests of the People (guanyu jinyibu yange zhengdi chaiqian guanli gongzuo qieshi weihu qunzhong hefa quanyi de jinji tongzhi) (2010); Point 3, Ministry of Land Resources, *Notice on Further Improving Administration of Expropriation (guanyu jinyibu zuohao zhengdi guanli gongzuo de tongzhi)* (2010).

[63] In a most recent violent expropriation-led dispute in Pingdu City of Shandong costing the life of one peasant, delayed and incomplete payment of compensation was one of the causes. Jieqi Luo and Xudong Qin, 'Closer Look: How a Land Dispute Led to a Farmer Dying in an Arson Attack' March 24, 2014 <http://english.caixin.com/2014-03-24/100655852.html> accessed March 26, 2014.

[64] Sargeson, 'Villains, Victims and Aspiring Proprietors: Framing 'Land-losing Villagers' in China's Strategies of Accumulation', pp 762-63.

this change, the 2004 Amendment of the 1982 PRC Constitution made three revisions in respect to property rights and expropriation, widely considered as landmark constitutional developments in China. First, Article 13 of the 1982 Constitution was revised to proclaim for the first time in PRC history that "citizen's lawful private property shall not be violated". Second, a paragraph was added to Article 33, stating for the first time that "the state respects and protects human rights". Third, the explicit requirement of making compensation for expropriation was added to the third paragraph of Article 10, the Chinese constitutional takings clause.

All of this has provided, over the last decade or so, the ground and impetus for a boom in the studies of Chinese takings law and a plethora of proposals put forward on legal reforms in this area. As mentioned at the beginning of this chapter, the existing literature has long been dominated by the Sino-US comparative approach and the inquiry has centred on the question why the similarly-structured Chinese constitutional promise on takings is largely broken. The findings are presented in the last section. Unsurprisingly, therefore, the reform proposals resolve around how to make China's own Fifth Amendment tick.

I. Giving Teeth to the Public Interest Prerequisite

As demonstrated in the last part, the constitutional public interest prerequisite in China is vaguely defined, structurally redundant and procedurally un-operationalized. Over the last decade, many proposals have been put forth to give teeth to the public interest prerequisite.

To overcome the definitional challenge, two approaches have been conceived so far. One is to refine and narrow down the statutory definition of public interest. Numerous academic attempts have been made in this direction: in order to better define what constitutes public interest as far as

expropriation is concerned, some have conducted linguistic/semantic analyses of its component words "public" and "interest".[65] Some compare public interest with related concepts such as "national interest", "social interests", "common interests" and "collective interests".[66] Still others try to list out the essential features of public interest such as being non-profit, long-term, and inclusive and so on.[67]

In a more direct way, it has been suggested that a definitive list should be provided in national legislations on what qualify as public interest in land expropriation. After all, as mentioned above, the constitutional public interest prerequisite has been repeatedly cited in statutes. Therefore, while some insist it to be impossible to formulate an exhaustive statutory definition of a concept as elastic as "public interest",[68] references have been made to Germany, Japan, Taiwan and Hong Kong, where some kind of enumerative list of public interest is written into legislations.[69] Most famously, the eminent civil law scholar Liang Huixing included such a list in his draft of the 2007 Property Law.[70]

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[65] Jianmiao Hu and Yijing Xin, 'An Investigation into the Concept of Public Interests (*gonggong liyi gainian touxi*)' [2004] 10 Legal Science Monthly (*faxue*); Jingbin Wang, 'On the Definition of Public Interests: A Jurisprudential Analysis of a Foundational Category in Public Law (*lun gonggong liyi zhi jieding: yige gongfa jishixing fanchou de falixue fenxi*)' [2005] 1 Rule of Law and Social Development (*fazhi yu shehui fazhan*); Jinguang Hu and Kai Wang, 'The Definition of Public Interests in Chinese Constitution (*woguo xianfa shang gonggong liyi de jieding*)' [2005] 1 China Legal Science (*zhongguo faxue*).

[66] Wang, 'On the Definition of Public Interests: A Jurisprudential Analysis of a Foundational Category in Public Law (*lun gonggong liyi zhi jieding: yige gongfa jishixing fanchou de falixue fenxi*)'; Hu and Wang, 'The Definition of Public Interests in Chinese Constitution (*woguo xianfa shang gonggong liyi de jieding*)'.

[67] Linhong Yang, 'On Public Interests (*shilun gonggong liyi*)' in *Chinese Administrative Law after the Constitutional Amendment: Essays of the 2004 Annual Conference of Chinese Administrative Law Society (xiuxian zhihou de zhongguo xingzhengfa: zhongguo faxuehui xingzhengfaxue yanjiuhui 2004 nian nianhui lunwenji)* (Chinese University of Political Science and Law Press 2005), pp 582-83; Jinsheng Chen and Guangwei Tian, 'The Concept, Characteristics and Standards of Public Interests (*gonggong liyi de hanyi, tezheng he hengliang biaozhun*)' [2004] 4 Administrative Law Studies (*xingzheng faxue yanjiu*); Feng Yang, 'How to Define Public Interests in Property Expropriation (*caichan zhengshou zhong de gonggong liyi ruhe jieding*)' [2005] 10 Legal Science Monthly (*faxue*).

[68] Liming Wang, 'On Implementation of Property Law and the Improvement on Expropriation and Requisition System (*wuquanfa de shishi yu zhengshou zhengyong zhidu de wanshan*)' [2008] 4 Law Science Magazine (*faxue zazhi*) 15, p 17.

[69] Jialong Liao, 'On the Scope of Public Interests (*guanyu gonggong liyi de fanwei*)' (2006) 7 People's Congress Studying (*renda yanjiu*).

[70] Huixing Liang (ed) *Draft Property Law of China: Clauses, Commentaries, Rationales and Reference Legislative Models (zhongguo wuquanfa cao'an jianyi Gao: tiaowen, shuoming, liyou yu cankao lifali)* (Social Science Archive Press 2000), pp 191-93.

The other approach proposes to empower the local people's congresses and courts to examine the public interestedness of the government's takings decisions on a case by case basis. As already mentioned, currently the decision of expropriation is an administrative prerogative without legislative or judicial supervision. Therefore, many have proposed to open the government's takings power to be reviewed by local people's congresses, which can play the role of "public interest machine" in sanctioning or rejecting individual expropriation decisions in their jurisdiction.[71]

Alternatively, many have argued that Chinese courts should step in to interpret what the constitutional public interest prerequisite means and assess the public interestedness of particular expropriation decisions. Most notably, the 2005 Supreme Court case *Kelo v. City of New London* has sparked a huge interest among Chinese scholars in American law of eminent domain.[72] Although finding out that America, a country established upon the commitment to private property was neither immune to controversies surrounding land takings, many have actually been motivated to look up to the US, which apparently has a much longer history dealing with and indeed better legal solutions to the problems of eminent domain. It is no wonder that an quite extensive body of literature has been accumulated analyzing the American jurisprudence on "public use" in the Fifth Amendment and suggesting that China should follow suit—not necessarily in a copy and paste fashion, but at least to allow judicial review of expropriation decisions.[73] In light of the afore-mentioned fact that these

[71] Qianfan Zhang, 'What is Public Interests: A Definition from Social Utilitarianism and its Constitutional Limits (*gonggong liyi shi shenme: shehui gongli zhuyi de dingyi jiqi xianfa shang de juxianxing*)' [2005] 1 Legal Forum (*faxue luntan*); Qianfan Zhang, 'The Plight and Solution of Public Interests:The Constitutional Interpretation of Public Use Clause in American Eminent Domain and its Implications to China (*gonggong liyi de kunjing yu chulu: meiguo gongyong zhengshou tiaokuan de xianfa jieshi jiqi dui zhongguo de qishi*)' [2005] 5 China Legal Science (*zhongguo faxue*); Zhongmin Tang and Zebin Wen, 'On Definitional Models of Public Interests (*guanyu gonggong liyi de jieding moshi*)' [2006] 5 Modern Law Science (*xiandai faxue*).

[72] Liu, 'The Chinese Takings Law from a Comparative Perspective', p 332.

[73] Zhang, 'The Plight and Solution of Public Interests:The Constitutional Interpretation of Public Use Clause in American Eminent Domain and its Implications to China (*gonggong liyi de kunjing yu chulu: meiguo gongyong zhengshou tiaokuan de xianfa jieshi jiqi dui zhongguo de qishi*)'; Zuolian Yao, 'The Public Interests Standard in Eminent Domain for Public Use: The Evolution of American Case Law (*gongyong zhengshou zhong de gonggong liyi biaozhun: meiguo panli de fazhan yanbian*)' [2006] 1 Global Law Review (*huanqiu falv pinglun*); Liu, 'A Comparative Study of the Important Issues in Eminent Domain Systems in China and America (*zhongmei zhengshou zhidu zhongyao wenti zhi bijiao*)'; Qinghua Wang, 'Eminent Domain, Public Use and Fair Compensation: On the

decisions have usually been considered as non-justiciable, this is going to require a broadening of the scope of administrative litigation or a re-classification of expropriation decisions, which is exactly what has been advocated.[74]

To be sure, however, no matter how delicately defined, the public interest prerequisite places no real limits upon rural land expropriation if the structural challenge persists. As long as expropriation is the only lawful way to carry out urbanization and de-agrarianization, even when an individual expropriation decision is ruled to be not in the public interest, it must proceed because there is no other way around.

Logically there are two ways out. One is to drop the public interest prerequisite and the other is to revamp China's land system so that state expropriation will not be required whenever rural land is converted to urban land or for non-agricultural purposes. The first view is in the minority,[75] seen as a step too far because it has been legally or even constitutionally recognized in many countries around the world that takings of private property must be justified by some sort of public purpose. The second view attempts to decouple expropriation from urbanization/de-agrarianization. On the one hand, it has been suggested that the constitutional clause "urban land is owned by the state" shall be revoked.[76] This will then make it possible that when rural land is transformed into urban land, it stays in private hands and state expropriation is not necessitated. On the other hand, it has been widely proposed that the draconian land use restrictions over collective land shall be lifted. Recall that whereas rural collective land can be used for construction only when needed by local public

Decision of Kelo v. City of New London (*tudi zhengshou, gonggong shiyong yu gongping buchang: ping Kelo v. City of New London yi'an panjue*)' [2007] 2 Peking University Law Review (*zhongwai faxue*) 479.

[74] Cheng, 'Judicial Review Power in Land Expropriation Disputes (*tudi zhengyong jiufen de sifa shenchaquan*)'. It is argued that decisions of expropriation are not abstract administrative acts but specific administrative acts that are judicially reviewable.

[75] Hongmei Zhao, 'The Uneccessary Distinction between Public Interests and Non-public Interests: A New Model of Interactions between Government and Society in Land Expropriation (*wuxu qufen gonggong liyi yu fei gonggong liyi: zhengdi zhidu de zhengfu shehui liandong xin moshi gouxiang*)' [2006] 8 China Land (*zhongguo tudi*).

[76] Xueyang Cheng, 'Chinese System of State Ownership of Land from a Public Law Perspective (*gongfa shijiao xia de zhongguo guoyou tudi zhidu*)' (2011) 25 China Land Science (*zhongguo tudi kexue*) 16, p 20.

utilities, peasant household residential plots, TVEs and joint-ventures, urban state-owned land is not under such limitation and can be developed or transferred much more freely. For years this "dual-track" land system is criticized as an anomaly, signifying that China is yet to finish its journey towards a true market economy under the rule of law. Broadly speaking, there are three theses in support of this point.

The first can be called the thesis of "truncation of ownership". The term is originated by the American economist Harold Demsetz and was introduced to China most likely by Zhou Qiren in the mid-1990s. The idea is that a part of the complete bundle of ownership rights may be deleted because "the position for controlling and abolishing the restraints of private rights has been granted to the state or already assumed by the state".[77] According to Article 71 of the 1986 General Provisions of Civil Law (*minfa tongze*)[78], ownership (*suoyouquan*) in Chinese civil law includes the rights to possess, use, reap benefit from, and dispose of (including transfer) the property. Against this background, it has long been a prevalent argument, especially among economists and civil law scholars, that given the stringent use limitation imposed, the constitutionally and legally enshrined collective ownership of rural land is merely nominally guaranteed. In reality, it is highly truncated in the sense that the right to use it to non-agricultural ends and the right to transfer it are largely deprived by the state.[79]

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[77] Harold Demsetz, *Ownership, Control and the Firm* (Blackwell 1988), pp 18-19, cited in Qiren Zhou, 'Reform in China's Rural Areas: the Changes in the Relationship between the State and Land Onwership--a Retrospect on the Changes in Economic Institutions' in Zhenglai Deng (ed), *China's Economy: Rural Reform and Agricultural Development* (World Scientific 2009), pp 340-41. The Chinese version of this chapter was first published in 1995 on *China Social Sciences Quarterly* in Hong Kong.

[78] As China does not have a civil code, the general provisions remain to be the most comprehensive rules of civil law to date.

[79] This is an extremely popular argument which still holds much currency today. Searching "ownership truncation" (*suoyouquan/chanquan canque*) on China's main search engine Baidu will yield a large number of results. The above-mentioned paper by Zhou Qiren seems to be the first academic work that deploys the term to describe the collective land ownership in China.

The second and third theses are respectively "property rights discrimination" and "state monopoly of primary land market", which are readily understandable in light of the foregoing discussion. On the one hand, the fact that state land ownership and collective land ownership receive differential treatment in law makes many contend that the latter is unjustifiably discriminated against.[80] On the other hand, since in most cases collective-owned land cannot be used for construction unless being expropriated by the government in the first place, it has been argued that the market of land for non-agricultural purposes or primary land market[81] is monopolized by the state, thereby blocking the establishment of a fully functioning market economy in China.[82]

In any event, the fact that collective land ownership is subject to use restrictions not applicable to state land ownership has come under fire for years. Different proposals have been put forward. First, many have argued that rural land shall be privatized so that individual peasants may convert their land into construction land or transfer it to non-agricultural users without having to go through expropriation.[83] Second, the opposite position has been taken that the rural land shall be nationalized while individual peasants retain use-rights and are permitted to convert or transfer rural land for non-agricultural uses without expropriation.[84] Third, the middle-ground and the most prevalent proposition holds that collective ownership of rural land can be retained but the collectives should be allowed to convert or transfer rural land for non-agricultural uses without expropriation.[85]

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[80] Xianjin Huang, 'On Discrimination of Land Rights (*lun diquan qishi*)' [1996] Problems of Rural Economy (*nongcun jingji wenti*) 16.

[81] The secondary land market is the market where the use-rights of state-owned land can be exchanged.

[82] Shouying Liu, 'The Dual Land Rights System and Truncation of Land Market in China (*zhongguo de eryuan tudi quanli zhidu he tudi shichang canque*)' September 21, 2008 <http://www.civillaw.com.cn/article/default.asp?id=40835> accessed December 10, 2012.

[83] The most prominent spokesmen for land privatization in China are economists like Mao Yushi, Sheng Hong, Chen Zhiwu, Wen Guanzhong, Wen Guanzhong and Yang Xiaokai.

[84] This is a minority view. See e.g. Fengzhang Li, 'The Nature of Collective Land Ownership: "Against Rights" through "Hollow Rights" (*jiti tudi suoyouquan de benzhi: tongguo kong quanli lai fan quanli*) ' (2010) 5 Rule of Law and Social Development (*fazhi yu shehui fazhan*).

[85] Daoyuan Liu, Qunying Lin and Xiangkun Cao, 'The Analysis of the Ownership of Collective Land of the Property Law: From the Perspective of Land Expropriation (*wuquan fa zhong jiti tudi quanli xilun: cong tudi zhengshou shijiao de jianshi*)' [2007] 1 Journal of Central South University of Forestry & Technology (Social Sciences) 25.

Despite their obvious difference, all these proposals purport to establish a unified construction land market without any use regulation upon rural land so that the built-in connection between expropriation and de-agrarianization can be cut off and that the public interest prerequisite will not be structurally redundant anymore.

To resolve the procedural challenge, a consensus has been reached in the existing literature that the expropriated should participate and have a say in the decision-making process of expropriation.[86] As mentioned before, the expropriated have only the right to be informed by the county/prefectural government of the expropriation initiatives before they are submitted for authorization and the expropriation decisions after the applications get approved. The reform suggestions are that not only should they be consulted about the expropriation initiatives, they should also be given the opportunity to influence the review and approval process.

II. Raising Compensation for Expropriation

As mentioned before, the constitutional requirement of "make compensation" faces not only the problem of compensation standard widely perceived to be unfairly low but also the problem of a lack of effective mechanism through which the expropriated can negotiate and challenge the government-set standard.

For many years, there has been a broad agreement both in and outside China that the best solution to the problem of expropriation compensation standard is to import the "fair market value" standard

[86] Jiansheng Zhang, 'On Administrative Procedure of Expropriation: Collective Land Expropriation as the Example (*xingzheng zhengshou chengxu lun: yi jiti tudi zhengshou weili*)' [2009] 2 Oriental Law (*dongfang faxue*); Guoqian Liu, 'Due Process Reform of Review and Approval of Land Expropriation (*tudi zhengshou shenpi de zhengdang chengxu gaige*)' [2012] 4 Legal Studies (*faxue yanjiu*); Aihua Zou, 'Basic Ideas and Concrete Solutions to Improve the Land Expropriation Examination and Approval System (*wanshan tudi zhengshou shenpi zhidu de jiben silu yu juti duice*)' [2011] Journal of National Academy of Administration (*guojia xingzheng xueyuan xuebao*) 95.

practiced in the US.[87] A case in point is that this proposal has also been adopted by *China 2030*, a report jointly prepared by the World Bank and the Development Research Center of the PRC State Council.[88] To many, this will kill two birds with one stone. First, market-based pricing is more objective than government pricing: while the current statutory standard is determined *ex parte* by the expropriating government which has the incentive to suppress compensation, fair market value is much more objective in trying to approximate the price "a willing seller would pay and a willing buyer would accept" at the time of takings.[89] It can therefore reduce as much as possible the subjectivity and arbitrariness in government's formulating the compensation standard. Second, it is widely believed that market-based compensation will enable the expropriated to receive the prospective value of the expropriated land. Although the rural collectives cannot transfer their land freely on a market owing to the land use restrictions and a direct implementation of the fair market value standard is not immediately possible[90], the price at which the government transfers the expropriated land subsequently can be used as the benchmark to determine its market price.

On the other hand, it has been suggested that the expropriated shall be granted the right to negotiate with the government over the amount of compensation.[91] And they shall also be allowed to challenge the compensation standard in court.[92]

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[87] Liu, 'A Comparative Study of the Important Issues in Eminent Domain Systems in China and America (*zhongmei zhengshou zhidu zhongyao wenti zhi bijiao*)'; Qianfan Zhang, '"Just Compensation" and Constitutional Check upon Eminent Domain (*gongzheng buchang yu zhengshouquan de xianfa xianzhi*)' [2005] 2 Legal Studies (*faxue yanjiu*); Aihua Zou, 'Rights to Compensation and Social Security of the Expropriated Peasants (*bei zhengdi nongmin de buchang quan yu shehui baozhang quan*)' [2009] Tribune of Political Science and Law (*zhengfa luntan*) 100; Sara Davis, Jacques deLisle and Roy Prosterman, *Property Seizure in China: Politics, Law and Protest* (Roundtable before the Congressional-Executive Commission on China, 2004).

[88] Development Research Center of the PRC State Council and World Bank, *China 2030: Building a Modern, Harmonious, and Creative Society* (International Bank for Reconstruction and Development 2013), p 136.

[89] See e.g. *United States v. Miller* 317 US 369, 374 (1943).

[90] Pils, 'Land Disputes, Rights Assertion and Social Unrest: A Case from Sichuan', p 250; Benjamin van Rooij, 'The Return of the Landlord: Chinese Land Acquisition Conflicts as Illustrated by Peri-Urban Kunming' (2007) 39 Journal of Legal Pluralism and Unofficial Law 211, pp 220-21; Washburn, pp 106-7.

[91] Rooij, p 219.

[92] Cheng, 'Judicial Review Power in Land Expropriation Disputes (*tudi zhengyong jiufen de sifa shenchaquan*)', pp 53-54.

Although there has long been a groundswell of support for an overhaul of the Chinese takings law, it is generally felt that little substantive progress has been over the last decade. To be sure, this is not to say that no change has been made during the past ten years. Quite the contrary, in response to the perceived crisis of the takings law, there have been a series of reforms on both the public interest prerequisite and compensation requirement. However, these reform measures have been considered to be patchy, piecemeal and insufficient to fulfil the constitutional promise. In the following chapter, I will first present the limited reforms that have occurred since the turn of the century and then introduce the conventional explanation why the reform is far from satisfactory.

Chapter 2 Stalled Reform of Rural Land Expropriation Law in China: Symptoms and Causes

This chapter is divided into two parts. Part 1 introduces the reform initiatives undertaken by the Chinese central authority over the past ten years in order to overcome the crisis of the rural land expropriation law concerning both the public interest prerequisite and the requirement of compensation. It will be shown that they fall far short of the prescriptions deemed necessary, the conventional explanation for which is discussed in Part 2. It has been widely suggested that the Chinese local governments have been financially reliant upon land expropriation, a phenomenon acknowledged as "land finance" (*tudi caizheng*). The long awaited reform of China's expropriation law has therefore been resisted by the local governments and is seen to be unfeasible as long as the land finance continues. Alternative sources of fiscal revenue must be made available for local governments so that the reform of land expropriation law can proceed.

Before we move on, it is worth noting that the reforms adopted so far have all taken the forms of central Party/government policies or ministerial rules (*guizhang*). There has not been any formal legal revision, particularly to the 2004 LAL. This is to say that all that has been covered in the last chapter remains effective law today, even though *de facto* they have been replaced by new policies and rules for years. This can be seen as another example of what is called "benign illegality" (*liangxing weifa*), a widely observed feature of the legal reform and development in China in the reform era. It refers to those reform measures that are generally considered to be positive and necessary in a fast-changing society but whose formal legality is dubious. The point here though is

not to address its legitimacy, which has long been debated.[1] Rather, it is to show that rural land expropriation in China has been governed by a mixture of statutes, policies and rules for about a decade. While many existing analyses still focus on the formal law, it is time to update our understanding.

1. The Reform and its Limits

I. The Constitutional Public Interest Clause

As mentioned, in the existing law, the constitutional public interest clause faces definitional, structural and procedural challenges. Over the last decade, no reform measures have been taken to tackle the definitional challenge. On the one hand, no statutory specification of the public interest clause has been provided. For example, Professor Liang Huixing's enumerative list of public interest in his draft Property Law was not incorporated into the finalized version. While the 2011 Regulation on Expropriation and Compensation of Houses above State-owned Land does offer a list of specific items of public interest for the state withdrawal of the use-rights of state-owned urban land[2], it is not

[1] This term was first introduced in Tiechuan Hao, 'On Benign Violations of the Constitution (*lun liangxing weixian*)' [1996] Legal Studies (*faxue yanjiu*) 90. For a skeptical view, see Donald C. Clarke, 'China: Creating a Legal System for a Market Economy' November 9, 2007 <http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2258&context=faculty_publications> accessed June 29, 2014; Zhiwei Tong, 'Benign Unconstitutionality should not be Supported: Different Opinions fr*om Comerade Hao Tiechuan (liangxing weixian buyi kending: dui hao tiechuan tongzhi youguan zhuzhang de butong kanfa*)' [1996] Legal Studies (*faxue yanjiu*) 19.

[2] Article 8 reads: "Where, for public interests such as safeguarding the national security and promoting the national economic and social development, it is necessary to expropriate a building under any of the following circumstances, the people's government at the city or county level shall make a decision to expropriate the building:
(1) necessary for national defense and foreign affairs;
(2) necessary for the construction of energy, transportation, water and other infrastructures as organized and implemented by the government;
(3) necessary for a public cause such as science and technology, education, culture, health, sports, environment and resource protection, disaster prevention and mitigation, protection of cultural relics, social welfare or municipal utilities as organized and implemented by the government;
(4) necessary for the construction of a social housing project as organized and implemented by the government;
(5) necessary for the redevelopment of old cities where dilapidated buildings concentrate and infrastructure lags

applicable to state expropriation of rural land. On the other hand, neither has the people's congress nor the court intervened to review the public interestedness of government's expropriation decisions.

That said, there have been reform measures in response to the structural and procedural challenges, though not without serious limitations.

While the constitutional clause that makes expropriation the only lawful way of converting rural land into urban land has not changed, the necessary connection between expropriation and de-agrarianization is partially severed. In 2003 and 2004, the central Party and government authorities suggested that the land law should be reformed to allow the collectives to transfer the use-rights of rural construction land on the market.[3] Recall that according to the 2004 LAL, rural land can only be used for construction by the owning collectives in very limited circumstances. State expropriation is necessitated whenever non-collective parties need to use collective-owned rural land for non-agricultural construction unless they obtain such use-rights as a result of the bankruptcy or merger of the TVEs or joint ventures established with rural collectives. It is forbidden in law that the collectives transfer the use-rights of their land directly on the market. The centrally pledged reform was apparently intended to liberalize the tightly regulated system so that the collectives can enter the market and transfer the use-rights of the rural land that has already been used for construction.

However, it has been further clarified since 2008 that the collectives will only be allowed to transfer the for-profit (*jingying xing*) rural construction land.[4] Out of the five exceptional cases

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behind as organized and implemented by the government according to the relevant provisions of the Urban and Rural Planning Law; or
(6) necessary for any other public interest as prescribed by law or administrative regulation."

[3] Point 9, CCP Central Committee and State Council, *Opinions on Improving Work of Agriculture and Countryside (guanyu zuohao nongye he nongcun gongzuo de yijian)* (January 16, 2003); Point 10, State Council. Indeed, local pilot projects have been carried out since the mid-1990s, of which the central authorities only gave formal policy recognition retrospectively. See Samson Yuen, 'China's New Rural Land Reform? Assessment and Prospects' [2014] China Perspectives 61.

[4] Point 2, Part 3, CCP Central Committee, *The Decision on Major Issues on Promoting Rural Reform and Development (guanyu tuijin nongcun gaige fazhan ruogan zhongda wenti de jueding)*; Point 11, Part 3, CCP Central Committee, *The Decision on Major Issues concerning Comprehensively Deepening Reforms (guanyu quanmian shenhua gaige ruogan zhongda wenti de jueding)* (November 12, 2013).

where the collectives are permitted to use rural land for construction, those for local public utilities and peasants' housing are classified as non-profit while those for TVEs and joint-ventures are categorized as for profit. While the collectives will still not be able to transfer rural construction land used for peasant residence and public utilities, they may transfer their construction land used for TVEs and joint-ventures on the market without being expropriated.

So far there is no uniform national prescription on how exactly rural for-profit construction land can be put on the market by the collectives without going through expropriation. Local experimentations have been going on for years across the country in different ways. Space forbids any detailed discussion of these varied local practices.[5] Suffice it to say here that overall it is no more than a baby step towards what has been promised by the central authority, i.e. the realization of a "unified market of urban and rural construction land" and "equality in market-entry opportunity, rights and price" between collective-owned and state-owned construction land.[6] This is because first, the kind of rural construction land that can be transferred is limited. Only the for-profit construction land is allowed to be put on the market. The collective-owned agricultural and non-profit construction land is still prohibited to be transferred without being expropriated first. In fact, rural for-profit construction land only accounts for one fifth of the rural construction land.[7] This means that the majority of rural collective land remains under stringent use regulation and expropriation is required if it is to be converted to non-agricultural purposes or transferred on the market. Second, the scope of voluntary transfer is limited. Article 8 of the 1994 Urban Real Estate Administration Law

[5] For an analysis, see Yuen.

[6] CCP Central Committee, *The Decision on Major Issues on Promoting Rural Reform and Development (guanyu tuijin nongcun gaige fazhan ruogan zhongda wenti de jueding)*; CCP Central Committee, *The Decision on Major Issues concerning Comprehensively Deepening Reforms (guanyu quanmian shenhua gaige ruogan zhongda wenti de jueding)*.

[7] Yuen; Haitong Securities, 'In-depth Survey of the Agricultural Sector' October 30, 2013 <http://pg.jrj.com.cn/acc/Res/CN_RES/INDUS/2013/10/30/960e4b80-1998-4e63-be9a-28d424b5d052.pdf> accessed July 7, 2014.

stipulates that within the urban planning areas (*chengshi guihua qu*), collective-owned land must be expropriated and turned into state-owned urban land before it can be placed on the market. In 2008, it was made clear by the central Party that collective for-profit construction land can be transferred without expropriation only when it locates outside the urban planning areas.[8]

Third and most crucially, although the policy announcements may have been formulated in a language that sound like giving the collectives a blanket permission to transfer their for-profit construction land as they want, in reality, such transfers have often been initiated and driven by the local governments.[9] It is not unheard of that in some localities, the peasant collectives are forced by the local governments to transfer their construction land to designated developers.[10] In this sense the so-called market transaction of collective for-profit construction land is in fact expropriation in disguise. Even if not forced, such transactions are almost invariably placed under some kind of strict regulation by local governments.[11] Take Guangdong Province as the example: according to its 2005 Measures on Administration of Transaction of Use-rights of Collective-owned Construction Land, first and foremost, these transactions must abide by the Land Use Master Plans (*tudi liyong zongti guihua*) and Urban and Rural Plans (*chengxiang guihua*).[12] Second, the transferred land shall not be subsequently used for commercial housing. Third, if the transferred land is to be used in for-profit

[8] Point 2, Part 3, CCP Central Committee, *The Decision on Major Issues on Promoting Rural Reform and Development (guanyu tuijin nongcun gaige fazhan ruogan zhongda wenti de jueding)*. It should be noted that not all local practices follow this rule as some localities do permit trading of the collective for-profit construction land within urban planning areas. Yet the formal legal barrier remains in place.

[9] Jiang Wan, 'State-led Transfer of Collective Construction Land: From Ideal back to Reality (*zhengfu zhudao xia de jiti jianshe yongdi liuzhuan: cong lixiang huigui xianshi*)' [2010] 32 Modern Law Science (*xiandai faxue*) 27.

[10] Lijian Guo, 'Five Abnomalities in Rural Land Circulation (*nongcun tudi liuzhuan wuda luanxiang*)' *People's Daily* (February 18, 2014).

[11] Fang He and Zhenkui Huang, 'The Evolution and Prospect of China's Pilot Policies on Collective Construction Land Circulation (*woguo jiti jianshe yongdi liuzhuan shidian zhengce de yanjinm yu zhanwang*)' [2010] 352 China Real Estate (*zhongguo fangdichan*) 44; Xiaoxia Wang and Yijun Jiang, 'Review and Outlook of China's Policies on Circulation of Use-rights of Rural Collective Construction Land (*zhongguo nongcun jiti jianshe yongdi shiyongquan liuzhuan zhengce de shuli yu zhanwang*)' (2009) 23 China Land Science (*zhongguo tudi kexue*) 38; Huiguang Chen and others, 'Diversified Innovation of the Models of Circulation of Rural Collective Construction Land: from the Perspective of State-Market Relationship (nongcun jiti jianshe yongdi liuzhuan moshi de duoyanghua chuangxin: jiyu zhengfu yu shichang guanxi de shijiao)' [2009] Economic System Reform (*jingji tizhi gaige*) 87.

[12] More details about these two kinds of spatial plans will be provided in Chapter 6.

projects, the same procedure of public tender (*zhaobiao*), auction (*paimai*) or listing (*guapai*) through which the use-rights of state-owned land is transferred must also be followed. In other words, it ought to be put on the trading platform managed by the local governments. Fourth, the revenue generated from such transactions is subject to the increased land value tax.[13] That is to say that typically such revenue will not all go to the owning rural collectives. Instead, it is to be shared with the local governments, although different proportions of distribution have been adopted by different localities.[14]

With respect to the procedural challenge, a change took place in 2004 when pre-application notice and consultation. Prior to 2004, the expropriated were not even given the chance to know about the initiatives of expropriation before they are approved. Since 2004, the State Council has required that before submitting their expropriation application, the initiating governments should inform those to be affected of the proposed expropriation and compensation arrangements. A pre-expropriation land survey shall also be carried out, the result of which must be verified by the expropriated. The documents showing their full knowledge about the proposed expropriation and compensation arrangements as well as their verification of the land survey result shall be included as part of the application package submitted to the approving provincial or central government.[15] Before submitting the application, the initiating government shall hold public hearings if requested by the expropriated. However, the State Council has made it clear that these public hearings are to deal with

[13] Articles 4, 5, 15, 26, *Measures on Administration of Transaction of Use-rights of Collective-owned Construction Land of Guangdong Province (guangdong sheng jiti jianshe yongdi shiyongquan liuzhuan guanli banfa)* (June 23, 2005).

[14] For example, a widely varied range has been adopted in different localities. 10%-80% of the revenue is stipulated to go to the local governments at various levels. Cuifang Chen and Wu Liu, 'Study on Circulation of the Use-rights of Collective Construction Land: Developing a Game Theory Model (*jiti jianshe yongdi shiyongquan liuzhuan yanjiu: yige boyi moxing de jiangou*)' [2007] Scientific and Technological Management of Land and Resources (*guotu ziyuan keji guanli*) 6; Zheping Xu, 'A Study on the Distribution of Revenue from Circulation of Collective Construction Land from the Perspectives of Efficiency and Fairness: Zhejiang Province as the Example (*jiyu xiaolv yu gongping shijiao de jiti jianshe yongdi liuzhuan shouyi fenpei yanjiu: yi zhejiang sheng weili*)' [2012] Economic Vision (*jingji shijiao*) 22. In fact, without a centrally mandated criterion, the distributional proportion remains highly in flux, which is a topic worthy of further research in its own right.

[15] State Council.

concerns over and objection against the proposed compensation and resettlement arrangements, not the decisions to expropriate.[16]

Admittedly, the fact that the expropriated is now given the right to be informed of the initiative of expropriation before it is referred for approval is a progress. But in no way does this give them any say in the actual making of the expropriation decisions. Unfortunately still, in practice, the meagre procedural rights with regard to expropriation decision-making granted to the expropriated have often been infringed upon without efficacious remedy in practice. Take the right to know about the proposed expropriation as an example. A 2010 survey conducted in 17 provinces across China found that in 29% of all the cases, farmers were not notified in advance of the expropriation.[17] When this happens, it is not clear at all if such procedural irregularities will have any negative impact upon the validity of the expropriation decisions. It is hardly any news that local governments forge application materials showing that the expropriated have been duly informed in advance to cheat the approving authority, oftentimes with impunity.[18]

To summarize, the last decade has witnessed very limited reforms to tackle the triple challenge that has prevented the constitutional public interest clause from being effectively implemented. In comparison, more substantive improvement has been made compensation wise. However, as will be shown in the next section, reform on this front is also far from complete.

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[16] Point 14, ibid; Point 11, Ministry of Land Resources, *Guiding Opinions on Improving Compensation and Resettlement System in Land Expropriation (guanyu wanshan zhengdi buchang anzhi zhidu de zhidao yijian)* (November 3, 2004).

[17] Keliang Zhu and Jeffrey Riedinger, 'Chinese Farmers' Land Rights at the Crossroads—Findings and Implications from a 2010 Nationwide Survey' (*World Bank*, April 18, 2011) <http://siteresources.worldbank.org/INTIE/Images/475494-1294353056366/ZhuLandRightsPres4.pdf> accessed August 11, 2013.

[18] For a recent example, see Chuanjiao Xie, 'Land Deal Contested by Villagers is being Investigated' March 25, 2014 <http://www.chinadaily.com.cn/china/2014-03/25/content_17378436.htm> accessed April 2, 2014.

II. Expropriation Compensation

Recognizing the widespread discontent among the expropriated and its destabilizing effect, the central authority in China started to reform the compensation regime a decade ago. It should be noted though that so far the 2004 LAL has not been formally amended and all the reform measures have taken the form of central Party and government policies, which are along two lines—one on compensation and the other on resettlement.

With regard to compensation, the policy adjustment is twofold. One is that the State Council finally took up the exception made in Article 47 of the 2004 LAL and stated in a 2004 policy document that if the maintenance of the peasants' original living standards requires more than 30 times the average yield, local governments may provide additional subsidy to the peasants with the revenue obtained through land use-rights transfers.[19] Worth noting is that this document was issued just two months after the LAL was amended in August 2004. That though is not to say that the law became outdated so soon. In fact, Article 47 of the 2004 LAL was the same as its counterpart in the 1998 LAL. Therefore, it actually took six years for the State Council to bring this statutory exception into effect. Consequently, on the policy level, there is no longer any unbreakable upper limit fixed for compensation. The other change has to do with the calculation of compensation standard. The statutory formula of "average yield×multiplier" has been replaced by "expropriation uniform annual yield standard" (*zhengdi tongyi nianchan zhi biaozhun*) and "comprehensive land price in expropriated areas" (*zhengdi qupian zonghe dijia*).[20]

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[19] Point 12, State Council.

[20] There are two follow-up policy documents issued by the Ministry of Land Resources to explain in detail the methods of evaluation and calculation for these two new standards. See Ministry of Land Resources, *Guiding Opinions on Improving Compensation and Resettlement System in Land Expropriation (guanyu wanshan zhengdi buchang anzhi zhidu de zhidao yijian)*; Ministry of Land Resources, *Notice on the Formulation of Uniform Annual Yield Standards for Land Expropriation and on the Comprehensive Land Price in Expropriated Areas (guanyu kaizhan zhiding zhengdi tongyi nianchan zhi biaozhun he zhengdi qupian zonghe dijia gongzuo de tongzhi)* (August 12, 2005).

Under this new system, local governments down to the county level are required to classify the land within their jurisdiction into different segments at different grades. Various standards of compensation will then be formulated and published for different segments—the higher the grade, the more the compensation. This has brought along the following changes. First, since compensation is no longer determined *ad hoc* by the local government in individual expropriation cases but through the promulgation of local rules, it enhances consistency and transparency of the compensation regime. Second, within the same area, expropriated land will receive the same amount of compensation regardless of future post-expropriation use. This is intended to make the compensation regime more equitable.[21] Third, the expropriation uniform annual yield standard is determined by the dominant farming pattern at a particular location, not the actual use of a piece of land. And it no longer requires the determination of a multiplier on a case by case basis but establishes fixed multipliers for different areas. In this way, compared with the older standard, it minimizes the possibility that local governments suppress compensation through manipulating the average yield and the multiplier. Fourth, when setting uniform compensation standards for their jurisdiction, local governments can no longer do it unilaterally as they used to do, but are obligated to hold public hearings and engage the public.[22]

Fifth, factors other than the annual agricultural yield are taken into consideration in establishing compensation standards, such as the location of the expropriated land, the local supply and demand of land and the local level of economic development. Last but not least, as mandated by the State

[21] The relevant State Council documents call this "same land same price" (*tongdi tongjia*). But unavoidably there will be borderline cases where the difference in compensation between adjacent pieces of land is difficult to justify.

[22] Article 12, Ministry of Land Resources, *Rules on Public Hearings of Land Resources (guotu ziyuan tingzheng guiding)*. No empirical research has been conducted so far to check if local governments do hold public hearings and how meaningful and participatory they are. But a case in Zhengzhou in 2009 shows that holding a public hearing does not necessarily guarantee that peasants are duly consulted. Qingli Chen, 'Public Hearing Held by Zhengzhou Land Bureau after the New Standards Becoming Effective Suspected to be a Mere Formality (*zhengzhou guotu ju beiyi zou guochang xin biaozhun yi zhixing cai kai tingzheng hui*)' July 9, 2009 <http://www.dahe.cn/xwzx/zt/hnzt/tjyd2009/tuijian/t20090709_1599251.htm> accessed March 17, 2014.

Council, the new standards shall not be lower than the old one, which means a general rise in compensation across the country.

Besides the changes in compensation standards, the other aspect of the reform over the last decade concerns resettlement. For long cash payment of compensation and resettlement fees has been proven to be unable to sustain the peasants economically in the long run.[23] While the low standard is definitely to blame, the fact that compensation was usually paid one-off has also been considered culpable. It has been documented that many land-losing peasants who become unemployed after expropriation either quickly squander the lump-sum compensation or are unable to find new employment and end up in dire impoverishment.[24] To solve this problem, since 2004, the central government has begun to demand that local governments should properly resettle the expropriated peasants to secure their "long-term livelihood" instead of just paying the compensation in a lump sum.[25] Various measures have been adopted across the country to provide the expropriated peasants with continuous social welfare supports such as pension, unemployment benefits, urban residence permit, etc.[26] One particularly popular model tried out in many localities over the years is

[23] For example, it has been estimated that the compensation could support the peasants for only six or eight years after expropriation. Xiangzhi Kong and Zhiqiang Wang, 'Compensation to Land-losing Peasants in Urbanizing China (*woguo chengzhen hua jincheng zhong shidi nongmin de buchang*)' [2004] Economic Theory and Economic Management (*jingji lilun yu jingji guanli*) 60, p 61; Daochi Qiu and others, 'Study of Expropriation Compensation Standard: Shapingba District of Chongqing as the Example (*zhengdi buchang biaozhun yanjiu: yi chongqing shi shapingba qu weili*)' (2005) 30 Journal of Southwest China Normal University (Natural Science) 568, p 569.

[24] Chengang Miu and Zhiliang Huang, 'Investigation of the Life and Development of Land-losing Peasants in Pearl Delta Suburbs and Countermeasures (*zhusanjiao chengjiao shidi nongmin shengcun fazhan zhuangkuang diaocha yu duice yanjiu*)' (2008) 36 Journal of Anhui Agricultural Science 6556, pp 6556-58.

[25] Point 13, State Council; Ministry of Labour and Social Security, *Guiding Opinions on the Work of Providing Occupational Training and Social Security to the Expropriated Peasants (guanyu zuohao bei zhengdi nongmin jiuye peixun he shehui baozhang gongzuo de zhidao yijian)* (April 10, 2006); Point 2, State Council, *Notice on the Questions relevant to Strenghthening Land Control (guanyu jiaqiang tudi tiaokong youguan wenti de tongzhi)* (August 31, 2006) (requiring that without sufficient social security funds expropriation cannot be approved); Ministry of Labour and Social Security and Ministry of Land Resources, *Notice on the Questions relevant to Guarantee Social Security for Expropriated Peasants (guanyu qieshi zuohao bei zhengdi nongmin shehui baozhang gongzuo youguan wenti de tongzhi)* (April 28, 2007). It should be noted that this is preceded by extensive local experiments started in the 1990s of replacing one-time payment of compensation with continuous provision of social welfare including pension and unemployment benefits. See Furong Wang, 'Problems and Solutions on Social Security of Land-losing Peasants in China Today (*dangqian woguo shidi nongmin shehui baozhang wenti yu duice*)' (Master thesis, Nanjing Normal University 2012), ch 3.

[26] The Ministry of Land has recommended four measures including providing the peasants with agricultural land to work on, employment or free occupational training, opportunity to share the return of commercial or industrial projects built on the expropriated land and migration. Ministry of Land Resources, *Guiding Opinions on Improving*

"resettlement through land retention" (*liudi anzhi*), which became centrally recognized for the first time in early 2014.[27] Despite the variation in local practices, the gist of this model is to allow the collectives and peasants to retain a portion of the land supposed to be expropriated as a more stable and reliable source of revenue in the long run.

Overall, during the last ten years, the policy changes towards a more consistent, transparent, equitable, broad-based and generous compensation and resettlement regime have demonstrated the commitment of the Chinese authority to tackling the compensation problem, which is surely to be welcomed. Yet it still faces the following problems. First, the guiding principles of "maintaining the original living standards" and "securing long-term livelihood" remain far from clear and measurable. It has been rightly pointed out that the original living standards approach can only go so far because merely providing enough compensation to duplicate peasants' pre-expropriation income levels will not ensure their economic support once they have lost their land and become incorporated into the urban economy, given China's staring urban-rural income disparity and the higher living costs in the cities.[28] This was partially addressed by another policy change pronounced by the Party in 2012 that the compensation shall not just maintain but improve the expropriated peasants' living standards.[29] Yet without any concrete guidelines, it is unclear to what extent the living standards of the expropriated may be improved, whether it will be comparable to that of the urban residents and how long the "long term" is.

Compensation and Resettlement System in Land Expropriation (guanyu wanshan zhengdi buchang anzhi zhidu de zhidao yijian).

[27] CCP Central Committee and State Council, *Opinions on Comprehensively Deepen Rural Reform and Accelerating Promotion of Modernization of Agriculture (guanyu quanmian shenghua nongcun gaige jiakuai tuijin nongye xiandaihua de ruogan yijian)* (January 19, 2014), pt 4 (20).

[28] Washburn, p 108.

[29] CCP Central Committee and State Council, *Several Opinions on Accelerating Development of Modern Agriculture and Further Invigorating Rural Development (guanyu jiakuai fazhan xiandai nongye jinyibu zengqiang nongcun fazhan huoli de ruogan yijian)* (December 31, 2012).

Second, the MLR requires that in every two to three years, the uniform standards ought to be revised upward to reflect changing circumstances.[30] It is then understandable that many of those expropriated regard compensation paid to them to be unfair when it is calculated according to standards published two or even three years ago.

Third, although the new compensation standard goes beyond the original use criteria, it does not explicitly share the expropriation surplus with the peasants. Admittedly, as required by the State Council, local governments can offer additional subsidy to the peasants with the revenue obtained through land use-rights transfers in order to maintain their original living standards. In theory, this makes it possible for some of the expropriation surplus to be redistributed from the state to the expropriated. Nevertheless, it provided neither any guarantee that this would happen nor any guidance on how much would be shared. Again the local governments are granted the discretion in choosing to subsidize or not, which raises legitimate concerns that they may not opt to do so. Empirical data is too patchy to support any conclusion one way or the other. But available evidence suggests that local governments have not been so keen to provide extra subsidy. For instance, the only national data published so far shows that in 2009 only 1.3% of the revenue of land use-rights transfer was used as subsidy to the expropriated peasants.[31] It was reported that in 2011 Shaanxi Province used just 0.5% of the revenue generated from land transfer to subsidize the peasants to keep their original living standards.[32]

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[30] Ministry of Land Resources, *Notice on Effective Publication and Implementation of Expropriation Uniform Annual Yield and Comprehensive Land Price in Expropriated Areas (guanyu qieshi zuohao zhengdi tongyi nian chanzhi biaozhun he qupian zonghe dijia gongbu shishi gongzuo de tongzhi)* (June 22, 2008).

[31] Ministry of Finance, 'Basic Situation of National Land Transfer Revenue of Expenditure' (April 13, 2010) <http://www.mof.gov.cn/zhengwuxinxi/caizhengshuju/201004/t20100413_286852.html> accessed March 16, 2014.

[32] 'Shaanxi Made 24.3 billion out of Selling Land and Subsidized 122 million to Expropriated Peasants Last Year' (September 27, 2012) <http://gz.house.163.com/12/0927/23/8CEP6DO900873C6D.html> accessed March 16, 2014.

A breakthrough finally came in the end of 2012 when the Chinese central authority openly avowed to further increase the proportion of the peasants' share in the land value increment.[33] In late 2013, at the Third Plenum of the 18th Party's Congress, this promise was reconfirmed that a distributional mechanism will be established to balance the interests of the state, collectives and individuals, to *reasonably* increase individuals' gains and to ensure the peasants a *fair* share in the increased value of land (emphasis added).[34] Details about how a reasonable and fair distribution of increased land value looks like are yet to be provided. But it seems that the vaguely-defined criteria of peasant's "original living standards" and "long-term livelihood" will remain as the ruling standards.

Which brings us to the crucial issue who is to decide if the "living standards" of the peasants are appropriately improved and their "long-term livelihood" secured and in what proportion the increased land value will be shared with the expropriated. Until now it is still up to the government to make the final call. As already shown, under the existing law, it is rather difficult for the expropriated to challenge the compensation and resettlement arrangements fixed by the government. In fact, the locally-set compensation and resettlement standards are not open to challenge in court. This is because as mentioned above, they take the form of promulgated local rules considered as abstract administrative act with general binding force, which are immune to administrative litigation.[35]

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[33] Pt 5, Point 2, CCP Central Committee and State Council, *Several Opinions on Accelerating Development of Modern Agriculture and Further Invigorating Rural Development (guanyu jiakuai fazhan xiandai nongye jinyibu zengqiang nongcun fazhan huoli de ruogan yijian)* .

[34] Points 11, 22, CCP Central Committee, *The Decision on Major Issues concerning Comprehensively Deepening Reforms (guanyu quanmian shenhua gaige ruogan zhongda wenti de jueding)*.

[35] Jun Fang, 'On Ways of Legal Remedies to Disputes of Expropriation Compensation and Resettlement (*lun zhengdi buchang anzhi zhengyi de falv jiuji tujing*)' in Songnian Ying and Huaide Ma (eds), *Sources of Modern Administrative Law (dangdai xingzhengfa de yuanliu)* (Fazhi Press 2006).

That said, during the last decade, two changes have taken place to give the expropriated more procedural rights concerning the compensation and resettlement arrangements.

On the one hand, since 2004, alongside the requirement of pre-application notice of the proposed expropriation, the initiating governments have been asked by the State Council to consult with the expropriated about proposed compensation and resettlement arrangements before submitting their expropriation applications for approval.[36] As mentioned, since the same year, the local governments have also been required to formulate and promulgate local compensation and resettlement rules. For each individual expropriation initiative, the initiating government should include in the application package a compensation and resettlement plan, indicating the local compensation standard and resettlement rules that are to be applied to the proposed expropriation initiative. At this stage, upon the request of the expropriated, the initiating government shall hold public hearings to address compensation-related concerns and objection.[37] However, this does not mean that the government-set compensation rules can be challenged. At most the expropriated can disagree with how the compensation rules are applied to their specific case. Worse still, similar to the right to know about the proposed expropriation in advance, the right to be consulted about the proposed compensation arrangements at public hearings has frequently been violated in practice. A 2010 survey shows that in 58% of the cases peasants were not consulted on compensation beforehand.[38] Procedural deficiency of this kind will not affect the validity of the compensation decisions.[39] Even if the public hearings are conducted, the government has no obligation to provide any feedback.

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[36] Point 14, State Council, *Decision on Deepening Reform and Enhancing Land Administration (guanyu shenhua gaige yange tudi guanli de jueding)*.
[37] Article 19, Ministry of Land Resources, *Rules on Public Hearings of Land Resources (guotu ziyuan tingzheng guiding)*.
[38] Zhu and Riedinger, 'Chinese Farmers' Land Rights at the Crossroads—Findings and Implications from a 2010 Nationwide Survey'.
[39] Article 34, Ministry of Land Resources, *Rules on Public Hearings of Land Resources (guotu ziyuan tingzheng guiding)*.

On the other hand, as mentioned before, once the detailed compensation and resettlement plan is approved by the initiating government, any remaining dispute must first be mediated and adjudicated by the government before being brought to court. The MLR stated in 2006 that in the mediation process, not only the legality but also the rationality of the compensation arrangements can be reviewed.[40] Given that the courts can only review the legality of the compensation decisions, which effectively means that they can only review whether or not the local compensation rules are faithfully followed in individual cases, this may seem to be an improvement. However, it was also made clear that the standard of rationality review is the maintenance of the peasants' original living standards and guarantee of their long-term livelihood, which as already mentioned is far from clear and measurable. More importantly, since the mediating authority is precisely the one that has approved the detailed compensation and resettlement plan in the first place, its impartiality and the effectiveness of the mediation mechanism are highly questionable, even though the rationality review becomes available. Indeed, this was recognized as problematic even by the MLR, which promised that "neutral organizations" would be brought in to evaluate the reasonableness of the compensation and resettlement arrangements in individual cases.[41] Nonetheless, the past eight years has seen no development in this respect.

Overall, despite the progressive measures adopted over the last ten years in order to improve the compensation regime, the situation remains less than ideal. In terms of compensation standard, the peasants' original living standards and long-term livelihood have not been replaced by the fair market value, leaving much discretion for the local governments to determine the amount of compensation and the proportion of increased land value to be shared. Meanwhile, the expropriated

[40] Point 2, pt 2, Ministry of Land Resources, *Notice on Accelerating the Establishment of the Mediation and Ajudication System for Disputes on Land Expropriation Compensation and Resettlement (guanyu jiakuai tuijin zhengdi buchang anzhi zhengyi xietiao caijue zhidu de tongzhi)*.
[41] Ibid.

still have little room to negotiate or challenge the compensation and resettlement packages provided by the government. Considering that there is barely any substantial improvement on the constitutional public interest clause, one may wonder why the much anticipated reform of the Chinese expropriation law has never come.

2. Land Finance as the Explanation

The foregoing account of the current expropriation law and policy has shown that the constitutional and legal limits over the power to expropriate are rather weak both substantively and procedurally. In law and economic terms, these limits have been called the administrative costs of takings, which in the American context include the costs to lobby the legislature to grant the power of eminent domain, procedural costs required by the Fifth and Fourteenth Amendments and state laws, costs associated with professional appraisal services, costs to guarantee condemnees' rights such as public hearings on the condemnation's legality and the amount of compensation required, and potentially the costs of lengthy law suits.[42] This has rendered eminent domain in America a cumbersome and expensive process typically to be avoided by government.[43]

In stark contrast, administrative costs of rural land expropriation in China are significantly lower where local governments can expropriate much more easily. This has provided a *prima facie* explanation that the local governments want to keep the *status quo* of the expropriation law. Nevertheless, as noted in the Prologue, the serious social grievances and frustrations spawned by

[42] Thomas Merrill, 'The Economics of Public Use' (1986) 72 Cornell Law Review 61, p 77.
[43] Ibid, p 80.

pervasive land expropriation have indicated that what Frank Michaelman famously called "demoralization cost" or "settlement costs" of land takings are extremely high in China.[44] The former connotes the present and future monetized loss of the uncompensated property losers and their sympathizers as well as other observers disturbed by the thought that they themselves may be subjected to similar treatment. The latter refers to the costs of time, efforts and resources to reach compensation settlements adequate to offset demoralization costs. With compensation and resettlement packages widely perceived to be inadequate and unjust, Chinese local government face increasing resistance against land expropriation on the one hand and heightened pressure to raise compensation on the other, both of which have been demonstrated in the preceding analysis. This means that the persistence of the current law on expropriation cannot be solely or even primarily explained by the low cost of rural land expropriation. Instead, we need to look at the other side of the equation, i.e. the benefits brought about by rural land expropriation. To put it briefly, land expropriation proves to be enormously beneficial to Chinese local governments in financial terms, which has generally been seen as the most critical reason that the reform of expropriation law hardly gets off the ground.

Already shown is that under the present land system, the government exclusively enjoys the right to convert rural land to urban land through expropriation, which creates a surplus in terms of both augmented land rights and economic profitability. It should be noted though that prior to the late 1980s, such expropriation surplus did not exist. Back then China's urban land system had two essential features. One was that the administrative allocation free of charge and without time limitation was the way through which state-owned urban land reached its users. Under a planned

[44] Frank Michelman, 'Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' (1967) 80 Harvard Law Review 1165, pp 1214-15.

economy, land was not treated as a commodity but a production means to be administered by the state and allocated to government agencies, state-owned enterprises, schools, social groups and public-private joint ventures on a need basis.[45] Charging rents or fees for land use was then considered by the central government to "unnecessarily raise the production cost of the enterprises, swell the state budget and incur administrative formalities".[46] The other feature was that the sale, lease, mortgage and any other type of transfer of the allocated land use rights were strictly prohibited.[47]

However, as China embarked on an open door policy and developing a market economy, such a land system became undesirable. First, because the allocation of land involved no costs, users had no incentive to economize on their land use, giving rise to widespread inefficiency in land use and imbalances in supply and demand, which was exacerbated by the legal prohibition on land transfers. Second, the land allocation system aggravated price distortions in the economy and undermined competition. Third, bureaucratic procedures for land allocation were inflexible and could not respond to rapid economic, social, and technological change. Last but least, due to all the preceding pitfalls, there was a dearth of incentive and funds to support urban infrastructure building.[48]

The initial change to this increasingly out-of-date urban land system was introduced as early as in 1979 when local governments started to charge Sino-foreign joint companies "site use fees" for the land they used.[49] In the years that ensued, many cities began to charge domestic enterprises land use

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[45] Pt 5, Ministry of Domestic Affairs, *Comprehensive Reply on Several Questions concerning the Implementation of the Measures on Land Requisition for State-led Construction (guanyu zhixing guojia jianshe zhengyong tudi banfa zhong jige wenti de zonghe dafu)* (April 27, 1954).

[46] Pt 1, Administrative Council of the Central People's Government, *Reply on the Issue of Charging Land Use Fee or Rent on Suburban Land used by State-operated Enterprises, State Agencies, Military, Schools and so on (guanyu dui guoying qiye, jiguan, budui, xuexiao deng zhanyong shijiao tudi zhengshou tudi shiyongfei huo zujin wenti de dafu)* (February 24, 1954).

[47] Article 10, the 1982 Constitution. Hin Ling Li, *Urban Land Reform in China* (Macmillan Press 1999) , p16.

[48] Mark T. Kremzner, 'Managing Urban Land in China: The Emerging Legal Framework and its Role in Development' (1998) 7 Pacific Rim Law & Policy Journal 611; David E. Dowall, 'Establishing Urban Land Markets in the People's Republic of China' (1993) 59 Journal of the American Planning Association 182.

[49] Article 5, *Sino-foreign Equity Joint Ventures Law (zhongwai hezi jingying qiye fa)* (July 1, 1979); Article 1, State

fees. But the real breakthrough came in 1987 when Shenzhen, drawing on Hong Kong's experience in public land lease, conducted the first competitive public auction of urban land use-rights in China to generate the then much-needed fiscal revenue for local infrastructure development and capital investments.[50] In a strict legal sense, this was unlawful given that the 1982 Constitution and the 1986 LAL prohibited land use-rights transfer. Yet it proved to be an ingenious policy innovation that kills two birds with one stone. By separating land ownership and use-rights, it freed up the room for commodification of urban land in China while keeping the socialist public ownership regime intact. It is therefore unsurprising that constitutional and legal recognition came before long when the 1988 Constitutional Amendment and the 1998 revision to the LAL finally authorize local governments to transfer the use-rights of the land they own.[51] The early 1990s witnessed further institutionalization of this change: in addition to the traditional authority to assign/allocate (*huabo*) land use-rights without charge,[52] local governments in China have since been permitted to transfer (*churang*) or lease (*chuzu*) the land use-rights to private users with charge[53], or mortgage the land to secure loans.[54]

Against this background we can make sense of "land finance", a widely acknowledged impetus propelling China's local states to expropriate rural land massively and resist the relevant legal reform

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Council, *Interim Provisions on Use of Construction Land by Sino-foreign Cooperative Joint Ventures (guowuyuan guanyu zhongwai heying qiye jianshe yongdi de zanxing guiding)* (July 26, 1980).

[50] For a detailed documentation of the policy experimentation in Shenzhen and its subsequent expansion to other localities, see Xiaofang Shen and Songming Xu, 'Shenzhen Special Economic Zone: A Policy Reform Incubator for Urban Land Market Development' in Xiaofang Shen and Xiaolun Sun (eds), *Untying the Land Knot: Making Equitable, Efficient, and Sustainable Use of Industrial and Commercial Land* (World Bank 2012).

[51] One sentence was added to Article 10 of the 1982 Constitution that "land use-rights can be transferred according to law". This is another well-known example of the above-mentioned "benign illegality".

[52] Article 4, 1992 Interim Measures for the Administration of Allocated Land Use Right; Article 54, 2004 LAL; Article 23, 1994 Urban Real Estate Administration Law.

[53] 1990 Interim Regulations concerning the Allocation and Transfer of the Use Right of the State-owned Urban Land; Article 54, 2004 LAL. N.B. Different English translations have been adopted to stand for *churang*, the paid transfer of land use-rights from the state to non-state users, such as land grant and conveyance.

[54] It should be noted that local governments are not permitted to pledge urban land use-rights directly. Yet since the 1990s they have set up arm-length legal entities, usually by the name of Land Reserve Centre or Land Development Centre, to pledge the expropriated land to obtain bank loans. For an in-depth examination of this process, see Jianbo Lou and Jinpin Jin, *Legal Institutions of Land Reserve and Primary Land Development (tudi chubei ji tudi yiji kaifa falv zhidu)* (Fazhi Press 2009).

in order to keep the administrative cost of takings low.[55] A loosely-defined umbrella term, land finance captures at least three ways Chinese local states may capitalize on the expropriation surplus in reality.

