RURAL LAND TAKINGS LAW IN MODERN CHINA

One of the most pressing issues in contemporary China is the massive rural land takings that have taken place at a scale unprecedented in human history. Expropriation of land has dispossessed and displaced millions for several decades, despite the protection of property rights in the Chinese Constitution. Combining meticulous doctrinal analysis with in-depth historical investigation, Chun Peng tracks the origin and evolution of China’s rural land takings law over the twentieth century and demonstrates an enduring tradition of land takings for state-led social transformation, under which the takings law is designed to be power-confirming. With changed sociopolitical circumstances and a new rights-respecting constitutional agenda, a rebalance of the law is now underway, but only within existing parameters. Peng provides a piercing analysis of how land has been used by the largest developing country in the world to develop itself, at what costs and where the future might be.

Chun Peng is Assistant Professor at Peking University Law School. He received his doctorate and master’s degree in law from the University of Oxford and holds a double degree in law and economics from Peking University. He has published widely on Chinese constitutional law, administrative law and comparative law in English and Chinese. Besides scholarly work, he writes op-eds on China and the world at The Diplomat, China Daily and Caixin. He also provides consultancy to the Ministry of Land and Natural Resources and local governments on legal reforms in China.
RURAL LAND Takings
Law in Modern China

Origin and Evolution

CHUN PENG
Peking University
For my parents, Peng Zhonghao and Wang Shuming
CONTENTS

List of Figures page x
List of Tables xi
Acknowledgments xii
List of Abbreviations xv

1 Introduction 1
1.1 Defining Land Taking in China 3
1.2 Massive Rural Land Expropriation in Contemporary China 6
1.3 Making Sense of China’s Rural Land Expropriation Law 11
1.4 Transition Paradigm 14
1.5 Theme, Thesis and Structure of the Book 24

2 A Broken Constitutional Promise: Diagnoses and Prescriptions 29
2.1 Public Interest Prerequisite: Triple Challenge 29
2.2 Expropriation Compensation: Unjust and Unfair 36
2.3 Prescriptions: Toward the Chinese Fifth Amendment 46

3 Limited Reform: Symptoms and Causes 57
3.1 Reform and Its Limitations 58
3.2 Land Finance as the Explanation 74
4 Original Constitutional Takings Clause: Origin, Meaning and Purpose 86
  4.1 Origin of Original Constitutional Takings Clause 87
  4.2 Parsing the Original Constitutional Takings Clause 92
  4.3 Purpose of Original Constitutional Takings Clause 106
  4.4 The Transition Paradigm Reconsidered 108
5 Theoretical Foundations of Land Takings Power: Competing Traditions and Common Legacy 112
  5.1 Land Nationalization: A Tale of Two Traditions 113
  5.2 Land Expropriation: From Classical Liberalism to Socialized Property 140
  5.3 Common Legacy of Competing Theories 154
6 The 1982 Constitutional Takings Clause Re-examined: New Wine in an Old Bottle 159
  6.1 “Urban Land Is Owned by the State”: A Reinterpretation 160
  6.2 Forbidding Voluntary Land Transaction 192
  6.3 Rational Use of Land 203
  6.4 Parsing the 1982 Takings Clause: Nature and Purpose 207
7 Rural Land Expropriation Law in the Reform Era: A Story of Continuity 212
  7.1 Structural Continuity 214
  7.2 Functional Continuity 223
  7.3 Normative Continuity 236
  7.4 Foundational Continuity 239
CONTENTS ix

7.5 Persistent Non-justiciability of Expropriation Decisions 253

8 Conclusion 266

8.1 Taking Stock 266
8.2 Doing Away with the Transition Paradigm 269
8.3 Making Sense of the Rise of the Transition Paradigm 274
8.4 An Immanent Critique 285
8.5 Looking Ahead 315

Appendix 1 319
Appendix 2 328
Index 331
FIGURES

1.1 Massive and accelerating rural land expropriation in contemporary China  page 7
7.1 Visualization of three boundaries and four zones  247
TABLES

7.1 Competence to sanction rural land expropriation of central and provincial governments  page 240
7.2 Quota control under land use master plans  242
7.3 Three boundaries and four zones  246
7.4 Urban rural planning areas  249
7.5 One form and three programs  250
ACKNOWLEDGMENTS

This book grew out of my trips as a student to three countries over the last decade. It all started when I came across the Chongqing Nail House incident during my exchange at the National University of Singapore in my junior year in college. Startled by the picture of a single house standing alone in a deep pit, I started to explore why land expropriation has generated so many conflicts and tragedies in my country, first with a course paper in Singapore and later in a graduation thesis at Peking University and a doctoral dissertation at Oxford.

Along the way, I have accumulated debts to many individuals and institutions. First and foremost, I would like to express my sincere gratitude to my tutors at Oxford. Professor Paul Craig kindly took me in eight years ago and has always been a tremendous source of guidance, encouragement and support, even after I finished my doctoral studies. I am extremely grateful for his patience, wisdom and kindness, which inspire me to become the best possible scholar and teacher that I can be. My cosupervisor, Dr. Patricia Thornton, has also devoted much time and energy to reading and commenting on earlier drafts of this book. I have benefited from her insights on politics and society in China, and our discussions are always stimulating. Moreover, it has been both relaxing and exhilarating to talk with Professor Reza Hasmath about research and other things of mutual interest, such as basketball.

