ENFORCING TAKINGS CLAUSES IN CHINA

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I. INTRODUCTION

Property rights are considered fundamental in constitutional jurisprudence and essential for economic development. However, China's economic growth over the past 30 years has posed a special paradox to many theorists: for some, it is a mysterious phenomenon that China could continue rapid growth for a few decades without proper contract law until 1999 and without constitutional private property rights until after 2004. For others, the lack of property rights explains the social unrests arising from land-taking and the potential risk of non-sustainability of further development.

This does not mean that there is no property protection in China; both the Constitution and other relevant laws provide for property rights. However, it is the security of property rights that is questioned. Not only do individuals find themselves vulnerable when government agencies (the State) take their property, but also collective organizations in rural areas fail to resist expropriation requests from the State. According to the original text of Article 10 of the 1982 Constitution, "The state may in the public interest take over land for its use in accordance with the law. No organization or individual may expropriate, buy, sell or lease land, or unlawfully transfer land in other ways." It was not until 2004 when the 20th and 22nd Amendment of the Constitution added compensation to the original clause.

Among other things, real property, especially land property rights are especially fragile because individuals are not considered landowners under the Chinese legal system. According to the 1982 Constitution, in urban areas, all land belongs to the state. In the rural areas, land belongs to the state or collective organizations. In both urban and rural areas, individuals only have a land-use right. What is more, collective organizations in rural areas cannot transfer ownership freely. They can only passively transfer their land ownership to the state when the latter expropriates the land. After the state expropriates the land from rural areas, individuals or private sectors can acquire land-use rights from the government or from the market. As a result, there is no spontaneous market for land price and the government will only compensate the collective landowners with the minimal government-set price. In other words, the government has a monopoly over prices for all land owned by the collective, which is highly distorted and below the actual market price.

Observers and experts have noticed the problems associated with land property rights in China. Many have proposed reforms to address

the distortion. Among them, there are three main approaches: the most radical one is to privatize land ownership both in urban areas and in rural areas.[1] Many economists believe that the property ownership is the ultimate reason for the distortion. However, due to the perceived conflict between privatization and socialism, this approach has not been officially endorsed.

The second approach is legalistic, which advocates to limit expropriation by a narrow interpretation of "public interests" in the law.[2] This approach was endorsed by the 2004 Constitution Amendment; and the 2011 Regulations on Expropriation and Compensation of Real Property on State-owned Land in Urban Areas provides a list of projects that are considered to be within public interests.

The third approach is a constitutional due process of law approach. This approach requires the government to go through important bargaining and assessment procedures and to make the results public with due care.[3] Up till now this approach has not been ratified by the Constitution. However, relevant ministerial procedures have been introduced to reflect the procedural requirements that emphasize fairness, neutrality and openness.

This article aims to examine the effectiveness of the third approach through a systematic analysis of over 200 court cases that involve Articles 46-49 of the Land Management Law, as amended in 2004. These articles were chosen for several reasons. Firstly, these articles are the de fecto due process of law provisions that restrict government land-taking actions substantively and procedurally. Secondly, these provisions are enforceable in China. Even if the Constitution is amended in the future, it is worthwhile to examine the enforcement of

[1] Huang Shaoan (黄少安), Sun Shengmin (孙圣民) & Gong Mingbo (宫明波), Zhongguo Tudi Chanquan Zhidu Dui Nongye Jingji Zengzhang de Yingxiang—Dui 1949-1978 Nian Zhongguo Dalu Nongye Shengchan Xiaolü de Shizheng Fenxi (中国土地产权制度对农业经济增长的影响——对1949—1978年中国大陆农业生产效率的实证分析) [The Impact of Land Ownership Structure on Agricultural Economic Growth: An Empirical Analysis on Agricultural Production Efficiency on the Chinese Mainland (1949-1978)], 3 ZHONGGUO SHEHUI KEXUE (中国社会科学) [SOC. SCI. CHINA] 38, 38-47 (2005); Matthew S. Erie, China's (Post) Socialist Property Rights Regime: Assessing The Impact of the Property Law on Illegal Land Takings, 37 H.K. L.J. 919, 919-49 (2007) (outlining the anti-commons (privatization) model and fuzzy approach (maintenance of a hierarchical order of rights among various players of rural land market) in modeling property law reform in China); see also Zhu Keliang & Roy Prosterman, Securing Land Rights for Chinese Farmers: A Leap Forward for Stability and Growth, 3 DEV. POL'Y ANALYSIS (Oct.15, 2007), http://object.cato.org/sites/cato.org/files/pubs/pdf/DPA3.pdf.

[2] Hu Jinguang (胡锦光) & Wang Kai (王锴), *Lun Woguo Xianfa Zhong "Gonggong Liyi" de Jieding* (论我国宪法中"公共利益"的界定) [*Defining Public Interest in the Chinese Constitution*], 1 ZONGGUO FAXUE (中国法学) [CHINA L. SCI.] 18, 18-27, (2005).

[3] Zhang Qianfan (张千帆), "Gongzheng Buchang" yu Zhengshouquan de Xianfa Xianzhi ("公正补偿"与征收权的宪法限制) [Just Compensation and Constitutional Control of Takings Power], 2 ZHONGUO FAXUE YANJIU (中国法学研究) [CHINESE J.L.] 25, 25-37 (2005).

Land Management Law. Because Chinese courts generally do not apply constitutional provisions in their adjudications. Thirdly, compared with the 2007 Property Law, the Land Management Law as revised in 2004 is more relevant for land taking control. The Property Law has only very limited impact on regulating land taking.[4] This is because disputes between the government and individuals are considered as administrative disputes rather than civil disputes. Therefore, the Property Law does not apply in land taking cases. At the same time, a substantial body of court decisions that apply the provisions of the Land Management Law has developed, rendering the neglect of the enforcement and judicial role in land disputes less and less tenable.