The first is that local governments can obtain large amounts of fiscal revenue, mainly in the form of land transfer fee (*tudi churang jin*) paid lump sum by commercial land users when the use-rights of state-owned land are transferred, usually via public competitive tender, auction or listing.[56] Although 30% of the revenue is supposed to go to the central government[57], the bulk of it gets retained by the expropriating and transferring local governments. As noted before, there is a huge gap between expropriation compensation and the transfer revenue, rendering land transfer a lucrative business for local governments. It has been estimated that land transfer revenues comprised almost

[55] Hongmei Liu, Zhibin Zhang and Keqiang Ma, 'A Review of the Research on Revenue from Land Finance in China (*woguo tudi caizheng shouru yanjiu zongshu*)' Research on Development (*kaifa yanjiu*); Shouying Liu, Xingsan Jiang and Qing Li, *China's Land Policy Reform: Policy Evolution and Local Implementation (zhongguo tudi zhengce gaige: zhengce yanjing yu difang shishi)* (Shanghai Sanlian 2010); Guangzhong Cao, Fei Yuan and Ran Tao, 'Land Finance, Industrial Structure Changes and Rapid Tax Revenue Growth (*tudi caizheng, chanye jiegou yanbian yu shuishou chaochanggui zengzhang*)' [2007] China Industrial Economy (*zhongguo gongye jingjie*); 2008 Ju Wang, Chunmei Lv and Shungxing Dai, 'Land Finance and Development of Real Estate Sector (*tudi caizheng yu fangdichan ye fazhan*)' [2008] Sub National Fiscal Research (*difang caizheng yanjiu*); Feizhou Zhou, 'Creating Wealth: The Role of Government and Farmers in Land Development and Transfer (*shengcai youdao: tudi kaifa zhong de xhengfu yu nongming*)' [2007] Sociological Studies (*shehuixue yanjiu)*; Feizhou Zhou, 'Land Finance and the Behaviour of Local Government (*daxing tumu: tudi caizheng yu difang zhengfu xingwei*)' [2010] Comparative Economic and Social Systems (*jingji shehui tizhi bijiao*).

[56] Another way to transfer the use-rights over state-owned land is non-public negotiation. In order to guarantee that the state-owned land is transferred at a fair price, the central authority demanded since the early 2000s that all state-owned land transfer for for-profit projects must go through public competitive tender, auction and listing. Article 4, Ministry of Land Resources, *Rules of Public Tender, Auction and Listing of State-owned Land Use Rights (zhaibiao paimai guapai churang guoyou tudi shiyongquan guiding)* (April 3, 2002); Article 4, Ministry of Land Resources, *Rules of Public Tender, Auction and Listing of State-owned Construction Land Use Rights (zhaibiao paimai guapai churang guoyou jianshe yongdi shiyongquan guiding)* (September 21, 2007).

[57] Article 55, 1998 and 2004 LAL. For more detailed rules on management of land transfer revenue, see Ministry of Finance, Ministry of Land Resources and People's Bank of China, *Measures of Administration of Receipts and Disbursements of Revenues from State-Owned Land Use-Rights Transfer (guoyou tudi shiyongquan churang shouzhi guanli banfa)* (December 31, 2006). For a historical analysis of the evolving central-local distribution of land transfer revenue, see Qingyong Zhang, 'Vertical Fiscal Competition, Price Bargaining and Central-local Distribution of Land Revenue: A Review of Land Revenue in China since the 1980s (*zongxiang caizheng jingzheng, taojia huanjia yu zhongyang difang de tudi shouru fencheng: dui woguo ershi shiji bashi niandai yilai tudi shouru de kaocha*)' [2008] 4 Institutional Economics Research (*zhidu jingjixue yanjiu*).

one-third of the budgetary revenues of prefectural level cities on average in 2010.[58] Some cities are reported to have even higher proportion (up to 70%) of finances coming from land transfer fees.[59]

Second, besides generating huge land transfer fees, rural land expropriation and development can also boost local tax base in both short and long run. This is especially the case in localities where land price is relative low and high land transfer fee is not immediately available. The process of converting rural land into non-agricultural uses alone will create an opportunity for local governments to collect corporate tax and income tax paid by the housing and construction industries.[60] In some cases, instead of using land for short-term revenue-generation, local governments intentionally transfer land at low or even zero prices in order to attract manufacturing investors, as this will offer a steadier revenue stream down the road when local governments can collect various formal taxes, such as VAT from enterprises, business tax from services and income tax from profits after businesses start to operate.[61]

A third benefit is that expropriated land can be used as collateral for local governments to secure bank loans. Article 28 of the 1995 Budget Law explicitly prohibits Chinese local governments from resorting to market borrowing, including bank loans. In practice, many local governments set up arm-length local government financing platforms (typically by the name of local development companies) and allocate the use-rights of expropriated land to them.[62] Such use-rights will then be put on mortgage by these government-set financing platforms to obtain bank loans. More often than

[58] Christine Wong, 'Paying for Urbanization: Challenges for China's Municipal Finance in the 21st Century' in J. Linn R. Bahl and D. Wetzel (eds), *Metropolitan Government Finances in Developing Countries* (Lincoln Institute for Land Policy, Cambridge, MA 2013), p 292.
[59] It was suggested that in 2010 land transfer revenues accounted for 70% of total local revenue for Beijing and 60% for Shanghai. Bin Wu, Shujie Yao and Jian Chen, *China's Development and Harmonization: Towards a Balance with Nature, Society and the International Community* (Routledge 2013), p 143.
[60] Zhou, 'Land Finance and the Behaviour of Local Government (*daxing tumu: tudi caizheng yu difang zhengfu xingwei*)'.
[61] Ran Tao and others, 'Land Leasing and Local Public Finance in China's Regional Development: Evidence from Prefecture-level Cities' (2010) 47 Urban Studies 2217, pp 2224-28.
[62] Yinqi Liu and Tao Sun, *Local Government Financing Platforms in China: A Fortune or Misfortune?* (IMF Working Paper No 13/243 2013).

not, these loans are to be repaid by future land transfer revenues,[63] driving the local states to engage in land expropriation and transfer even more.

Land finance in the above three senses is now generally considered to be the root cause that blocks further reform of expropriation law. However, one might wonder why Chinese local states have become such revenue-seekers? Most existing literature points to the 1994 tax-sharing reform which significantly altered the central-local relationship in China.[64] The story of this reform has been well told, which only needs to be sketched out briefly here.[65]

In the pre-reform era between 1949 and the late 1970s, Chinese fiscal system was highly centralized when all budgetary decisions were made from the top. With little discretionary fiscal power, subnational governments received operating budgets from the centre and spent according to central mandates. Local fiscal surplus had to be submitted to and deficit be covered by the centre. A system as such worked just fine under a planned economy but became incompatible with China's reform towards a market economy since the late 1970s. It was well understood then that economic revival could not be possible without local initiative and autonomy, which was precisely smothered by the pre-reform fiscal system. Therefore, in the 1980s, a series of fiscal reforms were tried out in order to solve this problem. Despite their difference in details, all these reforms aimed at establishing

[63] A recently published report surveying 23 provinces across the country demonstrates the astonishing extent to which Chinese local governments have their bank loans backed up by future land transfer revenue (from slightly over 20% to more than 66%). See Debing Liu, 'Ranking of Reliance on Land Finance for 23 Provinces (*ershisan ge shengfen tudi caizheng yilai du paiming*)' April 14, 2014 <http://finance.sina.com.cn/china/20140414/174318792509.shtml> accessed April 14, 2014.

[64] Ye'an Zhou, 'Theories and Practices of Reform of the Fiscal Expenditure Management at the County Level (*xianxiang caizheng zhichu guanli tizhi gaige de lilun yu duice*) ' [2000] 5 Management World (*guanli shijie*); Deyuan Zhang, 'What is the Problem of Land Acquisition (*zhengdi wenti shi shenme wenti*) ' [2006] 10 The World of Survey and Research (*diaoyan shijie*); Ying Xie, 'Understanding the Land Enclosure Fervor from Fiscal and Land Transfer System (*cong caizheng tizhi he tudi churang zhidu kan quandi re*)' [2006] 11 China Land (*zhongguo tudi*); Defu Tu and Yunlong Tu, 'Analysis of the Land Finance Behaviour of Chinese Local Governments (*woguo difang zhengfu de tudi caizheng xingwei fenxi*)' [2007] 1 Modern Business (*xiandai shangye*); Biliang Luo, 'Tax-sharing System, Fiscal Pressure and Government's Preferences for Land Finance (*fenshui zhi, caizheng yali yu zhengfu tudi caizheng pianhao*)' [2010] 10 Academic Research (*xueshu yanjiu*).

[65] Chunli Shen, Jing Jin and Heng-fu Zou, 'Fiscal Decentralization in China: History, Impact, Challenges and Next Steps' (2012) 13 Annals of Economics and Finance 1, pp 4-8; Joyce Yanyun Man and Yu-Hung Hong (eds), *China's Local Public Finance in Transition* (Lincoln Institute of Land Policy 2010), pp 4-8.

a revenue-sharing system where the central and local governments could "eat in separate kitchens" and the latter was authorized to varied extents to retain and spend fiscal surplus created in their jurisdictions. This has given rise to what was famously labeled as "local state corporatism" in China, where local governments were motivated to coordinate economic enterprises and promote economic growth, especially by developing local rural collective enterprises (TVEs as previously noted), from which they can collect tax and surcharges.[66]

Despite its success in boosting Chinese economy, the revenue-sharing system in the 1980s led to a substantial decrease in the central share of the revenue. One of the reasons was that as part of its effort to mobilize revenue collection, the central government had turned over an increasing share of revenues to local governments.[67] By 1993, the central share of revenues had fallen to just 22% of the total, compared with 38.4 percent in 1985.[68] It was then warned that the massive decline of central government's extractive capacity greatly enfeebled its ability to exercise macro control.[69] To tackle this problem, an overhaul of the fiscal system was launched in 1994, the centerpiece of which was introducing the Tax Sharing System. Most crucially, this system sets the value added tax (VAT), the most productive in the tax system, to be shared at the fixed rate of 75 percent for the central government and 25 percent for local governments. It also established a national tax system that was split from the local tax administration to collect central revenues, especially the VAT, in order to

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[66] Jean C. Oi, 'Fiscal Reform and the Economic Foundations of Local State Corporatism in China' (1992) 45 World Politics 99; Jean C. Oi, *Rural China Takes Off: Institutional Foundations of Economic Reform* (University of California Press 1999). Since the 1980s, rural China went through decollectivization and local government could no longer resort to agricultural sector for fiscal revenue. Meanwhile, because of the political taint still associated with private enterprises and the uncertain political winds from the top towards private entrepreneurs, developing rural collective industries became the most lucrative and least problematic strategy politically for local governments to seek revenue-generating sources.

[67] Other reasons include the local government's hiding and retaining the revenue which should have been remitted to the centre and granting tax exemptions without proper central authorization. For a more detailed record, see Shaoguang Wang and Angang Hu, *Report of Chinese State Capacity (zhongguo guojia nengli baogao)* (Liaoning People's Press 1993), ch 3.

[68] Man and Hong, p 5.

[69] Shaoguang Wang, 'China's 1994 Fiscal Reform: An Initial Assessment' [1997] Asian Survey 801, p 801.

avoid the problem of poor local tax effort.[70] These measures have effectively recentralized revenues. In just one year, the central share jumped from 22% to about 56% and remained at around 50% since.[71] However, this reform dealt only with revenue sharing, leaving expenditure sharing intact. Subnational governments remain responsible for the provision of a wide range of public goods and services, including education, health and other social services. The tax-sharing system therefore created a huge fiscal imbalance between revenue and expenditure for local governments in China, which account for 79% of total government expenditure but only 47% of total government revenues.[72] It has also left many centrally-imposed mandates unfunded.[73] It has therefore been argued that such a "mismatch between revenues and expenditure responsibilities" has financially squeezed subnational governments and forced them to seek land-based revenue and borrowing.[74]

As much as the 1994 tax-sharing reform is culpable for pushing local governments towards expropriation since the mid-1990s, it should be noted though that the new enclosure movement in rural China did not start from that year.[75] As a matter of fact, prior to this reform, Chinese local governments had already engaged in massive rural land expropriation. Between the late 1980s and early 1990s, local governments across the country joined in what is called the "development zone fever" which gave rise to a wave of large-scale land expropriation and led to protests of displaced peasants unsatisfied with low compensation.[76] This trend continued well into the late 1990s and the

[70] For more details of these measures, see Christine P.W. Wong, *Central-local Relations Revisited: the 1994 Tax Sharing Reform and Public Expenditure Management in China* (Paper for the International Conference on "Central-Periphery Relations in China: Integration, Disintegration or Reshaping of an Empire?" Chinese University of Hong Kong, March 24-25, 2000).
[71] Shen, Jin and Zou, 'Fiscal Decentralization in China: History, Impact, Challenges and Next Steps', p 12.
[72] Man and Hong, p 5.
[73] Kai-yuen Tsui and Youqiang Wang, 'Between Separate Stoves and a Single Menu: Fiscal Decentralization in China' (2004) 177 China Quarterly 71, pp 85-86.
[74] Man and Hong Hongyou Lu, Guangping Yuan and Sixia Chen, 'The Root of Land Finance: Competitive or Compelled? (*tudi caizheng genyuan: jingzheng chongdong haishi wunai zhiju*)' [2011] 1 Comparative Economic and Social Systems (j*ingji shehui tizhi bijiao*).
[75] See Prologue.
[76] He, 'Enclosure Movement in the 1990s'; Carolyn Cartier, ''Zone Fever', the Arable Land Debate, and Real Estate Speculation: China's Evolving Land Use Regime and its Geographical Contradictions' (2001) 10 Journal of Contemporary China 445, pp 454-58, 465-66; F. Frederic DENG, 'Development Zones and Urban Land Reform in

early 2000s.[77] The underlying logic of this phenomenon has already been explained above: local governments expropriate rural land to build development zones in order to promote export-oriented development and attract foreign investment. More often than not they intentionally transfer land use-rights to industrial investors at low or even zero prices. Although a loss is incurred on the balance book in the short term, in the long run it enhances local employment, tax revenue and GDP. These, as argued by some, are the key indicators in the "political tournaments" that Chinese local officials compete in under the current cadre evaluation and promotion system characterized by target-based vertical control. They are not only required to achieve what is assigned from above but also expected to outperform their counterparts in other locales. With higher local employment ratio, tax income and GDP growth, cadres stand a better chance to be assessed more favourably over their peers and thereby promoted by their superior.[78] In this sense, massive expropriation at the local level is not just a consequence of fiscal pressure imposed by the 1994 tax reform—it is also, as many have suggested, an instrument used actively by local officials to boost their own careers.

Some scholars have more recently dismissed the political tournament among local cadres as a relevant factor. Their fieldwork shows that the growth of local fiscal revenue and GDP is not formally included in the cadre evaluation. They argued that the real impetus behind land finance and

China' (2003) 22 Asian Geographer 5, p 19; Yanzhong Huang and Dali L. Yang, 'The Political Dynamics of Regulatory Change: Speculation and Regulation in the Real Estate Sector' (1996) 5 Journal of Contemporary China 171, pp 177-78.

[77] Mingxing Liu and others, 'Instrumental Land Use Investment-driven Growth in China' (2008) 13 Journal of the Asia Pacific Economy 313, pp 314, 317-18.

[78] Hongbin Li and Li-an Zhou, 'Political Turnover and Economic Performance:the Incentive Role of Personnel Control in China' Journal of Public Economics;Ye Chen, Hongbin Li and Li-an Zhou, 'Relative Performance Evaluation and the Turnover of Provincial Leaders in China' Economics Letters; Li-an Zhou, 'Governing China's Local Officials: An Analysis of Promotion Tournament Model (*zhongguo difang guanyuan de jinsheng jinbiao sai moshi yanjiu*)' (2007) 42 Economic Research Journal (*jingji yanjiu*) 36; Cao, Yuan and Tao; Zhen Jiang and Jun Xin, 'How Did the Land Finance of Local Governments Come into Existence (*difang zhengfu tudi caizheng shi ruhe chansheng de*)' [2011] 1 Macroeconomics (*hongguan jingji yanjiu*); Li Zhang and others, *Investment Attraction through Land by Local Officials* (2009).

expropriation lies in local government's wanting to maximize discretionary fiscal power because land-based revenues are extra-budgetary and can be amassed and used with lesser central control.[79]

More empirical work is definitely needed to pinpoint exactly how fiscal shortage, cadre's career competition and an appetite for discretionary power have influenced Chinese local governments' behaviour in terms of land finance and expropriation. Nevertheless, it has been widely agreed that expropriation for finance have bred a whole host of unwanted side-effects such as swelling local government debt, high risk of government default in case of a property bubble burst, and the lack of sustainable revenue sources to support long-term local development.[80] Meanwhile, the huge benefit gained through expropriation, be it economic or political, is now largely seen as the greatest source of resistance against the reforms aimed at increasing the administrative costs associated with expropriation through instituting more robust substantive and procedural legal constraints. As already noted, since the early 2000s, there has been much support for reform in this area towards better and narrower definition of the public interest clause, higher compensation standard and more participatory procedures. Yet the lure of land finance seems hard to offset. In the meantime, the central government has also been very tentative and cautious in rolling out more reform measures, being acutely aware of the potential risks of local financial crisis once the benefits from low-cost expropriation is dried up.

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[79] Ran Tao and others, 'China's Transition in the Evolving Regional Competition: Reflections on Fiscal Incentives and Development Model (*diqu jingzheng geju yanbian xia de zhongguo zhuangui: caizheng jili he fazhan moshi fansi*)' [2009] 7 Journal of Economic Research (*jingjixue yanjiu*) 21; Ran Tao and others, 'Does Economic Growth Lead to Promotion: A Logical Challenge against and an Empirical Re-examination at the Provincial Level of the Promotion Tournament Theory (*jingji zengzhang nenggou dailai jinsheng ma: dui jinsheng jinbiaosai lilun de luoji tiaozhan yu shengji shizheng chonggu*)' [2010] 12 Management World (*guanli shijie*).

[80] Shouying Liu and Xingsan Jiang, 'Land Finance and its Fiscal and Financial Risks (*tudi rongzi yu caizheng he jinrong fengxian*)' [2005] 10 China Land Science (*zhongguo tudi kexue*); Liu, Jiang and Li, *China's Land Policy Reform: Policy Evolution and Local Implementation (zhongguo tudi zhengce gaige: zhengce yanjing yu difang shishi)*, pp 8-10; Zhou, 'Creating Wealth: The Role of Government and Farmers in Land Development and Transfer (*shengcai youdao: tudi kaifa zhong de xhengfu yu nongming*)'.

In this situation, there is an increasing realization that revising the laws on expropriation and land use alone is far from enough. Wider reforms have been proposed to mitigate the impact of or eradicate land finance such as rebalancing central-local distribution of fiscal powers and expenditure responsibilities, adjusting the cadre evaluation system and authorizing local governments to issue bonds or levy property tax in order to raise the needed fiscal revenue.[81] As a matter of fact, pilot projects of levying property tax on owners of spacious, expensive and multiple homes have been implemented in Shanghai and Chongqing since 2011. But these experimentation schemes are obviously very limited in their scope and are primarily for the sake of curbing runaway house prices and real estate speculation. More recently the central government made it clear that no more pilot programmes would be carried out in other localities until a national law on property tax is enacted.[82] That said, the hope is still that in one way or another, once China's local governments become longer be as much financially reliant upon rural land expropriation, further reform of the expropriation law will be underway and the constitutional promise be eventually fulfilled.

[81] Shouying Liu and Xingsan Jiang, 'Financial Risks of Land Financing by Local Governments: Case Study of a Developed Area in East China (*tudi rongzi yu caizheng he jinrong fengxian: laizi dongbu yige fada diqu de ge'an*)' [2005] 5 China Land Science (*zhongguo tudi kexue*); Liu, Jiang and Li, *China's Land Policy Reform: Policy Evolution and Local Implementation (zhongguo tudi zhengce gaige: zhengce yanjing yu difang shishi)*, 266-68; Research Centre of China Land Survey & Planning Institute, 'Removing Local Over-reliance on Land Finance from an Institutional Perspective (*cong tizhi shang xiaochu difang guodu yilai tudi caizheng*)' [2006] 7 China Land (*zhongguo tudi*).

[82] Liyan Qi, 'China Not Planning to Expand Pilot Property-Tax Program' March 19, 2014 <http://online.wsj.com/news/articles/SB10001424052702303802104579448513811488016> accessed April 16, 2014. For an introduction to this topic, see Joyce Yanyun Man, 'China's Property Tax Reform: Progress and Challenges' [2012] Land Lines 15.

Chapter 3 Critiquing the Critique: Discovering China's Original Constitutional Takings Clause

The last two chapters provide a rather extensive literature review, which is intended for two purposes. First, it puts us in a position to have a panoramic view of what has been said so far about Chinese law and policy on rural land expropriation descriptively and normatively. Second, with enough details being presented about the existing research, we can see what has *not* been discussed to make a case for an alternative approach. The rest of the chapter proceeds in three parts. In the first part, I will argue that the existing literature is dominated by what I call the Transition Paradigm defined by four core assumptions. The second part explores the origin, meaning and purpose of China's original takings clause in the 1954 Constitution, which has hitherto been overlooked. The third part uses China's original takings clause as a test case to challenge some of the core assumptions of the dominant paradigm.

1. The Transition Paradigm Defined

Before explaining what I mean by the transition paradigm (hereinafter the TP) and why I think it has dominated the existing literature, I hasten to add that it in no way denies the differences among those who adhere to it. As well illustrated in the last chapter, there are plenty of differences in the existing literature. For example, on the prerequisite of public interest, while some scholars focus on

the definitional challenge, others pay more attention to the structural and procedural challenges. As to the reform proposals, some prefer to have the judiciary to intervene whereas others suggest that the people's congresses should take on the task to examine the public interestedness of the expropriation initiatives. Still there are others in favour of an enumerative definition of the public interest clause provided in national statutes. Opinions also differ on the solution to the structural challenge: some argue for wholesale privatization or nationalization of rural land, yet others have taken a more modest approach in recommending abolishing the use limitation over rural collective land. In this sense, identifying a paradigm does not intend to and cannot be an all-encompassing summary of the existing literature. Rather, it encompasses four assumptions most of the work in the field have rested upon, consciously or unconsciously.

TP as an academic term was first coined by Thomas Carothers in his famous article in 2002.[1] Originally it stands for the analytic model or framework adopted by the development-assistance community to understand democratization in the world since the "third wave" of democracy.[2] It captures the widely shared belief at the time that democratization is underway in those countries moving away from dictatorial rule. Under the original TP, democracy characterized by regularized national election is regarded as the endpoint of social and political transition and democratization as a natural process. The only remaining question is how to make this transition.

In our context, the TP refers to the conviction underlying much of the existing literature that China's takings law should be and is in a transitional state towards the American model, a process only to be hindered by the so-called land finance. It is characterized by the following four assumptions.

[1] Thomas Carothers, 'The End of the Transition Paradigm' (2001) 13 Journal of Democracy 5.
[2] This term first appeared in Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press 1991).

First and foremost, the *teleological assumption*: To put it quite bluntly, much of the existing scholarship hold the view to the effect that in terms of the takings law, America's today should be China's tomorrow. To be clear, this is not to say that it is always suggested that the Chinese takings law ought to become an exact copy of the American counterpart. A closer look at the American jurisprudence of eminent domain will reveal that it is anything but a unified, monolithic and static model to be imitated expediently by China in a wholesale fashion. The meaning and application of the "public use" standard have evolved over time in history.[3] The determination of "fair market value" and whether it adequately (and justly) compensates owners are frequently subject to debate.[4] And no uniform practice on the "due process of law" in eminent domain exists either on the federal level or among the states.[5] Nevertheless, for all its uncertainties and controversies, the American takings law is still generally believed to have offered a model that China should learn from. On the one hand, the public interestedness of particular expropriation decisions shall be subject to *ex ante* and *ex post* check through legislative authorization, public participation and judicial review. The scope of expropriation should be narrowed down through allowing rural land to be voluntarily converted to be urban or construction land. On the other hand, the current compensation standards based on the original use of the expropriated land and the living conditions or long-term livelihood of the expropriated ought to be replaced by the "fair market value" standard. The expropriated shall also be given the opportunity to negotiate and challenge the compensation offered by the government. On a deep level, all of this is founded on the afore-mentioned belief that the

[3] Liu, 'The Chinese Takings Law from a Comparative Perspective', pp 325-32; Yao.

[4] Christopher Serkin, 'The Meaning of Value: Assessing Just Compensation for Regulatory Takings' (2005) 99 Northwestern University Law Review; Ann E. Gergen, 'Why Fair Market Value Fails as Just Compensation' (1993) 14 Hamline Journal of Public Law and Policy; Laura H. Burney, 'Just Compensation and the Condemnation of Future Interests: Empirical Evidence of the Failure of Fair Market Value' [1989] Brigham Young Law Review.

[5] D. Zachary Hudson, 'Eminent Domain Due Process' (2010) 119 Yale Law Journal 1280. Worth noting is that today there are 21 states which do not require any pre-condemnation notice or hearing in legislation and not all their state courts have filled the gap through case law.

constitutional takings clauses in these two countries are comparable to each other. It is generally held that the third paragraph of Article 10 in the 1982 PRC Constitution is China's own version of the Fifth Amendment, the duly function of which is to protect collective rural land rights from the intrusive takings power of the state.

Particularly symptomatic in this regard is the prevalence of the following quote in China over recent years: "a man's house is his castle, which the wind may blow through, the rain may fall in but the king may not enter".[6] In popular media and academia, this has been widely taken as the value foundation that Chinese takings law rests on. In light of this, on the one hand, expropriation is seen as an innately necessary evil to be restricted by law both substantively and procedurally. On the other hand, the peasants' land rights are supposed to be constitutionally and legally shielded from the state's takings power. As demonstrated in the last chapter, the existing takings law and policy in China hardly provides any robust restraint over the power of expropriation or any effective protection of rural land rights. It is therefore considered imperative for legal reform in this area to fulfil the constitutional promise.

Second, the *developmental assumption*: As mentioned, in spite of mounting pressure for reform, the past ten years saw very little progress that brings the Chinese takings law closer to the American model. Yet this is not thought to have detracted from the validity of the teleological assumption—it actually reinforces it because one of the crucial differences identified between China and America is that the Chinese local governments have been engaging in rural land expropriation for financial benefits since the late 1980s and particularly since 1994 whereas such kind of incentive is much weaker in the USA. Indeed, to many the *Kelo* case serves a reminder that some American local

[6] In Chinese "风能进，雨能进，国王不能进". For the original quote and its history, see Joseph William Singer, 'The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations' (2006) 30 Harvard Environmental Law Review, p 309.

governments will do what their Chinese counterparts have been doing on a larger scale when they too feel the need to promote local economic growth and generate fiscal revenue.[7] In this situation, land finance is typically seen as the biggest obstacle for the much expected reform of takings law in China and there is an increasing realization that broader reform measures are required to overcome such a barrier. It is generally believed that when local governments no longer have to expropriate rural land to generate short or long term financial benefits, they will be less driven to expropriate at a large scale and more willing to increase compensation. This will then open up the doors of opportunity for more systematic and deeper reforms of China's takings law to move forward.

Third, the *temporal assumption*: Under the TP, the legal problem of rural land expropriation is framed mainly as a post-reform issue. It is understandably so because China's new enclosure movement has taken place since the urban land use-rights became marketable in 1988, especially after the 1994 tax reform. This is not to say that rural land expropriation did not exist before then. It did. But the general perception is that it was much less of a problem at a time when local governments were far less financially incentivized to expropriate and the speed and scale of expropriation did not pick up.

From a legal standpoint of view, the existing analyses invariably start from Article 10 of the 1982 PRC Constitution. Admittedly, references have been made to the constitutional takings clauses in the three PRC Constitutions prior to the exiting one, i.e. Article 13 of the 1954 Constitution, Article 6 of the 1975 Constitution and Article 6 of the 1978 Constitution.[8] For two reasons the first is generally taken as the basis from which the current constitutional takings clause is derived. On the one hand, it

[7] In the *Kelo* case, the land was taken and transferred to the pharmaceutical giant Pfizer.

[8] See e.g. Lekun Feng, 'On the Purpose of Land Expropriation (*tudi zhengyong mudi zhi yantao*)' (2005) 24 Journal of Lanzhou Jiaotong University (*lanzhou jiaotong daxue xuebao*) 68; Chuanhao Tian, Hong Yang and Jia Zhou, 'Land Acquisition System in China: Historical Evolution, Current Problems and Reform Directions (*zhongguo zhengdi zhidu: lishi yanbian, xianshi wenti yu gaige fangxiang*) ' <http://cres.zju.edu.cn/pic/20091119112819642.pdf> accessed May 6, 2014.

was clarified by the Constitutional Drafting Committee at the time that the 1982 Constitution as a whole was modeled on the 1954 Constitution rather than its two immediate predecessors enacted during the Cultural Revolution (1966-1976)[9], a tumultuous period officially acknowledged as a major setback in the legal and constitutional development of the PRC.[10] On the other hand, specifically with regard to the takings clause, the 1982 Constitution bears more resemblance to the 1954 one than to those in 1975 and 1978. While the public interest prerequisite for land takings disappeared from the 1975 and 1978 constitutional takings clauses[11], it reappeared in the 1982 Constitution. Interesting in historical terms as they may be, those pre-reform constitutional takings clause have never been thought to be able to shed any light on the existing law of rural land expropriation.

Fourth, the *conceptual assumption*. The existing literature share a conception of the power of land takings, which is largely unarticulated but is borne out by all the rules that have been cited as China's takings law over the past century. For example, regarded as the first two statutes on land takings promulgated by the communist government, the 1939 Land Regulation of Shan'ganning Border Region provides that for roads, military use or public buildings the government may expropriate (*zhengshou*) people's land and pay land price.[12] The 1944 Land Rights Regulation of Shan'ganning Border Region provides that for the purposes of national defense facilities, public roads, urban renewal, and other undertakings for public interest, the government may requisition

[9] Peng Zhen, 'Report on the Draft Amendment of the PRC Constitution (*guanyu zhonghua renmin gongheguo xianfa xiugai cao'an de baogao*) (originally published in 1982)' in *Selected Works of Peng Zhen* (People's Press 1991), p 439.

[10] CCP Central Committee, *Resolution on Certain Questions in the History of Our Party Since the Founding of the People's Republic of China (guanyu jianguo yilai dang de ruogan lishi wenti de jueyi)* (June 27, 1981).

[11] The two takings clauses (Article 6) are identical and read "The state may compulsorily purchase, requisition or nationalize urban and rural land as well as other means of production under the conditions prescribed by law."

[12] Articles 18 and 19, Land Regulation of Shan'ganning Border Region (*shan'ganning bianqu tudi tiaoli*) (April 4, 1939), cited in Shanxi Archival Institute and Shanxi Academy of Social Science (eds), *Selected Government Documents of Shan'ganning Border Region (shan'ganning bianqu zhengfu wenjian xuanbian)*, vol 1 (Dang'an Press 1986), p 226.

(*zhengyong*) the land owned by individuals or groups.[13] Moving on to the PRC, the 1953 Measures on Land Requisition for State-led Construction stipulates that the state may requisition the land needed for national defense facilities, factories, mines, railways, public transportation, water conservancy and irrigation projects, municipal works and other economic and cultural development while taking care of the vital interests of the local people and providing appropriate settlement for those affected (Articles 2-3). The 1958 Measures on Land Requisition for State-led Construction basically followed the suit of the 1953 Measures.[14] The 1982 Regulation on Land Requisition for State-led Construction prescribes that the state may requisition with compensation the land owned by collectives for the construction of economic, cultural, national defense and social public undertakings.[15]

Apparently, despite their differences in terminology, all these prescriptions are understood to ascribe two essential elements to the power of land takings: it is exercised for some sort of public works under the requirement of making compensation. On that basis, it is not only possible but indeed necessary to compare the Chinese takings law with the American law on eminent domain, precisely because both of them are believed to deal with the same kind of state power.

To sum up, under the TP, the takings clause in the 1982 PRC Constitution is deemed to have made a promise at least as good as the Fifth Amendment to the American Constitution. Taking this as the logical departure point, much of the existing analyses revolve around exposing and critiquing the

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[13] Article 13, *Land Rights Regulation of Shan'ganning Border Region (shan'ganning bianqu diquan tiaoli)* (December 1944), cited in Division of Legal History at Northwestern Academy of Politics and Law (ed) *Selected Materials of Modern Chinese Legal History 1840-1949 (zhongguo jindai fazhishi ziliao xuanji 1840-1949)*, vol 1 (Division of Legal History at Northwestern Academy of Politics and Law, 1985), p 586. Note that the 1939 draft of this 1944 Regulation stipulates in Article 25 that for the same purposes the government may requisition the needed land with price (*beijia zhengyong*). This means that requisition in the 1944 Regulation does require the payment of land price.

[14] Articles 2-3, *Measures on Land Requisition for State-led Construction (guojia jianshe zhengyong tudi banfa)* (January 6, 1958).

[15] Articles 2 and 9, *Regulation on Land Requisition for State-led Construction (guojia jianshe zhengyong tudi tiaoli)* (May 4, 1982).

pitfalls and deficiencies of the law and policy of rural land expropriation that have led to the breaking of the constitutional promise and massive enclosure movement in the reform era. Accordingly, it is now almost a consensus in the field that the objective of the reform is to fulfil the constitutional promise made by China's own Fifth Amendment, to which the transition towards the American model of takings law is not only desirable but also inevitable. This does not mean that the development towards the endpoint will be a straight line. It has not been so given the persistence of land finance. Nevertheless, it is believed that once this obstacle is cleared out of the way, a more thorough transition will be triggered.

For a decade now, the discussion on the Chinese law of rural land expropriation, scholarly and otherwise, has been dominated by the TP as described above. While many insights have been generated thereby, I argue that the predominant paradigm fails to capture the *dynamics* of China's takings law. This is not to say that the existing analyses and criticisms are erroneous or that further reform is unnecessary. Rather, it is to say that based on the afore-mentioned teleological, developmental, temporal and conceptual assumptions, the current scholarship falls short in accounting for the development path of the Chinese takings law. More specifically, the following issue has not been adequately addressed under the TP—how does the Chinese law of rural land expropriation become the way it is today? This question is all the more intriguing considering that China's constitutional takings clause is conventionally interpreted to be not so different from the American Fifth Amendment when these two countries are radically different from one another in terms of social, political and economic background.

Admittedly, a widely observed feature of the PRC legal system is that more often than not what's written in the formal constitutional document is not implemented in reality. Many have therefore

regarded the deviation of the takings law from its constitutional basis as another example in point. However, I argue that this is the wrong way to look at the problem and that the existing expropriation law actually reflects rather than contradict its constitutional basis. The teleological assumption of the TP does not hold because the Chinese constitutional takings clause shall not to be equated with the American Fifth Amendment. Nor can it be made sense of simply through being compared with its American counterpart. For a better understanding of the Chinese constitutional position on rural land takings, we must trace its evolution over the course of the 20th century including both the reform and pre-reform eras, an intellectual pursuit hitherto rendered irrelevant by the temporal assumption. Placed in its historical context, the power of land takings has a much richer and broader meaning in modern China than what has been captured under the conceptual assumption of the TP. Only with a contextualized understanding of its past trajectory will we then be able to challenge the developmental assumption that Chinese takings law is *en route* to the American model and make informed and more accurate predictions and realistic recommendations on how it will change in the future.

The remainder of this chapter uses China's original takings clause in the 1954 Constitution as a test case to call the TP into question. Although no longer in effect and almost completely overlooked in the existing literature, this clause serves a perfect entry point into the history of the law on rural land takings in modern China.

2. China's Original Constitutional Takings Clause: Origin, Meaning and Purpose

Article 13 of the 1954 Constitution reads: The state may, in the public interest, compulsorily purchase, requisition or nationalize both urban and rural land as well as other means of production according to the terms provided by law.[16] In spite of being constantly quoted as the first constitutional takings clause of the PRC, this article has never been subject to close scrutiny. This is probably because as just mentioned, it was seen as the basis out of which the current constitutional takings clause was written and was therefore relegated as insignificant as far as the post-reform crisis of the expropriation law is concerned. Yet a closer look will actually distinguish it from the 1982 takings clause in two important aspects. For one thing, while the 1982 clause deals with the power of expropriation (*zhengshou*), the 1954 clause lists out three kinds of takings power—compulsory purchase (*zhenggou*), requisition (*zhengyong*) and nationalize (*shougui guoyou*). For another, the original takings clause has no explicit requirement of making compensation for land takings. As a matter of fact, these two characteristics make China's 1954 constitutional takings clause unique and find no parallel in any other country in the world. Where does it come from?

Strangely enough, this question has never been raised, though there is no easy answer. It is well known that the 1954 Constitution, the first of its kind in the People's Republic, was drafted mainly out of two reference texts: the 1936 USSR Constitution for its orthodox socialist/communist doctrines and the 1949 Common Programme for its representation of indigenous revolutionary experiences in China. Interestingly, however, there is no trace at all in these two documents for the 1954 takings clause. Articles 5-12 of the 1936 USSR Constitution and Article 3 of the Common Programme deal with property and basic economic relationships under socialism, none of which even mention the power of land takings. Looking further back, it is the same with the 1924 Soviet

[16] The Chinese reads "国家为了公共利益的需要，可以依照法律规定的条件，对城乡土地和其他生产资料实行征购、征用或者收归国有。"

Constitution. Is it possible then that the China's first takings clause is "made in China" or there is some foreign influence other than its "socialist big brother"? Since the "hansard" (verbatim report of proceedings) behind the 1954 Constitution is not currently available, we need to find a way to piece the puzzle together.

I. The Origin of China's Original Takings Clause

Constitution-making in 1954's China was a six-step process spanning ten months. The first step was the writing of a first draft by a three-membered team led by Mao Zedong between December 1953 and February 1954. It was followed by a review and revision by the Politburo and Central Party Committee members in Beijing from mid-February to March 1954. The third step was the deliberation of the adopted draft by the Constitutional Drafting Committee, which was then sent to the Chinese People's Political Consultative Conference, provincial and military leaders for comments from late March before getting approved by the Central Government Committee. The fifth step was the publication of the draft in June to solicit comments from the general public during a period of three months. The sixth and final step came in September when the then newly founded and elected National People's Congress passed the constitution. In the draft constitution submitted to the Constitutional Drafting Committee on March 23rd 1954, Article 12 was basically the same as Article 13 in the final version.[17] This means that the original takings clause had been settled by then. Therefore, in order to figure out where the takings clause came from, we need to look at all the possible sources of reference by late March 1954. While it is known that on December 27th 1953

[17] Dayuan Han, *1954 Constitution and Constitutionalism in New China (1954 nian xianfa yu xinzhongguo xianzheng)* (Hunan People's Press 2004), p 631. It reads "国家在公共利益需要的时候，可以根据法律所规定的条件，对城乡土地和其他生产资料实行征购、征用或收归国有。"

Mao Zedong led a drafting team comprised of his three personal secretaries to Hangzhou with two bookcases of reference materials,[18] it has never been disclosed what exactly were these references, though there is one notable exception coming from Mao himself. In a telegraph cabled from Hangzhou back to Beijing on January 15th of 1954, he assigned the following reading list:

> *In order to facilitate discussion (of the draft constitution) in the Politburo in mid-February, I would like every Politburo member and Central Committee member present in Beijing start at once now to find the time to read each of the following main reference documents:*
>
> 1) *the 1936 Stalin Constitution and Stalin's Report (in a single volume);*
> 2) *the 1918 Russian Soviet Federated Socialist Republic Constitution (read Volume One of the Collected Materials on the Constitution and Electoral Law edited by the Government Office);*
> 3) *the Romanian, Polish, German, and Czechoslovakian Constitutions (read the Complied Constitutions of People's Democratic States published by the People's Press. The various national constitutions collected in this volume are similar with minor variations. The Romanian and Polish Constitutions are selected for being relatively new; German and Czechoslovakian Constitutions are selected for being relatively detailed and with characteristic differences. If you have time, read the others);*
> 4) *the 1913 Temple of Heaven Draft Constitution, the 1923 Cao Kun Constitution, the 1946 Chiang Kai-shek Constitution (read Volume Three of the Collected Materials*

[18] Ibid, p 70.

on the Constitution and Electoral Law. These represent three models: a ministerial system, a federalist system, and a presidential dictatorship);

5) *the 1946 French Constitution (read Volume Four of the Collected Materials on the Constitution and Electoral Law. This represents a comparatively progressive and complete capitalist ministerial system constitution).*[19]

From January 7th to March 9th 1954, as recalled by Dong Chengmei, a young graduate from Renmin Law School working under the Constitutional Drafting Committee at the time, the drafting team led by Mao prepared the first 100-article draft and edited a three-volume Reference Materials on Constitution (*xianfa cankao ziliao*). Volume 1 contains the 1918 Soviet Russian Constitution and the 1924 USSR Constitution. Volume 2 includes American, British, German and Swiss Constitutions. Volume 3 covers constitutions and constitutional documents enacted by the Qing Dynasty, the Beiyang Warlords and the KMT government. These volumes were published by the General Office of the Central People's Government Committee and distributed to all members of the constitutional drafting committee and relevant working staff.[20] Therefore, we can be fairly certain that these three official compilations, two mentioned by Mao[21] and one by Dong[22] had been used as reference materials for constitution drafting by March 1954.

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[19] Mao Zedong, 'Working Plan of Drafting Constitution (*xianfa qicao gongzuo jihua*)' in *Collected Works of Mao Zedong (mao zedong wenji)* vol 6 (People's Press 1993), p 320.

[20] Han, pp 773-74.

[21] Legal Committee of Central People's Government (ed) *Compiled Constitutions of People's Democratic States (renmin minzhu guojia xianfa huibian)* (1953). It includes constitutions of Bulgaria, Czechoslovakia, Korea, Hungary, Democratic Germany, Albania, Poland and Romania. General Office of Central People's Government (ed) *Collected Materials on the Constitution and Electoral Law (xianfa ji xuanjufa ziliao huibian)*, vol 1-4 (1953). Volume 1 includes 1918 and 1924 constitutions of Soviet Russia. Volume 2 covers constitutions of Poland, Romania and Democratic Germany. Volume 3 contains Chinese constitutions or draft constitutions in 1908, 1911, 1912, 1913, 1914, 1923, 1930, 1931 and 1946. Volume 4 includes constitutions of America, Britain, France, Weimar Germany and Swiss.

[22] Central People's Government (ed) *Reference Materials on Constitution (xianfa cankao ziliao)*, vol 1-3 (1954). Volume 1 covers 1918 and 1924 Soviet Russian Constitutions. Volume 2 includes constitutions of America, Britain, France, Weimar Germany and Swiss. Volume 3 contains Chinese constitutions or draft constitutions in 1908, 1911, 1912, 1913, 1914, 1923, 1930, 1931 and 1946.

In addition, there are three possible sources of reference. One is the 1940 Mongolian Constitution, which was referred to by Tian Jiaying, Mao's secretary and one of the three members of the drafting team, when he discussed about the constitutional right to freedom of movement.[23] Another one is a book edited by the Chinese Society of Political and Legal Studies.[24] It is likely to be a source of reference for two reasons. On the one hand, the editor is an organization led by such prominent political figures as Dong Biwu and Qian Duansheng who were themselves two of the makers of the 1954 Constitution. On the other hand, this book was published in July 1954, one month after the draft constitution was made available for consultation, as a reference guide to educate the public and give them the necessary knowledge to make informed judgments on China's own draft constitution. A third possible source is the 1931 Constitutional Outline of the Chinese Soviet Republic, which was not included in any of the previously-mentioned books but was referred to by Mao as a forerunner to the 1954 Constitution.[25]

Admittedly, in no way can we be entirely sure that these materials exhaust all sources of influence over the making of the 1954 Constitution. However, to a large extent they represent the totality of the reference constitutional documents then available. As already mentioned, the original takings clause came neither from the Russian constitutions nor from the Common Programme. Excluding the two, the scope of our search is reduced to a total of 31 constitutions as follows:

Type of Constitution	Constitution	Relevant Clauses
Chinese Constitutions	1908 Outline of Constitution by Imperial Order	No.

[23] Han, p 255.
[24] Chinese Society of Political and Legal Studies (ed) *Breakdown of Reference Materials of Constitutions (xianfa fenjie cankao ziliao)* (People's Press 1954). It covers the constitutions of the Soviet Union, Poland, Czechoslovakia, Bulgaria, Romania, Hungary, Albania, Mongolia, Korea, Vietnam, France and America.
[25] Han, p 389. For this reason Mao rejected the notion that the 1954 Constitution was the first Chinese constitution.

	1911 Nineteen Major Articles of the Constitution	No.
	1912 Provisional Constitution of Republic of China	Article 15: The rights of citizens as provided in the present chapter (including the right of the security of their property provided in Article 6) shall be limited or modified by laws provided such limitation or modification shall be deemed necessary for the promotion of public interest, for the maintenance of public order or on account of extraordinary exigency.[26]
	1913 Draft Constitution of Republic of China (Temple of Heaven Draft Constitution)	Article 12: Property ownership of the people of the Republic of China is not to be violated. But its disposal necessitated by public interest should be done according to law.[27]
	1914 Constitution of Republic of China	No.
	1923 Constitution of Republic of China (Cao Kun Constitution)	Article 13: Property ownership of the people of the Republic of China is not to be violated. But its disposal necessitated by public interest should be done according to law.[28] Article 24: The following affairs are to be conducted by the state according to legislation or by the local governments upon national orders: (7) public use expropriation.[29]
	1930 Draft Constitution of Republic of China	Article 10: When each county starts to be autonomous, it shall set the price of all land privately owned within its territory. The land owners report the land price themselves and the local government levies taxes and may purchase the land at any time based on the price. If the land value increases after the price is reported due to political progress and social development, the increment shall be enjoyed by all people in the county instead of falling into the private hands of the original land owners.[30]

[26] The Chinese translation reads "本章所载人民之权利，有认为增进公益，维持治安或非常紧急必要时，得依法律限制之。"

[27] The Chinese translation reads "中华民国人民之财产所有权不受侵犯，但公益上必要之处分，依法律之所定。"

[28] The Chinese translation reads "中华民国人民之财产所有权不受侵犯，但公益上必要之处分依法律之所定。"

[29] The Chinese translation reads "左列事项由国家立法并执行或令地方执行之: 七 公用征收。"

[30] The Chinese translation reads "每县开创自治之时，必须先规定全县私有土地之价。其法由地主自报之，地方政府则照价征税，并可随时照价收买。自此次报价之后，若土地因政治之改良、社会之进步而增价者，则其

		Article 32: People's property ownership is not to be violated, but it may be expropriated with appropriate compensation if public interests demand so.[31]
	1931 Constitutional Outline of the Chinese Soviet Republic	VI The Chinese Soviet regime has eliminating the feudal system and thoroughly improving peasants' lives as objectives, it promulgates a Land Law, advocates the confiscation of all land of the landlord class, and its distribution to poor peasants and middle peasants, and has realizing land nationalization as objective.[32]
	1931 Provisional Constitution of the Political Tutelage Period of the Republic of China	Article 16: People's property cannot be seized or confiscated without legal authorization.[33] Article 17: The exercise of people's property rights is protected by law within the remit that does not harm public interest.[34] Article 18: People's property can be requisitioned or expropriated according to the law and for public interest.[35]
	1936 Draft Constitution of Republic of China	Article 17: People's property cannot be requisitioned, expropriated, seized or confiscated without legal authorization.[36] Article 117: The state may levy taxes upon or expropriate land acquired by the people according to the price reported by the owner or appraised by the government.[37] Article 119: A land value increment tax shall be levied on any land whose value has increased not through the application of labor or capital, and the proceeds therefrom shall be used for the people.[38]
	1946 Constitution of People's Republic (Chiang Kai-shek Constitution)	Article 23: Liberties and rights listed above (including property rights in Article 15), except when necessitated by preventing harm

利益当为全县人民所共享，而原主不得私之。”

[31] The Chinese translation reads “人民财产所有权不受侵犯，但因公益上之必要，得以相当价格征收之。”

[32] The Chinese translation reads “中国苏维埃政权以消灭封建制度及澈底的改善农民生活为目的，颁布土地法，主张没收一切地主阶级的土地，分配给贫农，中农，并以实现土地国有为目的。”

[33] The Chinese translation reads “人民之财产非依法律不得查封或没收。”

[34] The Chinese translation reads “人民财产所有权之行使，在不妨害公共利益之范围内，受法律之保障。”

[35] The Chinese translation reads “人民财产因公共利益之必要，得依法律征用或征收之。”

[36] The Chinese translation reads “人民之财产，非依法律，不得征用、征收、查封，或没收。”

[37] The Chinese translation reads “国家对于人民取得所有权之土地，得按照土地所有权人申报，或政府估定之地价，依法律征税或征收之。”

[38] The Chinese translation reads “土地价值非因施以劳力资本而增加者，应以征收土地增值税方法收归人民公共享受。”

		to others' liberty, avoiding exigencies, maintaining social order or promoting public interest, cannot be limited by law.[39] Article 108: The following affairs are to be conducted by the state according to legislation or by the provincial and county governments upon national orders: (14) public use expropriation.[40] Article 143: All land within the territorial limits of the Republic of China shall belong to the entire body of citizens. Private ownership of land, acquired by the people in accordance with law, shall be protected and restricted by law. Privately owned land shall pay taxes according to its value and may be purchased by the Government according to its value…The State shall levy a land value increment tax on any land whose value has increased not through the application of labor or capital, and the proceeds therefrom shall be used for the people.[41]
Foreign Socialist Constitutions[42]	1947 Constitution of the People's Republic of Bulgaria	Article 10: Private property and its inheritance, and private economic ownership are recognized and protected by law…Nobody can exercise the right of ownership to the detriment of the public interest…Private ownership may be limited or expropriated for national or social interest with fair compensation. The state may fully or partially nationalize branches or individual enterprises of industry, commerce, transport and credit. Compensation is determined by the law of nationalization.[43]
	1948 Constitution of the Czechoslovak Socialist	Article 9: (1) Private ownership can only be restricted by law. (2) Expropriation is possible

[39] The Chinese translation reads "以上各条列举之自由权利，除为防止妨碍他人自由，避免紧急危难，维持社会秩序，或增进公共利益所必要者外，不得以法律限制之。"

[40] The Chinese translation reads "左列事项，由中央立法并执行之或交由省县执行之：十四 公用征收。"

[41] The Chinese translation reads "中华民国领土内之土地属于国民全体。人民依法取得之土地所有权，应受法律之保障与限制。私有土地应照价纳税，政府并得照价收买。土地价值非因施以劳力资本而增加者，应由国家征收土地增值税，归人民共享之。"

[42] Legal Committee of Central People's Government. The texts here are translated from Chinese to English so as to be faithful to the materials available to Chinese constitutional drafters.

[43] The Chinese translation reads "私有财产及其继承权，以及经济上的私有制，受法律的承认与保护。任何人不得利用私有财产权妨害公共利益。私人财产只有为谋国家或社会的利益，并有公平补偿的条件下始得加以限制或收归国有。国家将某些部门或个别工、商、运输、信贷企业的全部或一部收为国有。其补偿办法由国有化法律规定之。"

	Republic	only on the basis of the law and with compensation unless the law provides that no compensation is required. (3) No one may abuse the property rights to the detriment of the society.[44]
	1948 Constitution of the Democratic People's Republic of Korea	No.
	1949 Constitution of the People's Republic of Hungary	Article 8: (2) Private property and individual initiative may not infringe public interests.[45]
	1949 Constitution of the German Democratic Republic	Article 22: Private property is guaranteed by the Constitution. Its scope and its limitations are derived from law and from its obligations toward the society.[46] Article 23: Restrictions on private property and expropriations may be imposed only for public interest and on a legal basis. They shall take place against reasonable compensation unless the law provides otherwise. If the amount of compensation is in dispute, recourse to the ordinary courts shall be open insofar as a law does not provide otherwise.[47] Article 24: Property entails obligations. Its use must not run counter to the public interest. Misuse of property by economic ascendancy to the detriment of the public good results in confiscation without compensation and transfer to the people's ownership. Enterprises owned by war criminals and active National Socialists have been expropriated and will be transferred to the people's ownership. The same shall apply to private enterprises offering their services to war policies…Privately-owned large estates with acreage of more than one hundred

[44] The Chinese translation reads "(1)只有根据法律始得限制私有财产。(2)只有依据法律始能征用财产，并应予以补偿；但法律规定不予补偿者不在此限。(3)任何人不得滥用私有财产权为害社会。"

[45] The Chinese translation reads "(2)私有财产及私人创业不得损害公共利益。"

[46] The Chinese translation reads "所有权受宪法的保障。其内容及限度服从法律及其对社会所负的责任"。

[47] The Chinese translation reads "所有权的限制或征收只能在为公共利益时根据法律为之。在法律无相反规定的范围内，得予适当的补偿。对补偿数额的争议，在法律无相反规定的范围内，其诉讼程序于普通法院中进行之。"

		hectares are dissolved and shall be redistributed without compensation.[48] Article 27: Private economic enterprises suitable for socialization may be transferred to public ownership by law under the provisions dealing with expropriation.[49]
	1950 Constitution of the People's Republic of Albania	Article 11: Personal property cannot be used to the detriment of the society. Private property may be limited and expropriated by law when the social interest demands it. In what case and how much the proprietor will be compensated will be specified by law. Under the same conditions, certain branches of economy or enterprises may be nationalized by the State if social interests demand it.[50]
	1952 Constitution of the People's Republic of Poland	Article 74: (3) Confiscation of property can only be done under conditions set by law and with conclusive judgment of the court.[51]
	1952 Constitution of People's Republic of Romania	No.
	1940 Constitution of People's Republic of Mongolia	No.
Foreign Capitalist Constitutions	American Constitution	The Fifth Amendment[52]
	British Constitution[53]	No.
	French Constitution	French Constitutional Laws of 1875: No. French Constitution of 1946: No.
	1919 Constitution of the German Reich (Weimar Constitution)	Article 153: Property is guaranteed by the constitution. Laws determine its content and limitation. Expropriation may only be decreed based on valid laws and for the purpose of public welfare. It has to be executed with

[48] The Chinese translation reads "所有权负有一定义务。其使用不得违反公共利益。依靠经济上的优势，滥用所有权而损害公共利益时，其财产应予无偿没收，归全民所有。战犯及纳粹积极分子的企业应予没收而成为全民财产。为战争政策服务的私人企业亦同。超过一百公顷的私人土地所有权应予取消，并予无偿分配。"

[49] The Chinese translation reads "适于公有化的私人经济企业可按适用于征收的规定以法律收归公有。"

[50] The Chinese translation reads "无论何人不得利用私有财产损害社会。在社会利益需要时，得限制或征用私有财产，但必须根据法律行之。在何种场合并以何种数量补偿物主的财产价值，由法律规定之。在此种条件下，如社会利益需要时，得依法将某些经济部门或企业收归国有。"

[51] The Chinese translation reads "没收财产，只在法律规定的情形下并根据法院的确定判决，始得为之。"

[52] The Chinese translation reads "不得未经正当法律手续使其丧失生命、自由或财产。凡私产，非有相当赔偿，不得收为公有。"

[53] This includes Magna Carta 1215, Habeas Corpus Act 1679, Bill of Rights 1689, Parliament Act 1911, Representation of the People Act 1918 and Representation of the People Act 1928.

		appropriate compensation, unless specified otherwise by Reich law. Regarding the amount of the compensation, the course of law at general courts has to be kept open in case of a controversy, unless Reich laws specify otherwise. Expropriations by the Reich at the expense of the states, communities or charitable organizations may only be executed if accompanied by appropriate compensation. Property obliges. Its use shall simultaneously be service for the public welfare.[54] Article 155: The distribution and usage of land is supervised by the state in order to prevent abuse and in order to strive to secure healthy housing to all German families, especially those with many children. War veterans have to be given special consideration in the homestead law to be written. Land, the acquisition of which is necessary to answer the demand for housing, to promote settlement and cultivation of the soil and to elevate agricultural cultivation, may be expropriated…The owner of the land is obliged to the community to cultivate and exploit the soil. Any increase in the value of the land which does not result from the investment of labour or capital has to be made utilizable to the community.[55] Article 156: The Reich may transfer economic enterprises suited for nationalization into common property, if the regulations for expropriation are obeyed and if compensation is paid. It may join in the administration of economic enterprises or syndicates or may order the states or

[54] The Chinese translation reads "所有权，受宪法之保障。其内容及限制，以法律规定之。公用征收，仅限于裨益公共福利及有法律根据时，始得行之。公用征收，除联邦法律有特别规定外，应予相当赔偿。赔偿之多寡，如有争执时，除联邦宪法有特别规定外，准其在普通法院提起诉讼。联邦对于各邦自治区及公益团体行使公用征收权时，应给予赔偿。所有权为义务，其使用应同时为公共福利之役务。"

[55] The Chinese translation reads "土地之分配及利用，应由联邦监督，以防不当之使用，并加以监督，以期德国人均受保障，并有康健之住宅，及德国家庭尤其生齿繁多之家庭，得有家产住宅及业务之所需规定章则时，尤应特别注意参战人员。因应住宅之需要，奖励拓殖开垦或发展农业，土地所有权得征收之。家族内之土地财产应废止之。土地之耕种及开拓，为土地所有者对于社会之义务。土地价值之增加非由投资或人工而来者，其福利应归社会。"

		communities to do so, or may otherwise assure its decisive influence.[56]
	1874 Swiss Federal Constitution	Article 22: Land ownership is protected. To the extent allowed by their constitutional powers, the Confederation and the Cantons can, by legislation and for reasons of public interest, make provision for expropriation and restrictions on ownership. In cases of expropriation and restriction of ownership equivalent to expropriation, fair compensation shall be paid.[57]

Out of these 31 texts, two have prescriptions most similar to Article 13 of the 1954 Constitution: Article 18 of the 1931 Provisional Constitution of the Political Tutelage Period of the Republic of China and Article 23 of 1949 Constitution of Democratic Germany. They both use the concept of "public interest" (*gonggong liyi*) rather than its abbreviated form (*gongyi*) or social interest or public welfare and both set the condition of "in accordance with law". However, for the next three reasons, it is more likely that the latter was the source of inspiration to Article 13. First, well-known is the fact that upon establishing the new People's Republic the CCP completely abolished the legal *ancien régime* of the nationalist government,[58] making it highly unlikely that the 1954 Constitution would bring anything back from what was already regarded as a reactionary "falsely-legitimated legal order" (*wei fatong*). Second, two of the initial drafters, Chen Boda and Tian Jiaying, both suggested that the drafting of the 1954 Constitution had extensively drawn on the constitutions of other socialist countries in Eastern Europe.[59] Third, Article 13 of the 1954 Constitution was followed by Article 14 which stipulates that "the state forbids anyone to use private property to the detriment to the public

[56] The Chinese translation reads "联邦得依据法律，照公用征收之规定，将私人经济企业之适合于社会化者，予以赔偿收归公有。各邦或自治区得参与此类经济企业或组合之管理，或以其他方法，保持其一定之势力。"
[57] The Chinese translation reads "土地所有权受保障。联邦和各州为了公共利益，可以在宪法授予的权内通过立法方式征用土地或施加限制。在实行征用或相当于征用的限制时，应付予公正的补偿。"
[58] CCP Central Committee, *Order on the Abolition of Six Laws System of the Nationalist Party and Establishing the Judicial Principles in the Liberated Areas(guanyu feichu guomindang liufa quanshu yu queding jiefangqu sifa yuanze de zhishi)* (1949); Article 17, Common Programme of the People's Political Consultative Conference.
[59] Han, p 225; Bian Dong, Deshan Xin and Zi Zeng (eds), *Mao Zedong and his Secretary Tian Jiaying (mao zedong he ta de mishu tian jiaying)* (Central Archive Press 1996), p 21. This was also corroborated by Dong Chengmei. Han, p 774.

interest".[60] The 1931 Provisional Constitution does not have any clause of a similar kind. In contrast, Article 23 of the 1949 East German Constitution was followed by an Article 24 that reads "Property entails duties. Its use must not run counter to the public interest."[61]

Does this then mean that China's original takings clause actually found its origin from the East German Constitution? The answer is likely to be in the positive, albeit with two reservations. First, it may well be the case that the Chinese constitution-makers came up with an analogous takings clause independently without making recourse to or even having any knowledge of the East German clause. On this we never know unless more direct evidence is unearthed. But chances are that they did get the inspiration from the East German Constitution because almost none of those who had their fingers on the draft constitution by March 1954 received any legal education.[62] This is why Mao Zedong had to assign a reading list to his comrades in the Central Party Committee in order to prepare them for constitutional deliberation. This is also why the main initial drafter Tian Jiaying was recorded to have prepared himself by conducting a careful study of the constitutions of the Eastern European socialist states even before embarking on constitutional drafting in December 1953.[63] Therefore, in light of all the evidence presently available, Article 13 was more likely to be a transplant from the East German Constitution highlighted by Mao in his reading list than being invented *sui generis* by the Chinese constitutional drafters. Second, acknowledging that China's original takings clause took its cue from the East German Constitution, the former is far from an

[60] The Chinese translation reads "国家禁止任何人利用私有财产破坏公共利益。"
[61] The Chinese translation reads "所有权负有一定义务，其使用不得违反公共利益。"
[62] This includes the three initial drafters, all the Central Party Committee members and the eight-membered constitutional team that had revised the draft constitution by March 1954. The only exception was Dong Biwu, who went to Japan in 1914 to study law and might have become familiar with the 1889 Japanese Constitution. However, its takings clause (Article 27) is very different from and could not be the source of Article 13 of the 1954 Constitution. Its Chinese translation reads "日本臣民之所有权不得侵犯。因公益需要之处分，依法律之规定。"
[63] Panshi Ding, 'A Memory of the Old Contributor to China Youth Tian Jiaying (yi zhongguo qingnian de lao zuozhe tian jiaying)' in Bian Dong, Deshan Tan and Zi Zeng (eds), *Mao Zedong and his Secretary Tian Jiaying (mao zedong he ta de mishu tian jiaying)* (Central Archive Press 1996).

exact copy of the latter. Recall that Article 13 reads "The state may, in the public interest, compulsorily purchase, requisition or nationalize both urban and rural land as well as other means of production on the conditions provided by law." Article 23 of the 1949 East German Constitution reads "Restrictions on private property and expropriations may be imposed only for public interest and on a legal basis. They shall take place against reasonable compensation unless the law provides otherwise. If the amount of compensation is in dispute, recourse to the ordinary courts shall be open insofar as a law does not provide otherwise." These two articles are different in grammatical structure, objects to be taken, kinds of takings power and provisions on compensation and dispute resolution. Making sense of these four differences will give us a better understanding of China's original takings clause.