I am very fortunate to have a group of mentors at Peking University Law School, which is my alma mater and the institution I am now working for. Professor Wang Xixin has been a tremendous inspiration not only with his academic expertise in Chinese public law and political development, but also with his commitment to promoting the rule of law in China in a pragmatic and constructive manner. Professor Zhang Qianfan has offered me many opportunities to work for and learn from him, and Professor Shen Kui encouraged me to pursue a career in academia after supervising my college graduation paper. Dean Zhang Shouwen, Professors Jiang Ming’an, Chen Duanhong, Zhan Zhongle,
Wang Lei, Jiang Shigong and Dr. Li Yuanyuan have also graced me with their kindness and trust. They are the finest teachers and colleagues one can hope for.

Outside Oxford and Peking University, Professor John S. Baker has been a mentor and friend to me for almost a decade, and his support and advice are invaluable. Dr. Suzanne Yang and Dr. Stephen Reid organized extremely interesting training programs and hosted most enjoyable tea parties and luncheons at their house, which will always be fond memories.

Furthermore, I want to say thanks to many friends who have supported and motivated me over the years, including Liao Kezhong, Wang Xiangping, Wang Jianbin, Li Kunrui, Guo Yicong, Liu Shuichang, Li Zi, Tao Yu, Ge Cheng, Zhang Zichen, Liang Kun, Liu Yifan, Wu Yimin, Yan Tian, Liu Han, Rogier Creemers, Ewan Smith, Nicole Stremlau and Iginio Gagliardone. In particular, I want to thank Sunny Chiang, who helped me so much in times of need. I would also like to thank the colleagues and friends at Oxford Continuing Education Department, including Professor Alan Hudson, Professor Jonathan Michie, Annette Lord, Patrick Tilbury, Isabel Finch, Caroline Airey, Jim Campbell, Alison Boulton and James Boulton, who have made Oxford my second home.

In 2011, I had a brief stint conducting empirical research back in my hometown – the city of Changde in Hunan Province – and received warm hospitality from Mr. Liu Jianyao and Mrs. Yin Fangming, the directors of the city land administration bureau. In particular, I accompanied Mr. Zhong Guowen and his “demolition team” when they went to talk to the peasants who were to be expropriated. They broke the stereotype portrayed in the mass media by showing incredible patience and sympathy. Their work is most difficult and undervalued.

I also want to express my gratitude to the China Oxford Scholarship Fund (especially Mr. Timothy Beardson and Ms. Susan Yu), St. Catherine’s College, Oxford Law Faculty, the China Scholarship Council, the Great Britain China Center (particularly Mr. Richard Pascoe) and the Peking University-Lincoln Institute Center for Urban Development and Land Policy (Professor Liu Zhi and Professor He Canfei specifically) for generously providing me with financial support at different points over the past ten years.

This book has its origin in my doctoral dissertation at Oxford. I am indebted to the examiners of my transfer, confirmation and viva tests for their constructive suggestions: Professors Denis Galligan and Nick Barber at Oxford, as well as Dr. Zhu Sanzhu from School of Oriental and
African Studies, University of London, and Dr. Eva Pils from King’s College London. At the publication stage, I am extremely grateful to Mr. Joe Ng for his support of the project and his considerable patience with the tight schedule of a junior academic. My thanks also go to the three anonymous readers for their helpful comments and criticisms. Miss Cai Peiru kindly offered her assistance in finalizing the footnotes, which is greatly appreciated.


Last, and above all, this book is for the loving memory of my uncle Wang Yafei and for the good health of my maternal grandmother Deng Yunhua. Most importantly, my parents, who never went to college, sacrificed so much to bestow upon me the greatest thing any parents can give to their children – an education. I hope to make up a bit for those Spring Festivals spent oceans apart with this humble book, which is dedicated to them.
ABBREVIATIONS

ALL  Administrative Litigation Law
ALUP  Annual Land Use Plan
ARL  Administrative Reconsideration Law
CAC  Constitutional Amending Committee
CCP  Chinese Communist Party
CPPCC  Chinese People’s Political Consultative Committee
GDP  Gross Domestic Product
KMT  Kuo Min Tang
IWLO  ideal Western legal order
LAL  Land Administration Law
LALIR  Land Administration Law Implementation Regulation
LUMP  Land Use Master Plan
MLR  Ministry of Land and Natural Resources
MLRSC  Measures on Land Requisition for State-led Construction
NPC  National People’s Congress
NPCSC  National People’s Congress Standing Committee
PAL  Prime Agricultural Land
PRC  People’s Republic of China
RECHSL  Regulation on Expropriation and Compensation of Houses above State-owned Land
RLRSC  Regulation on Land Requisition for State-led Construction
SCP  Short-term Construction Plan
SOE  State-owned Enterprise
SPC  Supreme People’s Court
SPR  Small Property Rights
TP  Transition Paradigm
TVE  Township and Village Enterprise
UREAL  Urban Real Estate Administration Law
URP  Urban Rural Plan
URPL  Urban and Rural Planning Law
USSR  Union of Soviet Socialist Republics
VAT  Value Added Tax

xv