It is worthwhile to elaborate on the four articles before we move on to the main contents of this paper. Property rights are considered exclusive in modern jurisprudence. The exclusiveness means that, without due process, government expropriation of land property is considered unjustified. This is reflected in the requirements of Articles 46-49 of Land Management Law. Among the four articles, three place procedural limits on land expropriation and one on compensation. Article 46 expressly requires that the expropriation be approved through legal procedures, and be announced by the people's governments at or above the county level, which government entities are also to implement the expropriation. Article 47 provides for the computation of compensations for land, constructions and plants above the land and other relevant loss, including expected profit in the future. Article 48 provides for the publicity obligations of the local government once the plan for compensation and resettlement subsidies are decided. According to Article 48, the plan must be made available to the general public and the relevant government entities must "solicit comments and suggestions from the collective economic organizations, the land of which is expropriated, and the peasants." Article 49 imposes another publicity obligation on collective organizations, which are asked to "make known to its members the income and expenses of the compensation received for land expropriation". Therefore, the four articles as a whole serve the role of due process of law in the Chinese legal system.

This article will develop into the following three parts: Part I introduces the methodology and basic findings from the empirical study. Part II summarizes the judicial understanding of the 'taking's clauses', and highlights various points of consistency and inconsistency with such an understanding. Part III then makes several

[4] Mo Zhang, From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China, 5 BERKLEY BUS. L.J., 317, 317-63 (2008).

observations regarding why the courts tend to interpret the takings provisions against certain types of land right holders, and regarding recent developments from the perspective of judicial policy. I will then conclude and discuss the policy implications of the judicial enforcement of the takings' clauses in China.

II. METHODOLOGY AND BASIC FINDINGS

This part sets out the methodology and the basic findings from the case study. Methodologies applied in this article are both quantitative and qualitative. There have been other case studies of Chinese land disputes, but most investigate one or a few cases in a specific region.[5] Although they enrich our understanding of the government (including the judiciary) practice in dealing with land disputes, it is questionable whether the specific cases are representative and to what degree judges would apply the same rationale behind the cases examined to other cases. There have also been empirical studies of land disputes by economists and political scientists.[6] These studies help us understand the social and political background of land disputes, but they do not intend to analyze the variations with which lawyers are concerned: governing principles and rules, the scope of the rights and interests, and rationales behind the judicial understanding of rights and obligations.

This article attempts to improve the empirical study of Chinese land disputes by providing a more complete picture of land property right disputes in China. It does so by examining over 200 cases between 2004 and 2010 available in the public database, Chinalawinfo.com.[7] From a pure methodological perspective, compared with empirical research that collected cases from media reports,[8] or from one or a few specific regions,[9] the case sample

[5] *E.g.*, Eva Pils, Land Disputes, Rights Assertion, and Social Unrest in China: A Case from Sichuan, 19 COLUM. J. ASIAN L., 235, 240-244 (2005); Zhang Jing (张静), Tudi Shiyong Guize de Buqueding: Yi Ge Jieshi Kuangjia (土地使用规则的不确定:一个解释框架) [Uncertainty of Land-use Rules: An Explanatory Framework], 1 ZHONGGUO SHEHUI KEXUE (中国社会科学) [SOC. SCI. CHINA], 113, 113-124 (2003).

[6] Keliang & Prosterman, *supra* note 2; Loren Brandt, Scott Rozelle & Mathew Turner, *Local Government Behavior and Property Rights Formation in Rural China*, 160(4) J. INST'L & THEORATICAL ECON.,627, 627-671 (2004); Klaus Deininger & Songqing Jin, *Securing Property Rights in Transition: Lessons for Implementation of China's Rural Land Contracting Law*, 70 J. ECON. BEHAV. & ORG., 22, 22-38 (2009).

[7] *See* CHINA L. INFO., www.chinalawinfo.com (last visited Apr. 21, 2015).

[8] *E.g.*, Benjamin Liebman collected 223 defamation cases from Internet reports, *see* Benjamin Liebman, *Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China*, 47(1) HARV. INT'L L.J. 33, 37 (2006) (acknowledging the obvious problems of reliance of media reports of cases).

[9] *E.g.*, Eva, *supra* note 5; Margaret Y.K. Woo & Yaxin Wang, *Civil Justice in China: An Empirical Study of Courts in Three Provinces*, 53(4) AM. J. COMP. L. 911, 911-40 (2005).

collected here is likely to be less biased and more complete. While there are still many ways in which the sample is not representative—for example, many of the cases are from the same province while some provinces do not have even one case—we believe that, overall, our dataset improves the representativeness of empirical studies of land property law.

Since court decisions are not required to make public in China, there is no access to all relevant cases from official databases. As a result, the cases collected by Chinalawinfo.com are not complete and may not represent all the cases in China. Since 2009, some provincial courts, such as Henan and Shanghai started to publish their court decisions. Ever since then, collecting a sample of court opinions in land-taking cases from a single court or courts of certain regions might be possible. However, it would not be representative of cases nationwide; and it might reflect regional biases. By contrast, as a business legal information provider, Chinalawinfo.com has tried to collect as many as possible cases, as well as most published court decisions across various channels, including those provided by courts exclusively to Chinalawinfo.com.

In the beginning, all cases that have applied Land Management Law Articles 46-49 between 1998-2011 as of Nov. 30 2011 were retrieved. But no cases before 2004 and after 2010 were documented as of Nov. 30 2011. As a result, all the cases actually retrieved are between 2004-2010.[10] The time frame was thus set for three reasons. Firstly, this is the period during which land property laws began to promulgate and come into force. The original 1986 Land Management Law mainly focused on the administrative control of land use. In 1998, the Implementation Regulation for the Land Management Law was passed by the State Council, which laid out detailed procedural requirements for land expropriation and compensation. More generally, more weight was given to compensations for land taking and the control of government misconduct—especially by local governments—in land administration. In 2004, the Land Management Law was revised after the Constitution was amended, which echoed