II. China's Original Constitutional Takings Clause in a Comparative Perspective

To start with, the tone of the two takings clauses is different. Article 23 of the 1949 East German Constitution is in the impersonal passive voice whereas Article 13 is in the active voice. Indeed, on this point Article 13 diverges from most other constitutional takings clauses in the world as it tells the story from the standpoint of the state rather than private property. There are two reasons for this: one formal and the other substantive. I will explain the substantive reason later on in this chapter. For the moment, the formal reason is that Article 13 is located in Chapter 1 of the Constitution, i.e. the "General Principles (*zonggang*)" that sets out the state policies on a variety of issues. In particular, Articles 5 to 15 deal with the economy and almost all of them are written from the state's perspective. For example, Articles 5 to 10 provide for four different types of ownership of the means of production in the PRC and the state's different attitudes and strategies towards each of them.

Articles 11 and 12 stipulate that the state protects citizens' ownership of lawful income and means of subsistence and protects in accordance with the law their rights of inheritance. Article 13 is the takings clause and Article 14 prescribes that the state prohibits anyone using private property to the detriment of public interest. Article 15 is about state's economic planning. Except for Articles 13 and 14, the other articles are more or less the same as their counterparts in the 1936 Soviet Constitution, which are written in the active voice from the perspective of the state. Therefore, even though it might have come from a different source, Article 13 adopts a similar sentence pattern so as to be consistent with other relevant articles in the same chapter.

Second, the objects of takings are different. In the East German case it is private property in the broad sense, including both the means of production and the means of subsistence. In contrast, Article 13 concerns only with the takings of "urban and rural land and other means of production". This is particularly strange considering that the surrounding Articles 12 and 14 both cover private property in general.[64] In fact, it had been suggested during the deliberation over the draft constitution that Article 13 should be expanded to cover the takings of private means of subsistence such as privately-owned houses as attachments over the land (*fuzhuowu*), edible oil and grain.[65] The reason given was three-fold. First, since these means of subsistence could also be compulsorily purchased for public interest, Article 13 was too narrow to provide a constitutional basis for that. Second, extending the scope of the takings power in this way would not worry the public too much because it was still supposed to be "in the public interest" and "in accordance with the conditions set by law". Third, the constitutional takings clauses in other socialist countries at the time covered

[64] Article 12 reads "The state protects citizen's right of inheritance to private property according to law." Article14 reads "the state forbids anyone to use private property to the detriment to the public interest".
[65] Han, pp 142, 356.

private property in the general sense.[66] Eventually these reasons were not accepted, for which no formal explanation has ever been provided. But it is unlikely that they were just overlooked. This is because when asked about why Article 13 only covers the takings of production means during the constitutional deliberation in May 1954, Tian Jiaying replied that state-led construction might also well require compulsory purchase of privately-owned houses, which nevertheless was not to be governed by the Constitution but by specific statutes (*danxing fa*).[67] The specific statute he alluded to here was most possibly the 1953 Measures on Land Requisition for State-led Construction (hereinafter the 1953 Land Requisition Measures), which provided that for the purpose of state-led construction, houses and other attachments over rural and urban land can be requisitioned (*zhengyong*) by the state alongside the land with compensation.[68] Therefore, it seems to be more of a conscious choice on the part of the constitutional makers not to expand the objects of the takings power beyond the means of production.

As a matter of fact, it is until the 2004 amendment to the 1982 Constitution that such an extension is finally made.[69] This means that for half a century, from 1954 to 2004, the takings of privately-owned houses and other means of subsistence were completely left out of the written constitutions and underpinned only by statutes. Does this mean that it has been somewhat unconstitutional all the way through? Why is Article 13 limited to the takings of land and other production means? To make sense of these puzzles, we need turn to the third difference between the Chinese and East German takings clauses.

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[66] Ibid, p 356.
[67] Ibid, p 142.
[68] Articles 8, 9 and 17, *Measures on Land Requisition for State-led Construction (guojia jianshe zhengyong tudi banfa)* (December 5, 1953).
[69] Article 13. The Chinese reads "国家为了公共利益的需要，可以依照法律规定对公民的私有财产实行征收或者征用并给予补偿。"

Whilst Article 23 of the East German Constitution deals with the power of expropriation (*zhengshou/enteignungen*), as already highlighted, Article 13 is about three kinds of takings power—compulsory purchase, requisition and nationalization. No official interpretation has ever been given about what exactly these terms stand for. Hardly is there any academic discussion in this regard. Nevertheless, none of them were novel to those making the 1954 Constitution. Requisition was probably the most familiar. As noted above, the 1953 Land Requisition Measures was once referred to by Tian Jiaying over the course of constitutional deliberation. More crucially, on March 23rd of 1954, at the first assembly of the Constitutional Drafting Committee, Mao Zedong himself explicitly acknowledged that the 1953 Land Requisition Measures was reflected in the 1954 Constitution.[70] In light of this, chances are that the term *zhengyong* in the constitutional takings clause came from the 1953 law, in which requisition means compensatory takings of land (and the houses above).[71] It could be exercised for "the construction of national defense projects, factories and mines, railways, transportation, water conservancy projects, municipal works and other economic and cultural initiatives".[72] Requisition in this sense is usually seen to be interchangeable with expropriation/enteignungen in the East German Constitution.[73] In terms of its origin, it can be traced back to a series of legislations in the communist revolutionary border regions during the 1930s.[74] In the early years of the PRC, it was retained in a number of local and central regulations.[75]

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[70] Han, pp 224-25.

[71] The only exception was that requisition of urban land that belongs to landlords is non-compensatory. Yet if such land was rented out to peasants, the tenant peasants should be compensated for the crops and fixture thereover. Article 17, 1953 Land Requisition Measures. Clearly this was a product of the influence from the class-based land reform, which will be further discussed later.

[72] Article 2, 1953 Land Requisition Measures.

[73] It will be shown in Chapter 5 that the two are not completely interchangeable because the scope of Chinese land requisition as prescribed in the 1953 law was much more expansive than expropriation in Germany.

[74] Article 25, *Draft Regulation on Land Rights of Shan'ganning Border Region (shan'ganning bianqu diquan tiaoli cao'an)* (April 1939); Article 13, *Land Rights Regulation of Shan'ganning Border Region (shan'ganning bianqu diquan tiaoli)*; Article 12, *Special Regulation on Land Rights of Taiyue Region (taiyue qu diquan danxing tiaoli)* (April 15, 1945); Article 19, *Provisional Land Regulation of North-east Region (dongbei qu tudi zanxing tiaoli)* (October 17, 1950); Article 14, PRC Government Administrative Council, *Regulation on Land Reform in Suburban Areas (chengshi jiaoqu tudi gaige tiaoli)* (November 10, 1950).

[75] Article 19, *Provisional Land Regulation of North-east Region (dongbei qu tudi zanxing tiaoli)*; Article 14, PRC

That said, it should be noted that in the early 1950s, land requisition took on a couple of slightly different meanings. For one thing, it was interpreted as the taking of land use-rights rather than ownership.[76] For another, it was defined to require varied levels of compensation according to the class status and living conditions of those requisitioned.[77] Usually landlords with good living conditions were not to be compensated while middle and poor peasants or those with poor living conditions would be compensated. Rich peasants were compensated only for the land they toiled on. Such discrimination in compensation based on class status was apparently a consequence of the then ongoing land reform which aimed at land redistribution from the landed class to the landless. Yet these two meanings were soon to be abandoned. With the end of the land reform movement in 1952, the practice of class-based compensation stopped. The 1953 Land Requisition Measures promised compensation to all those requisitioned regardless of their class identity. Meanwhile, it resumed the conception of requisition as takings of land ownership. The idea of requisition as takings of land use-rights had not gained any currency until 51 years later when it became adopted by the 2004 Constitutional amendment.[78]

Compared with requisition, the term compulsory purchase is more difficult to grasp with, which had at least three known meanings by 1954. The first one is the compulsory purchase of grain

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Government Administrative Council.

[76] Central-south Administrative Committee (*zhongnan xingzheng weiyuanhui*), *Reply to Henan People's Government on the Interpretation of Expropriation, Requisition, Compulsory Purchase, Compulsory Rent in Article 10 of the Provisional Measures of Land Use for Urban Construction in Central-South Region (guanyu zhongnan qu chengshi jianshe shiyong tudi zanxing banfa di shi tiao nei zhengshou zhengyong zhenggou zhengzu deng de jieshi gei henansheng renmin zhengfu han)* (February 13, 1953).

[77] CCP Central Committee, *Measures of Managing Land Use for Railway Construction by Huainan Mines (guanyu huainan meikuang xiu tielu suo yong de tudi de chuli banfa)* (April 6, 1950); Article 2, *Provisional Measures of Land Requisition for Road Construction in East-China Region (huadongqu xiujian gonglu zhengyong tudi zanxing banfa)* (September 18, 1950); Article 2, *Provisional Measures of Land Requisition for Road Construction in Middle-south Region (zhongnan qu xiujian gonglu zhengyong tudi zanxing banfa)* (November 29, 1950); Article 3, *Instructions of South-west Military and Administrative Committee on Land Use for Public Factories in Land Reform (xinan junzheng weiyuanhui guanyu zai tudi gaige zhong jiejue gongying gongchang yongdi de zhishi)* (June 27, 1951).

[78] Zhaoguo Wang, *Explanatory Report on the Draft Constitutional Amendment at the Second Session of the 10th National People's Congress (guanyu zhonghua renmin gongheguo xianfa xiuzheng'an cao'an de shuoming)* (March 8, 2004). At the same time, "expropriation" is defined to mean takings of ownership, bringing Chinese terminology in line with the German counterpart.

(*liangshi zhenggou*), a Party policy establishing state monopoly over the production and circulation of grain. Although the policy was promulgated by the Central Party Committee just two months before Mao went to Hangzhou with his drafting team[79], for two reasons it is unlikely that "compulsory purchase" in the constitutional takings clause bears the same meaning. On the one hand, grain was considered at the time as a kind of means of subsistence rather than means of production.[80] As already shown, the takings clause was concerned only with the production means. On the other hand, an intentional choice was made by the Central Party Committee that the term "compulsory purchase" should not be formally employed in the context of grain procurement because it was once deployed by the Japanese invaders.[81] As a result, it was substituted by "planned purchase" (*jihua shougou*) or "unified purchase" (*tonggou*).[82] Therefore, compulsory purchase in the sense of takings of grain could not possibly have been reintroduced into the 1954 takings clause.

In contrast, the other two meanings of compulsory purchase were related to land. One is that in July 1946, the Central Party Committee issued a policy recommendation to its local branches in the liberated areas about adopting compulsory purchase as an alternative measure to the compensation-less confiscation (*moshou*) to carry through the land reform campaign.[83] It was suggested that on top of confiscating the landlord's land local governments might choose to compulsorily purchase such land that exceeds a certain set maximum. In reality, however, this

[79] CCP Central Committee, *Decision on the Planned Purchase and Provision of Grain (guanyu liangshi jihua shougou yu jihua gongying de jueyi)* (October 16, 1953).
[80] Note that in 1950 Mao suggested that grain could be regarded as means of production when it was confiscated from the landlords. Otherwise it is means of subsistence produced by the peasants with the means of production. Mao Zedong, 'On Revising the Report of Land Reform (*guanyu xiugai tudi gaige wenti de baogao*) (originally written in 1950)' in *Collected Works of Mao Zedong (mao zedong wenji)*, vol 6 (People's Press 1999), p 63.
[81] Bo Yibo, *Review of Several Important Decisions and Events (ruogan zhongda juece yu shijian de huigu)*, vol 1 (Central Party School Press 1991), p 266.
[82] Chen Yun, 'Implementing Unified Purchase and Sale of Grain (*shixing liangshi tonggou tongxiao*) (originally published in 1953)' in *Selected Works of Chen Yun (chenyun wenxuan)*, vol 2 (People's Press 1995), p 217.
[83] Central Committee of Communist Party of China, *Recommendation to the Governments of Liberated Areas for Realizing Land to the Tillers (wei shixian gengzhe you qi tian xiang ge jiefangqu zhengfu de tiyi)* (July 1946).

proposal was implemented in only a few localities[84] before being aborted in 1947.[85] In the ensuing years until 1952, compulsory purchase was never adopted again in the land reform campaign. Yet the word compulsory purchase was not completely out of circulation, which could be found in a series of central and local rules promulgated in the early 1950s, albeit with a different meaning.[86] According to these documents, compulsory purchase of land was not for land reform but for the development of infrastructure and municipal works. Compulsory purchase in this sense looks very similar to requisition as defined in the 1953 Land Requisition Measures. In fact, when Tian Jiaying suggested that "compulsory purchase" of private houses could be governed by specific statutes rather than the Constitution, he seemed to have mistaken "compulsory purchase" with "requisition" because at that time there was no specific statute on the former but one on the latter. However, if these two terms did mean the same thing, why were they listed separately in the 1954 takings clause?

The real distinction between the two does not lie in their purposes but in two other aspects. First is the process. Requisition starts with land-using entities (*yongdi danwei*), i.e. organizations that need land for purposes as specified in Article 2 of the 1953 Land Requisition Measures, applying for approval from central or local government.[87] The approving government should announce and explain the decision of requisition to those to be affected with the help of land-using entities.[88] It

[84] Zexue Sun, 'On Peacefully Achieving Land-to-the-tiller through Compulsory Purchase with Public Debt by the Communist Party of China (*lun zhonggong heping shixian gengzhe you qi tian zhong de gongzhai zhenggou*)' [2010] Study of the History of Communist Party of China (*zhonggong dangshi yanjiu*).

[85] Xiaowei Ren, 'Experiment and Abandonment of Peaceful Land Reform Policies by the Communist Party of China 1946-1947 (*1946-1947 nian zhongguo gongchandang dui heping tugai zhengce de changshi jiqi fangqi*) ' (2010) 39 Journal of Shaanxi Normal University.

[86] Article 6, Measures of Land Reservation for Railway (*tielu liuyong tudi banfa*) (June 24, 1950); Points 1, 4, *Interpretation of the Central People's Government on the Measures of Land Reservation for Railway (zhongyang renmin zhengfu zhengwuyuan guanyu tielu liuyong tudi banfa de jidian jieshi)* (September 16, 1950); Article 2, Provisional Measures of Land Requisition for Road Construction in East-China Region (*huadongqu xiujian gonglu zhengyong tudi zanxing banfa*) (September 18, 1950); Articles 1 and 3, *Beijing People's Government Provisional Measures of Use of Suburban Land for Urban Construction (beijing shi renmin zhengfu guanyu shizheng jianshe shiyong jiaoqu tudi zanxing banfa)* (October 19, 1950); Article 4, *Provisional Measures of Land Use for Urban Construction in Central-South Region (zhongnan qu chengshi jianshe shiyong tudi zanxing banfa)* (December 18, 1951).

[87] Article 4, *Measures on Land Requisition for State-led Construction (guojia jianshe zhengyong tudi banfa)*.

[88] Article 5, ibid.

will then organize and preside over the negotiation about compensation between the land-using entities and original owners.[89] Once the amount of compensation is settled, the government may also make the payment on behalf of the land-using entities.[90] Process of this kind makes requisition essentially a two-party relationship between state/government as the requisitioner and land owners as the requisitionee. Land-using entities are no more than an interested third-party along the way.

Conversely, compulsory purchase could only be applied when voluntary negotiation between the land-using entities and land owners leads to no agreement.[91] In other words, parties in need of land shall approach and bargain with the private land owners before petitioning the government for compulsory purchase. This means that in essence compulsory purchase involves a three-party relationship in which voluntary exchange between land-using entities and land owners must be attempted before the government can compulsorily purchase the land from the owners.

The other difference between requisition and compulsory purchase lies in compensation. For requisition, land-using entities may negotiate with the land owners about the compensation, but the amount is legally set at the total output value of the land for three to five years prior to the requisition.[92] On top of that, as a matter of principle, the requisitioning government is required to resettle the peasants according to their living and production conditions. So long as appropriate resettlement is not available, land requisition should be postponed or relocated.[93] More specifically, if the peasants lose the land they cultivate, the requisitioning government is responsible to provide them with agricultural land on which they can continue to work or help them find other jobs in order

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[89] Article 8, ibid.
[90] Article 14, ibid.
[91] Article 3, Beijing People's Government Provisional Measures of Use of Suburban Land for Urban Construction (*beijing shi renmin zhengfu guanyu shizheng jianshe shiyong jiaoqu tudi zanxing banfa*) (October 19, 1950); Article 10, *Provisional Measures of Land Use for Urban Construction in Central-South Region (zhongnan qu chengshi jianshe shiyong tudi zanxing banfa)*.
[92] Article 8, *Measures on Land Requisition for State-led Construction (guojia jianshe zhengyong tudi banfa)*.
[93] Article 3, ibid.

to prevent them from becoming destitute and homeless. Land-using entities should also recruit these land-losing peasants as much as possible.[94]

On the contrary, with very limited exception,[95] in the early 1950s, compensation for land in compulsory purchase was either to be negotiated by the land-using entities and land owners with reference to local market price or to be determined according to standardized land price set by the local government which also took local market price into account. There was no additioinal requirement that land-losing peasants receive employment assistance from the government or land-using entities.[96] Provisions of this kind could actually be traced back to the 1940s when market price was used as the benchmark to calculate the compensation for compulsory purchase in the land reform campaign. Back then it was stipulated that compensation should be agreed upon by the government, landlords and peasants' representatives based on local market price, although the landlords would be paid only part of the full price.[97]

The difference in compensation between compulsory purchase and requisition was already acknowledged in June 1954 by Zhang Youyu, the then vice mayor of Beijing and a participant in the

[94] Article 13, ibid.

[95] In a central regulation promulgated in 1950, compensation was explicitly set to be conditional upon the class status of those impacted in areas undergoing land reform. See Point 1, *Interpretation of the Central People's Government on the Measures of Land Reservation for Railway (zhongyang renmin zhengfu zhengwuyuan guanyu tielu liuyong tudi banfa de jidian jieshi)*. In three other central and local regulations, there were no specific compensation standards. See Measures of Land Reservation for Railway (*tielu liuyong tudi banfa*) (June 24, 1950); Provisional Measures of Land Requisition for Road Construction in East-China Region (*huadongqu xiujian gonglu zhengyong tudi zanxing banfa*) (September 18, 1950); Beijing People's Government Provisional Measures of Use of Suburban Land for Urban Construction (*beijing shi renmin zhengfu guanyu shizheng jianshe shiyong jiaoqu tudi zanxing banfa*) (October 19, 1950).

[96] Article 11, *Provisional Measures of Land Use for Urban Construction in Central-South Region (zhongnan qu chengshi jianshe shiyong tudi zanxing banfa)*; Point 1, Reply of the Central-south Administrative Committee to Civil Affairs Department of Hunan People's Government on Interpretation of Three Questions in the Provisional Measures of Land Use for Urban Construction in Central-South Region (*zhongnan xingzheng weiyuanhui guanyu zhongnan qu chengshi jianshe shiyong tudi zanxing banfa zhong sandian yiyi de jieshi gei hunan sheng renmin zhengfu minzhengting han*) (August 29, 1953).

[97] Point 5, Central Committee of Communist Party of China; Articles 6 and 8, Draft Regulation on Compulsory Purchase of Landlords' Land of Shan'ganning Border Region(*shan'ganning bianqu zhenggou dizhu tudi tiaoli cao'an*) (December 13, 1946); Article 8, *Provisional Regulation on Land Reform in Shandong Province (shandong sheng tudi gaige zanxing tiaoli)* (October 25, 1946).

constitutional drafting process.[98] Explaining the draft constitution to the Party cadres from Beijing, he made the following observation:

> *Compulsory purchase is buying with money, but it is coercive and you cannot refuse to sell. Requisition is substantively different from compulsory purchase. Requisition is the state compulsorily taking the land from its owners. It is not an exchange relationship, but in reality it is similar [to compulsory purchase] as it also requires payment of money [to the land owners]. But such money is called indemnity (buchang jin), which is always the same as the price (jiage) of the land.*[99]

Following Zhang's terminology, while compensation for requisition may be called "indemnity" because of the loss caused to the land owners, compensation for compulsory purchase can be called "price" for bearing more resemblance to the outcomes of voluntary exchange.

Taken together, these two differences between compulsory purchase and requisition clearly show that in spite of both being coercive, the former is much closer to market transaction than the latter. Under compulsory purchase, voluntary negotiation between the land-using entities and the owners is the procedural prerequisite to forcible taking by the government, which is used only as a last resort when no deal is reached. The compensation is negotiated or set on the basis of the local market price of the land. The government or land-using entities are not demanded to resettle the peasants by offering alternative employment opportunities. On the contrary, requisition does not presuppose the existence of a negotiation process. Its compensation does not reflect the market price but is typically

[98] Zhang was then leading the constitutional drafting group in Beijing to provide comments and suggestions on the draft constitution to the central Constitutional Drafting Committee in June 1954. He had also briefed both central and Beijing Party leaders for many times on the draft, probably because he was one of the few Party leaders who had been legally trained. See Youyu Zhang, 'Ten Years in Beijing (*shinian jingzhao*) ' in (Aolinpike Press 1990), pt 4. Zhang was later the leading figure in the making of the 1982 Constitution.

[99] Youyu Zhang, *Essays on Constitutionalism (xianzheng luncong)*, vol 2 (Qunzhong Press 1986), p 41.

calculated according to the output value of the land. And the government and land-using entities are required to help the peasants find new employment.

Similar to the above two terms, nationalization (*shougui guoyou*) was also exercised prior to the making of the 1954 Constitution. According to Article 10 of the 1950 Land Reform Law which was enacted to guide the land reform campaign, "all the confiscated (*moshou*) or expropriated (*zhengshou*) land and other means of production, unless nationalized according to this law, shall be taken over (*jieshou*) by county peasants' associations". Nationalization is therefore a consequence of land confiscation or expropriation. Articles 2-6 of the same law show that except for targeting at different classes, expropriation was the same as confiscation for both being non-compensatory. This then explains why the term expropriation in the 1949 East German Constitution was not transplanted into the 1954 takings clause: its requirement of making compensation contradicted what was understood as expropriation for the land reform campaign, i.e. compulsory takings without compensation.

As a policy option, nationalization was not however just applicable to the land reform. Li Weihan, then head of the United Front Work Department of the Central Party Committee (*tongzhanbu*), pointed out when commenting on the draft constitution at the Constitutional Drafting Committee between May and June of 1954 that nationalization could also apply to those private enterprises (and the land they occupied) under ripe conditions.[100] He was undoubtedly referring to the then ongoing "socialist transformation of capitalist industry and commerce", to which he and his department were notably instrumental.[101] Those familiar with the PRC history will know that during the socialist transformation campaign the capitalist industrial and commercial enterprises were not confiscated

[100] Han, p 142.

[101] The policy document that started the transformation campaign in June 1953 was based on the research done by the United Front Work Department. See Li Weihan, *Memories and Research (huiyi yu yanjiu)*, vol 2 (Communist Party of China Historical Materials Press 1986), pp 739-43.

but "bought out" (*shumai*) by the state, which was mainly because the countryside-based CCP was inexperienced in running industry and business and felt the need to rely on the national bourgeoisie in such undertakings. One may be tempted to think that the meaning of nationalization was altered here from being compensation-less to compensatory. However, this was not the case because the socialist transformation was carried out not through the state paying compensation out of its own pocket to the capitalists for acquiring their private enterprises and the land thereunder. In fact, as early as in 1951 Liu Shaoqing rejected purchasing land from the capitalists as a way to implement socialist transformation because it would create too great a financial burden upon the state.[102] Instead, the transformation was executed by way of what was called "state capitalism" or more technically "public-private joint management" (*gongsi heying*), under which the private owners were permitted to retain a small portion of the profit generated by the companies they once owned for a limited period of time. After that, previous private enterprises would be fully nationalized.[103] In this sense, nationalization for socialist transformation is different from nationalization for land reform only in that it was less radical and took a bit more time to complete. They both are compensation-less.

On the basis of the above analysis, we can now decode the two puzzles with regard to the objects of takings clause. The reason that Article 13 focuses only on the takings of land and other production means is two-fold. On the one hand, two out of the three kinds of takings power had been exercised for some sort of party-state-led social movement that aimed at transforming the pre-existing ownership structure of the production means in the society. Nationalization was once employed as a

[102] Liu Shaoqi, 'Speech at Chun Ou Zhai (*chun ou zhai jianghua*) (originally published in 1951)' in *Liu Shaoqi on Economic Development in New China (liu shaoqi lun xinzhongguo jingji jianshe)* (Central Archival Press 1993), pp 211-12.

[103] CCP Central Committee, *Resolution on the Transformation of Capitalist Industry and Commerce (guanyu ziben zhuyi gongshangye gaizao wenti de jueyi)* (February 24, 1956). The time period was fixed at ten years from 1956.

measure to carry out the land reform campaign and socialist transformation movement. So did compulsory purchase with regard to land reform. On the other hand, requisition was not used directly to implement these transformative programmes. But right from the beginning it was directed at land because it had always been about providing land for the state-led construction.

This is surely not to say that the state had no authority to or did not take the means of subsistence. Quite the contrary, there had been a long history in this regard by 1954 because requisition, compulsory purchase and nationalization of land typically entailed the taking of the means of subsistence, especially the private houses thereover. But it does show that for the constitutional makers in 1954 the taking of means of subsistence is secondary in significance to that of production means to warrant an explicit mentioning in the written constitution. The reason for that will be explained later on. Suffice it to say here that this by no means leads to the conclusion that the power of taking private subsistence means had been unconstitutional all the way until it finally got mentioned in the 2004 constitutional amendment. This is because Article 13 of the 1954 Constitution did not grant the takings power to the party-state, which had exercised it concerning both the means of production and subsistence even before the founding of the PRC. The absence of any mention of the power to take the means of subsistence in the written constitution is therefore not to be interpreted as denying the constitutionality of that power. Instead, it stands for tacit acceptance of what was already there.

The fourth and final difference between the 1954 takings clause and its counterpart in the 1949 East German Constitution is that unlike the latter, the former does not contain a requirement of making compensation or a provision on resolving compensation dispute through courts. What's been said so far renders this understandable. On the one hand, the Chinese original takings clause does not

include a general requirement of compensation across the board because it involves three types of takings power, only two of which are compensatory. On the other hand, settling compensation-related disputes in courts had never been embraced by the Chinese party-state up until then. There was no reason for the constitutional makers at the time to introduce such an alien practice into the takings clause.

All in all, it should be clear from the preceding discussion that China's original constitutional takings clause in 1954 is truly unique for being a hybrid of both foreign and indigenous elements and blending both past and future. While partially transplanted from the East German Constitution, it grows out of and embodies the native experiences of revolution and development of the Chinese communist party-state. Compulsory purchase originated as an alternative to confiscation in the redistributive land reform movement in the 1940s and was then turned into a measure to secure land for public works in the early 1950s. As compensatory takings of land for public works, requisition was initially practiced in the 1930s and 1940s in the revolutionary border regions and was subsequently retained in the 1953 Measures on Land Requisition for State-led Construction in the PRC. Nationalization figured prominently first in the land reform campaign until the early 1950s before being revived for the socialist transformation of capitalist industry and commerce which was then still a project in process. In this way, as much as being a reflection of the past, the original takings clause also projected into the future, be it state-led construction or socialist transformation movement that were to come.

On March 23rd 1954, at the first meeting of the Constitutional Drafting Committee, Chen Boda, another secretary of Mao and one of the three initial drafters, made an explanatory report on the draft constitution, suggesting that the guiding principle of constitution-making was to achieve the

following: 1) "to reflect the great transformations of social relations since the outset of the people's revolution and the founding of the People's Republic"; 2) "to sum up the main experiences of struggling for and organizing these transformations"; 3) "to perpetuate the people's revolution"; 4) "to fully express the fundamental mandate for China to gradually proceed towards socialism and point out the possible and appropriate way through which the Chinese people strive to realize that goal"; and 5) "to adopt the foreign experiences on constitutional law, especially those of the USSR and other socialist countries in addition to relying on China's own experiences.[104] In light of the above analysis, it is fair to say that the original takings clause has achieved all of the five objectives by weaving together the historical and future, the native and the foreign. In this sense, the original takings clause is a microcosm, *par excellence*, of the 1954 Constitution as a whole. On a more specific note, reading Article 13 in the context of the entire constitution explains why it is confined to the taking of the means of production and land in particular without mentioning the taking of the means of subsistence. To the Chinese constitutional makers in 1954, undoubtedly it was the taking of land and other means of production for land reform and socialist transformation that had represented the great transformation of social relations, the main revolutionary experiences and the future development of the people's revolution. It is therefore more worthy to be expressly mentioned in the written constitution.

However, as noted above, Article 13 of the 1954 Constitution did not grant the takings power to the party-state. And there was no comparable provision in either the 1949 Common Programme or the 1936 USSR Constitution, the two main reference texts for the 1954 PRC Constitution. One may then wonder why it had a constitutional takings clause in the first place. What is its raison être? Worth noting is that it has been long recognized that the Fifth Amendment to the US Constitution

[104] Han, pp 223-24.

does not confer the power of eminent domain to the federal governments. Such a power is generally considered as an inherent attribute of the sovereignty prior to and regardless of the existence of a written constitution. Hence the American constitutional clause is essentially a limitation over a pre-existing power which will otherwise be unlimited.[105] Is China's original takings clause intended to perform the same function just like its American counterpart does?

III. Purpose of China's Original Constitutional Takings Clause

No official interpretation of Article 13 of the 1954 Constitution has ever been published. The best source available is a set of constitutional law textbooks and monographs published between 1954 and 1957.[106] These works are authoritative because they were written or edited by influential national universities or sometimes the communist leaders themselves. The reason for choosing 1957 as the end year is because the anti-rightist movement in that year was widely viewed as putting a stop to the implementation of and indeed any serious attention to the 1954 Constitution. Therefore, the books published before 1957 are the most reliable source for an "uncontaminated" reading of the 1954 takings clause.

In all these books, Article 13 was regarded as the exemplification of a three-pronged socialist principle. First, the public interest, sacrosanct and supreme in a socialist society, is always over and above the private interests, which must conform to the needs of the public interest.[107] Second,

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[105] Philip Nichols, *The Law of Eminent Domain: A Treatise on the Principles which Affect the Taking of Property for the Public Use*, vol 1 (2nd edn, Matthew Bender & Co. 1917), p 58.

[106] A useful list of these works can be found at Binwen Xing, 'Book Collections: Constutional Studies in Early People's Republic' <http://xingbinwen.fyfz.cn/b/700546> .

[107] Xiu Lin and others, *On Several Issues of Our Draft Constitution (tantan woguo xianfa cao'an de jige wenti)* (Zhongnan People's Press 1954), p 31; Bangyan Lou, *Basic Knowledge of PRC Constitution (zhonghua renmin gongheguo xianfa jiben zhishi)* (New Knowledge Press 1955), p 94; Da Li (ed) *Lectures on PRC Constitution (zhonghua renmin gongheguo xianfa jianghua)* (People's Press 1956), pp 84-85; Chun Gao (ed) *A Plain Introduction to Constitution (xianfa tongsu jianghua)* (Hebei People's Press 1955), p 31; Defeng Wu and others (ed) *Lectures on PRC Constitution (zhonghua renmin gongheguo xianfa jianghua)* (Hubei People's Press 1956), p 70; State Law

public/collective/social interest is permanently consistent with any private interest in a socialist society. Indeed, public interest is the fundamental (*genben*) and long-term interest of each and every individual. Without public interest, there is no private or personal interest. Without general development of the society, there will be no increase in the interests of individuals. This is why private interests must always comply with the public interest.[108] Third, the PRC is a socialist state under the rule of all people, which represents the common interest of them all. All state policies and measures aim at maintaining and creating common benefit for the entire population. Therefore, national or state (*guojia*) interest is the public/common interest of all people, which is also consistent with their individual personal interest. The state guarantees private interests for the sake of public interest.[109] The gist of this socialist principle is that the public interest, always represented by the socialist state, is ontologically prior to, axiologically superior than, and yet fundamentally consistent with the private interest. It can be best illustrated by the following formula: public interest=state interest⩾private interests.[110]

Under this socialist principle, land taking is seen as necessarily in the public interest for being exercised by the socialist state, which always represents the public interest. Consequently, in a socialist society, land taking in the private interest is a logical impossibility. While it may result in the loss of the private interests of those whose land is taken, it is a duty for them as socialist citizens

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Teaching and Research Office of Central Political-Legal Cadres School (ed) *Teaching Materials on the PRC Constitution (zhonghua renmin gongheguo xianfa jiangyi)* (Falü Press 1957), p 158; Peihua Liu (ed) *Outlines of Lectures on the PRC Constitution (zhonghua renmin gongheguo xianfa jiangke tigang)* (Liaoning People's Press 1957), pp 80-81.

[108] Gao, *A Plain Introduction to Constitution (xianfa tongsu jianghua)*, p 33; State Law Teaching and Research Office of Central Political-Legal Cadres School, p 158; Liu, *Outlines of Lectures on the PRC Constitution (zhonghua renmin gongheguo xianfa jiangke tigang)*, p 81.

[109] Liu, *Outlines of Lectures on the PRC Constitution (zhonghua renmin gongheguo xianfa jiangke tigang)*, p 80; State Law Teaching and Research Office of Central Political-Legal Cadres School, p 158.

[110] Note that "≥" means "greater than and equal to" here.

to accept or even welcome the state land taking, not only because their private interests must yield to the public interest but also because it is in their own fundamental and long-term private interests.[111]

A story told in a 1955 book is particularly illustrative in this regard. It was suggested that a few years before an entire village in Hebei province was asked to make way for the construction of a water reservoir by the state. Initially the villagers were reluctant to do so since they did not want to leave their homeland. But they made the move eventually and their land was taken by the state. Relocated to a new place, they actually found themselves to be better off. This is because they were taken care of very well by the state, which built better houses for them and provide them with land much more fertile than what they used to have. The conclusion derived from this was that the personal interest of every individual socialist citizen is in complete harmony with the public interest and guaranteed by the state. If the state public interest requires, every citizen should comply with such requirement without reservation.[112]

Seen in this light, China's original constitutional takings clause in 1954 is in no way purported to limit the takings power of the state. While it is neither a power-granting clause as already demonstrated, it is essentially power-confirming. This is the substantive reason that it is located in Chapter 1 among various other state policies—rather than imposing a constitutional limitation over the takings power, the original takings clause has constitutionally enshrined the takings power—it is one of the policies adopted by the state towards private ownership of land and other means of production, the normative foundation of which is the socialist principle mentioned above. It is therefore a grave mistake to conflate it with the Fifth Amendment to the US Constitution, which is included in the Bill of Rights and intended to limit the state's takings power.

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[111] Liu, *Outlines of Lectures on the PRC Constitution (zhonghua renmin gongheguo xianfa jiangke tigang)*, p 80; State Law Teaching and Research Office of Central Political-Legal Cadres School, p 158.
[112] Gao, *A Plain Introduction to Constitution (xianfa tongsu jianghua)*, pp 32-33.

3. Reconsidering the Transition Paradigm

The Chinese original constitutional takings clause in 1954 as explained above has presented a case that cannot be, to say the least, easily fitted into the prevailing Transition Paradigm.

To start with, the conceptual assumption is not applicable to the original takings clause, which has a much broader notion of the power of land takings. For one thing, it can be used not only for the construction of public works but also for such purposes as land reform and socialist transformation. For another, making compensation is not a general requirement but applies only to compulsory purchase and requisition. Nationalization in the original takings clause is compensation-less.

Second, neither does the teleological assumption hold in respect to the original takings clause. Far from being power-constraining and aimed at protecting individual private property against the encroachment of the state, it constitutionally confirmed the expansive takings power of the party-state, which is precisely the opposite of the American Fifth Amendment.

One may argue that none of this detracts from the validity and usefulness of the Transition Paradigm by pointing out the current takings clause in the 1982 Constitution has renovated the constitutional foundation and is fundamentally different from its 1954 predecessor. While it might be drafted out of the latter thirty-odd years ago, there is a fundamental rupture between the two. After all, the original takings clause was formulated in the middle of an unfinished socialist revolution set to abolish private land ownership and establish a planned economy. In contrast, the current takings clause is to be interpreted against the background that China has set up a market system and promised that "the state respect and protect human rights".[113] Therefore, as far as the contemporary takings law is concerned, the teleological and conceptual assumptions remain perfectly valid and

[113] Article 33, 1982 Constitution (as amended in 2004).

appropriate. Indeed, the fact that they do not apply to the original takings clause reinforces the TP by showing that China has come a long way since the opening-up and reform.

Whether or not the 1982 Constitution actually constitutes a fundamental break away from the past will be discussed in much more detail later in this thesis. Yet it is hard to ignore the imprints left by the original takings clause on the current takings law.

On the one hand, in terms of the public interest prerequisite, the present constitutional takings clause and takings law have retained three crucial characteristics of the original takings clause. First, no clear-cut and exhaustive definition of "public interest" is proffered. Second, the scope of public interest under the present takings clause seems no less extensive than its 1954 predecessor. Third, to date those affected by land takings remain isolated from the decision-making process. Neither do they have the chance to challenge the decisions of land takings.

On the other hand, as to the compensation for land takings, under the original takings clause, the annual output value and living and production conditions of the peasants are the factors that determine the compensation and resettlement for requisition of rural land. It is not difficult to notice that this has been preserved in the current LAL.

None of this is to say that the existing law is simply a copy of what went before. The changes since the 1950s are more than noticeable. No longer are land reform and socialist transformation of capitalism legitimate purposes for land takings. In the current 1982 PRC Constitution, the power to compulsorily take the ownership of land is reduced from the above-mentioned three kinds to just one, i.e. requisition (renamed as expropriation in 2004). Gone is the requirement of exhausting voluntary negotiation before forcible takings. In fact, the whole idea of taking land for public construction through exchange-like compulsory purchase vanished, resulting in the collapse of the internal

structure of increasing coerciveness from "compulsory purchase" to "requisition" to "nationalization" in the original takings clause. Consequently, market price of land, once used to determine compensation for compulsory purchase of land prior to the early 1950s, is no longer a benchmark anymore nowadays. In this sense, perhaps somewhat surprisingly, the popular reform proposal to adopt market value as the compensation standard over the last decade is not calling for a legal transplant from America but a revival of the CCP's own historical practice.

That being said, on balance, it is fair to conclude that the original takings clause in 1954, though long forgotten and neglected, has laid down the foundation for China's takings law today. The past six decades witnessed the disappearance of some features of but no substantial alteration to the takings law. There is a deep-lying tradition of expansive, non-participatory and unchallengeable takings power with compensation and resettlement determined by the current use of land and living conditions of those affected, which well predates the reform era and is still alive and kicking today. The current law on rural land expropriation is inextricably influenced by such a historical lineage and can be fully understood only when placed within it. By exploring the reasons why certain pre-reform features of the takings law get preserved well into the reform era while others vanished along the way, we can map out the path the Chinese law of rural land takings has traversed so far and be in a better position to predict its likely future development.

In this situation, we must go beyond the temporal assumption of the TP to analyze the Chinese takings law in its historical context, to which the original constitutional takings clause in 1954 proves a great entry point. To recap, it does not conform to the conceptual and teleological assumptions of the TP by covering three different and distinct types of takings power and finding its normative foundation in the power-confirming socialist principle. Why was it so? What kind of

historical legacy was embodied in a constitutional takings clause of this sort? Given that the state is supposed to always and only exercise the takings power in the public interest, which is superior to and fundamentally in harmony with individuals' private interests, why doesn't the original takings clause just say that "the state may take private land and other private means of production"? What is the point to have a restrictive clause similar to that of the 1949 East German Constitution? To answer these questions, we now turn to the theoretical foundations of the takings power in modern China.

Chapter 4 Theoretical Foundations of Land Takings Po wer in Modern China

Last chapter shows that the power of rural land takings had been exercised by the Chinese communist party-state long before the 1954 Constitution, a *fait accompli* that was constitutionally enshrined by the original takings clause. It went beyond the conventional conception of compensatory land takings for public works to include three different types of takings power—nationalization, requisition and compulsory purchase.

As explained, compensation-less nationalization was the iconic measure of the CCP in its revolutionary campaigns between the late 1920s and the early 1950s. Later in the 1950s and 1960s, it was envisaged as a way to implement the socialist transformation of capitalist industry and commerce. Compensatory requisition for public works dated from the 1930s in the revolutionary border regions and was retained after 1949, most notably in the 1953 Land Requisition Measures. Compulsory purchase was briefly tried out in the late 1940s as an alternative complementary measure to confiscation during the land reform campaign. After the establishment of the People's Republic, it evolved into acquisition for public works more akin to market transaction, to which voluntary negotiation between land-using entities and landowners was the procedural precondition.

This chapter presents and analyzes the foundational theories that had justified and guided the exercises of these takings powers. For the following two reasons, our main focus will be on nationalization in the pre-PRC era and requisition. First, nationalization for socialist transformation of capitalism primarily concerned takings of means of production including land in the urban rather than the rural areas. It therefore lies outside the purview of this thesis. Second, compulsory purchase

for land reform or public works existed only very briefly in history and will be touched upon only when relevant.

The rest of this chapter proceeds in three parts. The first part deals with the power of nationalization. It examines the socialist tradition of land nationalization before moving on to introducing the competing programme devised by the nationalist party, especially its founding father Sun Yat-sen. By exploring the theories and practices of land nationalization from classic Marxism to Soviet Russia, it demonstrates that in spite of some well-known exceptions, the CCP's revolutionary strategies towards land nationalization and the post-revolution land system it established were basically in line with the socialist tradition. It also explains why the original constitutional takings clause in 1954 was normatively grounded in the afore-mentioned socialist principle. The second section presents the competing nationalist programme of land nationalization, which differed from the communist counterpart in both philosophy and policy. Although criticized by the CCP as reactionary, the nationalist programme of land nationalization did indirectly influence the law of land requisition promulgated by the CCP.

The second part discusses the origin and evolution of compensatory land requisition as a legal concept in China, a topic that receives much less academic attention than the previous one. Specifically, it highlights the change of its normative basis from classical liberalism to the theory of private property as social function in the 1920s. This new normative foundation was not only borne out by the land laws under the nationalist regime, but was also accepted by the communist government, albeit likely in an unconscious way. More importantly, it helps us understand why the takings clause in the 1954 PRC Constitution transplanted the rather restrictive provision from the

1949 East German Constitution, which, as noted at the end of last chapter, might not make much sense at first sight.

The final part concludes that notwithstanding their notable differences, the competing foundational theories of land taking in modern China did share similar conceptions of private ownership of land, the state-individual relationship and ultimately the takings power.

1. Nationalization: a Tale of Two Traditions

I. The Socialist Tradition of Land Nationalization

(1) Mandate from Classic Marxism

According to the founding charter of the CCP in 1921, one of the Party's top priorities was to abolish the bourgeoisie private property and confiscate all the means of production including land. This was but one of many proclamations of the Party on its commitment to land nationalization along the way, the inspiration of which undoubtedly came from classic Marxism.

In the 1848 Communist Manifesto, Marx and Engels claimed that the theory of the communists could be summed up in one sentence: abolition of private property. This is deeply rooted in the Marxian interpretation of human history, seen as centering on class struggle between those exploited and oppressed and those exploiting and oppressing. The defining feature of a certain class is its relation with the means of production, i.e. the instruments and objects of labour such as machineries and land. In a society, those who own the means of production and control human labor thereby are the ruling and exploiting class. Those who own no means of production and whose labour power is

under control constitute the class ruled and exploited. Axiomatic to this differentiated class structure is struggle rather than cooperation. By definition, revolution is the struggle by the exploited class against the exploiting class and "revolutions are the locomotives of history".[1] Propelled by successive class revolutions, human society progressed from primitive communism, slave society, feudalism to capitalism. Like all previous social systems, the capitalist society is characterized by class antagonism between the bourgeoisie and the proletariat. It will ultimately be replaced by socialism when class exploitation intensifies to such an extent that the working class can no longer sustain itself and the proletarian revolution becomes inevitable. However, different from all its predecessors, under a socialist society, for the first time in human history, class distinction and oppression will be ended because private property in the means of production is completely abolished.[2]

More specifically, for the following three reasons, classic Marxism suggests that private land ownership is doomed to be eliminated.[3] First, Marx utterly rejected the proposition that private land ownership constitutes a "natural right". He took such rights-based justification as no more than a cloak used by the conquerors to disguise the fact of conquest and to legitimatize their possessions "through the instrumentality of laws imposed by themselves".[4] Second, Marx suggested that "landed property is based on the monopoly by certain persons over definite portions of the globe". Such monopoly is economically realized through the rent paid to the landed proprietors, who can thereby "pocket a product of social development created without their help".[5] Therefore, just like the profit is an extortion of surplus labour value, land rent is also a form of unearned income indicative

[1] Karl Marx, 'The Class Struggles in France, 1848 to 1850 (originally written in 1850)' in *Marx and Engels Collected Works*, vol 1 (Progress Publishers 1969).
[2] Karl Marx and Fredirich Engles, 'Communist Manifesto' in *Selected Works of Marx and Engels*, vol Vol. 1 (Progress Publishers 1969).
[3] Karl Marx, 'Rent of Land' in *Economic & Philosophic Manuscripts of 1844* (Progress Publishers 1959).
[4] Karl Marx, 'The Nationalization of the Land' *The International Herald* (June 15, 1872).
[5] Karl Marx, *Capital*, vol Vol. 3 (Friedrick Engels ed, International Publishers 1959), p 442.

of exploitation. Meanwhile, as Marx argued, it also constituted "one of the greatest obstacles to a rational development of agriculture" because "the tenant farmer avoids all improvements…for which he cannot expect complete returns during the term of his lease".[6] Third, in line with the Marxist interpretation of history, Engels argued that the abolition of private land ownership is necessitated by the advancement of human society. In primitive societies land was under common ownership. In the course of agricultural development, that became a fetter on production and was therefore replaced by the more productive private land ownership. Yet with further development of agriculture in the capitalist society, private property in land becomes a hindrance on production again and is bound to be transformed into "a far higher and more developed form" of common ownership.[7] This new form of common land ownership, as imagined by Marx, is the nationalization of land, a "social necessity" that is inexorable.[8]

In order to realize such a social necessity, the Manifesto asks the proletariat to "wrest, by degree, all capital from the bourgeoisie" to accomplish a double mission: 1) to "centralize all instruments of production in the hands of the state"; and 2) to "increase the total productive forces as rapidly as possible". Upon the victory of the proletariat revolution, according to the Manifesto, class distinction will disappear and all production will be in the hands of "a vast association of the whole nation" or "associated individuals".[9]

The logic behind this revolutionary vision is readily understandable. As noted, in Marxism a class is fundamentally defined by its relationship with the means of production. Therefore, if the proletariat is to become the ruling class, it must seize the means of production. To achieve this they

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[6] Ibid.
[7] Frederick Engels, *Anti-Dühring. Herr Eugen Dühring's Revolution in Science* (Progress Publishers 1947), pt 1, ch 13.
[8] Karl Marx, 'The Nationalization of the Land'.
[9] The difference in formulation is a result of different editions. The former phrase was used in the 1888 English edition edited by Engels while the latter was used in the German editions.

need organize themselves into a state and take the means of production into the hands of the state. Once the production means is concentrated in the state, the capitalist mode of production is destroyed and the entire social structure it underpins is transformed. This will not only unfetter the productive forces but also sweep away class antagonism and indeed the classes themselves. Over this process, the nature of the state changes profoundly: In the revolution, the state is the organized proletariat as a separate class struggling in a divided class society, famously called by Marx as the "dictatorship of the proletariat".[10] After the revolution, the society will be rid of class and the state turned into "a vast association of the whole nation" or "associated individuals".

Notwithstanding the enormous power and lucidity with which the ultimate objective of land nationalization was pronounced, these highly abstract theoretical sketches of classic Marxism were ambiguous on two points. On the one hand, as acknowledged by Marx and Engels themselves, there is a tension internal to the double mission between the long-term benefits of nationalization to and its short-term damage on economic productivity in a society. They conceded that in the beginning nationalization would involve "means of despotic inroads" on property rights and the conditions of bourgeois production, which would be economically destructive and untenable. Even though they did insist that this was necessary in the long run for revolutionizing the mode of production and unleashing greater productive forces[11], they did not make it clear whether and how to solve this supposedly temporary tension in practice. On the other hand, classic Marxism offered no concrete guidance on what a nationalized land regime would look like. The founding fathers did not map out any specific institutional form of state land ownership that could reflect and accommodate the fundamental transformation of the state and society they had envisaged.

[10] Karl Marx, 'Marx to Joseph Weydemeyer In New York (originally published in 1851)' in *Karl Marx and Frederick Engels: Collected Works*, vol 38 (New York: International Publishers 1982), pp 401-3.
[11] Karl Marx and Fredirich Engles, 'Communist Manifesto', ch 2.

For all their theoretical and practical importance, the above ambiguities were far from the most urgent issues facing the Marxist revolutionaries in the 19th century. Rather, it was the question about initiating a revolution. The Manifesto suggests that land nationalization is applicable only to the most advanced capitalist countries, where the "forces of production have been developed to the point where enough could be developed for all" and private ownership of means of production has already hindered further development. The abolition of private land ownership thus becomes "not only possible but absolutely necessary".[12] However, at the time of Marx and Engels, most European countries were predominantly agricultural and the majority of land was owned by the landlords. Capitalism was yet to be developed, let alone assume dominance. The natural question then is can land nationalization take place in those pre-capitalist societies?

(2) Land Nationalization in Pre-capitalist Societies: Engel's Plan

Both founders of classic Marxism considered that small-scale agriculture was destined to be replaced by capitalist production and the peasants turned into proletariat. Once capitalism dominates the countryside, conditions will become ripe for the proletarian revolution towards land nationalization.[13] Without this being the case in the 19th century, however, Marx and Engels did not consider it an objective process that could be automatically set off or simply waited for. The crucial question to them was how could the proletariat initiate a revolution in the countries that were economically backward and populated mainly by the peasant mass?

[12] Frederick Engels, 'The Principles of Communism' in *Selected Works of Marx and Engels*, vol Vol. 1 (Progress Publishers 1969).
[13] Karl Marx, 'David Ricardo's Theory of Rent' in *Theories of Surplus-Value*, vol Vol. 2 (Progress Publisher 1968); Frederick Engels, 'The Peasant Question in France and Germany' in *Selected Works of Marx and Engels*, vol Vol. 3 (Progress Publishers 1970) <http://www.marxists.org/archive/marx/works/download/Engles_The_Peasant_Question_in_France_and_Germany.pdf> .

For Marx and Engels, the key was to establish a proletariat-peasant alliance. Marx argued in the 1870s that "the proletariat must, as the government, take measure whereby the peasant sees his situation immediately improved and which therefore win him over to the revolution".[14] In 1894, Engels made similar remarks when he extended his support to the French socialists' attempt to win over the mass peasantry because "no lasting revolutionary transformation is possible in France against the will of the small peasant".[15] In fact, he suggested that a worker-peasant alliance must be established with urgency: "The greater the number of peasants whom we can save from being actually hurled down into the proletariat…the more quickly and easily the social transformation will be accomplished."[16]

However, to win over the peasantry was no easy task. The reason is that the land-owning peasantry was largely conservative or even reactionary in being inclined to defend their private ownership of land not only against capitalist accumulation but also against proletarian nationalization.[17] To devise a strategy to revolutionize the conservative peasantry proved to be central to the revolutionaries of later generations in the less developed countries like Russia and China. But in classic Marxism it was Engels who offered the first and only detailed plan for such a mission in *The Peasant Question in France and Germany*, published in 1894, one year before his death.

To Engels, the revolution depended much on mobilizing the peasantry which was held back by its deep-rooted sense of private property. Sympathetic to the French socialists' pragmatic consideration to "bring the peasant under their influence", Engels nevertheless adamantly criticized their attempt to

[14] Karl Marx, 'On Bakunin's Statism and Anarchy', cited in Jon Elster, *Making Sense of Marx* (Cambridge University Press 1985), p 442.
[15] Engels, 'The Peasant Question in France and Germany'.
[16] Ibid.
[17] Karl Marx and Fredirich Engles, 'Communist Manifesto'.

do so by promising to maintain the small-holding peasant ownership. He argued that this was to the true socialists "a promise which we ourselves know we shall not be able to keep". Instead, the socialists should first try to transform small peasants' private enterprise and land ownership into cooperative ones.[18] This is to be done not by coercion but "by dint of example and the proffer of social assistance" that will make the peasants understand that their property can only be preserved through being converted into "co-operative property operated co-operatively". At the end of the day, however, collectivization is but an intermediate stage towards the nationalization of land. In the transitional period, the state may claim formal title over land with the production being collectively carried out by local communities.[19]

In contrast, Engels proposed to confiscate landlords' land and transfer it to the state without compensation. Yet he did not rule out the possibility of compensation completely by acknowledging that Marx had once repeatedly said to him that the socialists "would get off cheapest" if they could buy out the landlords.[20] As to whether or not to pay such compensation, Engels argued that it would depend on "the circumstances under which the socialists obtain power, and particularly upon the attitude adopted by these gentry, the big landowners, themselves".[21]

To summarize, in classic Marxism, especially *per* Engels, land nationalization as a socialist ideal is not to be compromised by the pragmatic concern to win over the peasants through securing their private land ownership. Rather, they are to be voluntarily collectivized before eventually surrendering their land to the state. Meanwhile, forceful confiscation without compensation should be applied to the landlords, who may as well be bought out with compensation when the circumstances permit. All this had laid down the general theoretical framework under which land

[18] Engels, 'The Peasant Question in France and Germany'.
[19] Ibid.
[20] Ibid.
[21] Ibid.

nationalization was to be carried out by revolutionaries of the subsequent generations. As is well known, it was the Russians that made the first avowed attempt.

(3) The Russian Way: From Lenin to Stalin

As noted above, classic Marxism mandated two tasks for the Russian revolutionaries to fulfil: one was to initiate a revolution towards land nationalization in the underdeveloped Russia and the other to design rules and institutions of state land ownership. The following texts set out the revolutionary programme devised by Vladimir Lenin before introducing the nationalized land regime under Joseph Stalin.

Lenin envisaged that land nationalization in Russia would come in two stages. In 1894, commenting on the proposal to confiscate land from the landlords and return it to the peasants, he admitted it to be a progressive bourgeois democratic demand. The social-democrats (the Russian Marxists at the time) should adopt such a programme insofar as it promoted the abolition of private land ownership of the landlords and the elimination of feudalism in Russia. However, Lenin warned that this programme was anything but socialist because it preserved small landed proprietorship, which was to the benefit of capitalism rather than socialism. Therefore, the revolution must ultimately transcend it.[22] This shows that while echoing Engel's insistence on land nationalization, Lenin diverged from him in accepting the need for land redistribution to the peasantry, at least temporarily. More specifically, he conceived that the revolution would start from a land-to-the-tiller bourgeois-democratic phase before progressing to a full-blown socialist stage of land nationalization.

[22] Vladimir Lenin, 'What the "Friends of the People" are and How They Fight the Social-Democrats (originally published in 1894)' in *Lenin's Collected Works*, vol Vol. 1 (Progress Publishers 1972), pp 290-91.