[10] The Supreme Court Gazette published a couple of cases in 2005, which are not included in the above-mentioned 204 cases. Two civil cases were administrative cases regarding land-taking decisions which were published ever since 1998, and the Court supported the plaintiffs, *see* Chen Qingzong Su Tingyangcun Yizu, Tingyangcun Cunweihui Zhengdi Buchangkuan Fenpei Jiufen An (陈清棕诉亭洋村一组、亭洋村村委会征地补偿款分配纠纷案) [Chen Qingzong v. Group One of Tingyang Village and Tingyang Villagers' Committee], 2005 Sup. People's Ct. Gaz. 10 (Fujian Xiamen City Interm. People's Ct. 2003); Beishapocun Cunweihui Su Xi'an Shi Gaoxin Jishu Chanye Kaifaqu Dongqu Guanweihui Deng Tuoqian Zhengdikuan Jiufen An (北沙坡村村委会诉西安市高新技术产业开发区东区管委会等拖欠征地款纠纷案) [Beishapo Villagers' Committee v. East Administration Committee of Xi'an Municipal High-Tech Industrial Development Region], 2005 Sup. People's Ct. Gaz. 1 (Sup. People's Ct. 2003).

the expression of the 20th Amendment. The 2007 Property Law does the same. In 2011, the Regulation on the Expropriation and Compensation of Houses on Urban State-Owned Land replaced the Regulation on the Demolition of Urban Houses. The title of the regulation makes it clear that this is a right-based real estate regulation.

Secondly, this period witnessed rapid economic growth and a shift in public policy from a focus on efficiency to more attention to fairness. From 1997-2004, the Chinese Communist Party (CCP) followed the principle of "taking account of fairness while keeping efficiency as the priority".[11] After 2004, however, the policy became "emphasizing efficiency for primary allocation; emphasizing fairness for reallocation".[12] Accordingly, the courts were asked to play different roles over time, alternatively to "protect the sail of the economy" or "to promote a harmonious society". Judicial polices over land disputes changed over time to reflect changing social and economic policies.

Last but not least, this period of time overlapped with the implementation of the Five-Year Reform Outlines of the Supreme People's Court (the SPC hereinafter). The first five-year reform lasted from 1999 to 2004, and the second from 2004 to 2009. The current five-year reform started in 2009 and will end in 2013. With the five-year outlines, the judiciary set various goals, aiming to transform itself from a bureaucratic organ to a professional and neutral authority. Therefore, examining the courts' practice in adjudicating land disputes during this period provides an opportunity to observe the resolve and reality of the judiciary's commitment to the rule of law and other goals.

The basic findings are based on the research of the following aspects of the cases collected: (1) the type of litigation (civil, criminal or administrative), (2) the time and place of the dispute, (3) the land right holder's identity (village, individual farmers, or other land users), (4) the result of the claim (success or failure), (5) the legal ground of the court's decision, and (6) the judicial policy underlying the court's interpretation of relevant takings' provisions.

Among the cases found, 84 cases apply Article 46; 108 apply Article 47; and six cases are based on Articles 48 and 49 respectively. Table 1 provides an overview of the cases studied. Table 2-1 to 2-4

[11] Jianchi Xianlü Youxian, Jiangu Gongping (坚持效率优先,兼顾公平) [Insist the priority of efficiency with caring justice], Zhongguo Gongchandang Di Shisici Quanguo Daibiao Dahui Sanci Huiyi Baogao (中国共产党第十四次全国代表大会三次会议报告) [Report of CCP's 3rd Session of the 14th Congress], (promulgated by CCP's 3rd Session of the 14th Cong., effective 1993).

[12] Chuci Fenpei Zhuzhong Xiaolv, Zaici Fenpei Zhuzhong Gongping (初次分配注重效率,再分配注重公平) [emphasize efficiency in primary distribution and justice in redistribution], Zhongguo Gongchandang Di Shiqici Quanguo Daibiao Dahui Baogao(中国共产党第十七次全国代表大会报告) [Report of CCP's 17th Congress], (promulgated by CCP's 17th Cong., effective Oct 21, 2007).

present a more detailed distribution of cases related to the four articles. Some features are immediately noticeable. Firstly, most lawsuits were brought after 2006, suggesting the potential impact of the Constitutional Amendments, the enactment of the 2007 Property Law and the revision of the Land Management Law on the awareness of property rights and subsequently the law enforcement of land-taking clauses.

Secondly, there is no significant difference in the numbers of cases adjudicated in more developed, eastern regions and those in less developed, middle and western regions. This suggests that the stage of economic development does not play an important role in judicial preference of land property rights, either procedurally or substantively. In other words, adjudications in different regions tend to be 'consistent' with each other, which imply the existence of underlying principles or policies behind the judicial behaviors.

Thirdly, there are more civil cases (169) than administrative cases (35), and there are more cases applying Article 46 and Article 47 than cases applying Article 48 and Article 49. Finally, the overall number of cases seems to have an inverted U-shape as it seems to rise between 2004-7 but then falls down again after 2007 (Chart 1).

Table 1: Overview of Cases Analyzed

Case Number	Total	% of total	Article 46 Expropriation Procedures	Article 47 Computation of Compensation	Article 48 Publicity requirement on the government	Article 49 Publicity requirement on the collective
Total Case numbers	204	100%	84	108	6	6
Civil cases	169	83%	68	93	2	6
Administrative cases	35	17%	16	15	4	0

Table 2-1: Time-Spatial Distribution of Cases Based on Article 46

Article 46	2004	2005	2006	2007	2008	2009	2010	Sum
Sichuan		1		1				2
Shandong		1						1
Guangdong	1	1						2
Hainan			2					2

Hubei			1	1				2
Zhejiang			1	2				3
Jiangsu			1					1
Yunnan					60	1	3	64
Henan						3	1	4
Chongqing						1		1
Ningxia						1		1
Hunan							1	1
Total	1	3	5	4	60	6	5	84

Table 2-2 Time-Spatial Distribution of Cases Based on Article 47

Article 47	2004	2005	2006	2007	2008	2009	2010	Sum
Anhui		1						1
Heilongjiang	1							1
Gansu			1					1
Beijing						3		3
Liaoning	2	1		1	1			5
Shanxi		1					1	2
Jinagxi				1				1
Guangdong	2	4	14	2				22
Sichuan		1		1	2			4
Shandong		2	2					4
Fujian				1				1
Hainan		2		18	1			21
Hubei			1	1				2
Zhejiang			1	2				3
Yunnan				7	5	8		20
Henan						7		7
Hebei				1				1
Chongqing		1		2		3		6
Ningxia						1		1

Hunan							1	1
Qinghai	1							1
Total	6	13	19	37	9	22	2	108

Table 2-3 Time-Spatial Distribution of Cases Based on Article 48

Article 48	2004	2005	2006	2007	2008	2009	2010	Sum
Beijing						1		1
Yunnan						1		1
Hubei				1				1
Guangdong			1					1
Zhejiang			1					1
Shandong		1						1
Total	0	1	2	1	0	2	0	6

Table 2-4 Time-Spatial Distribution of Cases Based on Article 49

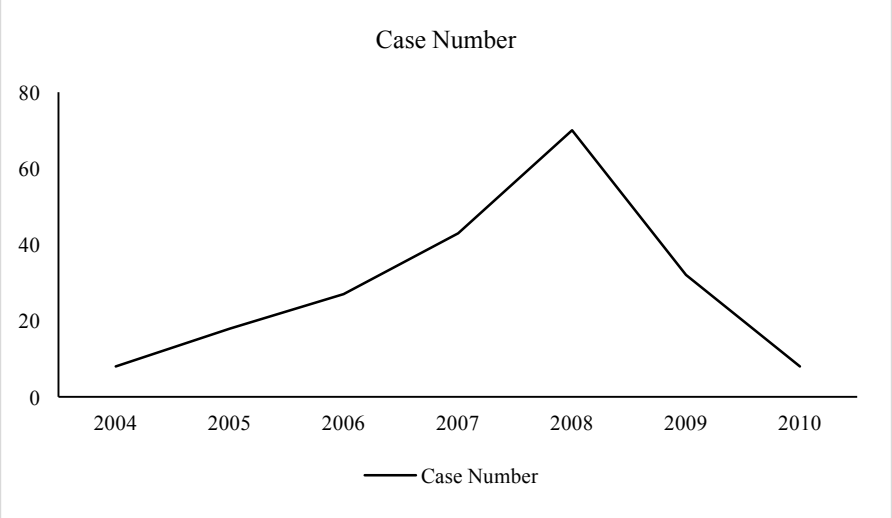
Article 49	2004	2005	2006	2007	2008	2009	2010	Sum
Henan						1	1	2
Beijing						1		1
Guangxi				1				1
Guangdong		1	1					2
Sum	0	1	1	1	0	2	1	6

Table 3: Case numbers divided according to year

	Case Nos. in Total	Article 46	Article47	Article 48	Article 49
2004	7	1	6	0	0
2005	18	3	13	1	1
2006	27	5	19	2	1
2007	43	4	37	1	1
2008	69	60	9	0	0

2009	32	6	22	2	2
2010	8	5	2	0	1

Chart 1： The Inverted U-Shape of Case Numbers between 2004-2010



Besides the findings of Part I, we also look into judicial preference in applying these clauses and the reasons behind the application.

III. HOW JUDGES APPLY THE TAKINGS CLAUSES IN THEIR ADJUDICATIONS

This part of the article investigates how judges apply the 'takings' clauses' and highlights various points of consistency and inconsistency in the judicial implementation. Some findings emerge. Firstly, the courts tend to be more 'neutral' in adjudicating civil cases than in adjudicating administrative cases; and there seems to be clear preference of the interests of rural collective organization over private or individual claims. Secondly, Judges do not usually support property claims against procedural wrongs. Thirdly, in those cases that judges did support procedural justice, there are usually additional substantive reasons to invalidate the government decisions. Finally, courts tend to support collective property rights based on procedural reasons, or majority rule against individual right holders.

A. Civil versus Administrative Litigation

Among all the sample cases, 169 out of 204 cases are civil cases and only 35 are administrative cases. Moreover, as Table 3 below shows, if one compares the plaintiff success rates for the two types of litigation, the likelihood of a plaintiff win in civil litigation (brought against either a collective organization or another individual) is usually higher than in an administrative litigation.

Table 3 Plaintiff Success Rate in the Litigation

	Article 46	Article 47	Article 48	Article 49
Number of cases (civil and administrative cases combined)	84	108	6	6
Respective number of Civil and Admin Cases	68, 16	93, 15	2,4	6, 0
Number of cases with plaintiff success: civil and administrative respectively	0, 4	53, 7	1, 0	3, 0
Rate of plaintiff success: total	4.7% or (16%)[13]	55%	17%	50%
Rate of plaintiff success: Civil	0	56%	50%	50%
Rate of plaintiff success: Administrative	25%	46%	0	0

Less administrative litigations of course does comply with the general proportion of administrative cases among all lawsuits in China. However, given the large scale of land taking and social unrests generated by land taking, the numbers of administrative litigations are rather small and not proportionate. In deed, there are reasons to believe that less administrative litigations are the result of judicial policies that either reject administrative litigations in land-taking cases or reject individuals as the proper party to bring the lawsuit against the government.

In 2002, the SPC made it clear that only disputes over compensation for attachments and young crops will be accepted as civil litigations. The reason given by the SPC is that these disputes are "disputes among equal parties." However, land compensation disputes between the farmers and the collective organizations are excluded and are not considered as between equal entities. In the meanwhile, the SPC expressly instructed lower courts to reject judicial review of land

[13] Percentage in parentheses reflects lower number of total cases when civil cases with the same fact patterns are counted as one.

taking cases but to leave them to the local administrative agencies to deal with.[14]

Local courts followed the SPC's instruction and refused to take many land disputes cases. The 2003 Guangxi High Court "Circular Regarding Cases that Courts Should Not Accept" illustrated the impact of the SPC vividly. 13 categories of cases, including land disputes, especially compensation disputes between farmers and collectives were listed as non-justiciable in Guangxi Province. When interviewed by curious reporters, the spokesman of the High Court explained that all these cases involve a wide range of people and tend to trigger conflicts. These cases are difficult to adjudicate because they are complex, vexatious, and costly. Judgments are also difficult to enforce. "For example, cases such as land disputes involving women who have married out, compensations for dam construction immigrants, and disputes over tombs location for *fengshui* reasons lead to enforcement difficulties even if we accept them."[15] According to the report, the Circular was made after an incident caused by a court decision involved with illegal fund raising activities. After the court decision was rendered, 60 people were unable to claim their money back from the debtor who was in actual bankruptcy. Those people then surrounded the court and even harassed the judges, blaming the court for the consequence. As a matter of fact, it was not until 2011 that the SPC eventually determined that courts should accept administrative cases involving land disputes brought by individual farmers.[16]