In the first phase, the revolution was to be carried out by an alliance of workers, peasants and the bourgeois to eradicate feudalism and landlords through land confiscation and redistribution. In the second stage, the proletariat would unite with the peasants to fight the bourgeois and capitalism. Private land ownership would then be eliminated and all land transferred to the state.[23]

Three points are worth noting about Lenin's two-stage theory of revolution. First, the road towards nationalization of land began with confiscation of landlords without compensation. Marx's proposal to buy out the landlords was not taken on board. In fact, it was explicitly rejected by Lenin. He argued that to give landlords compensation constituted "treason to socialism and imposition of a new tax on the labouring and exploited masses".[24] Second, it was out of highly pragmatic considerations that Lenin endorsed a temporary redistribution of the confiscated land back to the peasants. He recognized that "general redistribution" of land had long been a popular request among Russian peasants, who had not yet realized that nationalization of land was in their objective interests. In order to mobilize this conservative peasantry, Lenin considered it necessary "to remove any idea that the workers' party wants to impose upon the peasantry any scheme of reforms against their will and independently of any movement among the peasantry". Therefore, the direct demand for nationalization should not be immediately pronounced and land redistribution be adopted first.[25] Third, Lenin insisted on the eventual transition from the first to the second stage. He cautioned that at the first democratic-bourgeoisie stage, "we cannot under any circumstances flatly reject nationalization of the land; but we must specify the particular political conditions without which nationalization might be detrimental to the proletariat and the peasantry."[26] Such favourable political

[23] Vladimir Lenin, 'To the Rural Poor: An Explanation for the Peasants of What the Social-Democrats Want (originally published in 1903)' in *Lenin's Collected Works*, vol Vol. 6 (Progress Publishers 1964).
[24] Vladmir Lenin, *Theses on the Agrarian Question* (at the Second Congress of the Communist International, 1920).
[25] Vladimir Lenin, 'Revision of the Agrarian Program of the Workers' Party (originally published in 1906)' in *Lenin's Collected Works*, vol Vol. 10 (Progress Publishers 1972), pp 194-95.
[26] Ibid, p 194.

conditions, as envisioned by Lenin, would emerge when "the decisive victory of the present revolution brings about the complete sovereignty of the people, i.e., establishes a republic and a fully democratic state system".[27]

Favourable political conditions of this sort were hardy present at the time of the *April Theses* in 1917. Nonetheless, Lenin claimed in that famous speech that "the specific feature of the present situation in Russia is that the country is passing from the first stage of the revolution—which…placed power in the hands of the bourgeoisie—to its second stage, which must place power in the hands of the proletariat and the poorest sections of the peasants".[28] The most important reason for Lenin to call for a socialist revolution ahead of schedule was his acute awareness of the fact that the popular demand for land reform remained unsatisfied by the provisional government in power at the time.[29] He saw this as a great opportunity to be seized in order to win over the peasants by satisfying their needs. In this situation, the following land programme was pronounced: All landed estates are to be confiscated and all land immediately nationalized and disposed of by the local soviets ("council" in Russian) of peasants' deputies. Model farms are to be established on large estates and put under the control of the local democratic bodies to engage in collective agricultural production.[30]

In promoting land nationalization and collectivized agricultural production, Lenin's plan definitely pointed towards socialism. However, with a decentralized land use system in which the power to arrange agricultural production resided with the local peasant soviets, it also satisfied the Russian peasants' long-held desire to have a greater input into the ways land was used, which made it more

[27] Ibid., pp 194-95.
[28] Vladimir Lenin, 'The Tasks of the Proletariat in the Present Revolution (The April Theses, originally published in 1917)' in *Lenin's Collected Works*, vol Vol. 24 (Progress Publishers 1964).
[29] Jules Townshend, *The Politics of Marxism: The Critical Debates* (Leicester University Press 1996), pp 67-68.
[30] Lenin, 'The Tasks of the Proletariat in the Present Revolution (The April Theses, originally published in 1917)'.

attractive and successful than those proposals put forward by competing forces in winning the peasants' hearts and minds. This combination of state ownership, local administration of land use and collective production was subsequently adopted in the Bolshevik Party's *Resolution of on the Agrarian Question*[31] and then in the 1917 Land Decree. It prescribed that private land ownership shall be abolished and all land shall become part of the national land fund. The right to use the land shall be accorded to all citizens on the condition that they are able to cultivate it.[32]

Despite that land nationalization was proclaimed both in policy and in law, in reality, most confiscated land was partitioned among peasants for individual farming.[33] Clearly, this was in conflict with the socialist mandate to transform small agriculture into the more productive collectivized form. Hence the ensuing years witnessed the acceleration of collectivization in Soviet Russia, which did not last long until the New Economic Policy between 1921 and 1928. Most notably, the 1922 Land Code assured to villages and other rural groups the permanent tenure of all land actually in their possession on the date of the proclamation of the law. It no longer imposed on the peasants any kind of socialist land tenure featured in earlier party policies and laws, but gave equal standing to all previously existing forms of land tenure, including individual holdings.[34]

At the theoretical level, this could be seen as the Russian's response to the above-mentioned tension between the revolution's long-term gain and short-term damage on economic productivity. Since the early 1920s, the economic conditions of Russia were extremely dire after years of civil war. The Soviet government was forced to rely, at least temporarily, on peasant farming as the source of

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[31] *Resolution on the Agrarian Question* (The Seventh (April) All-Russia Conference of the RSDLP(B), April 29, 1917).
[32] Points 1,6, 8, the Peasant Mandate on the Land, *Decree on Land* (passed at the Second Congress of Soviets of Workers', Soldiers', and Peasants' Deputies, November 8, 1917). The Peasant Mandate on the Land published in August 1917 was incorporated as part of the law.
[33] Vladimir P. Timoshenko, 'The Agrarian Policies of Russia and the Wars' (1943) 17 Agricultural History 192, p 205.
[34] Ibid, p 206.

the agricultural products so necessary to the national economy. Against this background, for practical reasons, Russian peasants were allowed more freedom to choose the forms of land tenure for themselves.[35] Unsurprisingly, the majority of them selected independent farming.[36] However, as Lenin himself explicitly acknowledged, the New Economic Policy was just a strategic retreat from socialism.[37] When Stalin came to power in 1928, Soviet Russia returned to collectivization.[38] For what is worth, although Lenin followed Engels in favouring a gradual and peaceful collectivization via persuasion and encouragement,[39] it is widely known that what happened under Stalin's Russia was precisely the opposite.[40]

More pertinent here, though, is the institutional form of a nationalized land regime in Soviet Russia. As noted before, classic Marxism is ambiguous on this point. Neither did Lenin live to offer any detailed plan. It was after the collectivization campaign and under Stalin's rule that Soviet Russia's socialist land system finally settled down, the main characteristics of which are as follows.

First and foremost, the state's ownership of land is exclusive and absolute. Exclusive because the state is the sole subject of the right to land ownership. Alienation and transaction of land (sale, barter, lease, gift, inheritance, mortgage, etc) are strictly prohibited. Absolute because the state as the owner has unrestricted and indisputable powers over land. Specifically, through the proper organs of the

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[35] Ibid.
[36] Stanislaw J. Sawicki, *Soviet Land and Housing Law: A Historical and Comparative Study* (Praeger Publishers 1977), p 42.
[37] Vladmir Lenin, 'The New Economic Policy and The Tasks Of The Political Education Departments (originally published in 1921)' in *Lenin's Collected Works*, vol Vol. 33 (Progress Publishers 1965).
[38] By no means is this to claim that ideological factor is the only reason for Stalin to initiate large-scale collectivization. Another well-known significant impetus was the economic crisis that propelled the soviet government to take more control over agricultural production, especially grain collection through collectivization.
[39] Dorothy Atkinson, *The End of the Russian Land Commune, 1905-1930* (Stanford University Press 1983), p 214.
[40] On this we only have to refer to Stalin's famous article Dizziness with Success, in which he acknowledged that collectivization campaign was oftentimes coercive. J. V. Stalin, 'Dizzy with Success: Concerning Questions of the Collective-Farm Movement (originally published in 1930)' in *Collected Works of* vol Vol. 12 (Foreign Languages Publishing House 1955), pp 197-205.

government, the state determines the economic purpose of land, effects its planned distribution and exerts control over the proper use of land.[41]

Second, land tenure is a right *sui generis* conferred by the state, in its capacity as the exclusive owner of all land, upon persons natural or juridical to use a piece of land. It has the following features. 1) Land use-rights can be allocated/allotted either to the state itself represented through its enterprises and agencies or to non-state collective organizations and private individuals. 2) Allotment/allocation of land use-rights is free of charge because land is an asset of the whole people. Land tenure can last for a limited period of time or more usually permanently. 3) Land is functionally divided into six categories: agricultural land, habitation land, industrial land, land covered by woods and forests, land covered by waters and unused land. Land must be used in accordance with these specified functions for which it is designated. Therefore, the right to use land also entails the legal duty to use it according to the set purposes. For example, a collective farm that has received land for agricultural production cannot deviate from such purposes unless authorized by the competent government authority. This is for the purpose of guaranteeing the implementation of the land policy under the socialist planned economy, defined as a system of measures taken by state agencies that aims to achieve the most rational and efficient use of land according to economic planning. 4) Land tenure is protected by law. But the normative basis for that is less about respecting the users' rights than protecting the social interests in the orderly utilization of land as an economic resource.[42]

Third, land management is carried out entirely by the state administration. The power to allocate land use-rights for different purposes is divided within the government hierarchy among the

[41] P. S. Romashkin (ed) *Fundamentals of Soviet Law* (Foreign Languages Publishing house 1962), pp 290-94.
[42] F.J.M. Feldbrugge, G.P. Van den Berg and William B. Simons (eds), *Encyclopedia of Soviet Law* (2 edn, Martinus Nijhoff Publishers 1985), pp 435-37, 656-58; Romashkin, pp 294-301; Sawicki, pp 55-57.

executive committees of the village, city, district and provincial Soviets as well as national Council of Ministers. The rigorous restriction over land use to the designated purposes necessitates state supervision and control carried out by a variety of governmental agencies.[43]

Fourth, land use-rights can be subject to withdrawal by the government if the land is not put into use within two years after allocation, or used for undesignated purposes, or if the land is to be expropriated. Withdrawal of land in the case of expropriation can be initiated by the executive committee of the national Council of Ministers or provincial/city Soviets. The courts are not competent to judge the legality of the withdrawal. Expropriation shall be exercised only when a necessity arises for state or social needs and with the consent of the expropriated. Compensation is not to be paid over the land expropriated because land is assigned free of charge as a gratuitous right. However, it should be paid for the costs spent on the improvement of land and the crops, seeds, houses and buildings thereon. At the same time, compensation may also be paid by way of allocating to the expropriated the right to use another plot of land or living space.[44]

In the words of a Soviet jurist, the socialist land system established under Stalin's Russia was

an aggregate of rules which regulate the entire system of land relations arising from the nationalization of land and developing with an eye to a fairer and more efficient use of land…as the exclusive property of the state, in the interest of socialist and communist construction in the U.S.S.R.[45]

Enough has been said about the socialist tradition of land nationalization from classic Marxism to the Russian model. We now move on to demonstrate how such an imported tradition had informed and been manifested in the Chinese experiences over the 20th century.

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[43] Feldbrugge, Berg and Simons, pp 435-39.
[44] Ibid, p 438; William B. Simons (ed) *The Soviet Codes of Law*, vol Vol. 23 (Sijthoff and Noordhoff 1980), pp 879-80.
[45] Romashkin, p 290.

(4) Land Nationalization in Communist China

It is fair to say at the outset that the CCP had broadly followed the socialist tradition of land nationalization explored and explained above until the reform era since the late 1970s. This is borne out not only by the revolutionary strategies it adopted towards nationalization but also by the land system established in the PRC.

In terms of revolutionary strategy, facing a backward agricultural country, the CCP realized the significance of a worker-peasant alliance and strived to win over the conservative mass peasantry. Specifically, inspired by Lenin's two-stage theory, it chose confiscation and redistribution of land instead of nationalization as the first step of revolution. In his famous 1939 article on Chinese revolution, Mao Zedong divided it into two stages. The first stage was the bourgeois-democratic revolution or what he called "new-democratic revolution" and the second was the proletarian-socialist revolution. The former overthrew the landlord classes through land confiscation and redistribution. But it was not a socialist revolution because it achieved no more than clearing the way for capitalist development and paving the conditions for socialism. To complete the bourgeois-democratic revolution and to transform it into the socialist stage was the two-fold task for the CCP.[46]

However, this is in no way to say that the CCP was simply executing a pre-ordained blueprint to every last detail. Just like the Russian revolutionaries did not strictly follow the works of Marx and Engels, the CCP did adapt to local conditions and deviated from both classic Marxism and the

[46] Mao Zedong, '*Zhongguo Geming he Zhongguo Gongchandang* [*The Chinese Revolution and the Chinese Communist Party*]' in *Selected Works of Mao Zedong*, vol Vol. 2 (People's Press 1991).

Russian model, most notably in three cases. However, as will be shown, these examples affirm rather than challenge the influence of the imported socialist tradition over the revolution towards land nationalization initiated by the CCP in China.

The three deviations from the revolutionary script by the CCP are all well known. First, as noted, Engels set land nationalization as the ultimate and non-negotiable revolutionary goal. Lenin stopped short of distributing land ownership and granted only land use-rights to the peasants. In stark contrast, the CCP gave not just the use-rights but the ownership to the peasants upon land confiscation.[47] Second, from 1937 to 1946, the CCP suspended land confiscation and redistribution and adopted the more modest measure of rent reduction. Third, while Engels considered it acceptable to buy out the landlords to "get off cheapest", Lenin rejected compulsory purchase as "treason to socialism". As mentioned in the last chapter, however, the CCP did use compulsory purchase of landlords during the land reform campaign. Let's now look at these deviations one by one.

The decision to provide the peasants with land ownership rather than just use-rights was not made until 1931. Although as early as in 1921 its founding charter called for confiscation of all means of production, the CCP never attempted at full-scale land confiscation prior to 1927. Before then its agrarian policies went no further than reduction of land rent[48] or confiscation of land that exceeded certain set maximum.[49] Between 1927 and 1931, when driven by the KMT to the remote mountainous rural areas, the CCP finally came to realize the importance of the mass peasantry as an

[47] Article 11, 1947 Outline of Land Law; Article 10, 1950 Land Reform Law.

[48] *Manifesto of the Second Congress of the Chinese Communist Party* (July, 1922); *Draft Charter of the Chinese Communist Party (zhongguo gongchandang danggang cao'an)* (July, 1923); *Statement of the Chinese Communist Party on the Current Situation (zhongguo gongchandang duiyu shiju zhi zhuzhang)* (May, 1924); *Resolutions on Peasant Movement (nongmin yundong yijue an)* (July, 1926).

[49] *Plan of the Chinese Communist Pary on the Present Practical Problems (zhongguo gongchandang duiyu muqian shiji wenti zhi jihua)* (November, 1922); *Declaration of the Chinese Communist Party and Communist Youth League: To People Now Fighting for National Liberation (zhongguo gongchandang zhongguo gongchanzhuyi qingniantuan xuanyan: gao cici wei minzu ziyou fendou de minzhong)* (January, 1925).

indispensable revolutionary force. The *1928 Jinggangshan Land Law*, *1929 Xingguo Land Law* and *1930 Soviet Land Law* demanded land confiscation and redistribution of use-rights to the toiling peasants. Yet all of them fell short of land ownership redistribution and remained faithful to the socialist mandate of nationalization in prescribing that the ownership of confiscated land went to the local soviet government. It was in 1931 that the CCP eventually changed course and turned to the privatization of confiscated land. The reason behind was two-fold. On the one hand, it became increasingly clear to the Party that what the peasants wanted was not just use-rights but full ownership of land. To mobilize them to support the disruptive land revolution, it was considered necessary to make the offer actually sought. On the other hand, the absence of stable ownership left many peasants feel highly uncertain about their work on land. In particular, it resulted in a widespread reluctance among the peasants in the revolutionary regions to start ploughing the field even when spring came in 1931, leading to a sharp decrease of agricultural output.[50] In this situation, in spite of being the long-term objective, nationalization of land turned out to be doubly detrimental to the revolution. It did not only, as just mentioned, dampen the effort to win over the mass peasantry to support the revolution, but also undermined the economic productivity in the revolutionary areas, which was even more vital to the survival of the Party. Therefore, the CCP conceded that the conservative adherence to private land ownership was in the peasants' nature and during the democratic revolution stage land nationalization would only be a slogan for propagation instead of a policy for implementation. Only until the revolution succeeded on the national level and the entire country was put under a proletariat-peasant dictatorship would nationalization be realized.[51]

[50] Central Party Bureau of Soviet Area, *Land Question and Strategy of Anti-rich-peasants (tudi wenti yu fan funong celve)* (February 8, 1931); Mao Zedong, 'Opinions on Strengthening the Work of Spring Ploughing (*guanyu jiaqiang chungeng gongzuo de yijian*)' in *Works of Mao Zedong (maozedong wenji)*, vol 1 (People's Press 1993); Mao Zedong, 'Our Economic Policy (*women de jingji zhengce*, originally published in 1934)' in *Selected Works of Mao Zedong*, vol 1 (People's Press 1991).

[51] Central Party Bureau of Soviet Area.

Obviously, to the CCP, the conferral of private land ownership upon the peasantry was by no means a principled decision but a practical expediency out of the need to facilitate revolution and mitigate its short-term damage on productivity. But by invoking Lenin's two-stage theory, it became ideologically justified. In fact, up until the mid-1950s, private land ownership by the peasants was officially recognized and constitutionally enshrined. Article 8 of the 1954 Constitution states that the state guarantees the peasant's land ownership according to law. However, it is a serious mistake to think that private land ownership is to be perpetuated in the socialist China. As a matter of fact, never did the CCP make any promise to such effect. Quite the contrary, it repeatedly cautioned against the belief that private land ownership would be preserved in the long run and emphasized on the socialist future of the revolution in collectivization and nationalization of land.[52] In the socialist ideology, private land ownership was fundamentally no more and no less than a transitory product at the democratic stage of the revolution which had to be revoked once the revolution progressed to the next stage. Admittedly, it has now been acknowledged by the Party itself that to actuate such a transition in the 1950s was premature and problematic. Nevertheless, in the official narrative, elimination of private land ownership through collectivization and nationalization remains to be the unquestionable hallmark of what socialism stands for. It was only for very pragmatic considerations that private land ownership was temporarily accepted by the Party.

The same logic also explains the Party's suspending land confiscation and distribution between 1937 and 1946. This period witnessed the establishment of a national united front between the KMT and the CCP to fight the anti-Japanese war. Internal unity of the Chinese nation as a whole became

[52] Ibid; Committee of the Chairmen of the Provincial County and District Soviet Governments in Jiangxi, *Outline of the Land Question (tudi wenti tigang)* (March 1931); Biwu Dong, *On the Questions of Rural Production and Burden after the Land Reform (guanyu tudi gaige hou nongcun shengchan yu fudan wenti)* (August 21, 1947); Jinchaji Party Bureau, *Instructions on Developing Rural Production after Land Reform (guanyu tudi gaige hou nongcun fazhan shengchan de zhishi)* (May 6, 1948).

so paramount to sustaining the war effort that the Party chose to exempt the landed classes from confiscation in order to reduce domestic friction and consolidate their support.[53]

The third deviation of the CCP from the imported socialist tradition of land nationalization was that compulsory purchase of land from the landlords was briefly tried out during the land reform campaign between 1946 and 1947. Such "treason to socialism" in Lenin's eyes was accepted by the Party not on the grounds that Marx and Engels once commended it. Rather, it was again due to practical reasons not so different from the two examples presented above. As touched upon in the last chapter, the central party issued a recommendation in July 1946, advising the local party branches to buy out the landlord's land above certain set maximum while leaving the rest intact.[54] This was a significant change to the Party's policy of full-scale confiscation over the decade before the breakout of the anti-Japanese war in 1937.

The underlying reason can be found in an instruction issued then by the party centre, in which it was made clear that compulsory purchase was for the purpose of fending off criticisms over violent and radical land confiscation from the "democratic personages" (*minzhu renshi*) and the "middle forces" (*zhongjian shili*).[55] In other words, it was more about consolidating political support for the Party than constraining the practice of confiscation and mitigating its harshness. If there is still any doubt about whether or not this was the only or even the primary motivation behind the CCP's policy change because the just-mentioned party instruction seemed to be more of a propagandist nature, the same point could also be found in the reply from the party branch in the Jinjiluyu Revolutionary Area to the central party's recommendation in 1947: "[compulsory purchase of land]

[53] *Telegraph by the CCP Center to the Third National Congress of the KMT (zhonggong zhongyang gei zhongguo guomindang sanzhong quanhui dian)* (February 10, 1937); *Task of the CCP during the Anti-Japanese Period (zhongguo gongchandang zai kangri shiqi de renwu)* (May 3, 1937).
[54] Central Committee of Communist Party of China.
[55] *The CCP Central Party Committee's Instructions to Zhou Enlai and Dong Biwu on Explaining Our Party's Land Policies to Members of China Democratic League (zhonggong zhongyang guanyu xiang minmeng renshi shuoming wodang tudi zhengce gei zhou enlai dong biwu de zhishi)* (July 19, 1946).

poses no harm, which would be beneficial to solving the land problem for families of party cadres and democratic personages".[56] Meanwhile, forcing landlords to sell their above-the-quota land had nothing to do with respecting their land ownership through simulating a market transaction. Exactly the opposite, the Party emphasized that to regard compulsory purchase in this situation purely as a transactional relationship was gravely wrong. More importantly, it should be seen as a mere complementary measure while the more radical confiscation is the main method of conducting land reform campaign.[57] In this sense, without citing or probably knowing Engels' work, the CCP used compulsory purchase as a way to "get off cheapest" the landlords. Understandably, a measure of this kind would not last long. When the civil war broke out full-scale in early 1947, the CCP returned to land confiscation and redistribution which had proved to be more effective in mobilizing the mass peasantry.

By the time when the 1954 Constitution was made, China was at a transition point. Since 1952, the CCP started to push forward the socialist transformation movement, the core of which was to replace private ownership of the means of production with the public one.[58] As noted in the last chapter, the 1954 Constitution was supposed to "fully express the fundamental mandate for China to gradually proceed towards socialism". How did it do that?

In terms of the property regime, following the Marxist theory, the 1954 PRC Constitution is based on a clear distinction between the ownership of the means of production and that of the means of subsistence. The Communist Manifesto famously suggests that socialism "deprives no man of the

[56] Quoted in Kuisong Yang, 'On the Attempt and Possibility of Post-war Peaceful Land Reform by the Communist Party of China (*guanyu zhanhou zhonggong heping tugai de changshi yu keneng wenti*)' [2007] Nanjing University Journal.
[57] *Notification on Experiences of Trial Projects on Public Land Debt in Various Locales in Central Shan'ganning Border Region (zhongyang shan'ganning bianqu ruogan difang shiban tudi gongzhao jingyan de tongbao)* (Feburary 8, 1947).
[58] This was called the Party's "general line during the transition period" (*guodu shiqi zong luxian*), which was first formulated by Mao Zedong in 1952 and formally elevated to be party policy in early 1954.

power to appropriate the products of society; all that it does is to deprive him of the power to subjugate the labour of others by means of such appropriations." In other words, socialism does not abolish private property generally. In the People's Republic, citizens' private property in the means of subsistence was called "personal property" (*geren caichan*) rather than private property (*siyou caichan*). According to Articles 11-12 of the 1954 Constitution, citizen's lawful ownership and right to inheritance of the means of subsistence are guaranteed by the state.

Contrarily, socialism does not tolerate private ownership of the means of production, which is seen to be exploitive in nature. Article 5 lists out four types of ownership of the production means and Articles 6-12 spell out the different state policies towards them. Under the influence of the socialist tradition, public ownership of the production means is constitutionally prioritized because it represents the socialist future of the country (Article 6). Article 101 stipulates that public property of the PRC is sacred and non-violable and that every citizen has the obligation to cherish and protect it. Collective ownership is also regarded a form of socialist property, which is guaranteed by the state and will be used to transform individual farming and manufacturing (Article 7). In contrast, private ownership of the means of production by individual labourers and capitalists, including the private land ownership granted by the Party to the peasants since the 1930s, are to be transformed in a voluntary and gradual manner (Articles 8-10). During the transitional period, they would still be protected by the state (Articles 8-9). But the underlying reason was not that they are intrinsically worthy of state protection. Instead, as was explained in the 1950s, the main purpose was to keep the individual owners incentivized to work over the transitional period.[59]

Under these circumstances, private property in general cannot possibly be recognized as a basic constitutional right by the 1954 Constitution. While half of it, namely the private ownership of the

[59] Li, *Lectures on PRC Constitution (zhonghua renmin gongheguo xianfa jianghua)* , p 85.

means of subsistence will be guaranteed by the state in the long run, the other and more important half—private ownership of means of production is fated to be transformed and eliminated. This perhaps is the best explanation for why all the property rights-related articles appear in the first chapter of the 1954 Constitution on various state policies instead of its Chapter 3 on citizen's basic rights and obligations.[60] Private property was then regarded more a part of the state's economic policy than a right enjoyed by individuals vis-à-vis the state.

Against this background, we can now better understand why China's original constitutional takings clause in 1954 was normatively based on the socialist principle introduced in the last chapter. Motivated less by principle than by practical concerns, the state protection of private ownership of the production means promised in the 1954 Constitution was then said to be limited by the public interest both negatively and positively. While Article 14 sets the negative limitation that private property cannot be used to harm public interest, Article 13, i.e. the original takings clause, is the positive limitation that when required by the public interest private means of production can be taken by the state.[61] For two reasons land taking was thought to be necessarily in the public interest. On the one hand, transferring private land into the hands of the state by definition enhances and develops public property, which, as demonstrated above, was considered as representing the future direction of the country. On the other hand, it was also believed that state's taking rural agricultural land would certainly help transform China from a backward agrarian economy into an advanced industrial one. After all, under a planned economy, only the state was responsible for and in charge of industrializing the country. Overall, be it for enhancing public property or promoting

[60] On this point, four explanations were offered by Professor Gan Chaoying who did not come to a definitive conclusion. Now this can be settled. See Chaoying Gan, 'A Historical Review of Constitutional Property System in New China (*xin zhongguo xianfa caichan zhidu de lishi huigu*)' [2010] China Legal Science (*zhongguo faxue*), p 144.
[61] Zhang, *Essays on Constitutionalism (xianzheng luncong)*, p 41; Lou, *Basic Knowledge of PRC Constitution (zhonghua renmin gongheguo xianfa jiben zhishi)* , pp 93-94.

industrialization, rural land taking by the state is always in the long-term national interest, which is also the common interest of all citizens and the fundamental interest of each individual in a socialist society.[62]

That being said, as we know, the PRC has never gone so far as the Soviet Russia to nationalize all land, even though state land ownership was undoubtedly the favoured way towards socialism. Up till today, the land ownership structure in China remains bifurcated with both state ownership and collective ownership in place. The reason for that will be discussed in the next chapter. Suffice it to say here that since the 1950s until the reform era China had basically copied the Soviet model in terms of land administration system. First, considered as a critical economic resource, land was managed by the state according to the planning system, making land administration essentially an integral part of the state's economic administration. Urban land was allocated by local governments free of charge to state agencies, state-owned enterprises, public-private joint ventures and so forth on a need basis.[63] In the rural areas, although land was formally owned by the collectives after the collectivization movement, in most cases it was actually the state that had the final say on the use and disposal of rural collective land. This was because the collective leaders were usually appointed by and therefore acted as agents of the state.[64] Moreover, after the 1950s, land was de-commoditized with both the urban and rural land markets closed down and voluntary transactions of land forbidden. Concerning urban land in particular, if there was a change of economic plan that necessitated a shift

[62] Liu, *Outlines of Lectures on the PRC Constitution (zhonghua renmin gongheguo xianfa jiangke tigang)*, p 80; State Law Teaching and Research Office of Central Political-Legal Cadres School, p 158.

[63] Pt 1, Administrative Council of the Central People's Government; Pt 1-3, Ministry of Domestic Affairs, *Reply on Several Issues of Charging Deed Tax or Rent on Requisition of Privately Owned Land and Use of State-owned Land by State-owned Enterprises, Public-Private Joint Ventures, Private Enterprises and so on (dafu guanyu guoying qiye gongsi huiying qiye ji siying qiye deng zhengyong siyou tudi ji shiyong guoyou tudi jiaona qishui huo zujin de jige wenti)* (March 8, 1954). It was prescribed in 1954 that urban land could also be allocated to private enterprises, not free of charge but for a land use fee. Yet it did not take long before private enterprises were eliminated in China by the socialist transformation movement. Pt 5, Ministry of Domestic Affairs, *Comprehensive Reply on Several Questions concerning the Implementation of the Measures on Land Requisition for State-led Construction (guanyu zhixing guojia jianshe zhengyong tudi banfa zhong jige wenti de zonghe dafu)*.

[64] Xueyang Cheng, 'How was the Rural Land Collectivized? (*nongcun tudi shi ruhe bei jitihua de*)' January 29, 2014 <http://www.zgxcfx.com/Article/63660.html> accessed July 28, 2014.

in the current land use, the state would withdraw such land without compensation and the land-using entity could not rent it out or sell it.[65] Similarly, rent and sale of rural land was also explicitly banned since the early 1960s after collectivization.[66] Last but not least, following the Soviet model, it has been prescribed in China since the 1950s that withdrawal or requisition of state-owned land is non-compensable, even though the state shall properly resettle those affected.[67] Different from the previous two features that changed dramatically during the reform era, as will be shown in the next chapter, this has remained the case even till today.

To summarize, despite deviations primarily driven by pragmatic considerations, the CCP had basically followed the Marxist-Soviet tradition of land nationalization in both its revolutionary strategies and the post-revolution land regime. In particular, the original takings clause underpinned by the so-called socialist principle was an epitome and continuation of this tradition. But how much contemporary relevance does it still have given that, as mentioned at the end of last chapter, nationalization has long been removed from the written constitution? This is the question that will be dealt with in more depth later on. For the moment, it's worth noting that the socialist programme represented only part of the historical experiences of land nationalization in modern China. As is well known, its rival nationalist party, the KMT had also avowed to realize nationalization of land.

[65] Pt 3-4, State Council, *Notice on Correcting and Stopping Waste in Land Requisition for State-led Construction (guanyu jiuzheng yu fangzhi guojia jianshe zhengyong tudi zhong langfei xianxiang de tongzhi)* (January 24, 1956).
[66] Article 21, CCP Central Committee, *Revised Draft Regulations on the Work in the Rural People's Communes (nongcun renmin gongshe gongzuo tiaoli xiuzheng cao'an)*.
[67] Article 13, *Regulation on the Administration of Land Use for Buildings in Villages and Townships (cunzhen jianfang yongdi guanli tiaoli)* (November 21, 1950); Article 9, *Measures on Land Requisition for State-led Construction (guojia jianshe zhengyong tudi banfa)*; Article 18, *Measures on Land Requisition for State-led Construction (guojia jianshe zhengyong tudi banfa)*.

II. The Nationalist Tradition of Land Nationalization

At first sight, the nationalist land programme devised by Sun Yat-sen may appear quite similar to the communist counterpart since it also claimed to pursue "nationalization of land". As will be demonstrated below, however, they were different in both philosophy and policy.

Similar to the Marxist position, Sun Yat-sen was dismissive of private land ownership. First, he considered it an intrinsic injustice because land is a naturally given material that predates and outlasts human beings and should belong to all equally.[68] On a more practical note, convinced by the American political economist Henry George, Sun considered private land ownership undesirable.[69] According to George, there are three productive sources in a society—land, labour and capital. Correspondingly, the products are rent, wage and interest, the sum of which constitutes the total products in a society. At a given level of productivity, rent is inversely related to wage and interest. Land monopoly and speculation based on private ownership of land will drive up rent and thereby squeeze wage for labour and interest for capital investment.[70] Hence Sun suggested that on the one hand, private land ownership is an impediment to China's industrialization in diverting capital investment from productive industries to unproductive speculation of land.[71] On the other hand, reflecting on his tour around Europe and America in the early 1900s, Sun identified private land ownership to be the root cause of endemic inequality and poverty in the West.[72] The solution in

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[68] Sun Yat-sen, 'Speech to the Chinese Socialist Party in Shanghai (*zai shanghai zhongguo shehui dang de yanshuo*)' in *Collected Works of Sun Yat-sen*, vol 2 (Zhonghua Book Company 1982), p 514.

[69] The impact of Henry George on Sun's land programme has been well documented and analyzed. See Richard W Lindholm and Sein Lin, *Henry George and Sun Yat-sen: Application and Evolution of their Land Use Doctrine* (Cambridge MA: Lincoln Institute 1977); Sein Lin, 'Sun Yat-sen and Henry George: The Essential Role of Land Policy in Their Doctrines' (1974) 33 The American Journal of Economics and Sociology 201.

[70] Henry George, *Progress and Poverty* (Garden City, NY: Doubleday, Page, & Co 1912), Book III, ch II.

[71] Sun Yat-sen, 'Speech at the Welcoming Event of the Press in Guangzhou (*zai guangzhou baojie huanying hui de yanshuo*)', p 355.

[72] Sun Yat-sen, 'Speech at the Anniversary Celebration Ceremony of the Ming Paper in Tokyo (*zai dongjing mingbao chuangkan zhounian qingzhu dahui de yanshuo*)' in *Collected Works of Sun Yat-sen*, vol 1 (Zhonghua Book Company 1982), p 327.

his mind rested with nationalization of land, which would facilitate industrialization and prevent its accompanying misery in China.

As to the specific measures to nationalize land, different from the CCP, Sun rejected compensation-less confiscation even though he admitted it to be a strategy of "thorough revolution".[73] This was due to the following three reasons. First, Sun saw confiscation as a sure way to generate great resistance from the land owners, which in his view would devastate the fledgling revolution.[74] Second, Sun thought that China was not ready for land confiscation and nationalization. He remarked that even Russia had to adopt the New Economic Policy and give room to private land ownership because it was too undeveloped economically—China was no better at all, hence it should do the same too.[75] Third, on a deeper level, Sun had a different interpretation of human history from Marxism. He rejected the notion that class revolution is the locomotive of history. Instead, he viewed that "the primary force of human evolution is cooperation and not struggle".[76] "The reason for social progress lies in the harmony of the majority of the economic interests in the society, not in their conflict".[77] "Class war is by no means the reason for social evolution but a disease that appears in the process of social evolution". "Marx was not a 'physiologist' but a 'pathologist' of human society".[78] On these grounds, Sun preferred a "slow and peaceful" way over radical confiscation to achieve land nationalization. While stressing the need for the nationalist party to ally with the

[73] Sun Yat-sen, 'Speech at the Graduation Ceremony of the First Peasant Movement Institute in Guangdong (*zai guangdong nongmin yundong jiangxi suo diyi jie biye dianli de yanshuo*)' in *Collected Works of Sun Yat-sen*, vol 10 (Zhonghua Book Company 1986), p 556.
[74] Ibid, pp 557-58.
[75] Sun Yat-sen, 'Three Principles of the People -The Principle of People's Livelihood -First Lecture (*sanmin zhuyi minsheng zhuyi diyi jiang*)' in *Collected Works of Sun Yat-sen*, vol 9 (Zhonghua Book Company 1986), pp 391-92.
[76] Sun Yat-sen, *The International Development of China* (Putnam's Sons 1922).
[77] Sun Yat-sen, 'Three Principles of the People -The Principle of People's Livelihood -First Lecture (*sanmin zhuyi minsheng zhuyi diyi jiang*)'.
[78] Ibid.

peasantry, he held that the interests of landed proprietors should also be attended under a win-win settlement.[79]

What then was the win-win settlement Sun Yat-sen was seeking for? First of all, he borrowed the idea of single land tax from Henry George who famously claimed that:

Let the individuals who now hold it still retain, if they want to, possession of what they are pleased to call their land. Let them continue to call it their land. Let them buy and sell, and bequeath and devise it. We may safely leave them the shell, if we take the kernel. It is not necessary to confiscate land; it is only necessary to confiscate rent…In this way the State may become the universal landlord without calling herself so, and without assuming a single new function. [80]

Accordingly, Sun proposed to impose a tax over the value of land (excluding that of the improvements) with the aim to reduce land monopoly and enhance efficiency in land use.[81] What is critical here is to determine the tax base—the land value. Diverging from George, Sun made his original contribution in advising that the base land value should be reported by the owners themselves. Naturally this runs the risk of under-reporting, a problem Sun was well aware of. His second proposal was that the state retains the power to compulsorily purchase the land at the reported base value whenever necessary in the future.[82] In Sun's opinion, landowners would then report a fair base value—not too high because it is the benchmark for land value tax and not too low because it will be the price for potential compulsory purchase by the state.

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[79] Sun Yat-sen, 'Speech at the Graduation Ceremony of the First Peasant Movement Institute in Guangdong (*zai guangdong nongmin yundong jiangxi suo diyi jie biye dianli de yanshuo*)', pp 555-58.
[80] George, Book VIII, ch II.
[81] Sun Yat-sen, 'Speech at the Anniversary Celebration Ceremony of the Ming Paper in Tokyo (*zai dongjing mingbao chuangkan zhounian qingzhu dahui de yanshuo*)'; Sun Yat-sen, 'Speech to the Chinese Socialist Party in Shanghai (*zai shanghai zhongguo shehui dang de yanshuo*)'. The difference between Sun and George was that Sun did not propose to abolish other types of taxation.
[82] Sun Yat-sen, 'Speech at the Farware Party with the Nanjing United League Members (*zai nanjing tongmenghui huiyuan jianbie hui de yanshuo*)' in *Collected Works of Sun Yat-sen*, vol 2 (Zhonghua Book Company 1982), p 321.

The third measure proposed by Sun was for the state to appropriate all the increment of land value,[83] the justification of which was two-fold. On the one hand, he argued that the rise in land value should not be attributed to its private owners but to such exterior factors as urban development brought by successful revolution. Therefore, it is unjust for the individual owners to harvest all the windfall profits. On the other hand, Sun believed that nationalizing increased land value would purvey the nascent revolutionary government with the much-needed financial resource to cover the cost of public administration and services.[84] Concerning how to nationalize the increased land value, Sun suggested that land sale should be an exclusive state prerogative, making compulsory purchase the only way for the owners to alienate their land at the original reported price. This will then automatically ensure all land value increment fall into the public coffer and prevent private land owners from obtaining any unearned benefits.[85]

It is worth noting that in his final years, Sun Yat-sen came to realize the crucial importance of winning over the mass peasantry to the success of Chinese revolution and put forth the slogan of "land to the tiller".[86] On this he moved closer to the communists. But his land programme remained very distinctive.[87] Most importantly, "land-to-the-tiller" to Sun and the KMT did not involve confiscation. Rather, it was about redistributing products between landlords and tenant peasants and giving the latter a bigger share.[88] Hence the KMT's agrarian policy in mainland China was

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[83] Sun Yat-sen, 'Speech to the Chinese Socialist Party in Shanghai (*zai shanghai zhongguo shehui dang de yanshuo*)', p 522.
[84] Sun Yat-sen, 'Three Principles of the People ‐The Principle of People's Livelihood ‐Second Lecture (*sanmin zhuyi minsheng zhuyi di'er jiang*)', p 390.
[85] Sun Yat-sen, 'The Means of Introducing Local Self-Government (*difang zizhi kaishi shixing fa*)' in Yan Huang (ed), *Selected Works of Sun Yat-sen (sun wen xuanji)*, vol 2 (Guangdong People's Press 2006).
[86] Sun Yat-sen, 'Speech at the Graduation Ceremony of the First Peasant Movement Institute in Guangdong (*zai guangdong nongmin yundong jiangxi suo diyi jie biye dianli de yanshuo*)', p 555.
[87] The KMT and the CCP established the first united revolutionary front in 1924. But when asked if the nationalist party was implementing Russian policies, Sun claimed that what he appreciated about Soviet Russia was merely the organizational aspect of the revolutionary party, not the substantive revolutionary "ism" it upheld. Yongying Xu, 'Meeting Mr. Sun Yat-sen (*jian sun zhongshan xiansheng ji*)' Tsinghua Weekly (*qinghua zhoukan*), quoted in *Materials on Modern History (jindai shi ziliao)*, vol 68 (China Social Science Press 1988), pp 183-84.
[88] Sun Yat-sen, 'Three Principles of the People ‐The Principle of People's Livelihood ‐Third Lecture (*sanmin zhuyi minsheng zhuyi disan jiang*)'; Sun Yat-sen, 'Speech at the Graduation Ceremony of the First Peasant Movement

reduction of rents.[89] Overall, as Sun consciously pointed out, his policy does not topple the existing land ownership structure but only demands redistributing the rent, increased value and produce of land. This is, in his own words, "communization of the future" as opposed to the CCP's "communization of the present".[90]

It is now clear that to the CCP and the KMT the same catchphrase "nationalization of land" entailed very different assumptions, objectives and measures. In contrast to the socialist tradition, Sun insisted that "not all land should fall into state ownership and it is adequate if the state just owns what it needs."[91] When does the state need land? Three possible scenarios were put forward by Sun. First is the construction of public works such as road and market.[92] Second is for local development at a more general level. Sun envisaged that "in the future, the public authority will definitely need land for local development…inevitable is that the provincial capital will be expanded and land be taken for such development."[93] A concrete policy was also recommended to help the state to facilitate such large-scale local development, which was the separation of *de jure* nationalization from *de facto* nationalization. Sun suggested that to build an "Oriental New York City" out of Shanghai, the state might not afford to buy all the land that was needed upfront. But it could first legally nationalize all of the land it wanted without paying any compensation or actually taking up the area. The landowners can continue using the land (while losing the right to sell) until the state becomes financially capable of paying the compensation and taking physical possession of the land.

Institute in Guangdong (z*ai guangdong nongmin yundong jiangxi suo diyi jie biye dianli de yanshuo*)', p 558.

[89] It is worth mentioning that the KMT did promise to provide those landless tenant peasants with state-owned land for cultivation. However, this was never implemented when the KMT was in power in mainland China.

[90] Sun Yat-sen, 'Three Principles of the People -The Principle of People's Livelihood -Second Lecture (*sanmin zhuyi minsheng zhuyi di'er jiang*)'.

[91] Sun Yat-sen, 'Speech to Parliamentarian and Journalists at Xingyuan in Guangzhou (*zai guangzhou xingyuan dui yiyuan jizhe de yanshuo*)', pp 370-71.

[92] Sun Yat-sen, 'Speech at the Welcoming Event of the Press in Guangzhou (*zai guangzhou baojie huanying hui de yanshuo*)', p 355.

[93] Sun Yat-sen, 'Speech to Parliamentarian and Journalists at Xingyuan in Guangzhou (*zai guangzhou xingyuan dui yiyuan jizhe de yanshuo*)', p 370.

How can all this be funded? Recall that the state is supposed to compensate for compulsory purchase of land at the original reported price. This means that the state only needed to pay for the first allotment of land out of its own pocket and start to develop the area. As a result, the value of the land will generally rise. The state could then compulsorily purchase more land using just part of the now increased land price as the compensation.[94] In this way, the state can ultimately afford all the land it wants. The third scenario under which the state may find compulsory land purchase necessary would be to impose measures to stop land speculation and monopoly. Discussing developing the Chinese border regions of Mongolia and Xinjiang, Sun wrote that the state should buy up the land there and divide it into farmsteads, which would then be offered to landless tenant peasants for cultivation. The aim was to "prevent the speculators from creating the dog-in-the-manger system that is to the detriment of the public".[95]

In conclusion, diverging from the socialist tradition, Sun Yat-sen came up with his own unique programme of land nationalization. As explained, his objective is not to overturn the entire system of private landed property through confiscation, redistribution or public land ownership. Rather, it is to alleviate the negative consequences of private land ownership through a mixture of less radical measures such as land value tax, state appropriation of land value increment and potential compulsory purchase. What is widely known is that a nationalization programme of this kind had never been accepted by the CCP, which had long criticized it as reactionary. But what is less known is that in an indirect way the KMT's nationalization programme did have an impact upon the law on land requisition enacted by the CCP. It is to this we now turn.

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[94] Sun Yat-sen, *The International Development of China*, pp 34-35. In the same article, he offered a similar analysis in respect of railway construction in Guangdong: "if all the future city sites and mining lands be taken up by the Government before railway construction is started, the profit would be enormous. Thus no matter how large a sum is invested in railway construction, the payment of its interest and principal will be assured".

[95] Ibid, p 24.

2. Theories of Land Requisition: Origin and Evolution

As noted in the last chapter, the power of compensatory land requisition for public works prescribed in the 1954 constitutional takings clause originated from relevant legislations in the CCP revolutionary border areas in the 1930s. In particular, the *Land Regulation of Shan'ganning Border Region* and the *Draft Regulation on Land Rights of Shan'ganning Border Region* passed in April 1939 were the first legal documents enacted by the communist government that provided for land requisition. Despite the different terms deployed,[96] they stipulated that the government may take private land for road, military facilities, public buildings, municipal works and other undertakings in the public interest. Interestingly, since these regulations were passed under the Anti-Japanese National United Front when the communist party recognized the KMT Nanjing Government as the sole legitimate central government in China, it was explicitly stated that they were made in accordance to the basic principles of the land law promulgated by the Nanjing Government,[97] which was the 1930 Land Law of the Republic of China. Therefore, to understand land requisition in the communist revolutionary areas, perhaps somewhat surprisingly, we must first make sense of the basic principles of land requisition in the nationalist regime, the origin and evolution of which are discussed as follows.[98]

[96] Expropriation (*zhengshou*) was used in the Land Regulation of Shan'ganning Border Region (Articles 18-19) while requisition (*zhengyong*) was used in the Draft Regulation on Land Rights of Shan'ganning Border Region (Article 25). The reason behind this was unclear. But these terms shared the same meaning.

[97] Article 1, *Draft Regulation on Land Rights of Shan'ganning Border Region (shan'ganning bianqu diquan tiaoli cao'an)*; Article 1, Land Regulation of Shan'ganning Border Region (*shan'ganning bianqu tudi tiaoli*) (April 4, 1939).

[98] Different terms were used at different times to describe the power of compensatory land takings. Requisition is used here so as to be consistent with the terminology used in the original takings clause in 1954. As will be shown later, the term changed into expropriation in the late 1920s. These two terms are interchangeable in this chapter.

I. Origin of the Legal Concept of Land Requisition in Modern China

It was in the late 19th century that the legal concept of land requisition was initially imported to China. In an officially commissioned 1888 Chinese translation of the 1804 French Civil Code, Article 545 was translated that no one should be compelled to transfer his property to others unless such transfers greatly benefit the public and the owner is fairly reimbursed (*buhuan*) for the value of the property. Far from an accurate rendering[99], this was nevertheless the first introduction of compensatory land taking as a legal concept into China.[100] However, at that time no specific Chinese term was used to refer to the action of takings. Nearly two decades later, in 1907, through translating the 1900 Japanese Land Acquisition Act (*tochi shuyo ho*) into Chinese, the word "*shouyong*" (acquisition) was adopted.[101] It was picked up by the 1915 Land Acquisition Law (*tudi shouyong fa*) enacted by the Beiyang Government, which was the first-of-its-kind land takings law in China.[102]

This 1915 law is worthy of particular attention as it systematically covered the purpose, procedure, compensation and dispute resolution of land acquisition.[103] It was stipulated that with the

[99] Article 545 in French reads "Nul ne peut être contraint de céder sa propriété, si ce n'est pour cause d'utilité publique, et moyennant une juste et préalable indemnité." The typical English translation is "No one can be compelled to give up his property, except for the public good, and for a just and previous indemnity". See *The Code Napoleon, or, The French civil code* (London: Thomas Davison 1824), p 150. But it should be noted that "préalable" is better translated not as "previous" but as "prior" because the article means that indemnity must be paid in advance before the expropriation takes place, which was completely missed in the Chinese translation.

[100] Anatole Billequin (Bi Ligan), *French Statutes of Codification (faguo lvli)* (School of Combined Learning (*jingshi tongwen guan*) 1880), Part 3 "Civil Code", Article 545, cited in Ruiqing Wang, 'The Evolution of the Idea of Land Expropriation in Modern China from the Perspective of Academic Research (*xueshu shi shiye xia jindai zhongguo tudi zhengshou sixiang de yanjin*)' (2011) 10 Journal of South China Agricultural University (Social Science Edition) 108. The Qing government tasked the famous School of Combined Learning (*jingshi tongwen guan*) to translate a set of French statutes including the criminal law, civil law, civil procedural law, etc. Code Civil was translated as *minlv*, now called *minfa*. For a comparison between this earliest translation and later versions, see Guilian Li, 'Three Versions of Chinese Translations of the French Civl Code (*faguo minfa dian de sange zhongwen yiben*)' [1993] 1 Journal of Comparative Law (*bijiao fa yanjiu*) 86.

[101] *New Translated Collection of Japanese Statutes (xin yi riben fagui daquan, originally published in 1907)*, vol Vol. 6 (Shangwu Yinshuguan 2008), pp 86-109.

[102] Note that in 1913 the Interim Regulation on Land Acquisition for Railways (*tielu shouyong tudi zanxing zhangcheng*) was promulgated by the Ministry of Transportation, which was China's first ever government regulation on land acquisition. Modelled on the 1900 Japanese law, it was the prelude to the 1915 law. See Jiahua Zhu (ed) *Land Regulations (tudi fagui)* (Department of Civil Affairs of Zhejiang Province 1930), pp 485-93.

[103] *The New Compilation of Laws and Regulations of the Republic of China (zuixing bianding minguo faling daquan)* (Shanghai: Shangwu Yinshuguan 1924), pp 516-18.

approval from the President of the Republic of China and for the purpose of public interests, the central government and sub-provincial governments may compulsorily acquire land.[104] It copied Article 1 of the 1900 Japanese Land Acquisition Act to include a list of public interest items such as national defense, infrastructure development, educational and charitable enterprises as well as government buildings (Article 2). Standard of compensation is set to be the market price of the land acquired and the fixtures and crops thereon (Article 7). The amount of compensation could be negotiated, in the case of acquisition by the national government, between the initiating central governmental department and local land acquisition appraisal committee (*difang tudi shouyong pingjia hui*) comprising representatives of local officials and gentry (Articles 17 and 21), or between the local government and landowners if the acquisition is initiated at the local level (Article 18). Once the compensation is settled, the acquirer may request land conveyance within a prescribed period, during which it must also make full payment of compensation to the acquiree (Article 32). Failing to do so without good cause will void the settled agreement of acquisition and entitle the landowners to seek indemnity for any loss incurred (Article 33). If any dispute arises, landowners may choose to pursue administrative petition to the government or file suit in court (Articles 19-20, Article 36). Before any judgment is handed down, the acquirer can request urgent conveyance of land when required by the public interest, but the agreed compensation must be paid if demanded by the acquiree (Article 35).

In imposing these substantive and procedural limitations over land requisition, I argue that at a deeper level, the 1915 Land Acquisition Law should be seen as an embodiment of the classical liberal conception of land taking. For two reasons this was more of a result of foreign influence. On the one hand, as noted above, the legal concept of compensatory land takings was initially imported

[104] Articles 1 and 25, ibid.

into China by way of translating the 1804 French Civil Code, the takings clause of which actually originated from the 1789 Declaration of the Rights of Man.[105] As is well known, both of these documents are canonical texts of classical liberalism. On the other hand, also already mentioned is that China's own first legal formulation of compensatory land takings in 1915 was a transplantation of the 1900 Japanese law. As a matter of fact, the latter was a product of legal transplantation too. Specifically, the 1889 Meiji Constitution of Japan prescribes in Article 27 that "the right of property of every Japanese subject shall remain inviolate. Measure necessary to be taken for the public benefit shall be provided for by law." This was indeed an imperfect replica of Article 9 of the 1850 Imperial Constitution of Prussia, which reads "Property is inviolable. It shall only be taken or interfered with considerations of public weal, and then only in a manner to be prescribed by law, and in return for a compensation to be previously determined."[106] Apparently, the requirement of compensation for property takings was left out in the 1889 Meiji Constitution, which was widely perceived as a problem at the time but was addressed before long. The 1900 Japanese Land Acquisition Act was brought in line with the German model in requesting just compensation for land takings (Article 48).[107] As a result of transplanting the Japanese law which was itself a transplantation of German law, the earliest legal expression of land requisition in modern Chinese history found it root in the European classical liberal tradition, a brief discussion of which is warranted here.

Compensatory land takings existed in Europe since antiquity and had long been taken for granted.[108] Sophisticated theoretical discussion only emerged in the early 17th century, pioneered by

[105] Lynn Hunt (ed) *The French Revolution and Human Rights: A Brief Documentary History* (Boston/New York: Bedford/St. Martin's 1996), p 79. Article 17 reads "property being an inviolable and sacred right, no one may be deprived of it except when public necessity, certified by law, obviously requires it, and on the condition of a just compensation in advance."

[106] Wilhelm Röhl (ed) *History Of Law In Japan Since 1868* (Brill 2005), pp 207-8.

[107] Yixiong Jiang, 'On the Compesation System of Public Use Expropriation in Japanese Law (*riben fa shang gongyong zhengshou buchang zhidu zhi tantao*)' [1998] National Chung Chen University Law Journal (*zhongzheng daxue faxue jikan*) 5, pp 9-10.

[108] Susan Reynolds, *Before Eminent Domain: Toward a History of Expropriation of Land for the Common Good*

the Dutch jurist Hugo Grotius. Not only did he coin the term *dominium eminens* which later became "eminent domain" in English.[109] More importantly, he was the first to formulate a principled justification for state requisition based on a theory of the origin of private property. The reasoning can be summarized as follows. Under what he called the "primitive state"[110], people had only the use-right to what was bequeathed by God as the common possession of all men.[111] To the extent that use often amounted to using up, the original use-right did mean that the initial user could effectively exclude others.[112] But this was not private ownership in the sense of exclusive property, which according to Grotius only emerged when human beings left the idyllic primitive state characterized by abundance. Facing increasing conflicts over access to resources, people gradually found it necessary to recognize previous private possession of the common inheritance as private property, the objective of which was to secure stable and peaceful enjoyment of resources for all. This eventually gave rise to the positive legal recognition of private ownership.[113] In this sense, people surrendered their natural rights to use resources to the civil society in exchange of a more organized and thus more reliable property regime. As part of this social contract, individuals are obliged to obey the society, which has "a higher right over the property of the citizens than the citizens themselves". To Grotius, who lived in an age of absolutism, it is the sovereign state that naturally represents the entire society and thereby has the higher right over private properties than their owners, i.e. the power of requisition.[114]

(University of North Carolina Press 2010), p 85.

[109] Though it should be noted that the term had a much broader connotation in Grotius as to mean the sovereign's general right over its subjects and their property, including the right of taxation. Ibid, p 95.

[110] Later on a more famous term was coined by Thomas Hobbes—the "state of nature".

[111] Hugo Grotius, *On the Law of War and Peace (originally published in 1625)* (A. C. Campbell tr, London 1814), Book 1, ch 1, s 10. This is a common theme in natural law theories that the world exists for the preservation of mankind, which can be traced back to Thomas Aquinas. See Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Clarendon Press 1993), pp 12-13.

[112] Buckle, pp 13-14.

[113] Hugo Grotius, Book 2, ch 2, s 2.

[114] Hugo Grotius, *The Introduction to Dutch Jurisprudence (originally published in 1631)* (Charles Herbert tr, London: John Van Voorst 1845), pp 72-74.

The above justification also entails important limitations upon the requisition power. Grotius wrote that the sovereign state had the right to dispose of its subjects' property "on all occasions, where the public good is concerned". But it must repair the owners' losses at the public expense.[115] This is because for one thing, public good is the sole reason for people to enter into the organized property regime in the first place. Therefore, it must be the case that "the original framers of society intended that private interests should give way" to the public good. For another, compensation ought to be paid to the sufferers who have contributed their due proportion to the public good.[116]

Such a foundation laid down by Grotius paved the way for European theorists of subsequent generations,[117] among whom the English philosopher John Locke is most influential. In 1690 he famously wrote that the foundation of civil society is the protection of individual's natural rights of property. Only by serving the public good can government legitimately exercise authority delegated by the people to take one's property.[118] As to what is public good, different theorists used different terms. While Grotius used "public good/advantage", it was "public welfare" for the Swiss philosopher Emer de Vattel, "the necessity of state" for the German jurist Samuel Pufendorf and "public utility" for the Dutch theorist Cornelius van Bynkershoek. However, none of these terms were defined precisely and might well have meant very different things in each case.[119] Opinions also diverged on the rationale behind the requirement of compensation, on which two views are most representative. Pufendorf argued that "natural equity" requires no one to bear a greater burden than others to the public good and that whatever exceeds his just share must be refunded.[120]

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[115] Hugo Grotius, Book 3, ch 20, s 7. A similar statement can also be found in Book 2, ch 14, s 7: "it (eminent domain) must be for some public advantage, and then the subject ought to receive, if possible, a just satisfaction for the loss he suffers, out of the common stock".
[116] Ibid.
[117] William D. McNulty, 'Eminent Domain in Continental Europe' (1912) 21 Yale Law Journal 555.
[118] John Locke, *Second Treatise of Government (originally published in 1690)* (Hackett Publishing Company 1980), ch 5.
[119] William B. Stoebuck, 'A General Theory of Eminent Domain' (1972) 47 Washington Law Review 553, p 586.
[120] Samuel Pufendorf, *De Jure Naturae et Gentium (originally published in 1672)* (Charles Henry Oldfather and

Alternatively, Montesquieu suggested that as a matter of principle, individuals should not sacrifice private property to serve public interest because the latter consists in everyone having his property. If requisition must take place, individual shall be regarded "as the whole community" and be indemnified because "the public is in this respect like an individual who treats with an individual".[121]

Despite their differences, these eraly modern European theorists on property requisition were united in classical liberalism in the following three senses. First, they were primarily concerned with the protection of individuals' private property, which to them is the reason people entered into civil society and constitutes the *raison d'être* of legitimate government and law. Second, their conception of private property is both individualistic and absolute. For example, as noted above, Montesquieu advised that individual property owners be treated on a par with the whole community because public interest is no more than the sum of private interests and the collective whole has no conceptual priority over the individual. The same point was made more forthrightly by William Blackstone that in eminent domain "the public is considered as an individual, treating with an individual for an exchange".[122] On the other hand, private property was considered as absolute not in the extreme sense that it could never be outweighed in any circumstance. Rather, it is absolute for having no positive obligation imposed upon it as *a priori*. The freedom from external, especially state interference is the presumed default position and any form of intervention must be justified. Third, as a result of the previous two points, land requisition by the state was deemed an exceptional occurrence under stringent restrictions of one kind or another. For instance, Bynkershoek

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William Abbott Oldfather trs, London: H. Milford 1934), cited in Stoebuck, p 584. See also Pufendorf, *De Officio Hominis et Civis,* Tit. II, ch XV, s 4, cited in McNulty, p 560.

[121] Montesquieu, *The Spirit of Laws (originally published in 1748)* (Thomas Nugent tr, G. Bell & Sons 1912), Book 26, ch 15.

[122] William Blackstone, *Commentaries on the Laws of England in Four Books (originally published in 1753)*, vol Vol. 1 (Philadelphia: J.B. Lippincott Co. 1893), Book 1, ch 1.

insisted that public utility is the sole ground for requisition without exception.[123] Grotius argued that the state is never relieved of the burden of compensation and must fulfil such obligation whenever possible.[124]

The European considerations of private property and requisition power was dominated by classical liberalism in the 18th and 19th century, a phenomenon embodied in texts no less influential than the 1789 Declaration of Rights of Man[125], 1804 French Civil Code[126] and the 1850 Prussian Constitution[127]. As noted above, in one way or another, they had greatly influenced the ideas and legal rules of land requisition in China in the early 20th century, exemplified by the 1915 Land Acquisition Law as analyzed above. However, before long a legacy of this sort turned out to be challenging to the KMT government.

II. Evolution of the Legal Concept of Land Requisition in Modern China

Recall that under the nationalist programme of land nationalization conceived by Sun Yat-sen, the state may compulsorily purchase land at the original reported price for such objectives as public works, state-led local development and breaking up land monopoly. As promised in the Manifesto of the KMT's First National Congress in 1924, the party's land programme would be legalized through a series of statutes including one under the name Land Expropriation Law (*tudi zhengshou fa*).[128] By

[123] Cornelius van Bynkershoek, *Questions of Public Law (originally published in 1737)* (Tenney Frank tr, Clarendon 1930), Book 2, ch 15. He suggested that expropriation to gratify the pleasure of the public or for the adornment of public places is illegitimate even with compensation.
[124] Hugo Grotius, Book 3, ch 20, s 7.
[125] Apart from Article 17 the expropriation clause quoted above, Article 2 reads "The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression".
[126] The above-cited Article 545 was the takings clause. Article 544 reads "Property is the right to use and control things in the most absolute manner provided this use and control are not prohibited by the law".
[127] In addition to Article 9 which is the takings clause, Article 42 reads "The right of free disposal of the landed property is subject to no other restrictions than those of the general legislation."
[128] Milton J.T. Shieh, *The Kuomintang: Selected Historical Documents, 1894-1969* (St. John's University Press 1970), p 84.

1928, when the military campaign of the Northern Expedition ended, the demand on private land for local infrastructure building began to rise and the nationalist government felt prompted to promulgate its own takings law.[129] The state legal bureau prepared the initial draft, which had the same title as and was basically modelled on the 1915 Land Acquisition Law passed by the Beiyang government. However, when submitted to the KMT party centre for approval, the draft was significantly revised and the 1915 model was not adopted in the finalized statute enacted in July 1928.

First, the title of the law was changed into Land Expropriation Law with the term "acquisition" (*shouyong*) replaced by "expropriation" (*zhengshou*) in order to be in line with the afore-mentioned 1924 KMT party manifesto.[130] Although a technical one at the time, that change has once and for all altered the Chinese legal terminology of compensatory land takings. Second, similar to the 1915 Land Acquisition Law, the draft legislation prescribes that only the President can approve land expropriation. This turned out to be no longer practical given the increased demand of land takings for state-led local development across the country. Therefore, Article 8 of the finalized law authorized both the Ministry of Domestic Affairs and provincial governments to sanction land expropriation. Third, in terms of the purposes of land expropriation, in addition to the variety of public interest items already listed out in the 1915 law, two more were added in the 1928 law: state land expropriation can be practiced for the sake of regulating land distribution for agricultural development and the improving peasant's livelihood (Article 1). As shown by legislative records, such an expansion in the scope of land expropriation was originally intended to ensure the

[129] Yiguang Tu, *Comparative Study of Land Expropriation (tudi zhengshou zhi bijiao yanjiu)* (Taipei: Chengwen Press 1981), p 98.