B. Judicial Tolerance of Procedural Wrongs

In the sample cases, the courts rarely invalidate government decisions on expropriation for their procedural wrongs. Nor have procedural wrongs been the ground to overturn the decisions of collective organizations regarding the distribution of land compensation. Even when the plaintiffs won claims based on Article 46, usually the courts decisions were made because the relevant

[14] Zuigao Renmin Fayuan Guanyu Xu Zhijun Deng Shiyiren Su Longquan Shi Longyuan Zhen Dibacun Cunweihui Tudi Zhengyong Buchangfei Fenpei Jiufen Yian de Pifu (最高人民法院关于徐志君等十一人诉龙泉市龙渊镇第八村村委会土地征用补偿费分配纠纷一案的批复) [2002 Supreme Court Response to Xue Zhijun and Other 11 People v. 8th Villager's Committee of Longquan City Longyuan Township] (CHINA L. INFO.).

[15] Gan Bing (甘冰), Guangxi Gaoyuan Weihe Zanbu Shouli "Shisanlei Anjian" (广西高院为何暂不受理"13类案件") [Why Guangxi High Court Rejects 13 Categories of Cases for the Moment], ZHONGGUO QINGNIAN BAO (中国青年报) [CHINA YOUTH DAILY] (Aug. 24, 2004), available at http://zqb.cyol.com/gb/zqb/2004-08/24/content_935227.htm.

[16] Zuigao Renmin Fayuan Guanyu Shenli Sheji Nongcun Jiti Tudi Xingzheng Anjian Ruogan Wenti de Guiding (最高人民法院关于审理涉及农村集体土地行政案件若干问题的规定) [Provisions of the Supreme People's Court on Several Issues concerning the Trial of Administrative Cases Involving Rural Collectively-owned Land] (promulgated by Sup. People's Ct. Aug. 7, 2011, effective Sep. 5, 2011) art. 4 (CHINA L. INFO.).

agencies lacked the proper authorization according to the statutory law. Among the four sample cases, three of them involved with local governments that were not authorized to implement demolition of attachments on the expropriated land. According to Article 46, governments above county level are responsible for implementing the expropriation. In the three cases mentioned above, one street administration [17] and two township governments [18] decided to demolish houses on the expropriated land. In the fourth case, the local government de-registered 14 people's land use certificates without authorization which also reflected the concern with the agency's qualification rather than its procedural wrongs.[19]

In one of the cases adjudicated by Yunnan High Court in 2009, 41 households sought to invalidate the expropriation and compensation plan.[20] According to the decision, Dongchuan District Government of Kunming City entered into agreement with the collective organization (the Shengou Village) and compensated the villagers in October 2006 before the Yunnan Provincial Government formally approved the expropriation projected in August 2007. After the compensation and resettlement plan were made public in August and October of 2007. The plaintiffs subsequently challenged the expropriation and compensation and asked the court to invalidate the relevant decisions on the ground of Articles 46, 47 and 48 of Land Management Law. Both first and second instance courts found procedural wrongs on the part of the Dongchuan Government, acknowledging that according to the Land Management Law and its Implementation Measures, the Dongchuan Government should have obtained higher level

[17] Qiu Xiexing Su Hangzhou Shi Yuhang Qu Renmin Zhengfu Xingqiao Jiedao Banshichu Chengxiang Jianshe Xingzheng Qiangzhi An (裘谢兴诉杭州市余杭区人民政府星桥街道办事处城乡建设行政强制案) [Qiu Xiexing v. Xingqiao Street Administration of Yuhang District, Hangzhou City] (Zhejiang Hangzhou Yuhang Dist. People's Ct., Dec 13, 2007) (CHINA L. INFO.).

[18] Zhou Yunfa Deng Su Taizhou Shi Jiaojiang Qu Renmin Zhengfu Qiangzhi Chaiqian Jiufen An (周云法等诉台州市椒江区人民政府强制拆迁纠纷案) [Zhou Yunfa and others v. Jiangjiang District of Taizhou City Government] (Zhejiang Taizhou Luqiao Dist. People's Ct., Jun. 11, 2007) (CHINA L. INFO.); Boluo Xian Shiba Zhen Wuni Hu Cunmin Weiyuanhui Fuhoulongfu Gong Sige Cunmin Xiaozu Su Boluo Xian Renmin Zhengfu ji Boluo Xian Shiba Zhen Renmin Zhengfu Zhengdi Buchang Jiufen Xingzheng An(博罗县石坝镇乌坭湖村民委员会富厚龙富共四个村民小组诉博罗县人民政府及博罗县石坝镇人民政府征地补偿行政纠纷案) [Four Villagers' Groups of Wu Ni Hu Village v. Shiba Township Government of Boluo County], 3 RENMIN FAYUAN ANLI XUAN (人民法院案例选) [PEOPLE'S COURT CASE SELECTION] (2007) (Guangdong High Ct., Nov. 14, 2005).

[19] Wang Chao Deng Shisi Ren Su Zhumadian Shi Renmin Zhengfu Zhuxiao Tudi Shiyong Zheng Jiufen An (王超等十四人诉驻马店市人民政府注销土地使用证纠纷案) [Wang Chao and Thirteen Others v. Zhumadian City Government] (Henan Zhumadian City Interm. People's Ct., Jul. 2, 2010) (CHINA L. INFO.).

[20] Dongcheng Qu Tongdu Zhen Shengou Cun Disan Cunmin Xiaozu Sishiyi Hu Cunmin yu Dongchuan Qu Renmin Zhengfu Tudi Xingzheng Zhengshou Jiufen Shangsu An (东城区铜都镇深沟村第三村民小组41户村民与东川区人民政府土地行政征收纠纷上诉案) [41 Households of Shengou Village v. Dongchuan District Government of Kunming City] (Yunnan High Ct., May 20, 2009) (CHINA L. INFO.).

government approval and publicized the compensation and resettlement plan for comments before carrying out the expropriation. However, the courts declined to invalidate the expropriation decision and the compensation plan, on the grounds that Dongchuan Government was a qualified agency according to Article 46, and that the procedural wrongs brought no negative consequences to the legal interests of the plaintiffs.[21]

C. Less Tolerance of Procedural Wrongs with Substantive Wrongs

In the few administrative cases where government decisions were invalidated for procedural reasons, substantive review also played a role in the courts' decisions. For example, in Zhang Guoqi and others v Zhejiang Provincial Government, Zhang and other villagers questioned the legality of the government's decision to transfer his land use right to a developer. The first instance court said that as Zhang was only a member of the collective organization, he did not have standing to sue the government. The second instance court, the High Court of Zhejiang, reversed this decision and invalidated the administrative transfer decision on the ground that it is illegal to apply administrative transfer to the collectively owned land before taking's procedure. The reason is that administrative transfer only applies to state-owned land.[22] In this case, although a procedural wrong was an important factor to invalidate the government decision, there were also substantive rights concerned. That is, whether or not the government has the authority to transfer collectively owned land.

The courts are not always "procedure blind". They are generally indifferent to individual claims for their procedural rights. But the courts are likely to support a collective decision based on procedural reasons: the majority rule of the collective decisions for land taking, for compensation, or for distribution of compensation.

D. Majority Rule in Land-Taking Disputes

In general, court decisions regarding land property rights have a collectivist color. The following three scenarios were common in the

[21] The plaintiffs argued that Dongchuan Government paid RMB10, 547,265.60 in total to compensate for 105.7 hectares of land in 2006 without completing prior expropriation procedures. It was alleged that Dongchuan Government did so in order to avoid compulsory insurance on expropriated land at RMB 30,000 per acre, which was required by Kunming City Government starting from Jan. 1 2007. The compulsory insurance, if applied, would result in RMB 3,171,000 as extra compensation for the farmers. The courts confirmed the procedural problems, but did not support this argument, contending that the insurance should be paid to a unified social insurance account, instead of being distributed directly to the farmers.

[22] Zhang Guoqi Deng yu Zhejiang Sheng Renmin Zhengfu Tudi Xingzheng Fuyi Jiufen Shangsu An (张国其等与浙江省人民政府土地行政复议纠纷上诉案) [Zhang Guoqi v. Zhejiang Province Government] (Zhejiang High Ct., Apr. 14, 2006) (CHINA L. INFO.).

sample cases. Firstly, the courts were very likely to reject the claims of the individuals based on Article 46 and Article 48 for lack of standing. According to the decisions, the major reason is collective ownership: the courts asserted that land ownership in rural areas is collective, so that individuals, even as members of a collective organization, do not have independent standing to claim compensation from the government.

Secondly, courts tend to support the collective organization when there are disputes of distribution of compensation between affected individuals and collective organizations. That is, the disputes between individual villager(s) and the village. In many cases, the government would expropriate only a portion of land owned by the collective. If the land acquired happened to contract out, the affected farmers would want to get all the compensation for their losses. In this case, legal disputes will arise between the affected farmers (the contractors) and the collective, which literally owns the land. In a typical dispute like this, the contractor asks for compensation according to the size of land that is actually measured and compensated by the government, while the village only wants to compensate the farmer according to the size of land originally assigned to the farmer. The difference in size is usually the result of the farmer's additional effort. However, a court would normally support the village if there is a decision made by the village.[23] As it is either the villagers' meeting or representatives of the villagers that will make the decision, the contracting farmer(s) almost always becomes the losing minority in the collective decision. Apparently, it is of the the collective's interest to keep the contractor from getting more than the minimal share prescribed by law, which includes only compensation for attachments on the land and young crops. And the court decisions made it possible for the majority to successfully allocate the minority's share of compensation according to majority rule.

In some cases, courts even support villages' decision to redistribute the compensation to all members rather than to the specific farmers who suffered the loss of land. In others, courts also supported the collective withhold compensation from some members if that was a majority decision. In both scenarios, courts rendered the majority's exploitation of the property interests of the minority, a typically rent-seeking behavior.

[23] For example, Xu Peng yu Jinning Xian Kunyang Zhen Xinglong Cunweihui Sanzu Chengbaodi Zhengshou Buchang Feiyong Fenpei Jiufen Shangsu An (徐鹏与晋宁县昆阳镇兴隆村委会三组承包地征收补偿费用分配纠纷上诉案) [Xu Peng v. Xinglong Villagers' Committee Group 3 of Kunyang County of Jinning Township] (Yunnan Kunming Interm. People's Ct., Sep. 14, 2009) (CHINA L. INFO.).

E. Summary

Overall, the 204 cases applying article 46-49 of the Land Management Law reveal a number of features of land property rights in China:

(1) The current taking's clauses in the land property legal system is not sufficient to preclude the government from discretionary expropriation. It mainly provides important legal ground for compensation. Indeed, when the Land Management Law was promulgated in 1986, Article 23 stated that it was the farmer's duty to *surrender* their land.[24] This provision was later revised and then disappeared from the Land Management Law. However the legislative intent seems to sustain in practice. Almost all legal disputes out of land expropriation are confined to compensation rather than the legitimacy or justification of government takings. Even after the Property Law took into force in 2007, Mr. and Ms. Wu, the so-called "most fearless holdout in history",[25] did not seek to keep their house against the taking. They sought to stop the demolition for higher compensation. In China, this is by no means unique or accidental.[26] This has made Chinese land right proctection different from property rights in other jurisdictions such as the claims sought after in Kelo v. City of New London in the United States.[27]

(2) Procedural violations of the government agencies are considered insignificant compared with substantive violations such as abuse of power, in which case land-taking does not fall into the realm of the relevant government agency. In reality, neither acts of expropriation nor the distribution of compensation can be challenged successfully only on purely procedural grounds.