[130] This was an published suggestion made by one member of the KMT's central political committee. Jiqing Zhu, 'Opinions on the Land Acquisition Law of the Central Political Committee Member Zhu Jiqing (*zhong wei zhu jiqing duiyu tudi shouyong fa zhi yijian*)' *Bank Weekly (yinhang zhoubao)* (Issue 6,1928) 52.

consistency between the expropriation law and the nationalist party's land programme, which, as noted above, conceives that the state can compulsorily purchase land not only for public works and local development, but also for preventing and speculation and monopoly.[131] Fourth, in the 1928 legislation, the standard of compensation was changed from the market value of land as prescribed in the 1915 law to the original reported land price as required by the party land programme (Article 30). Moreover, it was prescribed that the compensation should typically be paid in cash, but if the expropriation is for land redistribution or urban and rural redevelopment, at maximum one third of the compensation can be paid with government bonds (Article 37). Understandably, these changes in the standard and payment method of compensation considerably enhanced the affordability of land expropriation for the government. Last but not least, the rights of the expropriated to file administrative petition and litigation were kept in the 1928 statute. But they became significantly limited in two ways. For one thing, they were prescribed to be mutually exclusive (Articles 44-45). For another, it was stipulated that the implementation of expropriation decisions will not be suspended by any ongoing dispute resolution process (Article 46).

Taken as a whole, these changes in China's land expropriation law from 1915 to 1928 had substantially loosened the control over the state power of expropriation. While the influence from the Nationalist land programme could not be more obvious, it should not be seen simply as an example of party politics overriding legal principles. In fact, the need to legalize the KMT's land programme characterized by expansive takings power coincided with, and was to a large extent made possible by a general change in the normative foundation of takings law at that time. That is the introduction of the theory of private property as social function into China since the late 1910s,

[131] The expansion was not made in the draft but was incorporated into the finalized legislation after the party deliberation. Ibid.

which took place independently from the land policies of the Nationalist Party. As will be shown in the following text, this theory had a significant impact not only on the land requisition law enacted by the nationalist government, but also on the original constitutional takings clause in the 1954 PRC Constitution. A brief discussion of this theory is now in order.

In his 1912 series lectures titled *General Transformations of Private Law Since the Code Napoléon*, the French jurist Léon Duguit famously wrote that "property is not a right; it is a social function", a famous statement signaling a profound change in the way private property was understood in the Euro-American world.[132] This change is best illustrated when contrasted with the classical liberal theory of private property, against which Duguit launched his criticism.

As already explained, the classical liberal theory of private property, enshrined by such formative texts of western law as the 1789 Declaration of the Rights of Man of and the 1804 Code Napoleon, considers private property as individuals' natural rights and sees the *raison d'être* of government and law in protecting private property from arbitrary external interference. Duguit criticized that as both metaphysical and individualistic in an undesirable way.[133] Metaphysical because private property as natural rights cannot be made knowable through observation of the world. It is there merely a normative criterion without empirical basis.[134] Following August Comte, Duguit argued that such a notion contradicts the truly scientific method of positivism (or in his word "*realisme*") and is discredited in modern societies that have moved from metaphysical stage to positive stage.[135] The classical liberal position is undesirably individualistic because it presumes that

[132] Léon Duguit, *Les transformations générales du droit privé depuis le Code Napoléon* (2 edn, Paris: F. Alcan 1920), quoted in M.C. Mirow, 'The Social-Obligation Norm of Property: Duguit, Hayem, and Others' (2010) 22 Florida Journal of International Law 191, pp 191-92.
[133] N.B. Duguit clarified that his focus was on capitalist property (*propriété capitaliste*) rather than consumption goods (*objets de consummation*). He did not think that the ownership of consumption goods was "evolving in the socialist direction". Duguit, pp 149-50.
[134] Sheila Foster and Daniel Bonilla, 'The Social Function of Property: A Comparative Law Perspective' (2011) 80 Fordham Law Review 101, p 105. Original text can be found at Duguit, p 17.
[135] Duguit, pp 17-18. See also Martin Loughlin, *Public Law and Political Thought* (Oxford University Press 1992),

individuals exist in isolation.[136] To Duguit, this is far from an accurate description of the social reality—human beings are never isolated from one another. Instead, they are intrinsically social beings, who can only live and have always lived in societies.[137] The key feature of social reality is therefore human interdependence, not independence.[138] In this respect, Duguit was greatly influenced by his colleague and friend, the French sociologist Émile Durkheim, who is known for arguing that central to all human societies is social solidarity.[139] In Duguit's view, social solidarity or human interdependence is the "objective law" (*droit objectif*) or "rule of law" (*la règle de droit*) of society. Being descriptive and normative at the same time, it should direct and control all members of a society including the state.[140]

In this situation, the nature and purpose of the individual, state and private property as conceived by Duguit become fundamentally different from those conceptualized under classical liberalism. According to Duguit, bound by the objective law of social solidarity, individuals are by no means independent holders of natural rights and freedom—they are not the ends but means of society. Each individual has his or her reason of existence by virtue of the social work he or she does as "a cog of the vast machine which is the social body".[141] Their needs are legitimate only insofar as consistent with the need of the community and they may use their private property only to that extent as well.[142] It is in this sense that Duguit claimed that "property is no longer the subjective right of the owner; it is the social function of the possessor of wealth".[143]

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pp 107-11, cited in Mirow, p 201.
[136] Duguit, p 16.
[137] Ibid, p 18.
[138] Foster and Bonilla, p 105.
[139] Emile Durkheim, *De la division du travail social (originally published in 1893)* (Paris: F. Alcan 1922), cited in Julius Stone, *Human Law and Human Justice* (Stanford University Press 1965), p 161.
[140] Stone, pp 162-63.
[141] Duguit, p 157.
[142] Ibid, p 166.
[143] Ibid, p 158.

Correspondingly, the *raison d'être* of the state lies not in the protection of individuals' natural rights, as is suggested by classical liberal theorists. Rather, its principal responsibility is to further social solidarity.[144] It protects private property only if it fulfils its social function, thereby enhancing social solidarity. When the reverse happens, private property is to be prohibited or limited by the state.[145] Private owners can legitimately be forced to make sure that their property satisfies the needs of the community, be it a nation or a collective.[146]

It is certainly debatable to what degree Duguit's "objective law" is in itself metaphysical.[147] And it is rather difficult to see how social solidarity as a social fact can generate normative obligations for the state and individuals.[148] The more relevant point here though is what exactly the social function of private property entails. Apart from suggesting that the property owners can be compelled to put their private property into production instead of wasting or hoarding it, Duguit provided no further detail.[149] However, his theory of private property as social function did supply the KMT theorists in the late 1920s with the intellectual tool to justify the relaxation of those rather restrictive rules in the 1915 Land Acquisition Law underpinned by classical liberal values.

To be clear, Duguit's 1912 lectures were translated into Chinese only in 1935, eight years after the 1928 Land Expropriation Law.[150] However, between the late 1910s and mid-1920s, his work on the theory of property as social function had already been known to and cited by many Chinese

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[144] Léon Duguit, *Law in the Modern State* (F. and H. Laski tr, New York 1970), cited in J. W. F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford University Press 2000), p 62.

[145] Duguit, *Les transformations générales du droit privé depuis le Code Napoléon*, p 151.

[146] Ibid, pp 165-66.

[147] Han Kelson suggested that the French doctrine of *solidarité sociale* is merely a typical variant of the natural-law doctrine. Hans Kelson, *General Theory of Law and State (originally published in 1945)* (Anders Wedberg tr, The Lawbook Exchange, Ltd 2009), p 127. For relevant discussion, see Stone, ch 5.

[148] Stone, pp 162-65.

[149] Duguit stated that the consequences of absolute private property included "lands being left without cultivation, city lots without construction, vacant and unmaintained houses, and unproductive capital goods". He also wrote that legal intervention is legitimate to stop property hoarding. Duguit, *Les transformations générales du droit privé depuis le Code Napoléon*, pp 153, 163.

[150] Léon Duguit, *napolun fadian yilai sifa de putong bianqian (originally published in 1935 by Shangwu Yinshuguan)* (Diping Xu tr, CUPL Press 2003).

jurists.[151] Among them was Wang Shijie, who obtained his PhD in law from the University of Paris in 1920. He wrote in 1923 that a revolutionary idea of private property had been put forward by western legal giants such as Duguit and that countries like France, USA and Germany had all embraced this new trend of socialized property in their legislations.[152] Four years later, Mr. Wang was appointed the head of the KMT regime's state legal bureau and was put in charge of drafting the 1928 Land Expropriation Law. Absent any direct archival evidence, it is hard to pinpoint precisely what kind of impact he personally had on the draft and to what extent the theory of socialized property was consciously incorporated into the 1928 statute. What is certain, though, is the deep-level compatibility between this theory and the nationalist land programme the 1928 law was supposed to legalize. For one thing, unlike Marxism, both did not go so far as to demand overall confiscation and redistribution of land. As noted before, Sun Yat-sen believed that the driving force of history is cooperation rather than conflict, a point that would be well shared by a disciple of Durkheim's social solidarilism like Duguit. For another, seen by many Chinese jurists as the new trend dominating western legal thinking, the theory of private property as social function provided a timely justification for the KMT party-state to expropriate land for more extensive purposes than what would be acceptable under classical liberalism.

This last point could not be better illustrated than by Hu Hanmin's opening speech at the Legislative Yuan of the Republic of China as it first President in December 1928. He remarked that according to Sun Yat-sen, human beings are not independent and their rights not natural. Instead,

[151] Jiahe Zhang, 'The Changing Ideas of Ownership (*suoyouquan sixiang zhi bianqian*)' [1918] Taipingyang Journal 15; Zaorong Xu, 'The Materialization of Private Rights (*siquan zhi wuzhihua*)' [1921] Journal of Association of Legal Studies (*faxuehui zazhi*) 66; Shijie Wang, 'New Idea of the Nature of Property Rights (*caichanquan xingzhi zhi xinyi*)' [1923] Social Science Quarterly (*shehui kexue jikan*) 1; Tingrui Chen, 'New Theory of Liberty, Contract and Property Rights (*ziyouquan qiyuequan caichanquan xinlun*)' [1923] Legal Quarterly (*faxue jikan*) 465; Zhirang Zhang, 'The Evolution from Old to New Legal Principles of the World in the 19th Century (*shijiu shiji zhong shijie falv shang xinjiu liang da zhuyi zhi shanti*)' [1924] Legal Weekly (*falv zhoukan*) 5; Zhirang Zhang, 'Legal Philosophy of the French Scholar Duguit (*faru duji zhi falv zhexue*)' [1924] Legal Weekly (*falv zhoukan*) 3; Shutang Yan, 'Changing Ideas of Property (*caichan guannian zhi bianqian*)' [1925] Social Science Quarterly (*shehui kexue jikan*) 217.

[152] Wang, 'New Idea of the Nature of Property Rights (*caichanquan xingzhi zhi xinyi*)'.

they must live in societies, from which their rights are derived. Therefore, the public interests of the society, nation and state as enshrined in Sun's *Three Principles of the People* should be the highest guiding principle to any legislation adopted by the nationalist government. Individual rights are recognized and protected only to the extent that they also express public interests. In the Republic of China, citizens' private property can be compelled by law to serve the public interest, even though it is not to be abolished.[153] In this case, it was not by accident that the theory of socialized private property replaced classical liberalism to become the normative foundation of the KMT's land expropriation law in 1928.

Such a profound change was further cemented in the 1930 Land Law of the Republic of China promulgated by the nationalist government.[154] As mentioned in the beginning of this part, the legal provisions on land requisition enacted by the CCP in the revolutionary areas in 1939 were claimed to be made in pursuance to the basic principles of the 1930 Land Law. Does this mean that the CCP had then also embraced the theory of socialized private property as the normative basis for its own law on land requisition? In view of the preceding discussion, the answer should be in the negative. After all, this theory falls short of calling for a general abolition of private ownership of the means of production and is therefore but a bourgeoisie agenda. The reason that the CCP claimed to follow the 1930 Land Law promulgated by the nationalist government rested more likely with the united front it established with the KMT than a genuine commitment to the theory as such. However, it will be demonstrated below that the theory did have a signficant impact on the PRC's original constitutional takings clause, albeit most probably in an unconcious way.

[153] Hanmin Hu, *Opening Remarks at the National Government's Legislative Yuan (guomin zhengfu lifayuan kaihui ci)*, vol 1 (Secretariat of Legislative Yuan ed, Shanghai: Minzhi Publisher 1929), pp 1-12.
[154] Many of the articles on land requisition in the 1930 law were copied from the 1928 Land Expropriation Law.

In the preceding chapter, I demonstrated that the constitutional takings clause in 1954 was fundamentally power-confirming and based on the Marxist-Soviet socialist principle which equates state interest with public interest and prioritize public interest over private property. It was asked at the end of the last chapter that given its nature, why was not the takings clause simply that "the state may take private land and other private means of production"? As explained, it was most likely a creature of legal transplant from the 1949 East German Constitution. Does it then mean that the East German takings clause was also founded on this socialist principle?

Yes and no. Yes because it is well-documented that the 1949 East German Constitution, attempting to be palatable to the West for potential unification of the divided country, contained a number of provisions that would not have looked out of place in a bourgeois constitution.[155] As noted, its Article 23 is the expropriation clause and Article 24 deals with the obligation of property and prohibition of misuse of private property to the detriment of the public good. In fact, both of them came from Article 153 of the 1919 Weimar Constitution[156], which is known for replacing classical liberalism with an alternative that was none other than the theory of private property as social function. Interesting to note is that Duguit called his theory "socialist".[157]

This "socialist" theory embodied in the capitalist Weimar Constitution was brilliantly fit-for-purpose to the East German constitutional makers in 1949 who intended to write a constitution that could stride both worlds. Without a similar agenda, the Chinese constitutional makers did not incorporate into their constitution the explicit social obligation clause contained in

[155] Inga Markovits, 'Constitution Making After National Catastrophes: Germany in 1949 and 1990' (2009) 49 William and Mary Law Review 1307, p 1317.
[156] It reads "Property is guaranteed by the constitution. Laws determine its content and limitation. Expropriation may only be decreed based on valid laws and for the purpose of public welfare. It has to be executed with appropriate compensation, unless specified otherwise by Reich law. Regarding the amount of the compensation, the course of law at general courts has to be kept open in case of a controversy, unless Reich laws specify otherwise. Expropriations by the Reich at the expense of the states, communities or charitable organizations may only be executed if accompanied by appropriate compensation. Property obliges. Its use shall simultaneously be service for the common best."
[157] Foster and Bonilla, p 103.

Article 24, namely "property obliges", which was probably obscure and incomprehensible to them anyway at the time. However, as indicated by Articles 13 and 14 of the 1954 PRC Constitution, they did choose to transplant from Articles 23 and 24 of the 1949 East German Constitution both the negative and positive limitations imposed by public interest upon private property, which might well be perfectly socialist in their eyes. Indeed, when the Chinese commentators suggested in the 1950s that the constitutional takings clause had profoundly shaken the absolute sacrosanct nature of private property existing in capitalist societies[158] and that in a socialist society private property was not only rights but also generated duties and obligations to the owner[159], they were not very far from their German counterparts in 1949.

That being said, the Chinese constitutional makers in 1954 failed to notice a critical difference between the socialist principle derived from the Marxist-Soviet tradition and the theory of private property as social function. Although East Germany as a socialist country also engaged in large-scale land confiscation and redistribution,[160] the theory of social function of property has nothing to do with state ownership of production means or class struggle.[161] It is more about putting private property at the service of the community than putting it in the hands of the state or collectives. In this sense, there are essentially two kinds of socialism: while the Marxist-Soviet socialism demands public ownership of private property, the theory of socialized property calls for using private property for the public good.

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158 Liu, *Outlines of Lectures on the PRC Constitution (zhonghua renmin gongheguo xianfa jiangke tigang)*, p 80.
159 Zhang, *Essays on Constitutionalism (xianzheng luncong)*, p 41.
160 Article 24 reads "Privately-owned large estates with acreage of more than one hundred hectares are dissolved and shall be redistributed without compensation". See Ulrike Deutsch, 'Expropriation without Compensation: the European Court of Human Rights sanctions German Legislation expropriating the Heirs of "New Farmers" ' (2005) 6 German Law Journal 1367.
161 Foster and Bonilla, p 105.

3. The Common Legacy of Conflicting Theories

A broad range of theories about land takings power have been presented above, which run the ideological gamut from the radical left to the progressive centre-left and to the conservative right. On the far right end, it has been shown that the first land requisition law in modern Chinese history was grounded in classical liberalism introduced into China since the late 1800s, the core concern of which is the protection of individuals' property rights and limitation of state expropriation. On the far left end, under the socialist tradition of land nationalization, compensation-less land confiscation was seen as a revolutionary measure for the proletariat-peasantry alliance to struggle against feudal landlords and capitalists and ultimately to eliminate private ownership of all production means. Moving to the centre-left, drawing on divergent western sources such as Henry George and Léon Duguit, Sun Yat-sen and the nationalist party proposed to alleviate the evils of private ownership of land through more modest measures such as land value tax and potential compulsory purchase of land without thoroughly disrupting the existing property regime.

The differences between these theories cannot be overstated. First of all, as already shown, the same term land nationalization had very different connotations to the communist party and to the nationalist party, so much so that it has been conventionally deemed as the most crucial differentiator between their political agendas. Indeed, never did these two parties acknowledge the legitimacy of the land programme of the other side once the united front broke up and they parted their ways. Second, they conceptualized the inter-relationship between nationalization and requisition very differently. For the KMT, land requisition was designed to be one way to achieve the nationalization of land as conceived by the nationalists. On the contrary, apart from the only exception in the early

1950s when the class-based land nationalization did have a brief impact on determining compensation for requisitioning landowners of different classes, the communist party-state has always treated these two types of takings power as two distinctive activities it engages in that are separate and independent from each other.

That said, as demonstrated, the CCP did accept the basic principles of nationalist government's law on land requisition in the 1930s, which as noted above had already evolved into the theory of private property as social function by then. More importantly, with respect to the 1954 constitutional takings clause, the CCP did not only transplant the expropriation clause from the 1949 East German Constitution which is based on the same theory, but also juxtapose nationalization and requisition within the same constitutional article. This is by no means to say that the CCP consciously or intentionally gave up the Marxist-Soviet tradition for the theory of socialized property. Rather, it is to say that there is a deep underlying commonality between the two, as opposed to the classical liberal ideas of land takings which lost their currency in China since the 1920s.

To begin with, both the socialist theory and theory of socialized property resolutely reject the notion that private property is an absolute natural right of individuals, the protection of which is the ultimate goal of the state. Quite the contrary, private property, especially that of land, is regarded by both as something to be curtailed, if not completely abolished. Representing the larger community or "the laws of human history" pointing towards socialism, the party-state can and should compel private land ownership into sync with the larger scheme of things. To use Isaiah Berlin's terminology, it is not negative liberty but positive liberty that constitutes the *telos* of private property in land.[162]

In this situation, the state's taking private land is not seen as an action undertaken diffusely and occasionally for specific technical purposes such as construction of public works, as is conceived

[162] Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press 1969), "Two Concepts of Liberty".

under classical liberalism. It becomes an instrument to be used systematically and frequently in order to achieve pre-conceived plans made by the party-state such as realizing public land ownership and facilitating state-led local development. Land taking is therefore conceptualized not as an extraordinary event to be strictly limited, but an ordinary occurrence to be encouraged and guaranteed. From the perspective of landowners, since they are socialist citizens or obligated to discharge their social responsibility, dispossession by the state is neither a sacrifice nor a transaction, but an honourable duty that reaffirms and reinforces the fundamental and long-term harmony between individual interest and the common good.

Since the 1920s, as mentioned, these new ideas replaced the classical liberal counterpart to become the dominant thinking on land takings in China. An extensive discussion of the underlying reasons for that falls outside the purview of this thesis. Suffice it to say here that whilst one could argue that this was because classical liberalism of the Enlightenment in the West was too alien to the Chinese culture to be able to take root, to a larger degree, it was a testament to the famous proposition that modern Chinese history oscillated between "national salvation" (*jiuwang*) and "enlightment" (*qimeng*) where the latter consistently lost out to the urgency of the former.[163] In a time of war and crisis, the two dominant political forces in China were actually united in prioritizing national development over individual property. In spite of the differences in their specific agendas, both party-states aimed to bring systemic changes to the most critical element in an agrarian society like China—the ownership of land, for which land taking served an important tool. I call this "land takings for state-led social transformation". It is the common legacy bequeathed by the competing foundational theories of land taking in modern China.

[163] Zehou Li, 'Dual Variation of Enlightenment and Nationalism (*qimeng yu jiuwang de shuangchong bianzou*)' in *Essays on Modern Chinese Intellectual History (zhongguo xiandan sixiang shi lun)* (Beijing: Dongfang Publisher 1987).

A contemporary reader may think that as interesting as it may be in historical terms, all the above is largely a story of a bygone era. And the original constitutional takings clause in 1954 was undoubtedly a product of that era. Indeed, as the conventional wisdom in the field of Chinese law goes, the existing 1982 PRC Constitution constitutes a drastic departure from its 1954 predecessors, the former being a "Reform Constitution" whereas the latter a "Revolution Constitution".[164] After all, it is hard to disagree that the socio-political backgrounds of these two constitutional takings clauses are a world away from each other. While the 1954 one was made under a planned economy by a party-state that stressed class struggle and was about to smash private ownership, the 1982 provision came into being when the party-state decided to shift the focus of its work to developing the economy, to which private property is presumably rather crucial. Therefore, the *prima facie* case seems to be that the constitutional basis of land takings in China has been fundamentally renovated in the reform era to become more concerned with protecting private property against state interference, just as the US Fifth Amendment. But if true, that is hard to be reconciled with the fact that the central characteristics of the takings law in the 1950s have been generally preserved into the reform era until today, when the takings power remains expansive, non-participatory and unchallengeable. Facing such a paradox, one may argue that the new promise made by 1982 constitutional clause has yet to been fully embodied and delivered by the takings law thirty-odd years on. As I noted in the last chapter, this is an incorrect view. The next chapter will demonstrate that the 1982 constitutional takings clause is essentially a continuation of the historical legacy illustrated above.

[164] Yong Xia, 'Basic Theoretical Issues in China's Constitutional Reform: From 'A Reform Constitution' to a 'Constitutionalist Constitution' (*zhongguo xianfa gaige de jige jiben lilun wenti: cong gaige xianfa dao xianzheng xianfa*)' [2003] China Social Science (*zhongguo shehui kexue*).

Chapter 5 The 1982 Constitutional Taking Clause Re-examined: Old Wine in a New Bottle

This chapter re-examines the takings clause in the 1982 PRC Constitution, which has been the focus of academic attention in recent years. Two points are worth noting at the outset. First, in conventional understanding, the third paragraph of Article 10 of the 1982 Constitution is the existing constitutional takings clause. When enacted, that Article had five paragraphs which read:

Urban land is owned by the state.

Rural and suburban land is owned by collectives except for those portions which belong to the state in accordance with the law.

The state may in the public interest requisition land in accordance with the law.

No organization or individual may appropriate, buy, sell or lease land, or unlawfully transfer land in other ways.

All organizations and individuals who use land must make rational use of the land.[1]

It is not difficult to see why Article 10 is typically understood to be broader than a takings clause for dealing with other issues such as the ownership, alienation and use of land. However, for reasons that will be elaborated on in this chapter, I argue that Article 10 in its entirety is the constitutional takings clause *sensu lato* and its third paragraph is the constitutional takings clause *sensu stricto*. Second, it should be noted that the takings clause in the broad sense has undergone revision twice in 1988 and 2004. Important as these revisions are, as will be shown later, they have not altered the

[1] The Chinese version reads:城市的土地属于国家所有。农村和城市郊区的土地，除由法律规定属于国家所有的以外，属于集体所有。国家为了公共利益的需要，可以依照法律规定对土地实行征用。任何组织或者个人不得侵占、买卖、出租或者以其他形式非法转让土地。一切使用土地的组织和个人必须合理地利用土地。

structure and substance of the takings clause. Therefore, our focus is on the original version of the 1982 constitutional takings clause.

Comparing the 1982 takings clause in the narrow sense with its 1954 predecessor analyzed in Chapter 3, one finds that nationalization and compulsory purchase were removed, leaving requisition the only type of takings power explicitly mentioned in the written constitution. This change has never been picked up in the existing literature and no explanation has ever been offered. I will venture an explanation, but not until the end of this chapter. The reason behind is that only when we understand the 1982 takings clause in the broad sense can we be able to make sense of that change.

Now, if we extend our analysis to comparing the 1982 takings clause *sensu lato* with the 1954 takings clause, we will find that there is more to the story of constitutional change in this respect. First and foremost, for the first time in the PRC history, it was declared that urban land belongs to the state while rural and suburban land belongs to the collectives. Second, sale, lease and other ways of land transfer was formally prohibited by the Constitution. Third, rationality was announced to serve as the guiding principle for all land uses.

From a literary point of view, as already alluded to, it seems natural to consider these parts of Article 10 as less relevant to the power of land takings, which is provided for in the third paragraph. This is however a misapprehension. I argue that the constitutional takings clause *sensu stricto* can only be understood within the context of Article 10 as a whole and that the rest part of the Article is equally important in shedding lights on the constitutional takings power in China.

The rest of the chapter is divided into four parts. The first three parts analyze the just-mentioned three additional parts of Article 10 of the 1982 Constitution compared with Article 13 of the 1954 Constitution. On that basis, the fourth part explains the nature and purpose of the 1982 constitutional

takings clause as well as the reason why nationalization and compulsory purchase were removed. The central argument is that even though the 1982 constitutional takings clause has a very different socio-political background from its 1954 predecessor, it is in essence also part of the same tradition of land takings for state-led social transformation over the 20th century.

1. "Urban Land is owned by the State": A Reinterpretation

I. Land Ownership Clause or Nationalization Clause?

Seen from the perspective of the Marxist-Russian tradition of land nationalization, the land ownership structure specified in the first two paragraphs of Article 10 is somewhat puzzling. For one thing, as state ownership of land is a time-honored socialist mandate, why did it take over three decades for the People's Republic to constitutionalize it? What's so special about 1982? This is all the more curious given that the two highly ideological PRC Constitutions passed during the Cultural Revolution did not contain similar prescriptions and that it is usually believed that the socialist ideology is much less of an emphasis in the reform era. For another, while the socialist tradition does not differentiate between urban and rural land, why did Article 10 provide for state land ownership only in the urban area, but not the rural area?

In fact, such a land ownership regime is not only unprecedented in Chinese history but also unparalleled around the world. The natural question then is where does it come from? For reasons that will be explained later on, unlike the original takings clause in 1954, there have been a series of

scholarly works in recent years on the historical origin of the 1982 constitutional clause on state ownership of urban land, on which the following analysis draws.[2]

Before we move on, however, a few words are needed to explain the pre-1982 urban land ownership regime in the PRC. When the CCP took over the cities in 1949, it was estimated that 20% of the urban land was owned by foreign capitalists and bureaucratic bourgeoisie and 10% by national bourgeoisie. The remaining 70% was owned by small property owners.[3] Between 1949 and 1966, three different policies were applied based on the class status of the owner and land use.[4]

First, confiscation and nationalization were deployed on urban land owned by foreign capitalists and bureaucratic bourgeoisie, seen as reactionary classes in the cities.[5] Second, a relatively more moderate approach was adopted with regard to the land owned by national bourgeoisie. It was not to be immediately confiscated but to go through the socialist transformation movement, which took two forms.[6] On the one hand, with respect to their land used for industrial purposes and their land used for large-scale leasing business, public-private joint management was adopted. As already explained in Chapter 3, it was effectively nationalization without compensation, even though the original owners were allowed to retain part of the profit generated thereby until the outbreak of the Cultural

[2] Junfeng Yang, 'The Origin and Evolution of State Ownership of Urban Land in China (*woguo chengshi tudi guoyouzhi de yanjin yu youlai*)' [2011] Journal of Gansu Academy of Administration (*gansu xingzheng xueyuan xuebao*) 100; Qiren Zhou, 'The Puzzle of Nationalization of Urban Land (*chengshi tudi guoyou hua zhi mi*)' *The Economic Observer (jingji guancha bao)* (October 15, 2012); Qiren Zhou, 'Nationalization of Urban Land is the First Step in Nationalization of All Land (*chengshi tudi guoyou shi quanpan tudi guoyou diyi bu*)' *The Economic Observer (jingji guancha bao)* (October 25, 2012); Xueyang Cheng, 'The Origin of Nationalization of Urban Land (*chengshi tudi guoyou guiding de youlai*)' [2013] Yanhuang Chunqiu 35. For an earlier discussion, see Liang Fan, 'On the Procedural Problem after "Urban Land Belongs to the State" (*tan chengshi de tudi shuyu guojia suoyou hou de chengxu wenti*)' (May 22, 2001) <http://www.china-week.com/info/00612.htm> accessed June 23, 2014.

[3] Yuan Li (ed) *China's Land Resources (zhongguo tudi ziyuan)* (Beijing: China Land Press 2000), p 339.

[4] A similar approach was taken in the suburban context. See PRC Government Administrative Council. For the sake of brevity, only the urban land policies will be analyzed here.

[5] PRC Government Administrative Council, *Instructions on Confiscating the Property of War Criminals, Traitors, Bureaucractic Bourgeoisie and Counter-revolutionaries (guanyu moshou zhanfan, hanjian, guanliao zibenjia ji fangeming fenzi caichan de zhishi)* (February 4, 1951); PRC Government Administrative Council, *Provisions on Confiscating the Property of Counter-revolutionary Criminals (guanyu moshou fangeming zuifan caichan de guiding)* (June 22, 1951).

[6] CCP Central Committee, *Opinions on the Current Situation of Urban Private-owned Buildings and their Socialist Transformation (guanyu muqian chengshi siyou fangchan jiben qingkuang ji jinxing shehui zhuyi gaizao de yijian)* (January 18, 1956); State Real Estate Administration Bureau, *Report on the Socialist Transformation of Leased Private-owned Real Estate (guanyu siyou chuzu fangwu shehui zhuyi gaizao wenti de baogao)* (January 13, 1964).

Revolution. On the other hand, concerning their land used for smaller scale commercial leases above certain government-set threshold[7], the socialist transformation movement was carried out through what was called "state trusteeship" (*guojia jingzu*), which was essentially the same as public-private joint management because the state would first manage and rent out the property on behalf of the original owner and then shared 20%-40% of the rent to the owner for a limited period of time.[8] The owners were forbidden to withdraw from the trusteeship and were deprived of their ownership. Third, the land owned by national bourgeoisie used for renting below the set threshold and the land owned by small property owners used for their own residential uses were left intact.

Yet before long this three-pronged policy was abandoned from the outset of the Cultural Revolution. In 1967, several central ministries jointly proclaimed that all urban land, regardless of owner or usage, shall be indiscriminately nationalized.[9] In reality, private land and houses of millions of urban residents across the country were confiscated, oftentimes in spontaneous and unauthorized raids by the Red Guards. For instance, it was reported that about 50,000 privately owned or rented houses of 7,650,000 ㎡ was taken from their original owners in Beijing alone during the Cultural Revolution, amounting to over 1/3 of the houses in the city.[10]

That said, by the time when the Constitution was passed in December 1982, private ownership of urban land remained extant in China. In other words, not all private urban land had been nationalized over the course of the Cultural Revolution. This was confirmed by the 1978 PRC Constitution,

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[7] Different thresholds were stipulated as to different cities. Overall, it was set at 50 ㎡ for small cities and towns, 100 ㎡ for middle-sized cities and 150 ㎡ for big cities. Zhou, 'The Puzzle of Nationalization of Urban Land (*chengshi tudi guoyou hua zhi mi*)'.

[8] In practice, the payment of rent to the original owners stopped in 1967. Ibid.

[9] *Record of the Reply from State Real Estate Administration Bureau, National Taxation Bureau of the Ministry of Finance on the Nationalization of the Land in Cities and Towns (guojia fangguanju, caizhengbu shuiwu zongju dafu guanyu chengzhen tudi guoyouhua qingshi tigang de jilu)* (November 4, 1967).

[10] Beijing Municipality People's Government, *Provisions on Implementing the Policies on Private Houses Taken Over during the Cultural Revolution (luoshi wenge zhong jieguan de sifang zhengce de ruogan guiding)* (March 11, 1983).

passed two years after the Cultural Revolution ended, which provided in Article 6 that the state may nationalize urban land. If all urban land were already nationalized by then, there would have been no point to make such a prescription. In addition, a more explicit confirmation could be found in a central ministerial document published in March 1982, in which the State Bureau of Urban Development urged to carry out the examination and affirmation of land ownership in the urban area, including private land ownership by individual citizens.[11] In this situation, one may wonder: why was it announced just few months later in the 1982 Constitution that all urban land is owned by the state?

The answer is to be found in the legislative process of the 1982 Constitution that began in September 1980, marked by the setting up of the Constitutional Amending Committee (hereinafter the CAC). In the two constitutional drafts prepared before March 1981, there was no prescription on land ownership structure. In March 1981, the Secretariat under the CAC proposed for the first time that a clause on "land ownership by all people and land ownership by the collectives" should be introduced into Chapter 1 or General Principles of the Constitution. It was felt at the time that since land is a kind of means of production and natural resource of immense importance, the ownership of it should be prescribed in the Constitution, an issue left unspecified in all previous Constitutions in 1954, 1975 and 1978.[12] By the end of 1981, the land ownership clause as we know today had been written into the draft constitution. In December that year, vice chairman of the CAC Peng Zhen, who was in charge of constitutional drafting at the time remarked that although land ownership system in China had not been explicitly provided for in the Constitutions and laws in the past, urban land had always been treated as owned by the state and rural land owned by the collectives, which just

[11] State Bureau of Urban Development, *Provisional Rules on Administration of Property Rights and Registry of Houses and Land in Cities and Towns (guanyu chengshi zhen fangdichan chanquan chanji guanli zanxing guiding)* (March 27, 1982).
[12] Cheng, 'The Origin of Nationalization of Urban Land (*chengshi tudi guoyou guiding de youlai*)', p 38.

became overtly stipulated by the Constitution this time.[13] Similarly, according to the explanatory note on the draft constitution published by the CAC Secretariat in February 1982, the land ownership clause was "a reflection of the actual conditions" in China.[14] In light of this, it appears that the ownership clause is no more than the constitutional entrenchment of a pre-existing fact.

However, this could not possibly be the case given what has been demonstrated above—private ownership of urban land was allowed in the PRC between 1949 and 1966 and still existed even after the Cultural Revolution at the time of constitutional drafting. Were the constitutional makers simply ignorant of this fact? In fact they were not. As shown by the legislative records on the draft land ownership clause between February and April in 1982, they were fully aware that there was still privately owned urban land but nevertheless made a conscious decision to declare that all urban land belongs to the state.[15]

Two competing viewpoints emerged from their deliberation on the draft land ownership clause. One criticized it as inadequate for leaving rural land in the hands of the collectives. It was recommended that the Constitution should stipulate all land to be owned by the state while the peasant collectives retain just use-rights over rural land.[16] The central concern for the proponents in this camp was that collective ownership of rural land would constitute a serious obstacle to state-led non-agricultural construction and development. For instance, the then Vice Chairman of the Chinese People's Political Consultative Conference Rong Yiren suggested it to be very problematic for causing the state difficulties to open up mines, build army horse-breeding farms, extract oil and so on. Geng Biao, Minister of National Defense, remarked that since all military airports of the air force

[13] Ibid.
[14] Chongde Xu, *The Constitutional History of the PRC (zhonghua renmin gongheguo xianfa shi)* (Fujian People's Press 2003), p 619.
[15] The detailed records can be found in ibid, ch 18.
[16] Ibid, pp 645, 680.

and the navy were built in suburban and rural areas, the Constitution should not set up a land ownership regime that hinders future state-led construction.[17] Similar concerns were voiced by others that collective ownership of rural land would spawn disputes when the state needs to take rural land to establish satellite cities, exploit natural resources, develop new ports, etc.[18] In this regard, the most illustrative comment was made by Fang Yi, Chairman of the State Scientific and Technological Commission:

> *The contradiction between these two kinds of ownership is increasingly intensified and severe. The state enterprises and undertakings need to be developed, which requires land. But land is limited. Collective ownership of suburban and rural land becomes a way for [the rural collectives] to rip off the state and make a windfall. For one mu of land, ten thousand yuan was demanded. By selling the land the production teams can secure their members a good life for this generation and the next two, who don't have to work anymore. Although the draft Constitution prescribes that no organization or individual can sell the land, [a rural collective] can still do so in disguised forms by setting conditions [for them to accept state land takings] such as running factories which recruit the peasants to become workers and provide for them for life…the national fiscal expenditure becomes a bottomless pit…If this continues, it will enrich the peasants at the expense of the entire population, making the contradiction even more intense.*[19]

It should be noted at this point that the above concern was not ungrounded. At the 1980 and 1981 sessions of the National People's Congress prior to the one in which the 1982 Constitution was passed, multiple motions were put forth that a piece of legislation on land requisition should be

[17] Ibid, p 637.
[18] Ibid, p 680.
[19] Ibid, pp 644-45.

promulgated to tackle the widespread problem of hold-out by rural collectives against state land requisition by demanding unreasonable compensation from state-owned enterprises, coal mines and the army.[20] In fact, as early as in 1956, Mao Zedong made the following comments:

> *A few years ago, there was an airport to be built in a locality of Henan province. No resettlement was granted to the peasants and the government did not negotiate with and explained clearly to them. But it attempted to evict the people forcefully. As the peasants of that village said, if you used a stick to topple down the bird nest to the earth, the birds would voice out…The people of that place set up three defense lines... Those sent there to survey was forced away. The peasants won the battle. Later on, the government explained to the peasants clearly and made arrangements for them. They moved their homes and the airport was built finally. There are many incidents like this…The people oppose them [the cadres] by throwing stones to them and beating them with hoe. The cadres deserve it. I welcome it...The Communist Party should learn its lesson.*[21]

Ironically but perhaps unsurprisingly, this shows that right from the beginning the socialist principle introduced in Chapter 3 had not always been followed in practice. Unlike what was portrayed in the 1955 book noted in that chapter, it was more often the case that the peasants did not regard being expropriated by the state as a glorious duty to embrace but actively refuse to accept it, at least not without satisfactory compensation and resettlement. When the CCP decided to change its priority from class struggle to economic development at the dawn of the reform era, the

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[20] Secretariat of the Third Session of the Fifth PRC National People's Congress (ed) *Motions and the Review Comments of the Third Session of the Fifth PRC National People's Congress (zhonghua renmin gongheguo diwu jie quanguo renmin daibiao dahui disan ci huiyi ti'an ji shencha yijian)* (1980), pp 408, 469; Secretariat of the Fourth Session of the Fifth PRC National People's Congress (ed) *Motions and the Review Comments of the Fourth Session of the Fifth PRC National People's Congress (zhonghua renmin gongheguo diwu jie quanguo renmin daibiao dahui disi ci huiyi ti'an ji shencha yijian)* (1981), p 1838. Strictly speaking, there was a national legislation on this front, i.e. the 1958 Measures on Land Requisition for State-led Construction which was never formally repealed. Most likely it had just lost effectiveness during the Cultural Revolution.

[21] Mao Zedong, *Selected Works of Mao Zedong*, vol 5 (People's Press 1977), p 325.

contradiction between state-led non-agricultural development and collective ownership of rural land became intensified. In order to reduce the peasants' resistance and facilitate state-led non-agricultural construction and development, the need was more keenly felt to constitutionalize the state ownership of all land. This is why although land nationalization is a long-standing socialist mandate, only through the 1982 Constitution was it eventually enshrined constitutionally.

The alternative view accepted the draft ownership clause, arguing that rural land had best stay in the hands of the collectives. As noted, this is in contradiction to the Marxist-Russian tradition of indiscriminating nationalization. But three very practical considerations were raised. First, it was suggested that nationalization of rural land would not alleviate or resolve the holdout problem because taking state-owned land requires compensation too. Yang Shangkun, Vice Chairman of the Central Military Commission, noted that even if all land becomes state-owned, the disputes over land takings will not go away. For instance, while urban land was owned by the state, there were still households holding out in Tianjin and Beijing.[22] Second, the concern was expressed by Yang Xiufeng, Vice Chairman of the Legal Affairs Commission of the National People' Congress, that nationalization of rural land should not be done before the following issues are thought through: how will the state-owned rural land be administered? By whom? Who may use it?[23] Third and most importantly, the two leaders of the CAC Secretariat, Hu Qiaomu and Peng Zhen were both of the view that to nationalize rural land which had been owned by the peasant collectives would produce unwanted shock on the part of the peasant population, who had followed the lead of the CCP and

[22] Xu, *The Constitutional History of the PRC (zhonghua renmin gongheguo xianfa shi)*, p 681. Hu Qiaomu and Peng Zhen shared this view. Ibid, pp 666, 681.
[23] Ibid, p 681.

fought very hard for land rights. To prescribe that urban land belongs to the state in the Constitution was therefore a transitional first step necessary to minimize disruption.[24]

It is interesting though to note that throughout the entire deliberation process of the 1982 Constitution, no opposition was ever voiced against constitutionalizing state ownership of urban land. As already hinted, this was not because the constitutional makers believed that all urban land had already fallen into the hands of the state. Quite the contrary, the then head of the Supreme People's Court Jiang Hua clearly pointed out in April 1982 that in the cities those real estate holdings that had gone through socialist transformation were very different from those that had not. The distinction (between privately owned urban land and that owned by the state) would vanish if all urban land is pronounced to be owned by the state.[25] His concern was never echoed over the constitutional deliberation process. But we can confidently infer that the 1982 land ownership clause was not a result of the constitutional makers' misperception of the *status quo* at the time, but was intended to be a partial nationalization, which was one step back from the more radical full-scale nationalization due to very pragmatic reasons just explained. It is in this sense that I consider it to be a nationalization clause and part of the constitutional takings clause *sensu lato*, as much as it is a clause about land ownership structure.

II. The Contested Legitimacy of the 1982 Nationalization Clause

The legitimacy of the 1982 nationalization clause has been subject to debate in recent years, on which there are two conflicting views. The mainstream position is that it has very dubious legitimacy.

[24] Ibid, pp 666, 681-82.
[25] Ibid, p 681.

First, as mentioned above, since overall nationalization of urban land was initially pronounced during the Cultural Revolution, which had already been dismissed as a national disaster by the CCP itself in 1981, it was suggested that the 1982 Constitution should not have constitutionalized the legacy of the Cultural Revolution.[26] Moreover, without paying any compensation to or even consulting those affected, and in the absence of any statutory basis, the state had no right to simply "declare away" their private property in urban land.[27] A third argument is that private urban land used for residential purposes should be categorized as the means of subsistence, not means of production. As noted in the last chapter, socialism is tolerant of private ownership of the subsistence means, which shall not be nationalized.[28] The opposing minority view is that it is legitimate because it was an exercise of the constitutional amending power. As long as it is done following lawful procedures, which was the case in 1982, it can abolish private ownership of urban land.[29]

I am in favour of the minority view, but for a different reason. Of course it was by amending the previous Constitution that the 1982 Constitution nationalized all the urban land, including what was previously in private hands. But to say that just scratches the surface of the issue and has at best verified the formal legality, not substantive legitimacy of the nationalization clause. On a more fundamental level, I argue, it was an exercise of the inherent power of the party-state—the power of nationalization to achieve its projected social transformation. It is therefore essentially the same as the land reform movement and the socialist transformation movement. To be sure, this is not to say that it was an exact repetition of history. First and foremost, the specific goal in 1982 was no longer

[26] Cheng, 'The Origin of Nationalization of Urban Land (*chengshi tudi guoyou guiding de youlai*)', p 41.
[27] Yang, 'The Origin and Evolution of State Ownership of Urban Land in China (*woguo chengshi tudi guoyouzhi de yanjin yu youlai*)', p 105; Zhou, 'Property Rights on Rural Land and the Land Acquisition System: A Critical Choice for China's Urbanization (*nongdi chanquan yu zhengdi zhidu: zhongguo chengshihua mianlin de zhongda xuanze*)', p 197.
[28] Zhou, 'The Puzzle of Nationalization of Urban Land (*chengshi tudi guoyou hua zhi mi*)'.
[29] Rui Zhang, 'The Basis of the Legitimacy of the Land Ownership Clause of the 1982 PRC Constitution: Analysis based on Theories of Social Justice and Market Economy (*ba'er xianfa zhong tudi suoyouquan tiaokuan de zhengdangxing jichu: jiyu shehui zhengyi yu shichang jingji lilun de fenxi*)' (2013) 19 Rule of Law and Social Development (*fazhi yu shehui fazhan*) 90, p 91.

systematic renovation of the ownership structure in the society but non-agricultural development. Second, unlike the two previous revolutionary movements, nationalization in 1982 did not involve any extensive national campaign. While the former may be called "nationalization by campaign", the latter is "nationalization by declaration". Third, different from the socialist transformation movement which was explicitly provided for in the 1954 Constitution, nationalization in 1982 was not mandated by any written constitution. Fourth, having no statutory basis, it differed from the land reform movement that was underpinned by the 1947 Outline Land Law of China and the 1950 Land Reform Law. Fifth, the 1982 nationalization covered all urban land, including that used for household residence. It therefore went further than the socialist transformation movement in the 1950s, which as mentioned above covered only the land for commercial lease while leaving that for household residence intact.

Nevertheless, none of the above differences makes nationalization by declaration in 1982 any less legitimate than those revolutionary movements that preceded it. First, the change in the content of the party-state's social transformation project did not alter the fact that nationalization served a means to accomplish just that. Second, without going through extensive national campaign, private ownership of urban land was nevertheless not simply "declared away" in 1982. The draft Constitution containing the nationalization clause was published for public consultation from late April to August that year, which engaged millions of people. It was recorded that within two month of its publication, 1538 letters of comments and suggestion on the draft Constitution were sent to the CAC Secretariat, some of which were about the land ownership/nationalization clause.[30] Third, the land reform movement was not constitutionally mandated and the socialist transformation movement was carried out according to party policies and orders instead of statutes. Anyone familiar with the

[30] Xu, *The Constitutional History of the PRC (zhonghua renmin gongheguo xianfa shi)*, p 719.

CCP history understands that this is a long-standing characteristic of the political culture and practices of the Party.

Fourth, it should be highlighted that the 1982 nationalization clause was anything but a legacy of the Cultural Revolution. To start with, it was by no means intended to be an extension of the Cultural Revolution. During the deliberation, the framers of the Constitution never even mentioned about the Cultural Revolution. Furthermore, in view of the discussion in the last chapter, it is clear that nationalization of land has always been a socialist imperative and inherent power of the communist party-state, which was anything but an invention of the Cultural Revolution. All that the 1982 nationalization clause did was to constitutionalize this power, not for ideological but very practical reasons.

Last but not least, in Marxist theory land has always been deemed the quintessential example of production means. The Communist Manifesto made no distinction between land as a means of production and land as a means of subsistence but calls for abolishing private property in land generally. In China, the 1954 Constitution (Article 13), 1975 Constitution (Article 6) and 1978 Constitution (Article 6) have all classified land as a kind of production means. To be sure, land can be and has been used for non-productive purposes such as household residence, which is undoubtedly a kind of subsistence means in Marxian terms. But this confirms rather than repudiates the notion that land is in essence a subject of labour, i.e. a kind of means of production, on which human labour creates the means of subsistence—the household residence.[31] In fact, the reason that the socialist transformation movement did not nationalize urban land used for household residence

[31] In 1979, the central authority openly acknowledged that residential houses of the members of rural collectives are means of subsistence and should be owned by the members of the collectives. It did not say that land used for such houses is owned by the members. State Construction Committee and others, *Report on the National Conference on the Work of Rural Housing Construction (quanguo nongcun fangwu jianshe gongzuo huiyi de tongzhi)* (March 14, 1980).

was not that such land was seen as a means of subsistence. In 1949, an article in the People's Daily—the official newspaper of the CCP suggested that private ownership of urban residential land should be treated in a different manner from rural land. While the latter is the basis for feudal exploitation, the former is of a capitalist nature. The reason is that unlike rural land, urban housing is not a thing of nature but the produce of human labour which demands investment. At that time the Party was very concerned if the experience of rural land reform were to be repeated in the cities and all urban residential land became nationalized, it would significantly reduce the incentive for people to invest in urban housing and further exacerbate the already serious housing shortage in Chinese cities.[32] Therefore, to limit the socialist transformation movement to land for commercial leases was but a practical expediency, which is unlikely to last in the long run. Indeed, as was made clear in that same People's Daily article in 1949, all urban housing ought to be deemed as property of the entire society, over which the state should provide proper stewardship so as to ensure that urban housing increases and no one faces difficulty in finding a place to live. This would then lay down favourable conditions for eventually realizing public housing ownership under socialism in the future.[33]

All in all, nationalization in 1982 should be at least as legitimate as the land reform and socialist transformation movements. If one is to challenge the legitimacy of the former, it is logical for him or her to also challenge the legitimacy of the latter. In theory this is of course possible. Yet thus far none of those who have questioned the legitimacy of the 1982 nationalization clause has done so. Nor are they likely to if asked. My reason is that their real concern is less about what kind of judgment should be passed on the 1982 nationalization clause as a historical event than on the structural challenge it poses to the public interest requisite of land expropriation today. As noted in Chapter 1,

[32] 'On the Nature and Policy of Urban Real Estate and Lease (*guanyu chengshi fangchan fangzu de xingzhi he zhengce*)' *People's Daily* (August 11, 1949).
[33] Ibid.

the constitutional prescription that "urban land is owned by the state" effectively makes it impossible to guarantee the public interestedness of expropriation because expropriation is necessitated whenever rural land is converted into urban land. It is due to such apparent contemporary significance that the 1982 nationalization clause has received much more academic attention than the 1954 constitutional takings clause. In order to revolve this "urbanization challenge" to the public interest prerequisite, many scholars have proposed to abolish or radically re-interpret the 1982 nationalization clause by denying its legitimacy.[34]

While echoing their concern, I disagree with the suggested solution. I argue that the urbanization challenge can be tackled without going so far as to reject the legitimacy of the 1982 nationalization clause. As will be shown by the following analysis, the 1982 nationalization clause actually does not necessitate state expropriation when rural land is converted into urban land. The widely perceived urbanization challenge is more apparent than real and it is a prevalent myth derived from misreading the 1982 nationalization clause. Now is the time to set the record straight.

III. The Legacy of the 1982 Nationalization Clause

(1) Defining "Urban Land"

As early as in 1982, when the draft Constitution was published for public consultation, an official from Hunan cautioned that "urban land belongs to the state" was "not easy to explain clearly and

[34] Cheng, 'Chinese System of State Ownership of Land from a Public Law Perspective (*gongfa shijiao xia de zhongguo guoyou tudi zhidu*)', p 20; Zhenyuan Zheng, 'Urban Land should not only be Owned by the State (*chengshi tudi ying bujin shu guojia suoyou*)' October 15, 2012 <http://finance.jrj.com.cn/opinion/2012/10/15185714515992.shtml> accessed August 1, 2014; Jiming Cai, 'The Top-level and Systematic Design of China's Land System Reform (*woguo tudi zhidu gaige de dingceng he xitong sheji*)' [2013] Economic Review (*jingji zongheng*); Xueyang Cheng, 'On the Constitutional Interpretation of "Urban Land Belongs to the State" (*lun chengshi tudi shuyu guojia suoyou de xianfa jieshi*)' (2014) 115 Rule of Law and Social Development (*fazhi yu shehui fazhan*) 169.

difficult to enforce". This is because first, the boundaries of existing urban areas are constantly changing due to urban expansion. Second, sometimes it is difficult to have a clear-cut demarcation between the urban and the suburban areas. Third, more and more counties and towns will be recognized as cities in the future. Will their land then be nationalized as a result?[35] Two questions are raised here. How is "urban land" defined and demarcated? What practical implications does the 1982 nationalization clause have on urban land? Interestingly and strangely enough, these questions were not answered by the constitutional makers. Let's look at them one by one.

No authoritative explanation has been provided directly on what it means by "urban land" (*chengshi tudi*) in the 1982 nationalization clause to date. We must therefore find alternative ways to arrive at a sound definition. On this front the official interpretation of the 1998 LAL published by the National People Congress (hereinafter the NPC) proves valuable. It suggests that the prescription about urban land in Article 6 of the 1986 LAL is completely in line with that in the 1982 nationalization clause. Moreover, notwithstanding minor adjustments, Article 8 of the 1998 LAL is essentially the same as Article 6 of the 1986 LAL.[36] In light of this, the NPC's interpretation of Article 8 of the 1998 LAL is the most reliable proxy at hand to define the term "urban land" in the 1982 nationalization clause.

Following the suit of Article 6 of the 1986 LAL, Article 8 of the 1998 LAL prescribes that land in the urban districts of cities (*chengshi shiqu de tudi*) is owned by the state. The question of defining "urban land" thus becomes one of defining "land in the urban districts of the cities". To start with, what is a "city"? The NPC interpretation suggests that according to the first clause of Article 3 of the 1989 Urban Planning Law, the term "city" stands for a municipality directly under the central

[35] Xu, *The Constitutional History of the PRC (zhonghua renmin gongheguo xianfa shi)*, p 721.
[36] Yaowu Bian (ed) *Explanation of the PRC Land Administration Law (zhonghua renmin gongheguo tudi guanli fa shiyi)* (Beijing: Law Press 1998), p 59.

government (*zhixia shi*), a prefecture (*shi*) or a town (*zhen*) established as one of the administrative divisions of the state. Moreover, what is an "urban district"? The NPC interpretation explains that the present law offers no precise definition. But in practice it is typically understood to be the "built-up area" (*jiancheng qu*) of the cities.

Three points are worth noting about these definitions. First, the designation of a city in China is intrinsically an administrative decision. While the State Council has the authority to legally recognize a particular locality as a municipality directly under the central government or a prefecture, the provincial governments may do so in respect to a town.[37] In this circumstance, "city" in the 1982 nationalization clause is not about the social-economic characteristics of a particular locale but its administrative classification. Second, precisely because of the previous point, an administratively designated city in China usually contains within its boundary not only a smaller city proper but also a larger suburban and rural area in social-economic terms. This is why the term "urban land" in the 1982 Constitution needed and was indeed further specified by the 1986 and 1998 LAL to be "land in the urban districts of cities" as these two terms are not interchangeable with each other and the latter is narrower than the former. Third, as acknowledged by the NPC, an "urban district" is conventionally regarded as the "built-up area" of a city. But when is an area "built up"? According to the national standard of planning terminology in China, "built-up area" refers to the area within a city's administrative jurisdiction that is actually developed and covered with urban public service facilities and infrastructures.[38] It is arguably the best proxy of a truly urbanized area inside a city that can avoid the distortion of administrative classification.[39]

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[37] Articles 4-5, State Council, *Rules on Administration of Administrative Division (guanyu xingzheng quhua guanli de guiding)* (January 15, 1985).
[38] 3.0.6, Ministry of Construction, *Standard for Basic Terminology of Urban Planning (chengshi guihua jiben shuyu biaozhun)* (August 13, 1998).
[39] George C.S. Lin, *Developing China: Land, Politics and Social Conditions* (Routledge 2009), p 15.

Apparently, the scope of urban land defined in the above manner is constantly changing because existing cities expand and new cities are established. Under the Chinese urban planning system, urban planning is supposed to precede and guide the actual development of a city. Before a certain area is actually developed and thereby turned into an urban built-up area, it should first be earmarked in the city's urban planning scheme as an "area under planning control" (*guihua kongzhi qu*). Simply put, today's built-up area is yesterday's area under planning control and the area under planning control today will become a built-up area tomorrow. Therefore, from a dynamic point of view, urban land takes two forms: while the built-up area is the actual urban district, the area under planning control is the potential urban district. Combined together, these two are called the "planned urban areas" (*chengshi guihua qu*) of a city.[40] In this sense, "urban land" in the 1982 nationalization clause refers to the land in the planned urban areas, including both the already developed land and the land expected to be developed according to urban planning. The next question is: What implications does the 1982 nationalization clause have on such land?

There are indeed two dimensions to this question. One is its impact on urban land existing at the time when the 1982 Constitution came into effect (December 4 1982). The other is its impact on urban land coming into shape after the 1982 Constitution became effective. Let me analyze them one by one.

[40] Article 29, 1984 Urban Planning Regulation; Article 3, 1989 Urban Planning Law; Article 2, 2007 Urban and Rural Planning Law.

(2) Impact on Urban Land in Existence by the 1982 Constitution

In view of the definition just given, urban land existing by the time when the 1982 Constitution became effective might be in two forms. Broadly speaking, it included the land in both the built-up areas and the areas planned for future development of the cities at the time. Narrowly speaking, it included only the built-up areas in existence by then. For two reasons I suggest that the narrow definition should prevail here. On the one hand, urban planning stopped during the Cultural Revolution in China.[41] It was only in 1980 that the Central Party and State Council urged all cities in the country to make their own urban master plan by 1982.[42] Yet most cities had not finished making their plans until 1986.[43] Therefore, by the time when the 1982 Constitution was enacted in December of that year, the majority of Chinese cities were yet to develop an urban master plan. For example, Beijing had its urban master plan approved only in July 1983. Shanghai had its plan approved even later in 1986. This means that in those cities without an urban master plan, there was no area under planning control at all. On the other hand, there were admittedly a number of cities whose urban master plans were approved by the end of 1982. For example, the urban master plans of Shenyang, Hefei and Changsha were approved by the State Council before the enactment of the 1982 Constitution. But the reality is that land in the areas under planning control specified in these plans is not nationalized as a consequence of being so earmarked by the urban plan. In this situation, it is fair to say that urban land existing by the time when the 1982 Constitution came into effect refers to the land in those already developed areas in the cities.

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[41] Zongbo Tan, *Introduction to Urban Planning and Design (chengshi guihua)* (Tsinghua University Press 2005), p 412.
[42] State Council, *Minutes of the National Conference on the Work of Urban Planning (quanguo chengshi guihua gongzuo huiyi jiyao)* (December 9, 1980).
[43] Tan, p 413.

The question then is: what kind of impact did the 1982 nationalization clause have on such land? A consensus has now been reached that while it did convey the ownership of the previously privately owned urban land to the state, it did not immediately deprive the original owners of their possession or use-rights. In other words, their occupation and use of the land was completely uninterrupted by the 1982 nationalization clause. This is understandable because it was intended to be a transitional measure to minimize disruption. To a large extent this also explains why there was hardly any objection against or fuss about it at the time.[44] As a matter of fact, it went on without any legal endorsement for more than a decade. In 1989, the State Bureau of Land Administration prescribed that those who lawfully use the state-owned land via inheriting or accepting as gifts the buildings over such land should be seen as having the use-rights to such land.[45] However, this did not directly address the question what kind of rights the original owners have since the 1982 Constitution nationalized the urban land they previously owned. A more direct answer was given by the State Bureau of Land Administration in 1990, when it suggested in an internal reply to the Supreme People's Court that "after the 1982 PRC Constitution prescribes that urban land belongs to the state, citizens should naturally enjoy the use-rights over the urban land they originally owned".[46] It was in 1995 that a formal legal endorsement finally came: "Those who had used private land through buying houses or land or renting land before public ownership of land was implemented and has continued to use such land after the nationalization to date should be seen to have the use-rights of the now state-owned land".[47] In view of this, nationalization in 1982 was much less intrusive upon

[44] The only exception indicated by the available historical archival material is that an ordinary citizen from Beijing named Wang Yongquan wrote to the CAC Secretariat, commenting that the household residential plots should belong to the individuals rather than the state. Eventually his suggestion never sparked any discussion or debate, let alone being taken on board. Xu, *The Constitutional History of the PRC (zhonghua renmin gongheguo xianfa shi)*, p 721.
[45] Article 15, State Bureau of Land Administration, *Opinions on the Issue of Determining Land Rights (guanyu queding tudi quanshu wenti de ruogan yijian)* (July 15, 1989).
[46] State Bureau of Land Administration, *Reply on the Ownership and Use-rights of Urban Household Residential Plots (guanyu chengshi zhaiji di suoyouquan shiyong quan deng wenti de fuhan)* (April 23, 1990).
[47] Article 28, State Bureau of Land Administration, *Provisions on Determining Land Ownership and Use-rights*

private property than the land reform movement or the socialist transformation movement characterized by immediate or shortly delayed dispossession of the land owners.