(3) Compensation of rural land right is discriminatory compared with compensation of urban land right. The total amount of compensation for the collectively owned land is unilaterally determined by government agencies responsible for land

[24] Tudi Guanli Fa (中华人民共和国土地管理法) [Land Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 25, 1986, effective Jan. 1, 1987) (1986) art. 23 (CHINA L. INFO.).

[25] *See*, *e.g.*, Howard W. French, *In China, Fight Over Development Creates a Star*, N. Y. TIMES (Mar. 26, 2007), *available at* http://www.nytimes.com/2007/03/26/world/asia/26cnd-china.html?ex=1332561600&en=a821e4ef4e73851a&ei=5090.

[26] In early 2005, collective resistance of proposed demolitions caused large-scale collision between the villagers and the local government in Dongzhou County of Guangdong and Dingzhou County of Hebei. These protests also did not aim at preventing government taking but instead sought fair compensation. Many other "property right heroes" like Liu Zhengyou of Zigong and Qian Huiyun of Leqing, launched long-term resistance against the government through legal or social proceedings for compensation as well. Even in the most recent Tang Fuzhen event, Ms. Tang committed suicide because she disagreed with the compensation rather than the taking itself.

[27] Kelo v. City of New London, 125 S. Ct. 2655 (2005).

expropriation in rural areas. The decision-making process cannot be challenged in the courts. In this sense, rural rights holders are discriminated compared with those right holders in the urban areas: according to the 1994 Urban Real Estate Management Law, negotiation of price is required and the government will lose the case if it fails to comply with the negotiation and appraisal procedures. Thus land-taking law in China provides unequal protection of property rights between rural and urban areas.

(4) The current collective decision making process provided by the Land Management Law creates rent-seeking opportunity for the collective organization to take the advantage of individual land right holders who suffered from the government taking. For land compensation, village members were permitted to claim loss of attachments and young crops and sometimes resettlement subsidies. However, individual farmers cannot challenge the total compensation for the expropriation. After 2011, the SPC's judicial interpretation permits a majority of the farmers in the collective organization to sue the government if the villagers' committee refuses to do so.[28] But this does not resolve the problem of individuals or households who claim for a share of the compensation that differs from what is determined by the collective. Since the collective, either the actually majority of the villagers or the villagers' committee is not necessarily the actual victim of land-taking. Therefore, the collective tends to agree with the government compensation plan or even tries to redistribute the compensation at the cost of the land use right holder's interest.

IV. INSTITUTIONAL EXPLANATIONS FOR WEAK JUDICIAL ENFORCEMENT

Many have noticed of the weaknesses of land property rights in China. Some lay the blame the vacuum and vagueness in relevant laws and regulations.[29] Others have commented on the village leaders' incentive to readjust contracting land for rent-seeking purposes[30] and local governments' incentives to sell or lease lands as extra-budgetary

[28] Zuigao Renmin Fayuan Guanyu Shenli Sheji Nongcun Jiti Tudi Xingzheng Anjian Ruogan Wenti de Guiding (最高人民法院关于审理涉及农村集体土地行政案件若干问题的规定) [Provisions of the Supreme People's Court on Several Issues concerning the Trial of Administrative Cases Involving Rural Collectively-owned Land] (promulgated by Sup. People's Ct., Aug. 7, 2011, effective Sep. 5 2011) art. 3 (CHINA L. INFO.).

[29] *See* Erie, *supra* note 1, at 37; Deininger and Jin, *supra* note 6.

[30] Brandt, Rozelle & Turner, supra note 6. See also Chen Jianbo (陈剑波), Nongdi Zhidu: Suoyou Quan Wenti Haishi Weituo Daili Wenti (农地制度：所有权问题还是委托—代理问题) [Collective Ownership of Rural Land: Tenure or Principal-Agent Problem?], 7 JINGJI YANJIU (经济研究) [ECON. REV.] 83, 83-91 (2006) (offering a full account of views from economists regarding the failure of rural land management in China).

revenue.[31] These factors provide important explanations for the insecure property system in China. However, the fact that judges tend to be indifferent to the claims of individual land right holders deserves further investigation. This is because the courts' lack of sympathy for individual claims may constitute an independent institutional reason for weak property rights in China. Judges may curtail property rights or promote property rights in any jurisdiction. During adjudicatory proceedings, judges do not simply apply rules, they can make important legal changes through statutory interpretation or legal application. Therefore, the same provision may be enforced inconsistently or even in a distortive way. This is especially the case in China because the SPC is authorized to make judicial interpretation abstractly. This section explores some institutional reasons for the courts' behaviors in the way of applying the relevant legal provisions.

A. Collective Property Rights as an Institutional Barrier for Enforcement

As discussed above, the results of the litigations have a collectivist color when disputes between the collective organization and its members occur. Table 4 below categorizes the plaintiffs into 5 groups: collective organizations, local residents with contracted land (LRC), local residents without contracted land (LRNC), non-resident with contracted land (NRC), and non-resident without contracted land (NRNC). We also classify the entitlements to land property and rights to compensation upon expropriation into the following 4 types: right to compensation of land, right to resettlement subsidies, right to compensation for attachments on the land, and right to compensation for young crops on the land. Table 4 shows the patterns of remedies courts tend to provide for different categories of plaintiffs.

Table 4 Patterns of Compensation for Expropriation

	Compensation of Land	Resettlement Subsidy	Compensation for attachments	Compensation for young crops
Collectives	Yes	Yes	No	No
LRC	Yes-share	Yes-share	Yes	Yes
LRNC	Yes-share but with exception	Yes-share but with exception	No	No
NRC	No	No	Yes	Yes
NRNC	No but with exception	No but with exception	No	No

[31] Keliang & Prosterman, *supra* note 2.

The basic understanding of remedial rights to land property as provided the the court decisions can be summarized as follows: Firstly, only collectives have the right to compensation of land and resettlement. Individuals can only have a share of the compensation. Therefore, no individual farmer in a collective may represent the collective to challenge the overall compensation plan, unless he is the head of the village with proper authorization.