Nevertheless, this is not to say that the impact of the 1982 nationalization clause was merely nominal, which can be best understood with reference to the distinction between *de jure* and *de facto* nationalization first conceptualized by Sun Yat-sen. As explained in the last chapter, *de jure* nationalization means that the state acquires the legal title of land from its original owners without paying compensation or taking physical possession. As far as the use of land is concerned, it is business as usual. But once losing the title, the original owners can no longer sell the land. Up to this point the CCP's nationalization in 1982 is basically the same as Sun's plan. The two diverge when it comes to *de facto* nationalization, i.e. the state taking possession of the land. While Sun Yat-sen suggested that the state pays for the *de facto* nationalization with revenues generated from the increased value of the land it previously took, the CCP party-state does not pay for the land at all. This is because taking the nationalized land from its original owners is no longer expropriation of land ownership but withdrawal of the use-rights over urban state-owned land. As noted in the last chapter, following the Soviet model, withdrawal of state-owned land has been non-compensable in China since the 1950s and the original owners are compensated only for their private property above the land such as houses. No official justification has ever been proffered for such a policy. Yet an illuminating parallel may be drawn from the Soviet law, which denied compensation for state-owned land withdrawal for the reason that land tenure was a gratuitous right assigned free of charge by the state under a fully nationalized land system. Similarly, the original owners' continuous possession and use of their land after the 1982 nationalization clause are not seen as a residual extension of their previous ownership but a gratuitous benefit bestowed by the state free of charge. Therefore, no

(queding tudi suoyouquan he shiyong quan de ruogan guiding) (March 11, 1995).

compensation is supposed to be paid when the state merely take back what it ought to possess in the first place. It should be noted though that as mentioned before, since the late 1980s the use-rights of state-owned land did become transferrable with payment for a specified period of time. In this situation, the 1994 Urban Real Estate Administration Law (Article 19) and the 2007 Property Law (Article 148) prescribe that if the state is to withdraw the transferred use-rights before the lease expires, it should compensate for the remaining use-rights or refund the land-user with the rest part of the land transfer fee. However, apparently the private owners of urban land prior to 1982 did not obtain their use-rights of the nationalized land from paid transfer. Consequently, they are not to be compensated for such use-rights. In this circumstance, by making takings of urban land less costly, the 1982 nationalization clause does achieve its intended purpose of facilitating state-led construction.

(3) Impact on Urban Land coming into Existence after the 1982 Constitution

In contrast to the above consensus on the effect of the 1982 nationalization clause had on urban land existing at the time when it was enacted, its effect upon urban land coming into existence afterwards is now much disputed, on which there are three contending views. The first is that the land in the planned urban areas will be automatically nationalized.[48] The second is that such land will not be automatically nationalized but the state is obligated to expropriate it eventually. The third view is that neither will such land be nationalized automatically nor is the state obligated to take it. I argue that the last is the correct interpretation and the so-called urbanization challenge posed by the

[48] Weiluo Wang, 'A Stealth Land Revolution in 1982: How Private Land in China became Nationalized? (*1982 nian de yichang wushengwuxi de tudi geming: zhongguo de siyou tudi shi ruhe guoyouhua de*)' (2007) 99 Modern China Studies.

1982 nationalization clause to the public interest clause is actually non-existent. To put it differently, there is no tension internal to Article 10 of the 1982 Constitution between its first and third paragraph. It's unnecessary to reject the legitimacy of and abolish or re-interpret the former to save the latter. Let me elaborate.

The proposition that automatic nationalization applies to land within planned urban areas is untenable for two reasons. To start with, it is inconsistent with the reality. Since the 1982 Constitution, in the vast majority of cases, the fact that an area is marked as a planned urban area *per se* has not led to either *de jure* or *de facto* nationalization of the land thereof. Admittedly, there seems to be one exception where the City of Jiyuan in Henan Province pronounced in 1992 that all collective-owned land within its planned urban area would be nationalized since the last day of that year. Furthermore, it was stipulated that if not used for state-led construction, the nationalized land would continue to be used by its original owners.[49] One is quick to notice the resemblance of this local rule to the 1982 nationalization clause, albeit the latter was at the national level. In fact, the legal basis cited by the city government of Jiyuan then was none other than the 1982 nationalization clause that urban land belongs to the state.[50] But I argue that this is based on a misreading of the Constitution and is therefore strictly speaking unconstitutional. As touched upon earlier in this chapter, while the constitutional takings clauses in the 1954, 1975 and 1978 PRC Constitutions provided for the state's power of nationalization, such a provision was removed from the 1982 constitutional takings clause. The underlying reason for this will be discussed later in this Essay. Suffice it to say here that this should be seen as a constitutional change of momentous significance. Whilst it did not amount to mean that nationalization as a power intrinsic to the CCP party-state was

[49] Jiyuan People's Government, *Notice on Issues concerning Nationalization of Collectie Land within the Planned Urban Areas (guanyu chengshi guihua qu nei jiti tudi guoyouhua youguan wenti de tongzhi)* (December 8, 1992).
[50] Ibid.

given up, it did mean that the constitutional power of nationalization has since been formally rescinded. In other words, after the 1982 Constitution, the Chinese party-state can no longer practice non-compensatory nationalization and claim that it is in line with the existing constitution at the same time. This is the second and more important reason that it is wrong to think that land in the planned urban area will be automatically nationalized.

There is one possible counter-example in this regard. Article 2 (5) of the 1998 Implementation Regulations of the LAL states that when all members of a rural collective are converted into urban residents, the land originally owned by the rural collective belongs to the state. Under the Chinese household registration (*hukou*) system, the change of one's status from rural residents to urban residents is a governmental decision. Over the years, citing the just-mentioned clause as the legal basis, a number of local governments in China have nationalized rural land simply by re-classifying the original peasant owners to be urban residents.[51] The two most notable cases are Guangzhou in 2002 and Shenzhen in 2004.[52] The difference between the two is that whereas Guangzhou exercised non-compensatory *de jure* nationalization without taking physical possession of the land, Shenzhen exercised *de facto* nationalization with compensation, which is a departure from the historical tradition of compensation-less nationalization. Yet it should still not be equated with expropriation because the compensation paid includes only land compensation fee and compensation fee for fixtures and standing crops. There is no resettlement fee for the peasant owners, which is a statutory category of expropriation compensation. At any rate, local practices of this kind do appear to suggest

[51] Su Chen, 'Generalized Nationalization of Collective Land in Urbanization (*chengshihua guocheng zhong jiti tudi de gaiguo guoyouhua*)' [2000] 3 Legal Studies (*faxue yanjiu*).

[52] Pt 2 (1), General Office of Guangzhou CCP Committee and General Office of Guangzhou People's Government, *Several Opinions on Reform of Villages within Cities (guanyu chengzhong cun gaizhi gongzuo de ruogan yijian)* (May 24, 2002); Article 2, Shenzhen Municipal Government, *Administration Measures on Urbanized Land in Bao'an and Longgang Districts of Shenzhen Municipality (shenzhen shi bao'an longgang liangqu chengshi hua tudi guanli banfa)* (June 26, 2004).

that by converting the peasant land owners into urban residents, the state may lawfully nationalize rural land even after the 1982 Constitution.

This turns out, however, to be an incorrect understanding of the law. In 2005, less than a year after Shenzhen nationalized a large area within its administrative jurisdiction, the State Council Office of Legislative Affairs and the Ministry of Land Resources made a joint clarification on the meaning of the afore-mentioned Article 2 (5) of the 1998 Implementation Regulations of the LAL. According to this most recent authoritative interpretation, instead of suggesting that reclassifying rural land owners to urban residents enables the state to nationalize their land, the provision means that when a rural collective has undergone land expropriation and all of its members have consequently been converted into urban residents, the land in small quantity that remains collectively owned may then be expropriated by the state according to the law.[53] It is unequivocal that rural land cannot be nationalized but expropriated. Moreover, during the last decade, the Chinese central authority has repeatedly and expressly stressed that rural land nationalization via changing the *hukou* classification of its original peasant owners is forbidden.[54] The Shenzhen incident reportedly received central approval *ex post facto* only on the condition that it would never happen again.[55] If one still wonders why the 1998 Implementation Regulation of the LAL has such a misleading provision in the first place, chances are that it originated from Article 14 of the 1995 Provisions on Determining Land Ownership and Use-rights.[56] It states that "if a rural collective is revoked or all of

[53] State Council Office of Legislative Affairs and Ministry of Land Resources, *Interpretation Opinions on Article 2 (5) of the Implementation Regulation of the PRC Land Administration Law (guanyu dui zhonghua renmin gongheguo tudi guanli fa shishi tiaoli di'er tiao di wu xiang de jieshi yijian)* (March 4, 2005).
[54] Pt 10, State Council, *Decision on Deepening Reform and Enhancing Land Administration (guanyu shenhua gaige yange tudi guanli de jueding)*; Pt 3 (8), General Office of State Council, *Notice on Actively and Reliably Promoting Reform of Household Registration System (guanyu jiji wentuo tuijin huji guanli zhidu gaige de tongzhi)* (February 26, 2011).
[55] Yanzheng Lu, 'The Exceptional Case of Nationalization of Agricultural Land in Shenzhen (*shenzhen nongdi guoyouhua teli*)' November 3, 2006 <http://finance.people.com.cn/GB/70392/4996685.html> accessed August 1, 2014.
[56] State Bureau of Land Administration, *Provisions on Determining Land Ownership and Use-rights (queding tudi suoyouquan he shiyong quan de ruogan guiding)*.

its members are converted into non-agricultural population because of land requisition for state-led construction, its remaining land that is yet to be requisitioned belongs to the state". While this certainly demonstrates that conversion of the *Hukou* classification does not enable the state to nationalize rural land, it was not made clear in what way the remaining land could become state-owned. Hence the 1998 provision gives a false impression that it will be automatically nationalized. However, as the 2005 clarification points out, the remaining land can only be expropriated.

This brings us to the second view on the impact of the 1982 nationalization clause on the urban land that has come into being (actual or potential) since the 1982 Constitution, which is that such land will not be automatically nationalized but the state is obligated to expropriate it. It has long been the mainstream position held by both the government and the academia, giving rise to the widely-perceived urbanization challenge. After all, the first paragraph of Article 10 of the 1982 Constitution states rather plainly that "urban land belongs to the state". Logically then, when a piece of land is earmarked under the urban planning scheme to be within the planned urban area, it becomes urban land and should therefore be owned by the state. As the previous analysis shows, the state cannot simply nationalize (*de jure* or *de facto*) such land anymore after the 1982 Constitution. So it must eventually expropriate it, otherwise the first paragraph is not followed. However, as noted in Chapter 1, if the state has to and does expropriate all land falling in the planned urban area, as required by the first paragraph, it is not necessarily breaking the public interest prerequisite prescribed in the third paragraph of the same article. But it does render any check on the public interestedness of expropriation meaningless.

To tackle this urbanization challenge, as mentioned in Chapter 1, two kinds of proposals have been made in the existing literature. One is to abandon the public interest requisite itself, which is too radical to be acceptable. The other is to decouple expropriation from urbanization, which can be achieved in two different ways. As noted in Chapter 1, many have suggested that the first paragraph of Article 10 of the 1982 Constitution should be removed, a position I consider unnecessary if the goal is to decouple expropriation from urbanization. Alternatively, over more recent years, it has been argued that the constitutional provision that urban land belongs to the state needs not to be abolished but be re-interpreted in a way that disburdens the state of the recognized obligation to expropriate land classified as urban. This is the third view on the effect the 1982 nationalization clause has upon the urban land subsequently coming into existence: neither does it lead to automatic nationalization—more importantly, nor does it demand eventual expropriation. As mentioned above, I am in favour of this view. But for what reason?

Three competing propositions have been put forth so far in support of this view. First, it is argued that this constitutional provision should not be interpreted as to require the state to expropriate all urban land because the necessary connection between expropriation and urbanization is not the original intent of the constitutional makers and has resulted in widespread and serious violations of the peasants' land rights.[57] Second, it is suggested that "urban land is owned by the state" should be understood as "urban land *can* be owned by the state" rather than "urban land *shall* be owned by the state".[58] The reason given is that the latter interpretation produces undesirable consequences such as making expropriation the only way in which urbanization can be carried out and all the attendant

[57] Qianfan Zhang, 'Urbanization does not Necessitate Land Expropriation: Clearing the Misunderstanding of the Constitutional Dual Structure of Urban and Rural Land (*chengshi hua bu xuyao zhengdi: qingchu chengxiang tudi eryuan jiegou de xianfa wuqu*)' [2012] Legal Science (*faxue*) 19.
[58] Cheng, 'On the Constitutional Interpretation of "Urban Land Belongs to the State" (*lun chengshi tudi shuyu guojia suoyou de xianfa jieshi*)'.

problems. Third, it is submitted that the 1982 nationalization clause has no practical impact on urban land that has come into being after the 1982 Constitution. Although it did nationalize urban land in existence by the time when the Constitution was enacted in December 1982, which is more specifically, as noted, the land in the built-up areas of the cities back then, it places no responsibility whatsoever on the state to ensure that the land subsequently marked as urban land is owned by itself.[59] In other words, the 1982 nationalization clause applies only to the urban land in history. Unfortunately, however, no specific reason has been offered on why this should be the correct interpretation of the constitutional clause.

Sympathetic to their objective, I find that the first two propositions bring very little to the table in terms of argument. The consequentialist argument is largely tautology because breaking the necessary connection between urbanization and expropriation to prevent its undesirable consequences tells us why the 1982 nationalization clause needs be re-interpreted, but not how it should be re-interpreted. Furthermore, it is definitely right to highlight that based on the available archival materials, more likely is that the constitutional makers did not intend the urbanization challenge and did not think that the first and third paragraphs of the same constitutional article are in tension with each other. For instance, they have never fully discussed about, let alone provided any clear definition or demarcation of urban land. Nor were they particularly concerned about the changing and sometimes fuzzy boundaries of urban areas. Hence the most reasonable conjecture is that they only intended the nationalization clause to cover what was considered urban areas at the time of constitutional making. That said, in reality, their original intent has never been used as the

[59] Yang, 'The Origin and Evolution of State Ownership of Urban Land in China (*woguo chengshi tudi guoyouzhi de yanjin yu youlai*)', p 105; Chen Chen, 'Apply Correctly the Prescription "Urban Land Belongs to the State" (*zhengque yunyong chengshi shuyu guojia suoyou*) ' [2012] Land and Resources (*ziyuan daokan*) 40, p 41; Zhen Yuan, 'Study on the Scope of Collective Land Ownership (*lun jiti tudi suoyouquan keti fanwei de queding*)' (2012) 30 Hebei Legal Science (*hebei faxue*) 43, p43; Liantai Liu, 'The Constitutional Space for Reforming the System of Collective Land Expropriation (*jiti tudi zhengshou zhidu biange de xianfa kongjian*)' [2014] Studies in Law and Business (*fashang yanjiu*) 7, p 10.

ground for establishing the case for the urbanization challenge. One may well argue that even if it is not what the constitutional makers had in mind in the early 1980s, it still looks perfectly tenable simply because it is what the 1982 nationalization clause literally means. Difficult then is to hold that it means urban land *can* be owned by the state, not least because that deviates from the plain text. More crucially, it also contradicts the fact that the 1982 nationalization clause did mean that urban land existing by the time of constitutional enactment *should* be owned by the state. A re-interpretation of this kind effectively creates an unnecessary internal rupture within the same clause: on the one hand, it means that urban land in existence prior to the 1982 Constitution *should* be and indeed became owned by the state; on the other hand, it means that urban land coming into being after the 1982 Constitution *can* be but *not should* be owned by the state. In this situation, I argue that the best and correct understanding of the 1982 nationalization clause is that it is applicable only to urban land existing prior to the 1982 Constitution but not to urban land coming into existence afterwards in requiring the state to expropriate or nationalize it. My reason is not that this will eliminate the urbanization challenge. Rather, it is that such a challenge is more apparent than real in the first place. Let me elaborate.

(4) Doing Away with the Urbanization Challenge

As early as in January 1984, about one year after the 1982 Constitution was enacted, the first-of-its-kind PRC law on urban planning—the Regulation of Urban Planning (*chengshi guihua tiaoli*) was promulgated and contained the following provisions. Article 31: Any organization and individual that engages in various kinds of development (*gexiang jianshe*) within the planned urban areas, if needing to use state-owned land or requisition collective-owned land, shall…apply to the

government department in charge of urban planning for approval of use of construction land. Article 33: Within the planned urban areas, if there is the need to requisition collective-owned land for development, the city people's government shall follow the national regulation on land requisition for development and requisition the land from the rural collectives in a uniform manner. Article 35: If those rural collectives that locate within planned urban areas are to build or expand their rural residential settlements, enterprises and public institutions, they shall report to and seek approval from the government department in charge of urban planning about the location and scope of their proposed land use.

Two obvious conclusions follow from these provisions. On the one hand, after the 1982 Constitution, land within the planned urban areas or urban land is not automatically nationalized. Collective-owned land can still exist inside such areas. Otherwise Articles 31 and 33 would not have prescribed that for the sake of "various kinds of development" collective-owned land within the planned urban areas could be requisitioned or in today's jargon expropriated by the state.[60] On the other hand, as shown by Article 35, rural collectives may still use their land within the planned urban areas on their own if approved by the planning authority. What's not so obvious is when there is a need for the state to expropriate the collective-owned land within the planned urban areas. Articles 31 and 33 provide that such needs arise when collective-owned land is demanded for "various kinds of development". But does this exhaust all the possible scenarios under which the state has to expropriate collective land in the planned urban areas? What does it mean by "various kinds of development"? What kind of development can be conducted by the rural collectives themselves that

[60] This point is re-confirmed by Article 8 of the 1994 Urban Real Estate Administration Law and Article 9 of the 2007 Urban Real Estate Administration Law, both of which prescribe that collective-owned land within the planned urban areas must first be requisitioned and converted into state-owned land before its use-rights can be transferred with compensation.

requires government approval but does not involve state expropriation? To answer these questions, we have to look at China's land administration system at the time.

Prior to the 1986 LAL, China's rural land administration system was set out in the 1982 Regulation on the Administration of Land Use for Building Construction in Villages and Townships (hereinafter the 1982 Rural Construction Regulation). It makes the following distinction between rural land use by collectives and that by others. On the one hand, rural collectives may, upon government review and approval, use their own land to build member peasants' household residence, public buildings, production buildings, public facilities, courtyards, roads, green space, collective enterprises and public institutions. No government agency, enterprise, public institution or individual is allowed to use land in the villages and townships for construction without permission. On the other hand, if any entity owned by the whole people (i.e. state-owned entity), including those enterprises the state jointly establish with the collectives, want to use such land for construction, it shall follow the national regulation on land requisition for state-led construction. If non-agricultural individuals (i.e. those with non-agricultural *hukou*) are to use such land for establishing collective enterprises, they must also follow the national regulation on land requisition.[61] Based on these provisions, even without overtly stipulating so, the 1982 Rural Construction Regulation effectively means that the rural collectives can use their own land only for those non-agricultural purposes enumerated in the law. All other kinds of non-agricultural use of rural land by entities and individuals outside the rural collectives must involve state requisition.

In view of this, it is impossible not to notice the striking similarity between the contemporary Chinese land administration system as prescribed in the latest 2004 version of the LAL and that in

[61] Articles 5, 7, 9-11, 16, *Regulation on the Administration of Land Use for Buildings in Villages and Townships (cunzhen jianfang yongdi guanli tiaoli)* (February 13, 1982).

the early 1980s. As explained in Chapter 1, rural land in China is now placed under a stringent land use control regime characterized by what I call the "presumption of state expropriation in non-agricultural use of rural collective land", which poses the "de-agrarianization challenge" to the constitutional public interest clause. More specifically, it was prescribed that apart from being used for building peasant household residential plots, local public utilities and social welfare facilities as well as the TVEs (in the form of joint-ventures or as a result of bankruptcy or merger of such enterprises), rural collective land cannot be utilized for other non-agricultural purposes unless being expropriated by the state and turned into state-owned land. Given the previous discussion, one can find precisely the same situation back in the 1980s when rural collectives were prohibited from putting their land to non-agricultural purposes other than those specified in law and in the overwhelming majority of cases, non-agricultural development could only take place over state-owned land. This is what it means by for "various kinds of development" the land needs be expropriated.

The upshot of all the above is that according to the 1984 Urban Planning Regulation, expropriation of collective-owned land is required not by virtue of the fact that such land falls within the planned urban areas or is designated as urban land. As already shown, it may well be left in the hands of the rural collectives. However, when and only when such rural collective land is to be used for non-agricultural development that cannot be carried out by the collectives themselves, state expropriation is necessitated. If we consider the 1984 Urban Planning Regulation is consistent with and indeed embodies the 1982 Constitution for the reason that the former was promulgated merely one year after the former, we cannot but reach the following conclusion: The 1982 nationalization clause does not obligate the state to expropriate collective land within the planned urban areas unless

it is needed for non-agricultural development that cannot be accomplished by the rural collectives. In this sense, the urbanization challenge never really exists. The false perception that it exists is derived from the reality that land in the urban built-up areas is usually owned by the state, as was acknowledged by the afore-mentioned NPC interpretation of the 1998 LAL. The foregoing analysis has now made it clear that this is not because the state has to expropriate the collective-owned land in the urban built-up areas. Rather, it is because the state has to expropriate such land from the rural collectives first so that it can be used for developing urban public service facilities and infrastructures, which will then turn that area into a built-up area. This is precisely the de-agrarianization challenge to the public interest prerequisite of expropriation as a result of the stringent land use control over rural land, not the urbanization challenge.

We can now conclude with confidence that the first paragraph of Article 10 of the 1982 Constitution means three things. First, it is fundamentally an exercise of the party-state's inherent power of nationalization, which is not so different from the land reform movement and socialist transformation campaign that went before. Although it was *de jure* nationalization without immediate conveyance of the physical possession from the original owners who continued to have use-rights over the land, it did have a tangible practical impact in that future withdrawal of such use-rights of the now nationalized land is non-compensable. Second, as shown by the legislative record, the nationalization of urban land in 1982 was more of a compromise than a final solution. If not for the practical concern to appease the mass peasantry, the constitutional makers might well have decided to nationalize all land in China. At the end of the day, comprehensive nationalization is a classic socialist mandate. This then offers a *prima facie* testimony to the argument that the People's

Republic will fulfil this imperative and nationalize all land in the future.[62] Nonetheless, given that the 1982 nationalization itself was motivated primarily by pragmatic instead of ideological considerations, it is very unlikely that full-scale nationalization will be adopted unless some practical circumstances dictate so. More importantly, since nationalization as a kind of takings power has been removed from the 1982 Constitution, even though the Chinese party-state may still nationalize further by virtue of it being an innate power, it can no longer do so without seeking for extra-constitutional grounds. In terms of constitutional takings power in the PRC, only one type is left and that is expropriation. Transfer of collective-owned land to the state in any other manner is therefore unconstitutional. Third, the 1982 nationalization clause applies only to land in the urban built-up areas existing by the time when the 1982 Constitution was enacted. It neither leads to automatic nationalization of nor demands the state to eventually expropriate the land falling into urban planned areas after the 1982 Constitution came into effect. It is in this sense a historical clause with no ensuing practical impact afterwards. We do not need to question its legitimacy and recommend its abolishment or re-interpret it in a way that contradicts its literal meaning to cope with the urbanization challenge, which turns out to be non-existent under closer examination.

Before we move on, attention should be directed to four counter-arguments raised about the interpretation put forward here.[63] First, it is argued that interpreted as applicable only to the urban land in history, "urban land belongs to the state" is reduced to a mere descriptive provision, not a prescriptive one that regulates people's behaviour in the future. This falls afoul of the normative nature of the Constitution. Second, if it indeed meant to nationalize all urban land in existence by the enactment of the Constitution in 1982, it violated the principle *lex prospicit non respicit* for targeting

[62] Zhong Huang, 'Urbanization and the Ownership of "Urbanized" Collectively-Owned Land (*chengshi hua yu rucheng jiti tudi de guishu*)' [2014] Legal Studies (faxue yanjiu) 47, p 57.
[63] Cheng, 'On the Constitutional Interpretation of "Urban Land Belongs to the State" (*lun chengshi tudi shuyu guojia suoyou de xianfa jieshi*)', p 173.

at urban land that used to be privately owned before the 1982 Constitution. Third, such an interpretation does not address the issue about what to do with urban land coming into being after 1982. Fourth, since it is impossible for people today to accurately delineate the boundaries of the cities in existence at the moment of constitutional enactment in 1982, it is infeasible to work out what exactly had been nationalized back then.

None of these counter-arguments stand up to scrutiny. First, the 1982 nationalization clause seen as applicable only to urban land in history is not purely descriptive but prescriptive in the sense that it did have actual legal effects upon such land and does requires recognition and acceptance of that fact. If any dispute arises over the ownership of a piece of land in one city, the issue whether or not it was within the cities at the time when the 1982 Constitution was passed must be dealt with. Besides, even if we concede that it is descriptive instead of prescriptive, there is nothing wrong with a constitutional article being so. It is simply wrong to say that the 1982 PRC is by nature normative and therefore contains only prescriptive provisions because not every article in it is prescriptive. For example, Article 136 reads: The national flag of the People's Republic of China is a red flag with five stars. Article 137 reads: The national emblem of the People's Republic of China is Tiananmen in the centre illuminated by five stars and encircled by ears of grain and a cogwheel. And Article 138 reads: The capital of the People's Republic of China is Beijing. Apparently, all these provisions are no more prescriptive than the 1982 nationalization clause expounded in the above way, but no one will deny their status as constitutional clauses. Second, in nationalizing all urban land in existence by the time of the constitutional enactment in late 1982, the nationalization clause is anything but an *ex post facto* law. This is because it took effect from the day when the 1982 Constitution came into effect, not any time before. Third, the 1982 nationalization clause alone does not tell us what to do

with the urban land coming into shape after 1982. But this is precisely what we need to figure out by analyzing other parts of the Constitution and relevant legislations. Fourth, it is indeed possible today to work out the exact scope of nationalization in 1982 if we successfully identify all the urban built-up areas existing at the time. Even if that is a difficult task to achieve, it is far from a fatal flaw. Over the last three decades, we have been fortunate enough to have very little dispute over whether or not a piece of urban land was nationalized back in 1982.

2. No Voluntary Transaction of Land

The fourth paragraph of Article 10 of the 1982 Constitution stipulates that "no organization or individual may appropriate, buy, sell or lease land, or unlawfully transfer land in other ways." As shown in the last chapter, the prohibition of voluntary land transaction is an element of the Marxist-Soviet tradition of land nationalization, especially the Soviet model of post-revolution land administration system. Demonstrated earlier in this chapter is that since the 1960s, transaction of both rural and urban land had been banned in the PRC. Against this background, the just-cited provision should be no more than a constitutional confirmation of the long-held socialist tradition and the status quo by that time. That given, why did it not appear in the 1975 or 1978 Constitution, but in the 1982 Constitution?

Signs of this constitutional change in late 1982 can already be seen in a series of central policy documents and legislations published between 1981 and 1982. In April 1981, the State Council issued a sternly-worded rescript making the following statement: "It must be reconfirmed that land of the rural people's commune and production teams is owned by the collectives. The member

peasants have only use-rights over the land allocated to them as household residential plots, land (hills) allotted to them for private use and cultivated land contracted out to them, which is prohibited to be leased, sold or transferred without permission".[64] In January 1982, the State Council reconfirmed that land allocated to peasants as their household residential plots is owned by the rural collective and cannot be sold, leased or transferred unlawfully.[65] The 1982 Rural Construction Regulation enacted in February states in Article 4 that "sale, lease and unlawful transfer of land for buildings are strictly proscribed". The Regulation on Land Requisition for State-led Construction enacted in May 1982 prescribes in Article 2 that "it is forbidden that any entity buys or rents land directly or in disguised forms from rural collectives". In fact, this period was the first time since the 1960s that the Chinese central authority openly declared its commitment to prohibiting voluntary rural land transaction. What prompted it to do so then?

The clue is to be found in the Explanation on the Draft Regulation on Land Requisition for State-led Construction (hereinafter the 1982 Requisition Regulation) made at the NPC session that witnessed its passing in April 1982. Its legislative background was detailed as follows. Because the 1958 Measures on Land Requisition for State-led Construction had long been ill-suited to changed circumstances, there was a legal vacuum in the field of land requisition for state-led construction. As a consequence, the principle recognized in the 1978 PRC Constitution that the state may requisition land according to law was not enforced in practice. Phenomena such as "free bargaining" over construction land as well as sales and leases of land in disguised forms had also taken place, exacerbating the waste of cultivated land (*gengdi*). In this circumstance, the National Construction Commission drafted the 1982 Requisition Regulation in order to prohibit land-using entities from

[64] Point 3, State Council, *Urgent Notice on Stopping Appropriation of Cultivated Land for Rural Housing Construction (guanyu zhizhi nongcun jianfang qinzhan gengdi de jinji tongzhi)* (April 17, 1981).
[65] *Minutes of the Second National Conference on the Work of Rural Housing Construction (di'er ci quanguo nongcun fangwu jianshe gongzuo huiyi jiyao)* (December 29, 1981).

buying or renting land from the rural collectives.[66] Accordingly, the central authority's re-emphasis on banning voluntary rural land transaction in the early 1980s seems to be motivated primarily by two concerns. On the one hand, rural land transaction existed in the absence of any governing statute on state land requisition, which led to the non-implementation of the constitutional principle of state requisition according to law. To reinstate it in practice through enacting a new legislation on land requisition would therefore entail the ban on rural land transaction. On the other hand, prohibiting transaction of rural land was also required by the need to curb the waste of cultivated land.

To contemporary readers, these two concerns are far from self-explanatory. For one thing, why was rural land transaction incompatible with the constitutional principle of state requisitioning rural land according to law? Aren't they supposed to be mutually independent and exclusive, i.e. where voluntary transaction stops, state requisition steps in? For another, why was rural land transaction considered to have increased the waste of cultivated land? Isn't voluntary transaction supposed to be efficiency-enhancing instead of waste-generating? To make sense of this, we need to look at the Chinese law on land requisition and administration all the way back since the 1950s.

The 1982 Requisition Regulation is the third statute on land requisition in the PRC, preceded by the 1953 and 1958 Measures on Land Requisition for State-led Construction (hereinafter "the 1953 Requisition Measures" and "1958 Requisition Measures"). Judging from their titles, a commonality shared by these three legislations is that "state-led construction" is set as the purpose for land requisition. In Chinese the term is *国家建设*, which literally translates as "state construction". What does it mean? A bit more details can be found in Article 2 of these three statutes. In 1953, it was prescribed that land can be requisitioned when needed for building national defense facilities,

[66] Kebai Lv, *Explanatory Report on the Draft Regulation on Land Requisition for State-led Construction (guanyu guojia jianshe zhengyong tudi tiaoli cao'an de shuoming)* (April 28, 1982).

factories, mines, railways, public transportation, water conservancy and irrigation projects, municipal works as well as the development of other economic and cultural initiatives. In 1958, it was stipulated that the state can requisition land needed for it to build factories, mines, public transportation, water conservancy and irrigation projects and national defense facilities and to develop cultural, educational, public health, municipal works and other initiatives. In 1982, it was provided that land can be requisitioned if needed for the state to carry out economic, cultural and national defense construction and to develop public welfare undertakings. These provisions tell us little about the exact meaning of "state construction" beyond that it can take a variety of forms. However, as noted in Chapter 3, the concept of requisition as prescribed in the 1953 Requisition Regulation has typically been understood as interchangeable with expropriation/*enteignungen* in Germany. The reason is that both are believed to stand for compensatory land takings for some sort of public construction projects that are usually and to a large extent justifiably undertaken by the state. At the end of the day, the Chinese term "state construction" has the following two literal meanings: One is construction *by* the state which can be represented through its affiliated entities such as government agencies and state-owned enterprises. The other is construction *for* the state which is supposed to embody the public interest. In listing out particular items such as national defense facilities, railways, public transportation, municipal works and public welfare undertakings that fit these two criteria very nicely, the just-cited provisions in the Chinese law on land requisition between the 1950s and early 1980s have reinforced the conventional wisdom that land requisition is for public construction projects conducted by the state.

However, I argue that the received position is completely misguided and that land requisition in the PRC has intended for purposes well beyond what is usually understood as construction projects

by the state for the public. As a matter of fact, ever since the 1950s, state requisition has become the only way in which rural land can be provided for all kinds of construction and development projects the rural collectives are not permitted to engage in. A word of explanation is now in order.

To start with, notwithstanding its presence in the titles of those relevant legislations, "state construction" was not the sole end for land requisition. According to Article 19 of the 1953 Requisition Measures, private enterprises in need of land for their own use shall file applications to governments above the provincial/prefectural level. Once the application is approved, the local government within whose jurisdiction the land in question is located should requisition such land on behalf of the applying private enterprise. In 1954, clarifying on how to implement the 1953 Requisition Measures, the Ministry of Domestic Affairs (*neiwu bu*) noted that state agencies, state-owned enterprises, public-private joint ventures and *private enterprises* can all requisition land upon government approval.[67] Considering the above-cited provision in the 1953 Requisition Measures, this was surely not to say that these entities could requisition land by themselves—only the state can do so. Yet it did show that state requisition could be exercised to provide land not only for entities affiliated with the state, but also for private enterprises. Interestingly, the 1958 Requisition Measures did not have any provision similar to Article 19 of its 1953 predecessor. The reason however was not that the state no longer requisitioned land for private enterprises, but that private enterprises had already undergone the socialist transformation and been eliminated by then.[68] Well known is that after the socialist transformation, private and therefore capitalist enterprises

[67] Pt 1, Ministry of Domestic Affairs, *Reply on Several Issues of Charging Deed Tax or Rent on Requisition of Privately Owned Land and Use of State-owned Land by State-owned Enterprises, Public-Private Joint Ventures, Private Enterprises and so on (dafu guanyu guoying qiye gongsi huiying qiye ji siying qiye deng zhengyong siyou tudi ji shiyong guoyou tudi jiaona qishui huo zujin de jige wenti)*; Pt 5, Ministry of Domestic Affairs, *Comprehensive Reply on Several Questions concerning the Implementation of the Measures on Land Requisition for State-led Construction (guanyu zhixing guojia jianshe zhengyong tudi banfa zhong jige wenti de zonghe dafu)*.

[68] The success of the Socialist Transformation of Capitalist Industry and Commerce was pronounced at the Eighth CCP National Congress in 1956.

became utterly prohibited in the PRC. It was only in 1987 that their legitimacy became openly recognized by the party-state again.[69] Hence the 1982 Requisition Regulation did not have any prescription on land requisition for private enterprises, following the suit of its 1958 predecessor.

Nonetheless, as early as in 1983, it was prescribed that when individuals in cities and towns need land to build residence for themselves, it is forbidden for them to take up the land without government permission. Instead, they must apply for state requisition according to the relevant national regulation,[70] which was certainly referring to the 1982 Requisition Regulation. Two conclusions follow from this provision. On the one hand, it confirms the point I made above that the 1982 nationalization clause neither automatically nationalizes urban land nor obligates the state to expropriate it. This is because two different terms are used in the 1982 Requisition Regulation to connote the state's taking of land. According to Articles 2 and 31, collective-owned land is "requisitioned" and state-owned land is "withdrawn". The 1983 provision stipulates that individuals in cities and towns should apply for state requisition rather than withdrawal, which means that collective-owned land still existed within cities and towns and was not automatically nationalized after and because of the 1982 Constitution. In the meantime, the 1983 provision also shows that collective-owned land in cities and towns is to be requisitioned when individuals apply for it to build residence. The state is obligated to requisition the collective-owned land within cities and towns not by virtue of its location, but because it is demanded for non-agricultural construction and development such as building residence for individual urban residents. On the other hand, of more

[69] Politburo of the CCP Central Committee, *Further Deepening the Rural Reform (ba nongcun gaige yinxiang shenru)* (January 22, 1987).

[70] Article 4, *Measures on Administration of Building Residence for Individuals in Cities and Towns (chengzhen geren jianzao zhuzhai guanli banfa)* (June 4, 1983), cited in Lewei Cai, 'From Fiction to Nullity: the Evolution of Public Interest in Land Expropriation (*cong nizhi zou xiang xuwu: tudi zhengshou zhong gonggong liyi de yanbian*)' [2012] Tribune of Political Science and Law (*zhengfa luntan*).

relevance here, the 1983 provision clearly demonstrates that state land requisition was deployed to serve purposes other than state construction.

That said, one may argue that over the first four decades of the PRC land requisition for private enterprises and individuals only existed for a very short period of time in the early 1950s and the 1980s. It was therefore the exception while the rule was that state requisition was practiced to support state construction as commonly understood. However, attention should be directed to a 1959 Central Party announcement that land used for highways, railways, factories, mines and other kinds of basic construction (*jiben jianshe*) should be requisitioned according to the national regulation on land requisition, unless such construction projects are carried out by the people's communes which should then supply land for themselves.[71] Worth noting here is that this party document substituted "basic construction" for "state construction" as the purpose of land requisition. Was that an expansion or contraction of the scope of requisition? The answer is the former. The 1952 Interim Measures of the Work on Basic Construction, the first-of-its-kind legislation concerning this matter in the PRC, defines "basic construction" as the "expanded reproduction of fixed assets" in a variety of areas including manufacturing, mining, transportation, agriculture, finance, trade, culture, education, and public health and so on.[72] Derived from Marxist economic theory, "expanded reproduction" originally refers to the way in which the accumulation of capital takes place.[73] Yet in the Chinese context, according to the just-cited 1952 law, expanded reproduction of fixed assets simply means all sorts of construction works. Hence the more common and indeed more accurate

[71] Pt 5 (2), Politburo of the CCP Central Committee, *Eighteen Issues concerning the People's Communes (guanyu renmin gongshe de shiba ge wenti)* (April 20, 1959), cited in Cai, 'From Fiction to Nullity: the Evolution of Public Interest in Land Expropriation (*cong nizhi zou xiang xuwu: tudi zhengshou zhong gonggong liyi de yanbian*)'.
[72] Article 1, *Interim Measures of the Work on Basic Construction (jiben jianshe gongzuo zanxing banfa)* (January 9, 1952).
[73] Karl Marx, *Capital*, vol 2 (I.Lasker tr, Moscow: Progress Publishers 1956), ch 21.

rendering of the term is "capital construction". Apparently it is much broader in scope than state construction in conventional understanding.

According to the afore-mentioned 1959 provision, rural collectives could use their own land to engage in basic construction. Yet no national or local policy or law was ever promulgated to spell out the exact type of basic construction that could be undertaken by the rural collectives. A textbook on finance and accounting of the people's communes published in 1960 suggests that they can carry out basic construction in both productive and non-productive areas.[74] Productive construction stands for agricultural, industrial and transportation construction; non-productive construction means the construction of public welfare facilities within the rural collectives including member peasants' household residence, hospital, school, nursing home, kindergarten, canteen, etc. While this list might appear fairly extensive, it should be noted that agricultural production and collectives' public facilities were the two main kinds of basic construction for which rural collectives used their own land. This was no accident but a consequence of the limited role played by rural collectives in China after the collectivization movement in the pre-reform era, which focused primarily on agricultural production[75] and public provision for the member peasants. For example, it was prescribed in 1959 cited above that no less than 80% of the labour force of the people's communes should be committed to agricultural production.[76] This is probably why the 1962 Revised Draft Regulations on the Work in the Rural People's Communes stipulates that people's communes can carry out basic construction projects related to irrigation, afforestation, soil conservation and improvement, without even

[74] Teaching and Research Group on Finance and Accounting of the Department of Economics at Xiamen University (ed) *Finance and Accounting of People's Communes (renmin gongshe caiwu kuaiji)* (Agriculture Press 1960), p 336.
[75] The only notable exception of course is the Great Leap Forward Movement in the late 1950s when rural collectives were encouraged to engage in industrial production, especially steel-making, which turned out to be disastrous economically. Rural collectives' active involvement in industrial production re-emerged in the boom of the TVEs in the 1980s.
[76] Pt 12, Politburo of the CCP Central Committee, *Eighteen Issues concerning the People's Communes (guanyu renmin gongshe de shiba ge wenti)*.

mentioning industrial construction.[77] In this situation, it is fair to conclude that during the pre-reform era, unless it was for public provision for the member peasants, if rural collectives' land was to be used for non-agricultural construction, state requisition was required.[78] This further means that the even though there was no formal policy or law explicitly imposing stringent land use control upon rural land and the collectives retained the legal title to such land, the "presumption of state expropriation in non-agricultural use of rural collective land" and the "de-agrarianization challenge" were already in place between the 1950s and 1980s, when state requisition was in fact the only channel through which rural land could be used for non-agricultural purposes by non-collective entities and individuals.

But how did the state decide to requisition rural collective land? It should be pointed out that by following the Soviet model, since the early 1950s, China had instituted a comprehensive planning system of basic construction. To put it in short, the system required that construction projects of various scales to be planned and authorized in advance by the competent central or local planning authorities and governments.[79] Correspondingly, the 1953 and 1958 Land Requisition Measures both provided in Article 4 that land requisition should first be reviewed by the planning authority responsible for approving the relevant construction projects and then sanctioned by the central or local government.[80] In other words, the decisions to requisition were concomitant to the decisions to initiate construction projects that were made according to state economic planning. The requisition decisions were therefore part of the economic planning system and served as an instrument to

[77] Pt 11, CCP Central Committee, *Revised Draft Regulations on the Work in the Rural People's Communes (nongcun renmin gongshe gongzuo tiaoli xiuzheng cao'an)*.
[78] As shown earlier in this chapter, this was legalized by the 1982 Rural Construction Regulation and the 1982 Requisition Regulation.
[79] For details of this system, *Interim Measures of the Work on Basic Construction (jiben jianshe gongzuo zanxing banfa)*, ch 3; State Council, *Several Rules on Strenghthening the Planning Administration of Basic Construction (guanyu jiaqiang jiben jianshe jihua guanli de jixiang guiding)* (May 1962); State Planning Commission, State Construction Commission and Ministry of Finance, *Several Rules on Improving the Planning Administration of Basic Construction (guanyu gaijin jiben jianshe jihua guanli de jixiang guiding)* (November 15, 1965).
[80] Article 4, *Measures on Land Requisition for State-led Construction (guojia jianshe zhengyong tudi banfa)*.

achieve state economic plans. Worth noting is that such a planning system did not formally cover the basic construction projects conducted by the rural collectives. Nevertheless, the rural collectives were asked to also make plans for their own basic construction in pursuance to the state plans[81] and obtain government authorization for such plans and construction projects.[82] Overall, under a system of this kind, at least in formal legal terms, the CCP party-state could exercise full control over the utilization and conversion of rural land. This is why I use "state-led construction" instead of "state construction" to translate the Chinese term *国家建设*. As already demonstrated, from the 1950s to the 1980s, land requisition had been practiced for all kinds of construction projects, many of which were not undertaken by the state or intended for the public. Therefore, it is not for "state construction" but "state-led construction", because it is effectively a means for the party-state to determine the pace and scale at which rural land, especially cultivated land, is turned to be used for non-agricultural construction.[83]

In light of the preceding discussion, we can now make sense of the incompatibility between the constitutional principle of state requisitioning land according to law and voluntary rural land transaction as well as the causal relationship between rural land transaction and waste of cultivated land. Since in most cases rural land could not be used for non-agricultural purposes unless requisitioned by the state according to construction plans, voluntary transaction of rural land would bypass this restriction and the state would be prevented from requisitioning such land. More importantly, rural land transaction would severely disrupt the planning system and undermine the

[81] Pt 3, CCP Central Committee, *Resolutions on Issues concerning People's Communes (guanyu renmin gongshe ruogan wenti de jueyi)* (December 10, 1958).
[82] Pt I (1) 4, Bureau of Basic Construction of State Planning Commission, *Illustration on Making the 1960 Measures on Planning Administration of Basic Construction (1960 nian jiben jianshe jihua guanli banfa de bianzhi shuoming)* (July 1959); Pt 11, CCP Central Committee, *Revised Draft Regulations on the Work in the Rural People's Communes (nongcun renmin gongshe gongzuo tiaoli xiuzheng cao'an)*; Articles 5, 16, *Regulation on the Administration of Land Use for Buildings in Villages and Townships (cunzhen jianfang yongdi guanli tiaoli)*.
[83] "State-authorized construction" is another possible candidate. However, it is less appropriate than "state-led construction" because it implies a rather neutral or even passive role of the state, which is historically inaccurate in the Chinese context.

party-state's control over the utilization of rural land. The end result was unsupervised and unauthorized conversion of cultivated land into construction land, which, in the eyes of the party-state, was a "waste" of cultivated land.

The reason that these two problems became particularly acute in China in the early 1980s is two-fold. On the one hand, although the 1958 Requisition Measures were never formally repealed until the 1982 Requisition Regulation, its actual implementation was disturbed and eventually halted during the Cultural Revolution between 1966 and 1976. By the time of the late 1970s and early 1980s, it was generally perceived that there was no governing law on the issue of state land requisition. Hence the above-cited explanation on the draft of the 1982 Requisition Regulation stated that there was a legal vacuum in this field. On the other hand, it was acknowledged by the central authority that since the opening and reform policy in 1978, the rural economy took off and there was a rapidly increasing demand for non-agricultural construction in the countryside, especially peasants' residence.[84] Within just a few years, a huge amount of cultivated land was converted into construction land, ringing the alarm bell to the Chinese central authority that it might pose long-term and irreversible risks to a still predominantly agricultural country with a huge population but little cultivated land.[85] Against such a background, in 1981, the State Council issued an urgent notice stressing the need to curb this trend.[86] In 1982, it became a formal legal requirement that rural collectives must seek for approval from governments at the county or higher level whenever they

[84] *Minutes of the Second National Conference on the Work of Rural Housing Construction (di'er ci quanguo nongcun fangwu jianshe gongzuo huiyi jiyao*), *Minutes of the Second National Conference on the Work of Rural Housing Construction (di'er ci quanguo nongcun fangwu jianshe gongzuo huiyi jiyao)*. Becoming more capable to afford building residence was but one reason for the boom in rural house construction. The other reason lay in a policy change of the Party in 1979 which started to encourage the building of peasants' residence. Previously that was discouraged and suppressed for being non-productive and un-socialist. State Construction Committee and others.

[85] State Council, *Urgent Notice on Stopping Appropriation of Cultivated Land for Rural Housing Construction (guanyu zhizhi nongcun jianfang qinzhan gengdi de jinji tongzhi)*.

[86] Ibid.

convert their land to construction land.[87] Meanwhile, the problem of losing cultivated land to peasants' building residence was further exacerbated by rural collectives selling or leasing their cultivated land without government permission for non-agricultural development to non-collectives entities, oftentimes government agencies and state-owned enterprises.[88] True, these entities are affiliated with the state and it was acknowledged that they bought or rent rural land out of real needs for building office block, manufacturing sites or employees' accommodation.[89] Nevertheless, bypassing state requisition and government authorization to satisfy such needs was criticized as seeking self-interests of individual organizations at the expense of national interest. And the rural collectives' selling and renting out land was condemned as trying to gain windfall profits by treating land as a commodity.[90]

Against this background, as noted before, between 1981 and 1982, a series of policy documents and statutes were promulgated to reaffirm and reemphasize the party-state's right to requisition land according to law and the prohibition on voluntary land transaction, both of which eventually received constitutional enshrinement in 1982. The preceding analysis shows that as much as being a Marxist-Soviet tradition, the ban on land market was also a pragmatic policy response intended to enable the party-state to retain its control over the use of rural land by making sure that requisition stays the only way for rural land to be converted for non-agricultural purposes in most cases. It is for this reason that I argue that the constitutional clause inhibiting voluntary transaction of land constitutes part of the constitutional takings clause *sensu lato*.

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[87] Articles 5, 16, *Regulation on the Administration of Land Use for Buildings in Villages and Townships (cunzhen jianfang yongdi guanli tiaoli)*.

[88] For example, the Beijing municipal government found out in 1983 that this was very a pandemic practice among in Beijing. Beijing Municipality People's Government, *Notice on Working Harder in Dealing With the Problem of Leases and Sales of Collective Land (guanyu zhuajin chuli zulin maimai shedui tudi wenti de tongzhi)* (November 9, 1983).

[89] Ibid.

[90] Ibid.

3. Rational Use of Land

The third change in Article 10 of the 1982 Constitution as compared with Article 13 of the 1954 Constitution is the constitutional requirement that all organizations and individuals who use land must make rational use of the land. Similar to the previous two changes, I argue that this too is part of the constitutional takings clause *sensu lato*. But why on earth does it have anything to do with land takings?

At first sight, what this constitutional clause seems to be all about is the principle of rationality according to which land should be used. The term in Chinese is *合理*, literally meaning reasonable, efficient or sensible. In fact, however, it was closely associated with land takings right from the beginning. In January 1956, the State Council issued the Notice on Rectifying and Preventing Waste in Land Requisition for State-led Construction.[91] It was conceded that within just two years since the 1953 Requisition Measures was enacted, there had emerged the serious problem of massive waste of requisitioned land across the country. For example, 40% of the land requisitioned in Wuhan, Beijing, Hangzhou, Chengdu and Hebei was wasted. The percentage hit up to even higher at 80% in Changsha. This situation resulted in not only the cost of state funding but also the reduction of food production as well as the difficulty in resettling a large number of land-losing peasants. Two causes were identified. On the one hand, it was because the land-using entities had made bad construction plans and blindly asked the state to requisition more land than what was actually needed or to

[91] State Council, *Notice on Correcting and Stopping Waste in Land Requisition for State-led Construction (guanyu jiuzheng yu fangzhi guojia jianshe zhengyong tudi zhong langfei xianxiang de tongzhi)*.

requisition land before it was actually needed. On the other hand, the government agencies responsible for reviewing and approving applications of land requisition had been very slack in their job and yielded too much to the requests of the applying entities. They had also failed to regularly check whether and how the requisitioned land was used in reality. Hence the massive waste of rural land. Four measures were proposed in this Notice. First, governments at all levels must practice thrift in reviewing and approving land requisition plans and ensure that the quantity and location of the land requested to be requisitioned fit the general local development plan. Second, all land-using entities must economize on land use and prepare detailed plans in this respect before applying for state land requisition. Applications shall be filed only for the amount of land indeed needed and only when it is indeed needed. Third, governments at all levels must regularly check whether and how requisitioned land is used and rectify land waste. If there is any land not or no more needed by the land-using entities due to change of construction plans, it should be withdrawn without compensation and then allocated to other land-using entities or peasants. Fourth, all land-using entities shall turn in the requisitioned land that is not or no more needed back to the local government without leasing or selling it.

In view of the last part of this chapter, the 1956 State Council Notice is readily understandable. Soon after the planning system of basic construction and land requisition was established, the problem of excessive land use and requisition arisen because the land-using entities did not have to bear any cost incurred. To be sure, under the 1953 and 1958 Requisition Measures, they are responsible for paying compensation to the requisitioned.[92] However, since they were all in one way or another affiliated with the state and were supported by state funding, at the end of the day, the real

[92] Article 14, *Measures on Land Requisition for State-led Construction (guojia jianshe zhengyong tudi banfa)*; Article 8, *Measures on Land Requisition for State-led Construction (guojia jianshe zhengyong tudi banfa)*.

costs of land requisition were covered by the state.[93] In this situation, to borrow a term from economics, this was a perfect example of free-riding and moral hazard on the part of the land-using entities. In the meanwhile, the government at various levels had failed to rein in this problem probably not just because they were slack in doing so. More critically, it is perhaps intrinsically impossible for the government to check the "rationality" or "reasonableness" of every decision of land requisition, which was practiced, as already noted, for virtually all kinds of non-agricultural construction all over the vast country.

The intractability of this problem was proven time and again in the subsequent decades. Compared with the 1953 predecessor, the 1958 Requisition Measures added a paragraph to Article 3: Land requisition for state-led construction shall follow the principle of "economizing on land use" (*jieyue yongdi*). Any construction project that is not necessary at the moment should not be carried out; if the construction project is indeed necessary and land requisition is required, waste of land must be prevented. Whenever practical, vacant land and land of low quality shall be used first and the requisition of cultivated land or land of high quality shall be avoided. However, in spite of such legal prescription, excess in land requisition was far from eliminated. In 1962, 1964, 1970, 1973 and 1979, the above-cited provisions in the 1956 State Council Notice and the 1958 Requisition Measures were repeatedly reissued by the central authority, none of which seemed to be effective in solving the problem.[94] Apart from handing down instructions urging thrift in land requisition, the

[93] Jingdong Zhang, 'China's Urban Land is not Used for Free: on the Fundamental Cause to Low Efficiency in Land Use (*zhongguo chengshi tudi bingfei wuchang shiyong: jian lun tudi liyong xiaolv di de genben yuanyin*)' [1992] Urban Issues (*chengshi wenti*) 10, p 14.

[94] State Council, *Comments of the Ministry of Domestic Affairs on the Report on the Use of the Land Requisitioned for State-led Construction in Beijing and Tianjin (neiwu bu guanyu beijing tianjin liang shi guojia jianshe zhengyong tudi shiyong qingkuang de baogao de piyu)* (April 10, 1962); State Council, *Comprehensive Report of the Ministry of Domestic Affairs on the Inquiries done by Local Governments and Departments on the Use of the Land Requisitioned (neiwu bu guanyu ge difang ge bumen jiancha zhengyong tudi shiyong qingkuang de zonghe baogao)* (October 30, 1962);General Political Department of the People's Liberation Army, *Notice on Issues concerning Land Requisition by the Military (guanyu budui zhengyong tudi wenti de tongzhi)* (April 20, 1970); State Planning Revolutionary Committee and State Basic Construction Revolutionary Committee, *Notice on Implementing the State Council's Instruction on Practicing Thrift in Using Land for Basic Construction (gunyu guanche zhixing guowuyuan youguan*

other measure taken was to centralize the approving authority. While the 1953 and 1958 Requisition Measures both grant governments down to the county level the power to sanction land requisition depending on the size of the projects, in 1962, the State Council decided to scale such power up to the provincial level in order to toughen the overall control over land requisition.[95] Just two years later in 1964, however, part of that power was devolved down again to the governments at the county level if the size of the construction project is below certain threshold, the reason being that centralizing the approving authority at the provincial level turned out to be too administratively cumbersome to ensure timely review of an increasing number of requisition applications.[96] At the same time, being well aware of the risk of excessive requisition, it was emphasized in the same official document that after the devolution of the approving power, those governments in charge should continue to practice thrift in land requisition and that the control in this area should not be relaxed due to the devolution.[97]

From the late 1970s to early 1980s, after the Cultural Revolution, as demonstrated above, the conversion of rural cultivated land into construction land picked up in pace. Once again the central authority faced the mounting challenge of excessive and uncontrolled land requisition. In this circumstance, at a national conference on rural construction building in December 1981, it was pronounced for the first time that it is a "basic state policy" that "every inch of land must be cherished and used rationally".[98] A few months later, this was written into Article 3 of the 1982

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zai jiben jianshe zhong jieyue yongdi de zhishi de tongzhi) (June 18, 1973); pt 11, CCP Central Committee, *Decisions on Several Issues concerning Accelerating Agricultural Development (guanyu jiakuai nongye fazhan ruogan wenti de jueding)* (September 28, 1979).

[95] State Council, *Comments of the Ministry of Domestic Affairs on the Report on the Use of the Land Requisitioned for State-led Construction in Beijing and Tianjin (neiwu bu guanyu beijing tianjin liang shi guojia jianshe zhengyong tudi shiyong qingkuang de baogao de piyu)*.

[96] State Council, *Notice on Modest Decentralization of the Examining and Approving Power concerning Land Requisition for State-led Construction (guanyu guojia jianshe zhengyong tudi shenpi quanxian shidang xiafang de tongzhi)* (July 20, 1964).

[97] Ibid.

[98] *Minutes of the Second National Conference on the Work of Rural Housing Construction (di'er ci quanguo nongcun fangwu jianshe gongzuo huiyi jiyao)*.

Rural Construction Regulation enacted in February and Article 3 of the 1982 Requisition Regulation promulgated in May. Eventually, the principle of rational use of land became constitutionally enshrined in December of the same year. Given the historical background presented above, the constitutional clause of rational use of land applies equally to the land-using entities that apply for state land requisition and the governments which have the authority to review and approve such applications. Both of them are required to be reasonable and thrift so as to prevent waste of land, especially the scarce cultivated land. Therefore, as much as being about land use, that constitutional clause is also fundamentally concerned with land requisition and therefore constitutes a component of the 1982 constitutional takings clause.

4. The 1982 Constitutional Takings Clause: Nature and Purpose

At the beginning of this chapter, a distinction was made between the narrow and broad sense of the 1982 constitutional takings clause, i.e. the third paragraph of Article 10 and Article 10 as a whole. While the former is universally and always seen as the constitutional takings clause, it has never been the case with the latter. With the first two paragraphs on state and collective land ownership structure, the fourth paragraph on prohibition of voluntary land transaction and the final paragraph on rational use of land, Article 10 is typically considered to be broader than simply a clause on land takings. However, as demonstrated by the foregoing analysis, in ways that have been largely overlooked so far, all of these provisions are closely related to the power of land takings. To start with, the first two paragraphs of the Article are historically the result of a pragmatic decision by and a compromise among the constitutional framers, falling just one step short of full-scale land

nationalization. More importantly, the first paragraph stating that urban land is owned by the state is actually in itself an exercise of the power to nationalize the urban land existing at the time of constitutional enactment in 1982, even though it neither automatically nationalizes nor obligates the state to expropriate the urban land that has come into existence afterwards. Second, by eliminating the land market, the fourth paragraph was to ensure that the land expropriation remains the only way in which rural land can be turned into state-owned land and used for most non-agricultural construction and development. Third, the final paragraph spells out the basic principle to be followed by both the applicants and decision-makers of state land expropriation. For sure, this is not to say that these provisions are exclusively about land takings. For instance, the rationality principle also applies to the post-takings utilization of land. However, it does show that although usually not regarded to be so, in one way or another, these provisions are indeed associated with the state power of land takings. Therefore, the third paragraph is just the constitutional takings clause in the narrow sense, which must be comprehended in the light of Article 10 as a whole.

Now, how do these clauses all fit together within the same constitutional article? I argue that they are united on two points, from which the nature and purpose of the 1982 constitutional takings clause *sensu lato* can be derived. On the one hand, all of them are normatively based on the Marxist-Soviet socialist principle discussed in the last two chapters. The provisions in Article 10 on land requisition and the ban on voluntary land transaction have constitutionally endorsed the fact that from the 1950s to the 1980s, requisition was the dominant way to supply land to all sorts of non-agricultural construction projects, including those by and for private enterprises and individuals. This was normatively legitimized not because these entities and individuals were regarded to represent the state or the public interest, but because these construction projects were authorized by

the state. Recall that under the socialist principle, the state is the embodiment of public interest, which is superior to and at the same in harmony with the private interests of individuals. State land takings are necessarily in the public interest since they are measures taken by the state to enhance public property or to facilitate the industrialization of the country. Therefore, so long as a decision of land requisition is sanctioned by the state, regardless of who the applicants are or what ends the requisitioned land is subsequently put to, it is considered to be in the public interest. Similar arguments can also be made about the 1982 nationalization clause, which was legitimized under the same principle. From the perspective of those whose land is taken, according to the socialist principle, being disposed by the state is not conceptualized primarily as a loss or sacrifice of their private property rights in land, which, as has been made clear, was never a core concern to the party-state. Instead, it is a hounorable duty for the socialist citizens to accept state land takings, a point well illustrated by the afore-mentioned Explanation of the 1982 Requisition Regulation: "When receiving reasonable compensation and resettlement according to relevant rules, the rural collectives and peasants have the obligation to actively support state-led construction."[99] It was further confirmed in Article 4 of the finalized 1982 Requisition Regulation: if the land requisition for state-led construction complies with the prescriptions contained in this Regulation, the cadres and people of the requisitioned collectives shall submit to the needs of the state and not cause any hindrance or obstruction.

On the other hand, all the provisions in Article 10 serve the same function which is to facilitate state-led construction and development. For example, the clause on urban land belonging to the state was intended to do so in the first place. The no land transaction clause guarantees the state's control over the conversion of rural land to non-agricultural uses through land requisition. The rational land

[99] D. Kebai Lv

use clause, although seemingly a limitation over state land requisition, is more fundamentally purported to regulate the exercises of land requisition so that it will contribute to rather than undermine the state-led development.

Overall, considered against the historical background that the CCP started to commit itself to growing the economy at the dawn of the reform era in the late 1970s and early 1980s, Article 10 of the 1982 Constitution, i.e. China's existing constitutional takings clause, is essentially an integral part and extension of the historical tradition of land takings for state-led social transformation. Normatively and teleologically, it is no different from its 1954 predecessor, even though it was drafted and promulgated in the reform era and was therefore intended to facilitate state-led economic development instead of state-led revolution and class struggle. In other words, though the specific agenda has changed, the essential nature and purpose of rural land takings has stayed the same. In this sense, it is old wine in a new bottle. No more different can it be from the Fifth Amendment of the US Constitution.

I promised at the outset that an explanation would be ventured on the two changes made by the 1982 constitutional takings clause *sensu stricto* over its 1954 precursor, which is the removal of nationalization and compulsory purchase. That promise can now be fulfilled. The reason that the power of nationalization was removed is two-fold. First, the socialist transformation of industry and commerce had long been completed back in the 1960s. At the time of constitutional drafting in 1982, there was no longer any ongoing or anticipated revolutionary project that requires compensation-less nationalization. But this cannot explain why the power of nationalization was still provided for in the constitutional takings clauses in the 1975 and 1978 Constitutions, which brings us to the second reason. At the dawn of the opening and reform era, after decades of seclusion, China urgently needed

foreign capital investment to kick start the economic turnaround. In order to regain the confidence of international investors which had previously been undermined by practices such as compensation-less nationalization, a promise was made in one of the first few national statutes enacted in the reform era—the 1979 Law of Sino-foreign Equity Joint Ventures (Article 2) that the state will not nationalize these joint-ventures under any circumstances. Against this background, though without conclusive evidence, it is reasonable to think that this was at least one of the considerations behind that constitutional change in 1982.

On the other hand, the reason for the removal of compulsory purchase is that it is, as mentioned in Chapter 3, procedurally preconditioned on voluntary negotiation and exchange between the land-using entities and the landowners, which distinguishes it from the power of requisition. As noted above, after the collectivization campaign in the early

1960s, voluntary transaction of rural land became banned. This made it no longer possible and necessary to differentiate compulsory purchase from requisition and treat it as a free-standing takings power. Hence it was already removed from the 1975 and 1978 Constitutions. Besides, perhaps a more deep-seated reason is that under the socialist principle, dispossession by the state is not conceptualized as a transaction and it is unacceptable for anyone to bargain with the state.[100]

At this point, one may argue that what has been revealed so far is no more than a historical reading of the 1982 constitutional takings clause. It is unsurprising at all that to a large extent it still carried the historical legacy from the pre-reform years when the opening and reform policy was just about to be unfolded. Over the past three decades, however, China has undergone enormous and comprehensive changes, which should have long renovated the constitutional basis of rural land

[100] This also means that the state cannot buy land.

expropriation. A good example is the general perception today that it should not be a duty for citizens to actively accept state expropriation and that the decision to expropriate is not always in the public interest. Hence the crisis of China's existing law on rural land expropriation. Nevertheless, as will be pointed out in the next chapter, this is the precisely the point: the Chinese law on rural land administration and expropriation in the reform era since the 1980s has continued to be a faithful reflection of the 1982 constitutional takings clause as explained in this chapter. The constitutional basis of rural land expropriation in China today is still what it was over half a century ago.

Chapter 6 Rural Land Expropriation Law in the Reform Era: Myths, Realities and Prospects

The last three chapters have demonstrated that from the early 1900s to the 1980s, land takings in different forms had been conceptualized and exercised as an instrument for the communist party-state to achieve its social transformative programme in China, be it proletarian revolution or economic development. This was not only reflected by the relevant laws and policies it promulgated, but also enshrined in the PRC's constitutional takings clauses in 1954 and 1982. What are the contemporary relevance and implications of all these theoretical and practical legacies? This chapter moves on to examine the Chinese law and policy of rural land expropriation in the reform era. The first part presents the changes and continuities in the laws on rural land use control and expropriation since the early 1980s. It refutes the popular myth that the 1998 LAL radically broke away from the past and demonstrates that the present expropriation law is fundamentally a continuation of the historical tradition.

The second part reveals and rejects other two persistent myths in the current scholarship by explaining the existing mechanism under which the expropriation decisions are made and the justiciability of these decisions. It argues that the decisions to expropriate are essentially implementing the spatial plans made by the government and that a large part of these decisions are judicially reviewable according to the law, even though that is frequently not the case in reality and consequently there is hardly any jurisprudence on the constitutional public interest clause.

The third part overturns the Transition Paradigm, especially its developmental assumption, by making sense of what has and has not been done in the reform of rural land use and expropriation

system over the last ten or so years. It explains why those popular and long expected reform proposals identified in Chapter 2 have never come. It also discusses the possible trajectory of future development in this area. On that basis, the final part puts forward some modest but more realistic reform suggestions for both the short and longer terms.

1. Rural Land Use Control and Expropriation in the Reform Era: Change and Continuity

As shown in the last chapter, while the widely-perceived "urbanization challenge" is in fact more apparent than real, the "de-agrarianization challenge" was already in existence between the 1950s and early 1980s. Although the 1954 constitutional takings clause explicitly requires state land takings to be in the public interest, the reality was that in most cases rural land could be put to non-agricultural purposes only after being requisitioned by the state, regardless of how and by whom it was subsequently used. Until the early 1980s, however, that was never formalized in any policy or law—it was more of a natural consequence of the fact that back then the function of the rural collectives was by and large limited to agricultural production and public provision to their member peasants. Into the reform era, it continued to be the case and was legalized for the first time in the 1982 Regulation on the Administration of Land Use for Building Construction in Villages and Townships and the 1982 Regulation of Land Requisition for State-led Construction. Worth noting is that both of these statutes were enacted just months prior to and indeed remained effective after the 1982 Constitution. As demonstrated in the last chapter, the 1982 constitutional takings clause in the

general sense has confirmed and solidified the presumption of state expropriation [1] in non-agricultural use of rural collective land.

I argue that all of this has foreshadowed the existing law on rural land use control and expropriation prescribed in the present written constitution and the LAL. Before we move on to explain how this is so, a word or two is needed to define the scope of our inquiry. As already mentioned, the existing PRC Constitution was promulgated in 1982 and amended for four times in 1988, 1993, 1999 and 2004. The existing LAL was initially enacted in 1986 and subsequently revised in 1988, 1998 and 2004. It should be noted that the latest 2004 revisions to the 1982 Constitution and the LAL only involved the terminological change from "requisition" to "expropriation".[2] The 1993 and 1999 Constitutional Amendments did not touch upon the land issue. That is to say that the substance of the constitutional and statutory law on rural land use control and expropriation in the reform era is to be found in the 1982 Constitution amended in 1988 as well as the 1986, 1988 and 1998 LAL. Since Chapter 1 has already analyzed the 1998 LAL in detail, we will now focus on the 1986 and 1988 LAL and the 1988 Constitutional Amendment.

The 1986 LAL is known to be the first comprehensive national legislation on the land issue in the PRC. Four types of non-agricultural use of rural land by the rural collectives are enumerated in Articles 38-41, which are residence construction for collective member peasants, TVEs, public utilities and public welfare initiatives of the rural collectives and residence construction for urban residents without the rural *hukou*. Though still in need of government approval, all these four types of construction can be carried out by the rural collectives without state land expropriation. In addition, Article 36 prescribes that if the TVEs are to establish joint ventures with state-owned

[1] As previously noted, in 2004 the term requisition was constitutionally changed to expropriation. In this chapter, the term presently in use will be adopted unless otherwise specified.
[2] *2004 Amendment of the 1982 PRC Constitution* (March 14, 2004); *2004 Amendment to the PRC Land Administration Law* (August 28, 2004).

enterprises and urban cooperative enterprises, the rural land in need should be expropriated by the state. However, if approved by the government at the county level or above, such land can also be used by the rural collectives as in-kind contribution to the joint ventures without being expropriated by the state. Therefore, the 1986 LAL has listed out in total five kinds of non-agricultural uses of rural collective land that do not necessitate state expropriation—is that an exhaustive list? The answer is in the positive if we consider the structure of the law. It contains seven chapters, two of which are about non-agricultural use of land. Chapter 4 is about such use by the state while Chapter 5 is about the same by the rural collectives. Apart from Article 36, Chapter 4 is all about state expropriation of collective-owned land and withdrawal of state-owned land. Chapter 5 covers Article 37 to 42, with Articles 38-41 constituting the bulk of it. Articles 37 and 42 deal with the planning in non-agricultural use of rural land. Therefore, the above-mentioned five scenarios are all there is to non-agricultural uses of rural land by their owners—the collectives. It is then not difficult to see the similarity between the rural land use regulatory regime established by the 1986 LAL and that in the 1982 Rural Construction Regulation as well as that in existence *de facto* since the 1950s. In all of these cases, the presumption of state expropriation in non-agricultural use of rural land holds, although the specific kinds of permissible use by the rural collectives changed. For example, in this respect, the difference between the 1986 LAL and the 1982 Rural Construction Regulation and indeed the 1982 Requisition Regulation and the aforementioned 1983 Measures on Administration of Building Residence for Individuals in Cities and Townships is that joint-ventures established by the TVEs and residence construction for urban residents are added as two exceptions to the presumption of state expropriation.[3]

[3] It was made clear in the Explanation on the Draft LAL in 1986 that because more flexibility was widely demanded for TVEs to establish joint-ventures with their land as in-kind contribution, the change was made. *Explanatory Report on the Draft PRC Land Law (guanyu zhonghua renmin gonghe guo tudi fa cao'an de shuoming)* (March 15, 1986).

On a different note, how does the 1986 LAL compare with its immediate predecessor the 1982 Requisition Regulation in terms of the provisions on state expropriation? The situation is not so different from the previous one. To start with, Article 23 of the 1986 LAL has basically copied Article 4 of the 1982 Requisition Regulation in prescribing that those requisitioned shall submit to the needs of the state and not obstruct expropriation. Second, the compensation standards in these two statutes are identical: The land compensation fee for cultivated land is set at 3-6 times the land's average annual yield of agricultural products over the three years before the expropriation. The resettlement fee per person is set at 2-3 times the average annual yield of the land and the maximum resettlement fee per hectare is set at 10 times of such value. If the land compensation and resettlement fees combined are inadequate to maintain the peasants' original living standards, the provincial government may decide to increase the resettlement fee. However, the sum of the increased resettlement fee and the land compensation fee shall not exceed 20 times the land's average annual yield.[4] Third, as to the allocation of approving authority within the government system, these two laws are different in two respects. On the one hand, while both continue to delegate the approving power down to the county level, a tradition that as mentioned in the last chapter started in 1964, in comparison with the 1982 Requisition Regulation, the 1986 LAL shifted part of the approving power at the county level up to the provincial level.[5] On the other hand, for the first time in the PRC history, government authorities specialized in land administration were instituted from the ministerial to the county level under the 1986 LAL. Previously there was no single uniform government agency in charge in this area. The then newly-established agencies were

[4] Articles 9-10, *Regulation on Land Requisition for State-led Construction (guojia jianshe zhengyong tudi tiaoli)*; Articles 27-29, 1986 Land Administration Law.

[5] Article 8, *Regulation on Land Requisition for State-led Construction (guojia jianshe zhengyong tudi tiaoli)*; Article 25, 1986 Land Administration Law. In the 1982 Requisition Regulation, the county governments can authorize expropriation of cultivated land less than 3 *mu* and other kinds of land below 20 *mu*. The 1986 LAL prescribes that the county governments may sanction expropriation of cultivated land below 3 *mu* and other kinds of land below 10 *mu*.

called Land Administration Bureaus and were tasked to manage land-related affairs on behalf of the corresponding governments, including reviewing the expropriation applications before submitting them for final governmental approval.[6]

Now, what explains the overall continuity in the rural land use control and expropriation system from the early 1980s to the 1986 LAL? Obviously proximity in time is an important factor. In fact, the central authority decided to promulgate a comprehensive land law in 1979[7] and the initial draft of the 1986 LAL was already being prepared in 1981.[8] It was no surprise then that the finalized version of the LAL in 1986 was by and large the same as those regulations and rules promulgated just a few years earlier. Apart from that, a perhaps more fundamental reason for such continuity lies in the fact that the enactment of the 1986 LAL was driven by exactly the same concern as its precursors in the early 1980s. It was demonstrated in the last chapter that to fill up the legal vacuum of state land requisition in order to curb waste of cultivated land was the main consideration behind the series of policies and laws on rural land use control and expropriation in the early 1980s. The problem was far from resolved as a result, as evidenced by the fact that in March 1986, the central authority urged to speed up the drafting process of a comprehensive land law for precisely the same purpose of tightening up the state's control over unauthorized or excessive rural land expropriation and prohibited rural land transaction, which had perpetuated the problem of agricultural land loss and waste.[9] This point was further confirmed in the NPC Deliberation Report made at the time when

[6] Article 5, 1986 Land Administration Law; pt 4, CCP Central Committee and State Council, *Notice on Tightening Up Land Administration and Stoping Unauthorized Occupation of Cultivated Land (guanyu jiaqiang tudi guanli zhizhi luanzhan gengdi de tongzhi)* (March 21, 1986).
[7] CCP Central Committee, *Decisions on Several Issues concerning Accelerating Agricultural Development (guanyu jiakuai nongye fazhan ruogan wenti de jueding)*.
[8] , *Explanatory Report on the Draft PRC Land Law (guanyu zhonghua renmin gonghe guo tudi fa cao'an de shuoming)*.
[9] CCP Central Committee and State Council, *Notice on Tightening Up Land Administration and Stoping Unauthorized Occupation of Cultivated Land (guanyu jiaqiang tudi guanli zhizhi luanzhan gengdi de tongzhi)*.

the 1986 LAL was passed.[10] In light of this, the 1986 LAL was actually intended as an upgrade solution to the same old problem. This explains not only its overall similarity with its precursors from the early 1980s, but also its differences. The partial recentralization of the approving power and the establishment of the land administration bureaus both reflected the conscious effort to strengthen top-down control over rural land expropriation.

None of the above was changed by the first revision to the LAL in 1988, which as noted in Chapter 2 was primarily focused on opening up the market for the use-rights over state-owned land. The blanket ban on voluntary land transaction prescribed in the 1986 LAL (Article 2) and the 1982 Constitution was partially lifted. Shortly after the 1988 Constitutional Amendment acknowledged that "use-rights of land can be transferred according to law", the revised Article 2 of the LAL provides that the use-rights of state-owned land and collective-owned land can be transferred according to law. The specific measures about land use-rights transfer will be promulgated by the State Council. The state implements the system of paid uses of state-owned land according to law. The specific measures on paid uses of state-owned land will be promulgated by the State Council. The rest is indeed history: as explained in Chapter 2, by separating use-right from ownership, without abandoning the hallmark of socialism—the public land ownership, China has since established a huge and dynamic market of use-rights over state-owned land.

The next revision to the LAL came a decade later in 1998. The conventional wisdom is that as the first land law promulgated after China formally committed itself to market economy, the 1998 LAL marked a sharp departure from its predecessor to reflect the significant changes in the socio-economic background. Admittedly, it did contain some quite substantive changes. However, I

[10] Law Commission of the National People's Congress, *Report on the Deliberation Result of the Draft PRC Land Law (dui zhonghua renmin gonghe guo tudi fa cao'an shenyi jieguo de baogao)* (June 16, 1986).

argue that it is a myth to think that the 1998 LAL is radically different as far as rural land use control and expropriation are concerned.

First, as already noted, the 1998 LAL explicitly states that the rural collectives can only use their land for non-agricultural purposes in five exceptional scenarios spelt out by the law upon government permission. All other non-agricultural uses of land must take place over state-owned land and therefore involve state expropriation. Second, on the basis of the first change, the 1998 LAL sets up a "land use regulatory system" (*tudi yongtu guanzhi zhidu*) to replace the previous "system of graded examination and approval according to specified limits" (*fenji xian'e shenpi zhidu*) established by the 1986 LAL, where the governments from central to county level were put in charge of sanctioning expropriation of rural land up to certain scale. Third, in terms of the expropriation-approving authority, the 1998 LAL recentralized it to the provincial and central level. No longer do the governments down to the county level have the power to sanction rural land expropriation, however small the scale is. Fourth, with regard to expropriation compensation, there was a noticeable increase in the 1998 LAL compared with the 1986 LAL. For instance, the land compensation fee of cultivated land was increased from 3-6 times to 6-10 times the average annual yield of the expropriated land over the three years prior to expropriation. The resettlement fee per person was increased from 2-3 times to 4-6 times the average annual yield and the maximum resettlement fee per hectare was raised from 10 to 15 times the average annual yield. If the sum of the land compensation fee and resettlement fee is insufficient to maintain the peasants' original living standards, the provincial governments may decide to raise the resettlement fee. The upper limit of the sum was increased from 20 to 30 times the average annual yield. Moreover, the 1998 LAL specified that considering the level of social and economic development and under special

circumstances, the State Council may further raise the compensation standards. Fifth, alongside the increase of compensation fees, the 1998 LAL saw a change in the ways resettlement was supposed to be provided. While the 1986 and 1988 LAL require that the expropriating governments should help the expropriated peasants find new jobs by asking the TVEs or the land-using entities and other state-owned organizations to recruit them[11], such a provision was removed from the 1998 LAL.

With that said, one can easily see the fundamental continuity underlying all these changes from the 1986 LAL to 1998 LAL. First of all, the presumption of state expropriation in non-agricultural use of rural land was not only retained but actually enhanced. Recall that between the 1950s and early 1980s, absent any formal legal prescription, this presumption was practiced in a *de facto* fashion due to the limited role played by the rural collectives in the economy. The 1982 Rural Construction Regulation and the 1986 LAL both provided a list of permissible non-agricultural uses of rural land by the collectives, they nevertheless did not overtly state that the list was exhaustive. It was until the 1998 LAL that this presumption got positively confirmed for the first time in the PRC history. Moreover, as will be shown with more details in the next part of this chapter, the "land use regulatory system" was put in place precisely for strengthening the top-down state control over the conversion of rural collective land to non-agricultural purposes through state land expropriation. This also explains the recentralization of the expropriation-approving power back to the provincial level and above. Last but not least, despite the increase in expropriation compensation fees, "maintaining the peasants' original living standards" was well preserved by the 1998 LAL as the principle in determining compensation. Besides, the increase of compensation fees could be somewhat seen as to make up for the fact that the expropriating government no longer had the legal responsibility to assist the expropriated peasants with post-expropriation reemployment.

[11] Article 33, 1986 LAL; Article 31, 1988 LAL.

Overall, it is fair to conclude that the evolution from the 1986 LAL to 1998 LAL was to a large degree a repetition of the evolution from the relevant statutes in the early 1980s to the 1986 LAL. In both cases, the continuity significantly outweighed the change. The reason behind was similar, too. As demonstrated, the 1986 LAL was intended as an upgrade solution to the same old problem of waste of cultivated land due to excessive or unauthorized land requisition, which had initially motivated the promulgation of its predecessor statutes in the early 1980s. The 1998 LAL was expected to achieve exactly the same objective, a point openly acknowledged in the legislator's Explanation on the Draft LAL in 1998:

> *With the deepening of the reform and the change in circumstances, many provisions in the present LAL [the 1986 LAL] are now obviously unfit for the purposes of strengthening land administration and preserving cultivated land effectively. Problems such as unlawful approval of land use, unauthorized occupation of cultivated land and waste of land have taken place from time to time in some localities, resulting in sharp decrease of cultivated land and loss of land asset…Attaching great importance to the crucial matter of land administration and preservation of cultivated land that concerns the general situation of the country and the future generations of the Chinese nation, the Central Party and State Council issued the Notice on Further Strengthening Land Administration and Effectively Preserving Cultivated Land on April 15th, 1997…Accordingly, the National Land Administration Bureau prepared the Draft LAL and submitted it to the State Council for approval on August 18th, 1997…*[12]

One year later, the final version of the 1998 LAL was passed by the Standing Committee of the NPC on August 29th. As an upgrade on the basis of the 1986 LAL to enhance top-down state control

[12] Yongkang Zhou, *Explanatory Report of the Draft Amended PRC Land Administration Law (guanyu zhonghua renmin gongheguo tudi guanlifa xiuding cao'an de shuoming)* (April 26, 1998).

over rural land use and conversion and to curb waste of land, especially cultivated land, it formally introduced stringent land use control over rural collective land, retained the presumption of state expropriation in non-agricultural use of such land, established a land use regulatory system and recentralized the expropriation-approving authority.

Worth noting is that the sternly worded provision that "the expropriated shall submit to the needs of the state and not obstruct or hinder state expropriation" in Article 4 of the 1982 Requisition Regulation and Article 23 of the 1986 LAL was removed from the 1998 LAL. As already argued, that provision can be seen as the manifestation of the socialist principle which had underlay the Chinese law of land expropriation from the 1950s to the 1980s. Does its disappearance from the 1998 LAL imply a critical change in the normative foundation of China's expropriation law? The conventional wisdom among Chinese civil law scholars has long been that the underpinning theory of contemporary Chinese law on rural land expropriation is the theory of social obligation of private property.[13] The reason given for that seems to lie nowhere else than in the fact that the Chinese civil law system is generally modelled on its German counterpart[14], in which the theory of private property as social function plays the crucial role in legitimating and limiting the state's power of expropriation.[15] Against this background, it has been generally held by Chinese civil law scholars that the state is required to compensate those expropriated due to the reason that they have made "special sacrifice" to benefit the public interest.[16]

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[13] The earliest academic work proposing this connection I can find is a 1994 article. Quansheng Chen, 'On the Compensation for Land Requisition (*lun tudi zhengyong zhi buchang*)' (1994) 57 Legal Science (*falv kexue*) 56, pp 56-57.

[14] This transplantation started from the late Qing period and continued into the Republic Era. In the first three decades of the PRC, this German civil law tradition was abandoned for it was considered bourgeoisie and reactionary. Since the opening and reform era, it was resumed as the overall model for China's civil law system. For a historical account, see Jianfu Chen, *Chinese Law: Context and Transformation* (Martinus Nijhoff Publishers 2008), ch 1.

[15] Rebecca Lubens, 'The Social Obligation of Property Ownership: A Comparison of German and U.S. Law ' (2007) 24 Arizona Journal of International & Comparative Law.

[16] Maohui Qu and Hong Zhang, 'On Several Issues concerning Expropriation Law (*lun zhengshou falv zhidu de jige wenti*)' [2003] Law Review (*faxue pinglun*) 50.

However, I argue that it is a myth to assume that the Chinese and German expropriation laws share similar or even the same normative foundation simply because of the close relationship between the two countries' civil law system in general. Whereas the theory of social obligation of private property as practiced in German law conceptualizes being expropriated as a "special/unusual sacrifice" (*sonderopfer*)[17], the following was made crystal clear in the legislator's Explanation of the Draft LAL in 1998: "Land expropriation is a kind of state action, and also a duty the peasants should fulfil to the state. It is not the peasants 'selling land' to the state. When the land expropriated by the state is transferred, the differential land rent that determines the different land prices is the result of state investment and a kind of revenue that should in principle belong to the state."[18] Two important conclusions follow from this authoritative exposition of the 1998 LAL. On the one hand, it indicates first and foremost that the socialist principle has persisted to be the normative basis for the Chinese land expropriation law—expropriation is not to be conceptualized as a sacrifice borne by the peasants but an obligation owed by them to the state. Therefore, the German version of the theory of socialized property is absolutely not the normative foundation to the present Chinese law on rural land expropriation. To insist on that is to commit the same mistake revealed in Chapter 4 which had once confused the Chinese constitutional makers in 1954. On the other hand, the above-cited Explanation also explains why "maintaining the peasants' original living standards" was kept as the principle to decide on compensation standards—when the peasants fulfill their duty to the state by accepting land expropriation, which should not be regarded as a quasi-transaction, what the state should do in return is not to pay them the market land price or anything similar, but to ensure that

[17] For a brief discussion of the *sonderopfer* principle and expropriation in German constitutional law, see Markus Perkams, 'The Concept of Indirect Expropriation in Comparative Public Law—Searching for Light in the Dark' in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010), pp 130-37. Note that in German law not all expropriation or regulation of private property is seen to involve special sacrifice on the part of the individual owners. It may well be considered as part of the social obligation of private property and therefore non-compensable. But when it does cause special sacrifice, the state must make compensation.

[18] Yongkang Zhou.

they are not worse off while reaping the increased land value seen to be generated solely from state investment.

The gist of the foregoing account of the evolution of China's law on rural land use control and expropriation since the 1980s is that the tradition of rural land takings for state-led social transformation has persisted well into the reform era. As shown above, since the early 1980s, the central concerns for all legislations in this area have always been to enhance top-down state control over rural land and to preserve cultivated land. Apparently, both of these are perceived by the party-state to be critical to its project of transforming China into an urbanized and industrialized country without jeopardizing too much the environment and food security. Compared with these concerns, the protection of private land rights or even striking a balance between public and private interests was never a consideration of equal weight. Hence the Chinese law on rural land expropriation has continued to be based on the socialist principle and tended to facilitate rather than constrain the state takings power. One particularly illustrative example in this regard can be found in the fact the same article in the 1928 Land Expropriation Law passed by the nationalist government (Article 46) reappears in the 1998 Implementation Regulation of the LAL (Article 25), stipulating that any ongoing dispute resolution process does not suspend the execution of the expropriation decisions.

As will be argued later in this chapter, a historical legacy of this kind has weathered, largely unscathed, through the reforms over the last ten years, including the 2004 Constitutional Amendment introducing the provision "citizens' lawful private property must not be violated" and the revisions to the policies and laws on rural land expropriation as discussed in Chapter 2. But before that, let's first return to the existing law on rural land expropriation, which was previously analyzed in the first

chapter. The purpose here is to expose and dispel two persistent myths in this area. The first one concerns the decision-making on expropriation and the other is about the justiciability of expropriation decisions.

2. The Existing Law on Rural Land Expropriation Revisited

I. Making Expropriation Decisions

It has been demonstrated in the opening chapter that under the present law, the entire decision-making process on rural land expropriation in China takes place inside the government through a review and approval mechanism, where the initiating prefectural or county government submit applications to the provincial or national government for authorization. As noted in the Prologue, in terms of use, land is categorized into three types—agricultural land, construction land and unused land. In theory, therefore, state expropriation of collective land can trigger in total nine kinds of land use conversion, four of which are more typical in practice. The following chart illustrates these four types and the respective competence of central and local governments in authorizing them:[19]

Effect of Expropriation	State Council	Provincial Governments
Collective agricultural land → State-owned agricultural land	(1) Expropriation of Prime Agricultural Land (regardless of the amount);[20] (2) Expropriation of over 35 hectares	Other circumstances

[19] Articles 21, 44, 45, 1998 and 2004 LAL.
[20] According to Article 34 of the 1998 and 2004 LAL, "Prime Agricultural Land" (hereinafter the PAL) is a special kind of cultivated land with particular characteristics earmarked for special preservation by the provincial governments, which is supposed to take up 80% of all the cultivated land in a particular province.

	of cultivated land other than the PAL	
Collective agricultural land → State-owned construction land	(1) Expropriation of the PAL (regardless of the amount); (2) Expropriation of over 35 hectares of cultivated land other than the PAL; (3) Expropriation for construction projects authorized by the State Council; (4) Expropriation for the construction of road, pipeline and large-scale infrastructure projects authorized by central ministries and departments;[21] (5) Expropriation for the construction of road, pipeline and large-scale infrastructure projects authorized by provincial governments; (6) Expropriation to implement Land Use Master Plans in municipalities directly under the central government, provincial capital cities and cities with	Other circumstances

[21] This is provided for not in the LAL, but in Article 1, Ministry of Land Resources, *Measures on Examination of the Application of Construction Land Use for Approval by the State Council (bao guowuyuan pizhun de jianshe yongdi shencha banfa)* (August 30, 1999).

	a population over half a million[22]	
Collective construction land → State-owned agricultural land	Expropriation of land over 70 hectares	Other circumstances
Collective construction land → State-owned construction land	Expropriation of land over 70 hectares	Other circumstances

The above has thus far been the focus of the existing literature as far as the decision-making on rural land expropriation is concerned. Despite its apparent importance, the following question has almost never been addressed in depth: How do Chinese central and provincial governments decide to expropriate a piece of collective land? The lack of attention to this question is most probably due to the persistent myth that decision-making of expropriation is merely a matter of takings law. Since rural land expropriation is an administrative prerogative subject only to internal hierarchical examination and approval, there is a general tendency in the existing literature to believe that simply by reading the relevant provisions in the 2004 LAL, one will know all there is to be known about the decision-making on expropriation. That is government at which level gets to decide what, which was just presented. However, I argue in the following texts that expropriation decision-making in China involves more than a free-standing decision for the state to take a piece of rural land. To understand how these decisions are made requires much insight into China's peculiar land administration system, or the "land use regulatory system" as it is called since the 1998 LAL.

According to Articles 20 and 23 of the 2011 Implementation Regulation of the Land Administration Law, there are two ways in which expropriation applications can be submitted by prefectural/county government to be reviewed by central/provincial government: one is submission

[22] Ibid.

and review in clusters (*fen pici*), which I call "clustered expropriation"; the other is submission and review for individual construction projects (*dandu xuanzhi*), which I call "individual expropriation".[23] The former covers those applications made in order to implement the Land Use Master Plans (*tudi liyong zongti guihua*, hereinafter LUMPs) and Urban and Rural Plans (*chengxiang guihua*, hereinafter URPs). The latter refers to those applications made in order to provide land for such individual construction projects as energy, transportation, irrigation, mines and military facilities that need to occupy land other than those designated as construction land in the LUMPs. These individual construction projects shall be approved by the central or provincial government. To understand how the two kinds of expropriation applications are filed and on what grounds they are reviewed, we must first make sense of the two plans.

LUMPs and URPs have long been two crucial elements to China's land use regulatory system. Both are formulated nationally and locally to specify, within the planned time frame, the spatial outlook at different localities in China. Starting from 1986, the LUMPs set long-term (usually 10 to 15 years) land use plans at the national, provincial, prefectural, county and township levels.[24] As a planning instrument, LUMPs operate through two key mechanisms—quota control and spatial control. In the present national LUMP (2006-2020), the former include the following seven quotas:

Agricultural Land	Quota 1: The amount of preserved cultivated land (*gengdi baoyou liang*)
	Quota 2: The amount of preserved PAL (*jiben nongtian baohu mianji*)
	Quota 3: The total amount of construction land (*jianshe yongdi zong guimo*)

[23] See also Article 44, 2004 LAL.

[24] The legal basis has been set out in Chapter 3 of the LAL since 1986. So far there have been three rounds of land use planning in China. The first national LUMP covered the time span from 1986 to 2000, the second one from 1997 to 2010 and the present one from 2006 to 2020. The reason for overlapping in coverage is because the need was felt to make new plans prior to the expiry of the old plans. Without further specification, the following discussion focuses on the present plan.

Construction Land	Quota 4: The amount of urban industrial/mine land per capita (*renjun chengzhen gongkuang yongdi guimo*)
	Quota 5: The amount of newly added construction land (*xinzeng jianshe yongdi guimo*)
Land Conversion	Quota 6: The amount of cultivated land converted to construction land (*xinzeng jianshe yongdi zhanyong gengdi*)
	Quota 7: The amount of post-conversion cultivated land supplement (*buchong gengdi liang*)

Five points are worth noting about these seven quotas. First, they set the upper or lower limits for certain use of land during the planning period. For instance, the quotas under the first category mandate the minimum amount of agricultural land and PAL that must be preserved until 2020. The quotas under the second category establish the maximum amount of stock and increment of construction land during the same period of time. The quotas under the third category set the maximal amount of cultivated land allowed to be converted to construction land and the minimal amount of cultivated land required to be reclaimed in order to supplement the loss of converted cultivated land.

Second, these quotas are assigned in a top-down manner. Starting from the central government, they are set and distributed one-level-down among different localities within the jurisdiction of the superior government. Third, these quotas are not only set for the long run but also are broken down to Annual Land Use Plans (*tudi liyong niandu jihua*, hereinafter ALUPs), specifying the land-use-related work of a particular local government on a year-to-year basis.[25] Fourth, they are

[25] Ministry of Land Resources, *Administration Measures of Land Use Annual Plans (tudi liyong niandu jihua guanli banfa)* (December 19, 2006).

legally binding and are thus called "binding quotas" (*yueshu xing zhibiao*).[26] Local governments are subject to annual reviews and are expected to abide by these quotas assigned to them by the upper level government. Non-compliance can lead to disciplinary actions imposed on both the government and the responsible officials.[27]

Finally and most crucially, assigned by superior governments to lower-level governments and checked for their compliance on an annual basis, these quotas serve one single most important function—to guarantee the state's top-down control over the scale and speed of the conversion of agricultural, especially cultivated land into construction land. Each of these seven quotas is designed to achieve just that. First, Quota 1 and 2 are the minimum amount of cultivated land (including the PAL) set for the entire country, provinces, prefectures, counties and townships, which must not be reduced further within the planning period. In particular, the national minimum amount of cultivated land to be preserved until 2020 has been set at 1.8 billion *mu*, famously known as the "red line of cultivated land". This figure was then divided and allotted to local governments as their task of cultivated land preservation. However, given that there will necessarily be more conversion of cultivated land to construction land during the still ongoing process of urbanization and industrialization in China, Quota 6 and 7 place restrictions over the scale of such conversion and require local governments to reclaim at least the same amount of cultivated land as what is converted into construction land. All of these four quotas aim to pursue a "dynamic balance" (*dongtai pingheng*) between cultivated and construction land, making sure that there is no net loss in cultivated land and that the quantity of it will not fall below the set threshold. Second, by setting the maximum amount

[26] In the present national LUMP (2006-2020), besides these binding quotas, there are also "anticipatory quotas" (*yuqi xing zhibiao*) on matters such as the amount of forestland, orchards and grassland. The difference between the two is that anticipatory quotas have only a guiding effect upon the local governments, which are expected to achieve such quotas as much as possible. See S 3, State Council, *Outline of National Land Use Master Plan (2006-2020)* (October 23, 2008).

[27] For example, exceeding the quota in one particular year will cause deduction of quota from next year. S 7, ibid.

of construction land, especially the newly-added construction land, Quota 3 and 5 place a limit to the overall quantity and increase of construction land in a particular locality within the planning period. Third, as the maximum ratio of urban construction land to urban population, Quota 4 serves a similar purpose in constraining the speed of construction land expansion to ensure that it will not outpace the population growth. For what is worth, this quota can also enhance land use efficiency. The reason for that is because the higher the land/population ratio, the less intensive urban land is used. Conversely, the lower the land/population ratio, the more intensive urban land is used. That is why the present national LUMP demands a two-square-meters reduction in 2020 compared with 2010.

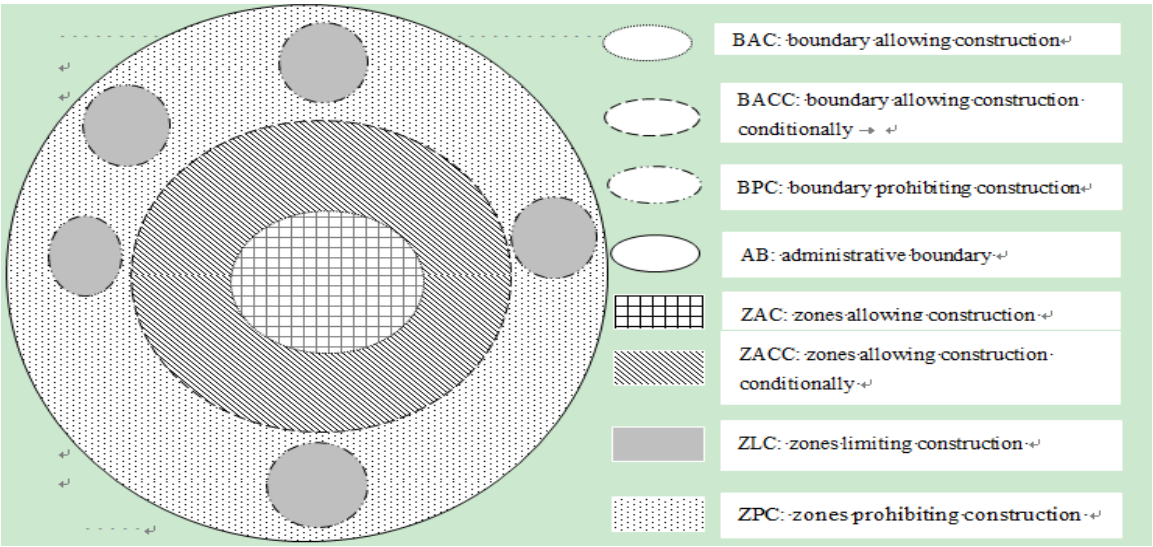
While the quota control under the LUMPs focuses on the quantitative side of land use in China, the present national LUMP has added for the first time an extra layer of spatial control that seeks to determine the spatial distribution of these different kinds of land use. While the quota control deals with the question of "how much", the spatial control concerns the issue of "where". It operates through a system called "Three Boundaries and Four Zones" (*san qu si jie*):[28]

Three Boundaries	Boundary of Areas for Urban-Rural Construction Land (*chengxiang jianshe yongdi guimo bianjie*)/Boundary allowing construction (BAC): the outer limits of areas allowed for construction land according to the quotas set in the LUMPs
	Boundary of Expanded Areas for Urban-Rural Construction Land (*chengxiang jianshe yongdi kuozhan bianjie*)/Boundary allowing construction conditionally (BACC): the outer limits of areas outside the BAC open for construction land

[28] Point 3, Ministry of Land Resources, *Notices on Strictly Implementing and Managing Land Use Master Plans (guanyu yange tudi liyong zongti guihua shishi guanli de tongzhi)* (February 22, 2012); Ministry of Land Resources, *Measures of Making and Examining Land Use Master Plans (tudi liyong zongti guihua bianzhi shencha banfa)* (February 4, 2009); Ministry of Land Resources, *Guideline for Municipal General Land Use Planning (shi di ji tudi liyong zongti guihua bianzhi guicheng)* (June 27, 2010); Ministry of Land Resources, *Guideline for the County-level General Land Use Planning (xianji tudi liyong zongti guihua bianzhi guicheng)* (June 27, 2010); Ministry of Land Resources, *Guideline for the Town-level General Land Use Planning (xiang zhen tudi liyong zongti guihua bianzhi guicheng)* (June 27, 2010).

	only conditionally to accommodate further urban development
	Boundary of areas prohibiting construction land (*jinzhi jianshe yongdi bianjie*, BPC): the outer limits of areas where construction is prohibited for the purpose of ecological, environmental and cultural-historical conservation
Four Zones	Zones allowing construction (*yunxu jianshe qu*, ZAC): zones for construction land as prescribed by the LUMPs
	Zones allowing construction conditionally (*xianzhi jianshe qu*, ZACC): zones outside the BAC but inside the BACC
	Zones limiting construction (*guanzhi jianshe qu*, ZLC): zones outside the BAC, BACC and ZPC
	Zones prohibiting construction (*jinzhi jianshe qu*, ZPC): zones where construction is prohibited for protecting important natural resources, ecological environmental and cultural-historical values

The inter-relationship of these boundaries and zones is illustrated by the following graph:[29]



[29] Taiyang Zhong, 'Success or Failure: Evaluating the Implementation of China's National Land Use Plans in Past Twenty Years' (Visit from the Nanjing University Research Presentations, University of Waterloo, 11 November 2013), p 44. There are slight changes in the translation of some Chinese terms.

By setting the quantity and location of agricultural and construction land, the LUMPs and its annual version made at all levels of China's administrative hierarchy effectively dictate the land use and its change in different localities both on a yearly basis and over the longer planning period. However, as noted above, this is but one of the two critical elements to China's land use regulatory system. The other element is the URPs, which is related to but distinctive from the LUMPs. They provide the urban development strategy at the national, provincial, prefectural, county, township and village levels.[30] Sub-national URPs are drafted at the respective local level and then submitted to the government one level above for review and approval.[31] Among the six tiers of URPs, the national and provincial URPs are more of a macro nature in setting out the urban development layout across the country or within individual provinces. The prefectural, county, township and village URPs hammer out the details.[32] For example, the prefectural and county URPs are supposed to set out the spatial arrangement for the respective locality, including its functional zones, layout of different land use, areas used for infrastructure and public service facilities, the PAL, historical and cultural heritage, etc. Meanwhile, the township and village URPs shall include the following content: the layout of the land used for residence, roads, water supply and drainage, power supply, garbage collection, livestock and poultry farms, etc.

While typically formulated for a 20-year period[33], the URPs are also broken down to Short-term Construction Plans (*jinqi jianshe guihua*, hereinafter SCPs) that usually cover five years.[34] With an increasing degree of specificity, sub-provincial URPs are categorized into master plans (*zongti guihua*), regulatory plans (*kongzhi xing xiangxi guihua*) and site plans (*xiujian xing xiangxi*

[30] Articles 13-18, 2007 Urban and Rural Planning Law.
[31] Articles 12-15, 2007 Urban and Rural Planning Law.
[32] Articles 17-18, 2007 Urban and Rural Planning Law.
[33] Article 17, 2007 Urban and Rural Planning Law.
[34] Article 34, 2007 Urban and Rural Planning Law; Article 6, Ministry of Construction, *Interim Working Measures on Short-term Construction Planning (jinqi jianshe guihua gongzuo zanxing banfa)* (August 29, 2002).

guihua).[35] These plans lay down the details of the functional spatial arrangements within a locality. For instance, construction land can be put to in total 43 types of uses such as residence, government buildings, shops, restaurant, theatres, factories, roads, parks, plazas and so on so forth.[36] On the planning map, each and every piece of land is earmarked for a particular use over the planning period. Generally speaking, under the URP, a locality is divided into four areas not so dissimilar from the four zones set out in the LUMPs:[37]

Built-up Areas (*jiancheng qu*)	Areas already developed and covered by basic infrastructure and public service facilities
Areas suitable for construction (*shiyi jianshe qu*)	Areas designated in the URPs to accommodate urban development projects
Areas restricting construction (*xianzhi jianshe qu*)	Areas designated in the URPs as unsuitable for urban development projects; if such development is necessary, the projects shall be in line with the overall development and their nature, scale and intensity must be strictly controlled
Areas prohibiting construction (*jianzhi jianshe qu*)	Areas designated in the URPs that should not accommodate urban development projects for preservation of ecological, natural and cultural-historical environment as well as meeting the needs of infrastructural facilities and public security, etc.

[35] This translation is officially recommended. Office of Translation and External Affairs at Shanghai Administrative Law Research Institute (ed) *Law Translation (fagui fanyi)*, vol 33 (2007).

[36] *Code for Classification of Urban Land Use and Planning Standards of Development Land (chengshi yongdi fenlei yu guihua jianshe yongdi biaozhun)* (January 1, 2012); *Explanation of the Code for Classification of Urban Land Use and Planning Standards of Development Land (chengshi yongdi fenlei yu guihua jianshe yongdi biaozhun tiaowen shuoming)* (January 1, 2012).

[37] Ministry of Housing and Urban-Rural Development, *Letters on Opinion Soliciation concerning Partial Amendment to the National Standard Urban Planning Basic Terms Standard (guanyu zhengqiu guojia biaozhun chengshi guihua jiben shuyu biaozhun jubu xiuding zhengqiu yijiangao yijian de han)* (July 27, 2005).

Unsurprisingly there is this question of compatibility and coordination between these two sorts of spatial plans. While in law they are supposed to be consistent with one another,[38] for one reason or another, there have often been instances of inconsistency in reality.[39] Nevertheless, this is not the place to delve into these issues. Suffice it to say here that the present use and future use change of a piece of land over the planning period, including both state-owned and collective land, are in effect determined by the LUMPs and URPs. Consequently, their annual versions, i.e. the ALUPs and SCPs dictate when and where a piece of collective land is to be expropriated. Moreover, it is worth noting that at the moment, the LUMPs are made by the local governments and approved by the governments at the next higher level.[40] It was prescribed by the MLR in 2009 that the government may consult the public for solutions to significant and difficult problems arising from the making of LUMPs.[41] The URPs are also made and approved primarily within the government system, though sub-national URPs should be reviewed by the standing committees of local people's congresses and open for public comment before sent to superior government for approval.[42]

Against this background, it is according to the ALUPs and SCPs that the prefectural and county governments initiate expropriation and submit relevant applications each year. Since during one year there may well be multiple expropriation initiatives taking place at different times, for the sake of convenience, these individual applications are submitted to and reviewed by the approving authority

[38] Article 22, 2004 LAL; Article 5, 2007 Urban and Rural Planning Law.
[39] Xiangdong Yin and Yunjing Pan, 'Spaital Regulatory Zoning: the Basic Spatial Platform for Planning Coordination (*kongjian guanzhi fenqu: guihua xietiao de jichu kongjian pingtai*)' in *Planning Innovation: Collected Papers of 2010 Annual Conference on Urban Planning in China (guihua chuangxin: 2010 zhongguo chengshi guihua nianhui lunwen ji)* (Chongqing Press 2010).
[40] Article 21, 2004 LAL.
[41] Article 13, Ministry of Land Resources, *Measures of Making and Examining Land Use Master Plans (tudi liyong zongti guihua bianzhi shencha banfa)*.
[42] Articles 14-16, 26, 2007 Urban and Rural Planning Law.

in clusters rather than one by one. A clustered expropriation application package normally consists of "one form and three programmes" (*yi shu san fang'an*)[43]:

One Form[44]	Application Form of Construction Land Projects (*jianshe yongdi xiangmu chengbao shuoming shu*): demonstrates that the proposed expropriation is in line with the relevant LUMPs and URPs
Three Programmes[45]	Agricultural Land Conversion Programme (*nongyongdi zhuanyong fang'an*): specifies the type, location, amount and quality of the agricultural land to be expropriated and converted
	Cultivated Land Supplementation Programme (*buchong gengdi fang'an*): specifies the location, amount, quality and timeframe of the supplement to the cultivated land and the PAL that are expropriated
	Land Expropriation Programme (*zhengyong tudi fang'an*): specifies the scope, type, amount and rights over the land to be expropriated as well as the compensation and resettlement arrangements

Upon receiving these application materials, the central or provincial government is to review and make decisions on the following grounds. On the one hand, the Agricultural Land Conversion Programme and Cultivated Land Supplementation Programme must demonstrate that the proposed expropriation is in conformity with the LUMPs, especially the quotas set in the ALUPs.[46] On the

[43] Article 20, 2011 Implementation Regulation of Land Administration Law; Article 7, Ministry of Land Resources, *Administration Measures on Examination and Application of Construction Land Use (jianshe yongdi shencha baopi guanli banfa)* (March 2, 1999).
[44] Article 9, Ministry of Land Resources, *Administration Measures on Examination and Application of Construction Land Use*.
[45] Article 10, ibid. If no collective agricultural land is expropriated, there is no need to prepare and submit the Agricultural Land Conversion Programme and Cultivated Land Supplementation Programme.
[46] Article 13, ibid.

other hand, the Land Expropriation Programme must meet the next three conditions:[47] 1) there is clear and uncontested demarcation of the location, scope and allocation of rights of the land to be expropriated; 2) the compensation standards are in line with relevant laws and regulations; 3) the resettlement arrangements of those expropriated are feasible. Therefore, in order to be approved by the provincial and central authorities, besides making lawful and proper compensation and resettlement arrangements, the most important requirement the prefectural or county governments' clustered expropriation applications must satisfy is to comply with the aforementioned spatial plans.

Alongside clustered expropriation, as mentioned before, the prefectural and county governments may also submit expropriation applications for individual construction projects, which are centrally or provincially authorized but will take up land other than what is designated as construction land in the LUMPs. In other words, these individual expropriation decisions lie outside the purview of the LUMPs. That being said, it is wrong to think that these individual expropriations can contravene the LUMPs. In fact, applications of individual expropriation require the same materials as the clustered expropriation except for one additional document called Land Provision Programme (*gongdi fang'an*), which specifies the particular construction projects the expropriated land will be used for.[48] This means that an application package of individual expropriation comprises of "one form and four programmes".[49] By reviewing these materials, the central and provincial government must make sure that individual expropriations are also in line with the LUMPs.[50] One may wonder how this is possible—as just mentioned, unlike clustered expropriation, individual expropriation are initiated for

[47] Article 14, ibid.
[48] Article 15, ibid.
[49] Article 23, 2011 Implementation Regulation of Land Administration Law; Ministry of Land Resources, *Guidelines concerning Approval of Land Use for Individual Construction Projects (dandu xuanzhi jianshe xiangmu yongdi shencha banshi zhinan)* (October 18, 2007).
[50] Point 5, Ministry of Land Resources, *Notice on Improving the Work of Examination and Approval of Land Use by the State Council for Individual Construction Projects (guanyu gaijin bao guowuyuan pizhun dandu xuanzhi jianshe xiangmu yongdi shencha baopi gongzuo de tongzhi)* (January 24, 2009).

construction projects that are not covered by the LUMPs. The answer is that the LUMPs shall be adjusted so as to accommodate these individual construction projects.[51] In this sense, while clustered expropriation follows the spatial plans, particularly the LUMPs statically, individual expropriation does so in a dynamic way. Notwithstanding this difference, both are no more and no less than concrete embodiment and expression of the government-made spatial plans. In this sense, under the Chinese law on land administration and expropriation today, decisions on expropriation are actually already made when the spatial plans are formulated.

As pointed out in the last chapter, between the 1950s and 1980s in China, the decision to expropriate collective land followed from the decisions to initiate basic construction projects and therefore constituted part of the economic planning system. If we compare the contemporary regime with its historical predecessor, we will find that spatial planning has now replaced economic planning to become the determining factor as to when and where rural land expropriation takes place. However, as demonstrated, the present spatial planning system is very much the same as the economic planning system in history in that both operate on the basis of quotas managed and controlled in a top-down manner. Moreover, it is worth pointing out that the bedrock principle to the entire spatial planning system is still that of the rational use of land, as evidenced by Articles 1 and 3 of the 2004 LAL and Articles 4 of the 2007 Urban and Rural Planning Law. This is perfectly understandable considering that the relevant clause in Article 10 of the 1982 Constitution has continued to stand as valid law. In light of this, as much as it was the case in history, rural land expropriation in China today remains an instrument to express and realize the supposedly rational planning will of the state.

[51] Ministry of Land Resources, *Notices on Strictly Implementing and Managing Land Use Master Plans (guanyu yange tudi liyong zongti guihua shishi guanli de tongzhi)*.

On that basis, we can move on to debunk the myth surrounding the justiciability of expropriation decisions. It was mentioned in Chapter 1 that the current scholarship holds that such decisions are non-justiciable primarily for two reasons. They are regarded either as administrative decisions made with finality (*xingzheng zhongju caijue*) or abstract administrative acts (*chouxiang xingzheng xingwei*), both of which are immune to administrative litigation. The next section will show that this is an incorrect understanding of the present law.

II. Justiciability of Expropriation Decisions

Are expropriation decisions made by the central and provincial governments legally unreviewable by the court? Under the 1989 Administrative Litigation Law, decisions made by the State Council are immune to judicial review. This means that expropriation authorized by the State Council cannot be questioned in court.[52] In reality, although the power to examine and approve expropriation applications resides legally with the central and provincial governments, the Ministry of Land and provincial departments of land are put in charge of handling the applications on behalf of the corresponding governments. Therefore, there are cases where the expropriation approval issued by the Ministry of Land was challenged in court.[53] The Supreme People's Court acknowledged in 2006 that because the expropriation authorization document is signed and sealed by the Ministry of Land rather than the State Council, it gives the false impression that such authorization comes from the Ministry and is therefore open to administrative litigation. However, it

[52] Neither can it be subject to administrative reconsideration according to the 1999 Administrative Reconsideration Law (*xingzheng fuyi fa*).
[53] Aihua Zou, 'The Plight and Solution concerning Remedy for the Expropriated in Land Expropriation: From the Perspective of the Land Expropriation Power of the State Council (*bei zhengshou ren tudi zhengshou jiuji kunjing jiqi duice: yi guowuyuan tudi zhengshou juedingquan wei shijiao*)' [2012] Journal of National Academy of Administration (*guojia xingzheng xueyuan xuebao*).

is actually an expropriation decision made by the State Council, which is not open to judicial review.[54]

In this case, the conventional wisdom is correct insofar as it rightly captures the non-justiciability of this type of expropriation decisions, although the reasons suggested are wrong. The non-justiciability of State Council's expropriation decisions does not derive from them being abstract administrative acts or administrative decisions made with finality. Instead, it is a built-in feature of the Chinese judicial review system.

Now, what about the expropriation decisions made by provincial governments? In practice, most expropriation decisions are of this kind. While the 1989 Administrative Litigation Law does stipulate that provincial government's decisions in general can be reviewed by the intermediate people's courts at the first instance (Article 14), the court's jurisdiction is subject to a number of exceptions including abstract administrative acts[55] and administrative decisions made with finality[56]. As noted, it is generally believed in the present scholarship that because the expropriation decisions fall into these two exceptional categories, they should be and usually are exempted from judicial review. The merit of this view has never been assessed so far, to which we now turn.

Abstract administrative acts, under the present Chinese judicial review system, are those administrative decisions "of generally binding force".[57] More specifically, they are "issued to address unspecified subjects and can be applied repeatedly".[58] It is then not difficult to see that provincial decisions on expropriation are precisely the opposite. For one thing, they are always

[54] Supreme People's Court, *Reply on Whether or Not to Accept the case on Zeng Cheng, Long Ping'an and others suing the PRC Ministry of Land Resources for its Administrative Act on Approval of Land Expropriation (guanyu zengcheng, long ping'an deng liu ren su zhonghua renmin gongheguo guotu ziyuan bu zhengdi pifu xingzheng xingwei shifou shouli de fuhan)* (July 3, 2006).
[55] Article 12 (2), Administrative Litigation Law.
[56] Article 12 (4), Administrative Litigation Law.
[57] Article 12 (2), Administrative Litigation Law.
[58] Article 2, Supreme People's Court, *Interpretation on Several Questions regarding the Implementation of the PRC Administrative Litigation Law (guanyu zhixing zhonghua renmin gongheguo xingzheng susong fa ruogan wenti de jieshi)*.

directed at specified subjects, i.e. the rural collectives and peasants to be expropriated; for another, they can be applied only once. Therefore, provincial expropriation decisions are specific administrative acts that should have been subject to administrative litigation. To rule them to be non-reviewable abstract administrative acts is legally unfounded.

On the other hand, it is not so easy to see through the legal reasoning behind classifying provincial expropriation decisions as administrative decision made with finality. In Chinese administrative law, to so qualify is dependent on two conditions: the decision must be a specific administrative act and its finality must be provided for by statutes enacted by the NPC or its Standing Committee. Given the above analysis, the first hurdle is easy to overcome. The difficulty lies in identifying the statutory basis that grants finality to the provincial decisions to expropriate. On this front, Chinese local courts have usually invoked Article 30 (2) of the 1999 Administrative Reconsideration Law.[59] It reads: an administrative reconsideration decision made by the provincial governments, according to the land expropriation decisions of the State Council or provincial governments, to confirm (*queren*) the ownership and use-rights of land is an administrative decision made with finality.

This clause has been interpreted as to grant finality *de jure* to the provincial expropriation decisions.[60] From a semantic point of view, however, this reading is deeply flawed. There are two kinds of decisions involved here: one is the administrative reconsideration decisions to confirm land rights while the other is the expropriation decisions. Being the basis on which rights-confirming

[59] '*Gao Weiping, Fan Xiaoqi su Anhui Sheng Renmin Zhengfu (Gao Weiping and Fan Xiaoqi v. Anhui People's Government)*' Anhui High People's Court, 2011 <http://www.ahcourt.gov.cn/sitecn/xzjx/44705.html> accessed August 28, 2014; '*Chen Jilian, Tan Jinhua su Guangdong Sheng Guotu Ziyuan Ting (Chen Jilian and Tan Jinhua v. Guangdong Department of Land Resources)*' Guangdong High People's Court, 2011 <http://www.gdcourts.gov.cn/gdcourt/front/front!content.action?lmdm=LM44&gjid=20120627041231620549> accessed August 28, 2014; '*Liang Wei'an, Mai Guiqiang, Liang Shengchang, Cheng Yuzhou, Liang Zhutian, Liang Jiabin, Liang Wanfu, Liang Guangneng su Guangdong Sheng Guotu Ziyuan Ting (Liang Wei'an et al v. Guangdong Depart of Land Resources)*' Guangdong High People's Court, 2013 <http://www.gdcourts.gov.cn/gdcourt/front/front!content.action?lmdm=LM44&gjid=20130904092852211342> accessed August 28, 2014.

[60] This is the position held by High People's Courts from Guangdong and Anhui provinces in cases quoted in the last footnote.

administrative reconsideration decisions are made, provincial expropriation decisions are different from and should not to be conflated with these reconsideration decisions. Understood literally, this clause has bestowed finality only upon the land rights-confirming administrative reconsideration decisions, not their basis—the expropriation decisions. If it does mean that both are final, it would have juxtaposed the two and clearly stipulated so. For sure, expropriation decisions do influence land rights—after all, expropriation leads to the loss and reallocation of these rights. However, the Supreme People's Court has made a clear distinction between land rights-confirming decisions and expropriation decisions. The former determines the legitimate distribution of land rights when there is a dispute concerning what belongs to whom.[61] These two types of decisions are distinctive from and do not crumble into each other. They are related only to the extent that expropriation decisions can be taken as the grounds for making land-rights-confirming decisions. The fact that the latter has finality does not mean that the former does so too.

Alternatively, it has been suggested that finality is granted *de facto* to the provincial expropriation decisions.[62] The reason is that if such expropriation decisions are not final and open to judicial review, they may well be quashed or changed by the courts. If that happens, rights-confirming administrative reconsideration decisions made according to these expropriation decisions will become groundless and must be quashed or changed accordingly. In this case, in order for such reconsideration decisions to be final, their basis, i.e. the expropriation decisions must also be final. This position is untenable for confusing finality with immutability. The former does not entail the latter. If the provincial expropriation decisions are altered by courts, those land rights-confirming

[61] Supreme People's Court, *Reply to Issues concerning Implementing Paragraph 1 of Article 30 of the Administrative Reconsideration Law (guanyu shiyong xingzheng fuyi fa di sanshi tiao di yi kuan youguan wenti de pifu)* (February 25, 2003). These clarifications have also made it clear that as far as expropriation decisions are concerned, exhaustion of administrative reconsideration is not the precondition of administrative litigation.

[62] Rikai He, 'The Confusion and Solution of China's Land Expropriation Compensation and Remedial System (*woguo zhengdi buchang jiuji zhidu de miwu yu chulu*)' [2007] Legal Research (*faxue*) 9.

reconsideration decisions can still be final in the sense of being immune to administrative litigation. At the same time, however, the provincial governments are obligated to alter its reconsideration decisions on its own initiative in order to reflect the change of its legal basis.

Therefore, if understood correctly, the existing Chinese law does *not* free provincial expropriation decisions from administrative litigation/judicial review and the non-justiciability argument has no legal merit. Nevertheless, as noted in Chapter 1, the reality is that Chinese local courts have generally chosen to shun away from exercising their jurisdiction on provincial expropriation decisions, citing various reasons to justify what is strictly speaking unlawful. Besides categorizing expropriation decisions as abstract administrative acts or administrative decisions made with finality, they have also ruled that these decisions are internal administrative acts which should be exempted from judicial review.[63] In Chinese administrative litigation law, internal administrative acts are those decisions internal to the government with no direct legal effect upon the citizens outside the government. From a formal point of view, provincial expropriation decisions appear to be merely internal to the government because they are made when the provincial governments approving the expropriation applications submitted by prefectural or county governments. Nevertheless, they clearly have external legal effects on citizens outside the government and should not be classified as internal administrative act.

In any event, despite having no grounds in law, Chinese local courts have typically avoided adjudicating on challenges against provincial expropriation decisions. Why? It is difficult to pinpoint any single cause: they may have done so either involuntarily due to external pressure, or intentionally in order to excuse themselves from getting involved in those oftentimes highly

[63] '*Pan Xiang and Cheng Xianfu su Nanjing Shi Lishui Qu Renmin Zhengfu* (*Pan Xiang and Cheng Xianfu v. Nanjing Lishui District People's Government*)' Jiangsu Nanjing Intermediate People's Court, 2013 <http://www.njfy.gov.cn:8080/ws_yz/Instruments.do?method=findhtml&AJXH=67884&YEAR=2014-1-28%2000:00:00&http://www.njfy.gov.cn:8080/ws_yz//html/11510000011746453201 00.html> accessed September 1, 2014.

contentious expropriation disputes, or simply out of a sincere but erroneous understanding of the law. All these three scenarios have been supported by empirical evidence. For instance, some local CCP committees reportedly issued internal instructions forbidding local courts to accept law suits challenging expropriation decisions.[64] It has also been documented that in some localities "the people's court simply doesn't have the nerve to accept cases related to 'hot issues' such as land expropriation and illegal demolition of homes".[65] Moreover, even the Director of the Administrative Division of the Supreme People's Court seems to have misread the law and regarded expropriation decisions as administrative decisions made with finality by virtue of Article 30 (2) of the 1999 Administrative Reconsideration Law.[66]

That said, even if Chinese local courts start to abide by the law and review the provincial expropriation decisions, can they quash such decisions because they fail to meet the constitutional public interest prerequisite? The answer is in the negative. The reason is that administrative litigation is limited in the scope of review. According to Article 5 of the 1989 Administrative Litigation Law, courts are only empowered to inquire into the legality, not the merits or appropriateness of an administrative act. As mentioned in Chapter 1, Article 42 of the 2007 Property Law prescribes that "in accordance with law" in the context of expropriation stands for lawful authority and procedure. In view of this, the legality of particular expropriation decisions centers on whether or not such

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[64] 'Deputy Tribunal Director of Zhengzhou Intermediate Court Replying to the Property Owner who is Expropriated: No Acceptance of Expropriation Case is a Chinese Characteristics (*zhengzhou zhongyuan fu tingzhang huiying bei chaiqian yezhu: chaiqian bu li'an shi zhongguo tese*)' March 27, 2013 <http://www.infzm.com/content/89121> accessed August 23, 2014.

[65] Kevin J. O'Brien and Lianjiang Li, 'Suing the Local State: Administrative Litigation in Rural China' (2004) 51 The China Journal 75, p 81.

[66] Zhenyu Wang, 'Why Land Expropriation Cases give the Courts Headache (*zhengdi guansi weihe ling fayuan touteng*)', available Zhenyu Wang, 'Why Land Expropriation Cases give the Courts Headache (*zhengdi guansi weihe ling fayuan touteng*)' October 20, 2008 <http://news.163.com/08/1020/08/4OMF8MIP00012Q9L.html> accessed September 1, 2014. Rather ironically, this article was published two years after the Supreme People's Court made a clear distinction between the expropriation decisions and land rights-confirming decisions that are final. It shows that such a misunderstanding of the law probably remains pervasive.

decisions are made by competent authorities following prescribed procedures.[67] In contrast, an inquiry into the substantive purpose of expropriation and its conformity to certain conception of public interest will count as a merit review and therefore lies outside the purview of the courts. To be sure, as shown by experiences of many other jurisdictions, the line between legality and merit review is a thin one and can sometimes be crossed subtly and covertly. In theory, the Chinese courts may well exhibit some judicial activism and venture to flesh out the public interest clause on an *ad hoc* basis in individual cases. Again this is improbable given the reality that the courts are generally reluctant or unable to take on the task of adjudicating provincial expropriation decisions in the first place. Nonetheless, for the sake of argument, let's just hypothesize for the moment that they do become willing and able to inquire into the substantive merit or "public interestedness" of the expropriation decisions under the pretext of legality review. Is there any real possibility that a more robust definition of public interest will be supplied by the judiciary?

In the light of the foregoing discussion on the processes and grounds of decision-making on expropriation, the answer is no. The above-mentioned spatial plans, on which the centrally/provincially authorized expropriation decisions are based, set out the functional layout of a particular locality and effectively determine when and where a piece of rural land is to be expropriated. Therefore, to question the purpose of a particular expropriation decision necessarily involves the questioning of those spatial plans themselves, which are quintessential examples of abstract administrative acts with general binding effects upon unspecified subjects. Under the existing administrative litigation system of China, these plans are indisputably unreviewable. At

[67] For example, if a provincial government arrogates to itself the power to authorize specified size or kind of rural land that is supposed to be in the hands of the State Council or violates the procedural requirements of expropriation or deviates from the centrally approved expropriation plan, it can be held accountable by the courts. Nevertheless, none of these scenarios yields any specification of what constitutes public interest in expropriation. Dongtao Wang, 'On the Justiciability and Standards of Review of the Land Expropriation-related Administrative Acts (*jian xi zhengdi lei xingzheng xingwei de kesuxing ji shencha biaozhun*)' January 7, 2010 <http://syzy.chinacourt.org/public/detail.php?id=4092> accessed September 7, 2014.

most the courts may examine whether or not an expropriation decision is lawful in the sense of being in line with the spatial plans it is supposed to reflect and implement or whether a spatial plan is lawfully made by competent authorities following legal procedures.[68] This is surely very important. Yet in no way will it generate any jurisprudence on the constitutional public interest clause.

However, one may argue that the court can skillfully bypass reviewing the underlying spatial plans to focus just on what kind of concrete purpose a certain expropriation decision is made for. After all, the spatial plans only dictate that a piece of rural land is going to be expropriated. As to what specific construction or development project such expropriated land will be used for, it is up to the initiating prefectural or county government.[69] Nonetheless, for the following two reasons, it is practically impossible for the court to review the public interestedness of the specific purpose a particular expropriation decision serves. On the one hand, at the time of expropriation review and approval, the potential post-expropriation use of land may well be undecided at all. One indicative example here is the expropriation for land reserve (*tudi chubei*) or the Chinese version of land banks. According to Article 10 of the 2007 Measures on Land Reserve Administration, rural land can be expropriated in order to be transferred into the prefectural or county government's land reserves. This means that land expropriation can be carried out simply for land reserve. Since the prefectural and county governments shall make annual plans for land reserve according to the spatial plans, land expropriation for land reserve must also be consistent with the spatial plans.[70] However, no specific

[68] For relevant discussion on indirect judicial review over the URPs in China, see Chunyan Zheng, 'On the Way towards Judicial Review of Urban and Rural Planning: Taking Examples from Judgments related to Urban and Rural Planning Cases (*lun chengxiang guihua de sifa shencha lujing: yi sheji chengxiang guihua anjian de sifa caipan wenshu weili*)' (2013) 25 Peking University Law Journal (*zhongwai faxue*) 803.

[69] Article 44, 2004 LAL; Article 22, 2011 Implementation Regulation of Land Administration Law. This applies to clustered expropriation and does not cover the case of individual expropriation where expropriation decisions are made specifically for provincially/centrally authorized projects of infrastructural development and public works.

[70] Article 7, Ministry of Land Resources, Ministry of Finance and People's Bank of China, *Measures on Land Reserve Administration (tudi chubei guanli banfa)* (November 19, 2007).

construction project needs be specified in the expropriation application materials.[71] It should be noted that land reserve by Chinese local governments started from Shanghai in the 1990s.[72] When it was first recognized at the central level, its function was explicitly stated to be "strengthening the state's capacity in controlling the land market".[73] It is in this sense we can then understand why rural land expropriation can be initiated for land reserve without any potential construction project: Its public interestedness is guaranteed by its being exercised to enhance the state's control over the land market. Consequently, there is no way for the court to review if the post-expropriation land use is in the public interest. Neither is the court able to question the public interestedness of expropriation for land reserve when it is legally stipulated it to be legitimate purpose of expropriation.

On the other hand, even when there is a determined concrete construction project at the time of expropriation application, it is not a factor to be taken into account by the provincial or central government when reviewing expropriation applications. As already mentioned, the focus of the reviewing authorities is on the compliance with the spatial plans. Therefore, even if the court reviews the expropriation decision, it cannot review the post-expropriation land use because it is an irrelevant consideration. More importantly, the decisions to expropriate and the decisions on post-expropriation land use are in essence two distinct administrative acts performed by different government authorities. The public interestedness of the expropriation decisions is determined by that of the spatial plans, which as mentioned above is judicially non-reviewable. The public interestedness of the post-expropriation land use decisions is surely up for debate, but there is no

[71] For a real-life example, see Shanghai Bureau of Land Resources, *Notice on Land Expropriation Plan by the People's Government of Shanghai Pudong New District* (June 20, 2014).
[72] Lou and Jin, *Legal Institutions of Land Reserve and Primary Land Development (tudi chubei ji tudi yiji kaifa falv zhidu)*, p 8.
[73] Ministry of Land Resources, *Notice on Tightening Up Administration of State-owned Land Resources (guanyu jiaqiang guoyou tudi zichan guanli de tongzhi)* (May 30, 2001).

way for such decisions to be brought to court by those expropriated in the first place because Chinese administrative litigation law requires the plaintiff to be a "victim" of the administrative act in question. Legally speaking, a decision over how and by whom a piece of expropriated land is to be used is the state dispensing its own property—the expropriated have no standing whatsoever to challenge such a decision in administrative litigation.

To summarize, contrary to the prevalent position in the existing literature, rural land expropriation decisions are not completely non-justiciable in China—those made by the provincial government can be judicially reviewed according to present law. However, Chinese local courts have frequently failed to take on the task in practice. Even if they do so, they can only review the legality of the expropriation decisions in the sense of their compliance with the spatial plans. The post-expropriation use of land lies entirely outside the purview of judicial review.

3. Letting Go the Transition Paradigm by Making Sense of the Stalled Reform

Based on the foregoing discussion, we are now finally in a position to have a contextualized understanding of the Chinese law on rural land expropriation. On the most fundamental and abstract level, over the 20th century, rural land takings of various sorts including expropriation have been conceptualized and practiced as a means to achieve different social transformative programmes devised and led by the communist and nationalist party-states. Specifically, this was manifested in two salient features of the land regime that have run through the PRC history. On the one hand, first as a *de facto* practice and then getting legally recognized, the presumption of state expropriation in non-agricultural use of rural collective land has been there right from the 1950s to today. On the

other hand, from economic planning to spatial planning, rural land expropriation has always been carried out according to some kind of top-down state plan. These two characteristics are closely related and mutually reinforcing to each other: while the former guarantees that it is the state that has an exclusive control over the use and conversion of rural land, the latter sets out the specific way the state is to go about it. Under these two conditions, it is then logically impossible for rural land takings in the PRC to be an action undertaken only diffusely and occasionally for specific technical public purposes. Instead, it is to be exercised systematically and frequently in order to reflect and realize pre-conceived plans of the party-state. This is the nature of the power of rural land takings in the PRC. It is normatively legitimated under the socialist principle, which prioritizes the public interest represented by the state over private property. Consequently, the Chinese law on rural land takings has always performed the function in securing, regulating and facilitating government's exercises of the takings power, rather than protecting the private land rights against state interference. The lack of meaningful judicial check over the government's expropriation decisions is thus a manifestation of this long tradition.

In view of the above, we should dismiss at least three of the four core assumptions underpinning the dominant Transition Paradigm identified in Chapter 3. First off, the conceptual assumption does not hold because land taking in China over the last century does not fit with the conventional conception of compensable takings for public works. Historically speaking, land nationalization required no compensation. More importantly, from the early 20th century to today, the purpose of land takings in China has always been more expansive than what is typically understood as public works. Second, the temporal assumption that the present crisis of China's law on rural land expropriation is mainly a post-reform issue does not hold either. Well illustrated is that the existing

law in this area is fundamentally a continuation of a long-entrenched historical tradition in modern China. Third, it has been shown that both the original and current constitutional takings clauses in China are radically different from the Fifth Amendment to the US Constitution. The Chinese expropriation law as it stands at the moment is by no means the unfortunate outcome of a broken constitutional promise. Quite the contrary, it is a faithful reflection of what the existing Constitution truly stands for.

To be clear, none of the above is to suggest that the Chinese constitutional and statutory law on rural land expropriation is perfect and needs no further reform. All it does is no more and no less to show that the Chinese law in this filed today is very much a result of its own distinctive historical path, which makes it profoundly different from the American counterpart. In this situation, one may argue that that is precisely the point—that the Chinese expropriation law *is not* the American law of eminent domain does not mean that it *should not* be. The radical difference between the two ought to be the reason for reforming the Chinese law along the lines of the American model, rather than the excuse for staying with the *status quo*. Therefore, we should start looking for measures to close the gap between the Chinese law and the American model. As noted in Chapter 2, the past decade saw very little progress in this respect, which has been commonly regarded as an end result of the widespread resistance from China's local governments heavily reliant on land finance. Therefore, the last surviving component of the Transition Paradigm—the developmental assumption is still valid in the sense that once the biggest challenge of land finance is addressed, the Chinese expropriation will move, gradually but steadily, towards the American model. To test the validity of this claim, we need to make sense of the stalled reform discussed in Chapter 2.

As mentioned, over the past decade, in spite of the widespread outcry and much expectation for legal reform on rural land expropriation, most of the popular reform proposals never come to fruition. To start with, no better-refined statutory specification of the constitutional public interest prerequisite for rural land expropriation is ever provided, with the 2007 Property Law broadly seen as a missed opportunity. Neither the people's congresses nor the people's courts steps in to scrutinize the purpose of expropriation government decisions, which remain as an administrative prerogative subject only to internal hierarchical review and approval. Second, the urbanization challenge and de-agrarianization challenge which make the constitutional public interest clause structurally redundant have been largely left intact, except for the policy change that allows the for-profit rural construction land to be transferrable without being expropriated. Nevertheless, as shown in Chapter 2, this reform is at most a baby step towards the promised unified market of urban and rural construction land. That is because for-profit construction land merely accounts for a tiny portion of rural land on the one hand, and it is transferrable only if it lies outside urban planning areas on the other. More crucially, the transfer of for-profit collective-owned construction land is highly regulated: 1) it should comply with the spatial plans; 2) the post-transfer land use is limited; 3) if involving commercial projects, it ought to be carried out on the government-managed trading platform; and 4) the local government is to share part of the revenue engendered. Third, despite the added procedural requirement that those expropriated should be informed of the expropriation applications before submission, there is still no way for them to influence the decision-making on expropriation.

Last but not least, as to the expropriation compensation, notwithstanding it being almost universally advocated, the fair market value standard has not been introduced. Admittedly, the last ten years did witness a series of substantial reforms in this area: 1) the legally-set maximum to the

sum of land compensation fees plus resettlement fees is abolished on the policy level; 2) the original use standard of compensation is replaced by more consistent, transparent, equitable, broad-based and generous criteria; 3) the way in which resettlement is provided gradually changes from one-off cash payment to continuous provision of social welfare or land retention so that the "long-term livelihood" of those expropriated can be secured; 4) the principle of compensation is altered from maintaining to improving the peasants' original living standards; 5) the expropriated are granted the additional procedural right to be consulted about specific compensation and resettlement arrangements before the submission of expropriation applications; and 6) the central authority has promised that a fair share of the post-expropriation increased land value or "expropriation surplus"[74] will go to the peasants, whose individual gains out of expropriation will be reasonably increased. That said, to many these reform measures are hardly satisfactory when compared with the fair market value standard, which is believed to be not only more objective and measureable but also able to make the peasants receive the prospective value of the expropriated land.

As noted in Chapter 2, the root cause for the stalled reform has been commonly identified to be the so-called "land finance", a popular phrase to describe the excessive fiscal and financial reliance of Chinese local governments upon rural land expropriation and subsequent land transfers. It is the mainstream view in scholarship and public discourse that once land finance is eased or even eliminated, deeper reform of China's expropriation law will be on the way. To examine this proposition, we need to place the phenomenon of land finance in the context of the historical development of the Chinese land system. Recall that ever since the 1950s, there are two salient features of the PRC land regime: one is the presumption of state expropriation in non-agricultural use of rural land and the other is state planning as the framework under which expropriation is

[74] The term was introduced in Chapter 1.

initiated and authorized. As already demonstrated, these two features have persisted well into the reform era with only two slight changes. One is that state spatial planning has replaced state economic planning. The other is that since 1988 paid transfer of expropriated land became legally and constitutionally permissible, which turned rural land expropriation to be beneficial to the state in economic terms. The 1994 tax-sharing reform and the inter-regional competition have exacerbated the tendency of China's local governments to seek fiscal and financial gains from rural land expropriation. Against this background, it is not hard to see that land finance does *not cause* the pervasiveness of rural land expropriation in contemporary China. In fact, both of them are symptoms of a common foundational cause—the two built-in characteristics of the PRC land system that guarantee and regulate the government's exclusive control over rural land.

To be clear, the above is not to say that land finance plays no role in driving China's local governments towards expropriation. As will be explained shortly, the opposite case is true. However, it does show that if the root cause is not addressed, tackling land finance alone is of limited impact and will not open up the space for those much expected reform measures, which are themselves unacceptable, off-target, inadequate or unfeasible, regardless of the existence of land finance. First, to provide any fine-tuned and narrower statutory definition of public interest or to enhance legislative and judicial scrutiny over the purpose of expropriation will necessarily challenge the abovementioned presumption and upset the government's exclusive control of rural land. Besides, as shown above, to recommend that the expropriation decisions should become judicially reviewable is basically barking at the wrong tree because the provincial expropriation decisions are already so if the relevant law is interpreted and implemented correctly. The real problem lies not only in the reluctance or failure of the Chinese local courts to follow the law, but more crucially in that the

spatial plans and post-expropriation land uses are immune to judicial review. Second, eliminating the so-called urbanization challenge via abolishing or re-interpreting the constitutional provision "urban land belongs to the state" is pointless, not only because as mentioned in the last chapter that challenge does not actually exist, but also because it misses the real crux of the problem—the de-agrarianization challenge. Third, to enhance public participation in expropriation decision-making is also disruptive to the government's exclusive control of rural land. More importantly, since expropriation decisions are effectively made according to spatial plans, it is almost no point to give the expropriated just the chance to influence the review and approval of expropriation applications, but not the making of spatial plans itself.[75]

Fourth, as has been acutely observed, with the afore-mentioned two characteristics staying in place, it is unlikely to solve the Chinese expropriation compensation problem simply by importing the fair market value standard[76], or, as was pointed out in Chapter 3, by retrieving it from the CCP's own historical practice prior to the early 1950s. On the one hand, in American law, the fair market value standard refers to the value of a property in its future "highest and best" uses regardless of its current actual use.[77] To claim the highest and best use, the owner must establish a reasonable probability that the asserted use could be made in the reasonably near future.[78] One important condition for such reasonableness is that the asserted use is legally permissible.[79] In the American eminent domain jurisprudence, any land value increment generated not by the owner's potential lawful use but by government's own actions has long been excluded from the fair market value

[75] N.B. This is still meaningful when the expropriated are most incentivized and arguably best positioned to bring any unlawful application inconsistent with the plans to the attention of the approving authorizes. However, it is likely to greatly increase the administrative costs of expropriation review, which is a balance to be struck by the approving governments.
[76] Washburn, pp 105-7.
[77] Yun-chien Chang, 'Economic Value or Fair Market Value: What Form of Takings Compensation Is Efficient?' (2012) 20 Supreme Court Economic Review 35, p 49.
[78] Ibid.
[79] Stephen Sussna, 'The Concept of Highest and Best Use Under Takings Theory' (1989) 21 The Urban Lawyer 113, pp 113-14.

compensation.[80] Under the presumption of state expropriation in non-agricultural use of rural land and stringent land use limitation over rural land[81], the highest and best use of rural land legally permissible in China is none other than its present use. And the expropriation surplus is purely a result of state expropriation and subsequent transfer. This means that even if the fair market value standard is transplanted to China in the form as practiced in America, it will make no real difference. To enable the Chinese peasants to share some of the expropriation surplus takes more than adopting the fair market value standard.

On the other hand, it has been observed that in the context of expropriation where there is no market or a "thin market" with just one seller, fair market value is basically a fiction and becomes practically ascertainable only through counter-factually simulating a market environment, a typical way of which is to examine the price of recent comparable sales.[82] For reasons given above, in China the rural land market is nearly non-existent, let alone a database of sufficient comparable sales. That makes implementing the fair market value standard completely unfeasible.[83]

That said, of course it is by no means a necessity for China to copy the fair market value standard as practiced in the US—it may well use the term in a different fashion to mean that the expropriated can get part of the expropriation surplus generated not in the market of rural land but in the market of expropriated land. To some extent that is what was promised at the Third Plenum of the 18th

[80] *McGovern v. New York* 229 US 363 (1913); *United States v. Miller*; *United States v. Cors* 337 US 325, 333 (1949).
[81] As previously mentioned, only upon government sanction can rural agricultural land be converted by the rural collectives into construction land without state expropriation under the five legally specified exceptional scenarios.
[82] Thomas W. Merrill, 'Incomplete Compensation for Takings' (2002) 11 NYU Environmental Law Journal 110, pp 116-17.
[83] Valerie Jaffee Washburn suggested a third reason that fair market value standard cannot resolve China's compensation problem. Because fair market value is supposed to be objective, individualized values in land for the owner are excluded. This means that peasants will not be compensated for their loss of subjective or sentimental value. As much valid as this point may be, it is a bit irrelevant here. What motivates many to propose the fair market value standard is not that it is perfect but that it is an improvement to the existing compensation standards in Chinese law. This point was well acknowledged in Liantai Liu and Di Zuo, 'A Flaw in a Jade Baton in the Fair Market Value Compensation Standard for Eminent Domain Law: the US Law as an Example (*zhengshou fa shang an gongping shichang jiazhi buchang guize de baigui zhi zhan: yi meiguo fa weili*)' [2013] Zhejiang Social Sciences (*zhejiang shehui kexue*) 55.

Party's Congress in late 2013. But for reasons just given, it is unsurprising that so far the term "fair market value" has not been directly alluded to. Overall, it is fair to conclude that even if the Chinese local governments' financial overdependence on rural land expropriation is addressed, none of the popular reform proposals can be or is worthy of being rolled out, as long as the aforementioned two salient features of China's land system remain in place.

But will these features be modified or even abandoned? For the following three reasons, that is highly unlikely in the foreseeable future. First, the various reform measures that did take place during the last ten years have either bypassed or reconfirmed these features. For instance, giving the peasants additional procedural rights to be informed of the expropriation initiatives and to be consulted about the specific compensation and resettlement arrangements has no impact upon these features. Neither does the increase in compensation and improvement of resettlement method. The only measure that poses a threat to the presumption of expropriation in non-agricultural use of rural land, namely making the for-profit rural construction land transferrable, actually confirms the state's planning-based control over such land because the transfers are supposed to follow the spatial plans and be carried out on government-managed trading platforms. This is why I suggested earlier in this section that these two salient features of China's land system have weathered largely unscathed through the reform over the last decade. Second, it has been explicitly stated by central officials and the MLR since 2013 that the planning-based land use regulatory system is a bottom line not to be crossed by any future reform.[84] Last but not least, it is most probable that such a system will be further improved and reinforced, as evidenced by a series of policy and institutional adjustments

[84] Hua Feng and Renze Chen, 'The Reform of Rural Land System, Baseline that should not be Crossed: An Exclusive Interview with Deputy and Head of the Office of the Central Rural Work Leadership Group Chen Xiwen (*nongcun tudi zhidu gaige, dixian buneng tupo: zhuanfang zhongyang nongcun gongzuo lingdao xiaozu fu zuzhang bangongshi zhuren chen xiwen*)' *People's Daily* (December 5, 2013) 2; Qian Li, 'Executive Meeting of the Minister: Discussing Issues related to Deepening the Reform of Land System (*buzhang bangong hui: yanjiu shenhua tudi zhidu gaige youguan wenti*)' August 1, 2014 <http://www.mlr.gov.cn/xwdt/jrxw/201408/t20140801_1325541.htm> accessed September 1, 2014.

since the turn of this century. The relevance of these changes is yet to be recognized by the existing scholarship on rural land expropriation. Thus a discussion is in order here.

As noted, ever since the 1950s, the central concerns of the Chinese land system have been to guarantee the top-down state control over rural land and to preserve cultivated land. A persistent challenge in this area is the unauthorized and excessive expropriation resulted from the government's inability to detect and curb the rampant free-riding behaviours of the land-using entities. In response, as documented in the last chapter, a variety of counter-measures were adopted between the 1960s and 1980s from recentralizing the expropriation-approving power to issuing policy documents urging thrift in land requisition and to making "rational use of land" a state policy and constitutional principle. However, none of these measures was anywhere near a satisfactory solution, as testified by the fact that a more sophisticated and stringent regulatory system was established under the 1998 LAL. Key to this regulatory regime is the internal hierarchical review and approval mechanism on expropriation decisions. Nonetheless, that has not been effective either, as the former Premier Wen Jiabao conceded in 2012 that unauthorized expropriation of agricultural land has continued to be widespread across the country.[85] There has been a wealth of reports that the local governments frequently get around superior oversight either by falsifying application materials or openly breaking the law.[86] The reason for them to do so, in brief, is two-fold. For one thing, it has now been widely observed that their pursuit of local industrialization and urbanization frequently conflicts with top-down land use and conversion quota and spatial restrictions presented earlier in this chapter.[87] For example, the project of expanding the administrative jurisdiction of Hangzhou

[85] 'Premier stresses unwavering reform, rural democracy' February 5, 2012 <http://news.xinhuanet.com/english/china/2012-02/05/c_131392403.htm> accessed April 6, 2014.

[86] For a more detailed analysis of land law violation (including but not limited to unlawful expropriation) committed by Chinese local governments, see Reza Hasmath and Jennifer Hsu (eds), *China in an Era of Transition: Understanding Contemporary State and Society Actors* (Palgrave Macmillan 2009), pp 85-88.

[87] Meina Cai, 'Land-locked Development: the Local Political Economy of Institutional Change in China' (PhD,

Municipality demanded 31330 *mu* of land, but it had a construction land quota of only 3670 mu allocated to it by the provincial government.[88] For another, the phenomenon of land finance as analyzed before means that the local governments have strong incentives to over-expropriate because of the expected fiscal, financial and political benefits.

Over the years, a plethora of measures has been adopted to rein in unauthorized expropriation at the local level. The toughest one was a six-month complete moratorium of expropriation approval between April and October 2004, which indicates the perceived ineffectiveness of other more light-handed approaches.[89] Meanwhile, the centre has tried to reassert its control by frequently issuing statements[90] and launching *ad hoc* law-enforcement campaigns[91]. In a more institutionalized manner, there are four important changes during the last ten years, all of which are intended to enhance the top-down oversight.

The first one is called "vertical management reform" started in 2003.[92] Previously Chinese local land administration department was under dual leadership. Territorially, it was under the administrative control of the local government. Vertically, it was subordinate to the sectoral and technical supervision of the superior land administration agencies. In comparison the vertical

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University of Wisconsin-Madison 2012), p 30.

[88] Ibid.

[89] General Office of State Council, *Urgent Notice on Further Regulating Land Market and Strictly Controlling Land Administration (guanyu shenru kaizhan tudi shichang zhili zhengdun yange tudi guanli de jinji tongzhi)*.

[90] Pt 4, General Office of State Council, *Urgent Notice on Further Tightening the Administration of Expropriation and Demolition and Effectively Protecting Legal Rights and Interests of the People (guanyu jinyibu yange zhengdi chaiqian guanli gongzuo qieshi weihu qunzhong hefa quanyi de jinji tongzhi)*; Point 3, General Office of Central Party Disciplinary Committee and General Office of Supervision Department, *Notice on Strengthening Supervision and Investigation and Further Normalizing Practices of Land Expropriation and House Demolition (guanyu jiaqiang jiandu jiancha jinyibu guifan zhengdi chaiqian xingwei de tongzhi)* (March 17, 2011).

[91] The first large-scale national campaign to stop local governments' illegal land takings took place between 2003 and 2004. See Ministry of Land Resources, *The Work Plan of Further Control and Overhaul the Land Market (jinyi bu zhili zhengdun tudi shichang zhixu gongzuo fang'an)* (February 26, 2003). For an elaborate account of the political-legal campaigns to promote land law compliance, see Benjamin van Rooij, *Regulating Land and Pollution in China, Lawmaking, Compliance, and Enforcement: Theory and Cases* (Leiden University Press 2006), ch 14. For a more recent campaign, see Xinhua News, 'China's State Council orders special check into land expropriation and house demolition practices' May 20, 2011 <http://news.xinhuanet.com/english2010/china/2011-05/20/c_13884148.htm> accessed August 11, 2013.

[92] Wensheng Sun (Minister of Land Resources), *Speech at the Meeting of Land Departments and Bureas Directors (zai quanguo guotu ziyuan ting ju zhang huiyi shang de jianghua)* (December 27, 2003).

supervision is a much weaker form of control because the local governments have a bigger influence upon their land administration departments primarily through the appointment of leadership and provision of funding.[93] This has created the problem of local protectionism where local land administration department fail to enforce the law against or even collude with local governments in tricking the approval and review mechanism.[94] The 2003 reform set up a vertical management system for sub-provincial land authorities, attempting to free them from local governments' interference.

Second, in 2006 the State Land Supervision System (*guojia tudi ducha xitong*) was formally introduced to further reduce the above-mentioned local protectionism.[95] Nine cross-regional State Land Supervision Bureaus are set up under the Ministry of Land, which are supposed to be independent from and keep an eye on local governments within their jurisdiction. One of their key responsibilities is to ensure the "lawfulness and facticity" of the expropriation applications submitted by provincial governments to the State Council or by sub-provincial governments to provincial governments.[96] To a large extent, compared with local land administration departments, these State Land Supervision Bureaus reinforce the review and approval mechanism, not only due to their independence from local interference, but also because of their strengthened legal enforcement power. While the local land authorities lack the legal authority to act against some most serious land law violations committed by local governments[97], the State Land Supervision Bureaus can directly

[93] Fulong Wu, Jiang Xu and Anthony Gar-On Yeh (eds), *Urban Development in Post-Reform China: State, Market, and Space* (Routledge 2006), p 135.
[94] Rooij, 'The Return of the Landlord: Chinese Land Acquisition Conflicts as Illustrated by Peri-Urban Kunming', pp 232-33.
[95] General Office of State Council, *Notice on Issues related to Esbalishing State Land Supervision System (guanyu jianli guojia tudi ducha zhidu youguan wenti de tongzhi)* (July 13, 2006). Two years before the formal institutionalization, the State Council has announced the initiative in its 2004 Decision on Deepening Reform and Enhancing Land Administration.
[96] Point 2, ibid; Articles 4-7, Chief State Land Inspector, *Supervision Measures of Review and Approval of Agricultural Land Conversion and Land Expropriation (nongyong di zhuanyong he tudi zhengshou shenpi shixiang ducha banfa)* (October 8, 2008).
[97] Rooij, 'The Return of the Landlord: Chinese Land Acquisition Conflicts as Illustrated by Peri-Urban Kunming', pp

press compliance and punish non-compliance through gradual escalation of regulatory intervention. For example, local governments may receive written reprimand and corrective actions recommendations or face total suspension of expropriation approval.[98] Since 2007, Individual officials can go through a publicized process of "summoned interviews" (*yuetan*) where they must explain themselves in person to the Minister of Land about their governments' irregular or illegal land-related decisions, including those about expropriation.[99] In more serious cases, they can face administrative discipline from demerit to demotion and to dismissal or criminal prosecution.[100]

A third change is made in improved monitoring technology. Starting from the year of 2000, snapshot satellite images of the same area at different time-points have been collected and compared by the central and provincial governments to detect unauthorized local land expropriation and conversion. A decade later in 2000, it was turned from selective examination to full-coverage inspection.[101] The fourth and most recent regulatory innovation took place in 2009, when an informant hotline was established for the public to report local violation of land laws, including unauthorized expropriation to land authorities from the MLR to the provincial, prefectural and county land administration bureaus.[102]

Admittedly, the above reforms do have had a notable impact: it was reported that between 2006 and 2011 there were 8471 officials that received discipline and 1589 officials were held criminally

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[98] Articles 13-14, Chief State Land Inspector.

[99] Xinhua News, 'Land Ministry Cracks Down on Land Illegalities and Irregularities in Provinces and 100-odd Responsibles are Summoned for an Interview (*guotubu zhengzhi duosheng tudi weifa weigui baiyu xiangguan zeren ren bei yuetan*)' <http://news.xinhuanet.com/politics/2013-06/28/c_116327919.htm> accessed August 11, 2013.

[100] Ministry of Supervision, Ministry of Human Resources and Social Security and Ministry of Land Resources, *Disciplinary Measures of Activities in Violation of Land Administration Rules (weifan tudi guanli guiding xingwei chufen banfa)* (May 2, 2008); People's Daily Online, 'Nine local officials in China punished for illegal land enclosure' May 25, 2011 <http://english.people.com.cn/90001/90776/90882/7390106.html> accessed August 11, 2013.

[101] *Minutes of Telephone and Video Conference on Work Arrangements of Enforcement Investigation with Satellite Images by Ministry of Land Resources (guotu ziyuanbu tudi weipian zhifa jiancha gongzuo bushu dianshi dianhua huiyi shilu)* (February 8, 2010).

[102] 'Telephone Line 12336 for Reporting Offences related to Land Resource is Opened (*12336 guotu ziyuan weifa jubao dianhua kaitong*)' June 25, 2009 <http://www.mlr.gov.cn/zt/tdr/2009/tpzl/200906/t20090625_122113.htm> accessed April 7, 2014.

liable due to their involvement in offences of the land law. Leaders from 35 counties and municipal districts were summoned for interviews.[103] Nevertheless, as acknowledged in the recently-published 2013 State Land Supervision Report, violation of land law committed by prefectural and county governments including unauthorized expropriation have persisted.[104] For this the reasons are as follows.

First, the vertical management system is limited in two ways. For one thing, it does not change the central-provincial relationship where provincial governments are in no way immune to engaging in unauthorized land expropriation themselves.[105] For another, although the power of appointing key cadres in sub-provincial land administration departments have been scaled up from local governments to the land authorities at the next higher level, local land departments remain financially dependent upon local governments which continue to exert considerable influence, if not direct control. A local land bureau official put it best: "we rely on central [guidance] for work and promotion, but local [government] for rice bowl".[106]

Second, the State Land Supervision System is also under serious constraints. According to a 2011 report evaluating its performance in the first five years, the supervision bureaus are found to face great funding and staff shortage.[107] For example, the total staff number of the nine supervision bureaus was set at 360, which means that on average each staff is responsible to oversee an area of

[103]'More than Eight Thousand Officials were Disciplined under Land Supervision in Five Years, Leaders from 35 Localities with Illegal Land Uses were Summoned for Interviews (*tudi ducha wunian baqian duo ganbu bei chufen sanshiwu ge weifa yongdi qu xian fuzeren bei yuetan*)' November 25, 2011 <http://www.legaldaily.com.cn/bm/content/2011-11/25/content_3122561.htm> accessed April 7, 2014.

[104] Chief State Land Inspector, *Public Report of State Land Supervision (guojia tudi ducha gonggao)* (March 12, 2014).

[105]'1738 Projects by Provincial Goverments involves Illegal Land Approval (*shengji zhengfu 1738 ge xiangmu cunzai feifa pidi*)' March 21, 2014 <http://www.legaldaily.com.cn/index_article/content/2014-03/21/content_5382115.htm?node=5955> accessed April 6, 2014.

[106] Wu, Xu and Yeh, *Urban Development in Post-Reform China: State, Market, and Space*, p 138.

[107] 'Press Conference on Performance Evaluation of State Land Supervision System in its Fifth Anniversary (*guojia tudi ducha zhidu shishi wu zhounian jixiao pinggu xinwen fabu hui*)' December 5, 2011 <http://www.gjtddc.mlr.gov.cn/ftzb/201112/t20111205_1040225.htm> accessed April 7, 2014.

26700 square kilometers.[108] Moreover, the supervision bureaus do not have the power to directly discipline offending local officials but need to refer the cases to other departments in charge of cadre personnel or supervision. As the cross-sectoral collaboration in investigating and handling local offences is presently missing, the effectiveness of land supervision is significantly reduced.[109]

Third, as technologically advanced as the satellite monitoring may be, it is not unheard of that some local governments have come up with cunning ways over the years to trick the system. For instance, it was reported that some of them would go the length to paint green barren hills or cover roads with potatoes so that both appear to be agricultural land if seen from thousands of miles above.[110] Fourth, the informant hotline set up by the land authorities at four levels received over 200000 reports between 2009 and 2012, nearly half of which were reported to the MLR. The reason for that is that lower level land authorities were not generally trusted by the public given their own record of breaking the land law. However, even if the public reported directly to the MLR, the overwhelming majority of the reported cases will be referred back to the local land authorities to look into simply because the MLR cannot possibly be able to handle such a huge number of reports all by itself.[111]

Finally and perhaps most importantly, even if local officials are caught and formally disciplined for unauthorized expropriation, it seems that they will get away with impunity in the end. Numerous reports have shown that officials return to a position at the same or even higher level soon after

[108] Point 3, General Office of State Council, *Notice on Issues related to Esbalishing State Land Supervision System (guanyu jianli guojia tudi ducha zhidu youguan wenti de tongzhi)*. China has a sum of 9.6 million square kilometers.
[109] 'Press Conference on Performance Evaluation of State Land Supervision System in its Fifth Anniversary (*guojia tudi ducha zhidu shishi wu zhounian jixiao pinggu xinwen fabu hui*)'.
[110] Zhifeng Qiao, 'Planting Beans on the Highway, Does the Departments of Land Resources Know? (*malu zhong dou, guotu bumen zhidao ma*)' July 27, 2014 <http://opinion.china.com.cn/opinion_77_105177.html> accessed September 11, 2014.
[111] Guo Zhang, 'The State Land Ilegality Reporting Hotline 12336 is "Hot at the Top while Cold at the Bottom" (guotu ziyuan weifa jubao rexian 12336 shang re xia leng)' *China Youth Daily* (February 27, 2012) 5.

getting demoted or dismissed due to violation of the review and approval system.[112] This is because these officials are actually regarded as innocent, if not laudable inside the government since they are thought to be "breaking the law for public causes". This seemingly contradictory phenomenon is perfectly understandable given that rural land expropriation is beneficial not to these individual officials but to the local governments they worked for as a whole.

In this case, to mitigate the problem of land finance will surely reduce the incentive of China's local governments to engage in unauthorized expropriation, which on the whole decreases the number of expropriation. However, it obviously has no impact upon the planning-based regulatory system on rural land use and expropriation *per se*. More crucially, the above analysis shows that what really concerns the central authority in China is not the system itself but the cheating of it and finding effective ways to detect, deter and discipline such cheatings, however difficult, if not impossible, the task may be. This explains why it has not been weakened but reinforced by the reforms adopted over the past decade. And this is why the last surviving developmental assumption of the Transition Paradigm is invalid.

To be absolutely clear, the above discussion makes no normative claim about China's rural land use and expropriation system centred on strict top-down government's control. All that has been suggested is not that such a system *should* not be changed, but that it is unlikely to undergo radical change in the foreseeable future. In fact, if we judge the system according to the socialist visions propounded by the founders, we may well come to the conclusion that a fundamental overhaul is needed. As early as in the 1930s, it was disputed whether or not the Stalinist system faithfully

[112] See e.g.'Investigation of Illegal Land Expropriation in Qingyuan of Guangdong: Reponsible Officials Stage a Comeback Afterwards (*guangdong qingyuan weifa zhengdi diaocha: zhushi guanyuan shihou dongshan zaiqi*)' May 18, 2010 <http://news.sina.com.cn/c/sd/2010-05-18/095620294842.shtml> accessed April 8, 2014; Legal Daily, 'Media Reports that Many Officials with Records of Land Law Violation are Promoted in Wuhu of Anhui Province (*meiti cheng anhui wuhu duoming tudi weifa guanyuan bei chufen shou zhongyong*)' (July 7, 2012) <http://politics.people.com.cn/n/2012/0717/c1001-18530810.html> accessed April 7, 2014.

followed the teachings of Marx, Engels and Lenin. According to them, as noted in Chapter 4, a system of nationalized means of production would be one under "a vast association of the whole nation" or "associated individuals" or a "fully democratic state". Commenting on the 1936 USSR Constitution, the renowned Marxist theorist Leon Trotsky criticized that Stalin's Russia had done exactly the opposite. "It is perfectly true that Marxists, beginning with Marx himself, have employed in relation to the workers' state the terms state, national and socialist property as simple synonyms." But the 1936 Constitution was "wholly founded…upon an identification of the bureaucracy with the state, and the state with the people". To Trotsky, this was the "source of crude mistakes, and of downright deceit" because "state property becomes the property of 'the whole people' only to the degree that social privilege and differentiation disappear, and therewith the necessity of the state". "The higher the Soviet state rises above the people, and the more fiercely it opposes itself as the guardian of property to the people as its squanderer, the more obviously does it testify against the socialist character of this state property." [113] Admittedly, it is hardly debatable that since the 1950s the rural land expropriation and use system and its normative foundation in the PRC have been highly statist and authoritarian, with very little concern about the peasants' private rights to land in their individual or collective capacity.[114] However, I hasten to add that there are sincere and genuine considerations that motivate the CCP party-state to maintain a tight control over rural land use and conversion, such as the preservation of agricultural land for food security and ecological sustainability against China's rapid industrialization and urbanization process that will continue for some decades to come. Again this is by no means to suggest that these considerations are or should

[113] Leon Trotsky, *The Revolution Betrayed: What is the Soviet Union and Where is It Going?* (Max Eastman tr, Courier Dover Publications 1937), ch 9.
[114] For incisive observations in this respect, see Eva Pils, 'Waste No Land: Property, Dignity and Growth in Urbanizing China' (2010) 11 Asian-Pacific Law & Policy Journal 1, pp 5-8, 37-44.

be accepted or that the current system is the best way to achieve the intended objectives.[115] These issues are undoubtedly open for debate. Nonetheless, that lies outside the scope of this thesis and will not be pursued here. Suffice it to say that in all likelihood, the presumption of state expropriation in non-agricultural use of rural land and the government's top-down, planning-based and exclusive control over rural land are going to be maintained in the near future. Does that then mean that no more reform of the rural land expropriation law is possible?

4. Looking into the Future: a Modest Proposal

I argue that further reform in this area is possible. But before I put forward my own suggestions, a few words are needed to explain why rural land expropriation has become a social crisis in contemporary China, even though the basic elements of the system have been in place for more than half a century now. While more empirical research is definitely needed, I venture the following points. First, the scale and speed of rural land expropriation accelerated in the reform era when increasing urbanization and industrialization in China require the conversion of more agricultural land and expropriation became financially beneficial to local governments. Second, during the reform era a noticeable change took place in the political culture of China, especially the public perception of what the party-state stands for. It was shown before that as early as in the 1950s the socialist principle that equates state interest with public interest and prioritizes public interest over private interest was not fully accepted by the peasants in land requisition. This has been even more

[115] For a criticism on the national red line of cultivated land by the famous Chinese economist Mao Yushi, see Yushi Mao, 'The Red Line of 1.8 Billion Mu of Cultivated Land is not Determined by the Market (*shiba yi mu gengdi hongxian bushi shichang jueding*)' December 26, 2013 <http://finance.ifeng.com/a/20131226/11347149_0.shtml> accessed September 19, 2014.

so since the 2000s when respect to private property and human rights were written into the PRC Constitution.[116] Third, as mentioned before, since the 1998 LAL, the previous law is reversed and the expropriating governments are no longer required to help to resettle the expropriated peasants through helping them find new employment by asking the TVEs or land-using entities to recruit them. This is to a large extent inevitable because from the 1990s onwards the TVEs generally declined and the land-using entities were mostly private enterprises that are not affiliated with the state. Unsurprisingly, the absence of government-provision of new employment does make it more difficult for the expropriated to have long-term security and therefore to accept state expropriation. Last but not least, as mentioned, expropriated land became a source of financial benefits to the local governments and the private land users since the late 1980s. In more recent years, due to numerous media reports and academic research, land finance is increasingly coming into public knowledge, making the expropriated peasants feel being unfairly treated. In this situation, even though the absolute amount of compensation fees is higher than before, the expropriated have a strong sense of relative deprivation when they see the huge gap between their compensation and the revenue reaped by local governments and private developers.

Therefore, there is indeed a crisis of rural land expropriation in China today, which has to be addressed. The foregoing discussion has shown that despite their popularity, the existing reform proposals are actually either unfeasible or unhelpful or both. In the following texts, I make two suggestions of further reform, one for the mid-to-longer term and the other for the relatively near future.

[116] For relevant discussion, see Pils, 'Land Disputes, Rights Assertion and Social Unrest: A Case from Sichuan'; Pils, 'Peasants' Struggle for Land in China'; Eva Pils, 'Contending Conceptions of Ownership in Urbanizing China' in Hualing Fu and John Gillespie (eds), *Resolving Land Disputes in East Asia: Exploring the Limits of Law* (Cambridge University Press 2014).

The longer-term suggestion is to enhance legislative scrutiny over and public participation in the making of spatial plans. As shown above, under the planning-based land use regulatory system, the expropriation decisions are in effect implementing planning decisions. Therefore, to break up the government's monopoly over decision-making on expropriation and to ensure that these decisions do reflect public opinion as much as possible, it is necessary to introduce checks and balances from outside. As demonstrated, the LUMPs are government-made decisions without legislative control and the government is not legally obligated to consult the public when making them. In comparison, the URPs can be reviewed by the standing committees of local people's congresses and are required in law to be open for public comment. Therefore, my very crude suggestion is that the LUMPs should become reviewable by the people's congresses and the government should be legally requested to solicit public opinions when making these plans. For the URPs, since legislative review and public participation are already available on paper, the next step is to boost their effectiveness. On these issues there is apparently a huge room for legal and social science research, which will not be pursued in this thesis due to limited space. The reason why I think these reforms can only happen in the mid-to-long term is not only that China has just started to emphasize on external input into the making of the spatial plans, but also that these plans are themselves highly technical and complicated—it requires a relatively extended period of time for capacity-building on the part of the people's representatives and the public. I leave out judicial scrutiny over spatial plans intentionally for two reasons. On the one hand, the current Chinese administrative litigation system does not allow the people's courts to review spatial plans which are indisputably abstract administrative acts. On the other hand, since these plans are themselves highly technical and inherently political, the chances are that the courts will have to defer to the government and people's congress. This is obviously not to

say that robust judicial review in this area is never possible or useful. It just shows that it is unlikely to be achieved in the near future.

My other suggestion is about expropriation compensation and is much more achievable in the short term. The central aim is two-fold. One is to share part of the expropriation surplus with the expropriated and the other is to give them the opportunity to negotiate about the compensation. But before introducing my own proposal, a word or two is needed to address an alternative approach. It was proposed, quite ingeniously in my view, that the individual expropriated peasants should be granted "Transferrable Land Development Rights" in addition to their ownership rights to the expropriated land in their collective capacity.[117] By doing so, the local government may still expropriate rural land at relatively low costs and then transfer such land to more profitable agricultural uses at a higher price. Nevertheless, in order to develop the land, on top of purchasing the use-rights of the now state-owned land from the government, private developers must also negotiate with the peasants and buy from them the transferrable land development rights which are not extinguished when expropriation takes place. This proposal is purported to kill two birds with one stone. For one thing, the government can still expropriate whenever and wherever it wants with low compensation. For another, the expropriated will be able to share part of the increased land value and negotiate with the future users of their land. To put it short, the government's costs of expropriation will not rise dramatically while the expropriated peasants will be treated much better—the cost is simply shifted more to the future land users. I argue that despite the good intentions, such a proposal is unfeasible. Since the peasants are given the opportunity to negotiate a price with the land-using entities, the situation may well arise where such negotiation yields no agreement at all. Then the land-using entities will not be able to use the land that is already

[117] Washburn, pt V.

transferred to them by the government. Consequently, the entire process of expropriation and transfer becomes meaningless and the implementation of the spatial plans is crippled. Of course it can be argued that the courts should step in at this juncture and hands down a deal they consider fair so that the land-using entities can utilize the land eventually. Yet that will re-introduce the problem of judicial independence in China through the back door. Or the local governments may force a deal between the peasants and the land-using entities, but that will then throw the element of voluntary negotiation out of the window. The question now is: how to achieve all these goals at the same time?

My suggestion is that the current expropriation compensation regime should be largely kept. However, the standards specified therein should no longer be the *exact amount* but the *baseline price* to be paid by the government. Once the spatial plans and their annual versions are made and published, the potential land-using entities can then approach and negotiate with the owning collectives and peasants. They must strike a deal before the government expropriation takes place for a price that should not be lower than the government-set baseline. If no such deal is reached, the government will expropriate the land at the set baseline price and then transfer it on the market. Within the limited time prior to government expropriation, the collectives and peasants are unlikely to hold out and demand prohibitively high price because that increases the probability that they not is will only get the baseline compensation in the end. On the other hand, the land-using entities will not suppress the price as much as possible because that increases the likelihood that they will eventually lose out to other competing negotiators or bidders when such land is put on market. In this situation, we can reasonably expect a more or less fair deal struck between the expropriated and the land-using entities, giving the former both a share of the increased land value and an opportunity to negotiate

about the price. What is equally important is that it ensures that the expropriation and transfer will be carried out according to the government-made spatial plans.

To some extent the above proposal draws on the local rule in Beijing since 2004 which provides that the government-set compensation standard is the baseline and the land-using entities should negotiate a higher price with the expropriated collectives.[118] Indeed, many other local governments have also prescribed that the land-using entities should negotiate with the peasants. However, what is missing from the existing practice is what to do when a deal is not reached. At the moment, more often than not the case is that a deal is forced upon the rural collectives and peasants to enable the expropriation to go ahead. My proposal avoids this problem. This is particularly important since empirical research has shown that the peasants are equally, if not more concerned with how much say they have on the expropriation compensation than the absolute amount of compensation they are paid.[119]

Of course my proposal is highly conditional on the fact that there is more than one competing potential land users, which can drive the negotiated land price above the government-set baseline. Apparently that is not always available, especially when expropriation is initiated for public works in conventional understanding such as roads, airports, schools and hospitals. However, it does not pose an insurmountable hurdle. On the one hand, those projects face much less resistance from the expropriated; on the one hand, it can be additionally required that for those projects the governments must use the comparable sales method and pay a compensation similar to the negotiated prices at

[118] Articles 5, 9-10, *Beijing Municipality Measures on Compensation and Resettlement of Land Expropriation for Construction (beijing shi jianshe zhengdi buchang anzhi banfa)* (July 1, 2004).

[119] Qinghua Shi, Hongtao jin and Jianwei Zhuo, 'Does Land Expropriation necessarily Lower the Peasants' Income: A Survey of Seven Villages in Shanghai and on the Pitfalls and Reform of Present Expropriation System (*zhengdi yiding jiangdi nongmin shouru ma: shanghai qi cun diaocha jian lun xianxing zhengdi zhidu de quexian yu gaige*)' [2011] Management World (*guanli shijie*) 77; Xiangqi Liu, Zhao Chen and Yang Zhao, 'Procedural Fairness Preferred over Monetary Compensation: the Deciding Factors of Satisfaction of Peasants on Land Expropriation (*chengxu gongzheng xianyu huobi buchang: nongmin zhengdi manyi du de jueding*)' [2012] Management World (*guanli shijie*) 44.

adjacent locations. After all, there is no reason that comparable land should receive different expropriation compensation simply because the future use is different.

It is undeniable that if my proposal is to be implemented, the Chinese government will reap less increased land value because the rural collectives and peasants are now also in the picture. Nevertheless, as noted above, the central authority has promised in recent years that a fair share of the expropriation surplus will go to the peasants, whose individual gains will be increased reasonably. This can be seen as a trade-off made by the Chinese party-state in order to address the social and political crises associated with rural land expropriation while maintaining a stringent top-down control over rural land. In this sense, my proposal goes no further than what is already openly pledged by the central authority and offers a bit more details on how this promise can be delivered. It is therefore rather modest, if not conservative. But that is precisely why I think it is more realistic and achievable in the short-term.

Before we close this chapter, attention should be brought to two counterarguments against the fact that the collectives and peasants will consequently share part of the expropriation surplus: one is principled and the other is practical. The principled counterargument is that the expropriation surplus is derived from state regulation or general socio-economic development, not the investment or efforts of the collectives and peasants. Therefore, it is an "unearned increase" that the latter do not deserve. This proposition holds much sway today, because as mentioned before, albeit for different reasons, there has been a long historical tradition in modern China for both the communist and nationalist parties to view that the increased land value is undeserved by the landowners. The American law of eminent domain does not include such increased value into the fair market value compensation either. In this situation, it is difficult to hold that such value should be attributed, even

partially, to the collectives and peasants. Moreover, since the just distribution of increased land value has been a topic of political and economic theories subject to heated debate for hundreds of years, there seems no principled justification in favour of giving the landowners part of the increased land value that will be agreed upon universally.

Under this circumstance, I suggest a better alternative moral and political basis for sharing the expropriation surplus with the collectives and peasants, through which we can get around the difficult, if not impossible question of fair distribution of increased land value. That is to argue that the collectives and peasants deserve at least part of the expropriation surplus not because they have somewhat created or are responsible for the increased value, but because they have shouldered a larger burden than their urban counterparts in sticking to the designated non-agricultural uses of their land. True, under the current Chinese land system, they do have the obligations to abide by the land use restrictions and to accept state expropriation. But that does not mean that they ought to bear all the costs of doing so on their own, especially when their urban counterparts receive a different and more favourable treatment because urban land is not under such stringent use regulations. Since equality has long been a constitutional principle of the PRC, the collectives and peasants should have been compensated with part of the expropriation surplus for the disproportionately heavy burden they have borne for the benefit of the whole society in general and the party-state-led social transformative plans in particular. In this regard, one does not have to borrow the concept of "regulatory takings" from the US law as was proposed.[120] In light of the affinity between the Chinese and German legal systems, a more appropriate candidate can be found in the German concept called "the "equalization payment" (*Ausgleichzahlung*).[121]

[120] Washburn, pp 113-14.
[121] Lubens, pp 411-12.

On a related but separate note, the practical counterargument against giving part of the expropriation surplus to the collectives and peasants is that it will increase the inequality among the peasants population because those who live in the suburbs will obtain much more compensation. Some of them may even become super-rich and a class of "land rentiers" will re-emerge in China.[122] Conceding that the worry is warranted, I submit that it is an inappropriate solution to deny the peasants any share of the expropriation surplus. A better and more nuanced approach is to allow the government to levy a tax upon the negotiated price so that not all "windfall" goes into private pockets. As mentioned in Chapter 2, this is what the Guangdong government has been doing in relation to the transfer of for-profit rural construction land. It is also a requirement of equality because the transfer of urban land has become subject to the Land Appreciation Tax since 1994.[123]

In conclusion, my modest and therefore more attainable reform recommendation on expropriation compensation is that in order to achieve equality in shouldering responsibilities towards the public interest and the party-state's social transformative projects, the collectives and peasants should be allowed to negotiate a price with the land-using entities, which must be above the government-set compensation standards compensation but is subject to the Land Appreciation Tax. While there are obviously a lot more details to be hammered out, this is a good starting point.

[122] Xuefeng He, 'Expropriation Compensation should Avoid Helping the Profiteering Class (*zhengdi buchang ying fangzhi qianghua shili jieceng*)' (December 27, 2012) <http://news.sina.com.cn/pl/2012-12-27/071625904603.shtml> accessed September 23, 2014.
[123] *Interim Regulation of Land Appreciation Tax* (December 13, 1993).

Epilogue Taming the Dragon: Land Takings Power in Modern China

I came across the famous Chongqing Nail House incident cited at the beginning of the thesis seven years ago when I was an exchange student in Singapore. Appalled by the startling viral picture showing a single house standing alone in a deep pit, I started the journey to find an explanation why land expropriation has aroused so much controversies and conflicts, frustration and indignation in my own country, which is largely unseen in those developed countries such as Singapore. The first piece of academic work I did on this topic was a Sino-US comparative study with the focus on the 2005 *Kelo* case. The conclusions I came up with back then are basically the same as those proposals made in the mainstream existing literature, which are documented in Chapter 1 of this thesis.

I began to realize in 2007 that the entire nation was in the midst of soul-searching on land expropriation, not least because of the discussion and debate surrounding the Property Law. Yet I certainly did not foresee that seven years later, much of those popular and almost commonsensical reform recommendations are yet to come into fruition. Over the years, the status quo turns increasingly solidified and the relevant legal scholarship has largely become ossified under the Transition Paradigm. There seems to be very little work left to be done by academic lawyers when it is generally felt that the symptoms of and solutions to the crisis of China's rural land expropriation law have already been thoroughly analyzed and revealed.

Being rather uncertain about what more can be done in this field, I embarked on my doctoral project four years ago at Oxford. In the first months if not years, I tried many different things such as comparing the Chinese law with the counterparts in more developed countries, looking at the social

science literature on how expropriation operates and is received or resisted by the peasants on the ground, and surveying the political and economic theories on private property rights. All I was trying to do is to find a way to contribute something new.

However, none of the above is reflected in the final product, which is mainly a detailed historical and doctrinal analysis of the Chinese laws and policies on the power of rural land takings over the past century. Inevitably as a consequence, it centres on the elitist discourse of the party-state with little attention paid to the other side of the story, i.e. how the peasants view and respond to state expropriation. To put it differently, it looks at the issue more from a top-down than a bottom-up perspective. It is also limited to an inquiry into the conceptualization and practice of the takings power, with perhaps inadequate emphasis on the land rights of the collectives and individual peasants. Moreover, it is almost exclusively a story about China without any international or comparative perspective. These are undoubtedly the limitations of this thesis, which can only be addressed in future research.

Having said that, I do think that my mission to seek for an explanation and solution to the crisis of China's expropriation law started seven years ago is now accomplished and I have made a bit of new contribution to this field. The reason is that this thesis does identify and uncover a fair amount of uncharted territories even when there has been a huge amount of ink spilled on rural land expropriation in China.

More specifically, I argue that my top-down, power-oriented and China-focused approach is better than the existing literature in capturing the dynamics of rural land takings and the relevant laws in modern China. First, as shown by this thesis, over the last century the Chinese experiences of rural land takings have largely been molded by the party-state, be it the communist or the nationalist. This

is certainly not to dismiss the (increasing) impact the society has on the discourses and practices surrounding rural land expropriation. Yet it is very clear that the legal changes in this respect are predominantly and fundamentally driven and shaped by the party-state. Second, this thesis has revealed a distinctive feature of the land expropriation regime in modern China: its logical and axiological starting point is not individuals' rights to land but the state's control over land. At the end of the day, the cornerstone of the Chinese land regime has been public ownership ever since the mid-1950s. This means that the expropriation law has evolved and will continue to evolve according to the needs of the state's control of the land instead of some notion of land rights. To make the point clearer, consider yourself to be confronted with two different land regimes. One is a system based on private land rights with much government regulation and the other is based on public land ownership with little government regulation. These two may appear much similar to one another on the surface. However, they become more or less alike through completely opposite processes. The former comes into existence through making the case for more government intervention concerning land as private property while the latter through making the case for more individual freedom with regard to the publicly owned land. In other words, the default position and evolving logic of these two regimes are profoundly different. To be clear, no value judgment is passed here. Nor does it say that private land rights do not play any role in a public land regime. Yet it does mean that an understanding of the land takings power is more crucial than that of land rights if the objective is to make sense of the past and future of the relevant laws in modern China. Last but not least, this thesis has demonstrated that because of its distinctive development trajectory, the Chinese rural land expropriation law can never be comprehended simply through a comparison or even a conflation with those supposedly counterparts in the US or any other countries. It can only be correctly grasped and constructively

criticized in its own historical context and following its own logic. This is definitely not to promote Chinese exceptionalism. But it does suggest that informed criticism and realistic recommendation are possible only after a situated understanding is reached.

Seven years ago, as a junior student in college, I wished to find a way to "kill" the dragon of rural land takings in my home country. Now my position has changed to be that the dragon cannot be killed but tamed. I hope that it is a sign of maturity rather than loss of ambition. After all, in the Chinese culture, the dragon has always been considered as auspicious and fearful at the same time for it has the power to both hurt and heal.

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