Secondly, a local resident with contracted land will get compensation for attachments and young crops, which are direct losses due to the expropriation. However, in many cases, local resident with contracted land will only receive an average share from the compensation of land and resettlement fees. A local resident without contracted land may or may not receive any share of the compensation, depending on whether or not he actually lives within the community. For example, a new resident was excluded from a share of land compensation because his actual residence was elsewhere and he did not have any investment in the village.[32] A woman who married out and left her contracted land to her family received 40% of the average share of compensation.[33] In another case, the first-instance court held that villagers without contracted land did not have the right to land compensation. However, the second-instance court revoked the first-instance decision and instructed the village to distribute the relevant share to the resident villagers.[34]

Thirdly, non-local residents with contracted land will only receive compensation for attachments and young crops. Most disputes of this type occurred when the villages contracted out non-arable lands, such as land for fruit trees, fishponds, riverbanks or forests. These contracts are not considered household-based contracts, but regular business contracts. Consequently, land taking is considered as "changed circumstances"[35] that lead to termination of the contracts. If the contract contains a provision for this circumstance, the court will respect the agreement. If the contract does not provide for compensation of early termination, courts may ask the village collective to compensate the contractor with a portion of the

[32] Liang Yongyi Deng yu Foshan Shi Sanshui Qu Lubao Zhen Silian Cunmin Weiyuanhui Junrong Cun Tudi Buchangfei Jiufen Shangsu An (梁泳仪等与佛山市三水区芦苞镇四联村民委员会君荣村土地补偿费纠纷上诉案) [Liang Yongyi and Others v. Junrong Villagers' Committee of Lubao County] (Guangdong Foshan Interm. People's Ct., Jun. 6, 2006) (CHINA L. INFO.).

[33] Zhong Guichang yu Qin Caidi Deng Nongye Chengbao Hetong Jiufen Shangsu An (钟桂常与秦财娣等农业承包合同纠纷上诉案) [Zhong Guichang and Qin Caidi Agricultural Contracting Dispute Case] (Guangdong Guangzhou Interm. People's Ct., May 30, 2007) (CHINA L. INFO.).

[34] Gumou yu Pingshan Zhen Deduo Cunweihui Hualong Cun Xiaozu Chengbao Tudi Zhengshou Buchang Feiyong Fenpei Jiufen Shangsu An (谷某与屏山镇地多村委会花龙村小组承包土地征收补偿费用分配纠纷上诉案) [Ms. Gu v. Hualong Village Group of Hualong Village, Pingshan County] (Yunnan Kunming Interm. People's Ct., Dec. 1, 2008) (CHINA L. INFO.).

[35] In Chinese, it is phrased as "情事变更".

compensation of land. However, the compensation is not considered a remedy for loss of land right, but for breach of contract.[36]

Finally, non-local residents without contracted land will not get compensation as a rule with certain exceptions: one of the exceptions could be the retroactive effect of the claimant's membership status. If the claimant had been a member villager when the takings decision was officially made, the court may support his claim for a share of the compensation. However, courts have divided opinions on whether or not land taking compensations are inheritable interests.

B. Judicial Politics As Disincentives for Enforcement

This has been a default understanding for many studies of Chinese land disputes, which rarely delineate courts decisions and local government taking decisions. Even among legal scholars, it is widely believed that local courts are just branches of local governments or at least, are financially and politically dependent on local governments. First of all, local judges are appointed by local legislatures in which government officials constitute the majority. The courts will deliver annual report to the local assembly as a way of accountability. If the local government officials are unhappy with the courts decisions, they may vote against the court reports and put the courts in a very difficult place.

Secondly, the presidents and some vice presidents of courts are usually former government officials or may be appointed as government officials in the future. This creates certain real or potential peer relationships between the senior court judges and other government officials. Given that court cases, especially complicated and difficult cases will be submitted to the adjudicatory committee headed by the president, composed of the vice presidents and some other senior judges, the presidents and vice presidents have significant impact on the court decisions.[37] Therefore, the presidents tend to choose to be prudent when reviewing government decisions.

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[36] Wei Youqiang Su Jianyang Shi Shiqiao Zhen Tongche Cun Jiuzu Tudi Zhengyong BuchangFei Fenpei Jiufen An (魏尤强诉简阳市石桥镇筒车村九组土地征用补偿费分配纠纷案) [Wei Youqiang v. Tongche Village 9th Group of Shiqiao County] (Sichuan Jianyang People's Ct., Oct. 24, 2007) (CHINA L. INFO.); Gansu Lintao Xian Xindian Zhen Kangjiaya Cun Cunmin Weiyuanhui yu Lanzhou Tielu Ju Chaiqian Buchang Jiufen Zaishen An (甘肃临洮县辛店镇康家崖村村民委员会与兰州铁路局拆迁补偿纠纷再审案) [Lan Zhou Railroad v. Kangjiaai Villagers' Committee of Xindian County, Linyao Township of Gansu] (Gansu High Ct., Dec. 29, 2006) (CHINA L. INFO.).

[37] Difficult, complicated and major cases as well as cases the collegial panels find difficult to deal with should be reviewed or adjudicated by the adjudicatory committee before the court decisions are issued. The president or the responsible vice president shall decide whether or not a specific case should be submitted to the adjudicatory committed, *see* Zuigao Renmin Fayuan guanyu Yinfa Guanyu Gaige he Wanshan Renmin Fayuan Shenpan Weiyuanhui Zhidu de Shishi Yijian de Tongzhi (最高人民法院关于印发关于改革和完善人民法院审判委员会制度的实施意见的通知) [Notice of the Supreme People's Court on Issuing the Implementation Opinions on Reforming and Improving the Judicial Committee

Thirdly, courts are financially dependent on the governments at various levels[38], which have at least two consequences for the courts' attitude to land disputes: first of all, courts might prefer to reject administrative cases because they do not benefit from the fees collected from administrative lawsuits. Unlike civil cases from which the courts collect fees according to the disputed amount of money, in most administrative cases, courts take a flat fare of 50 RMB.[39] Due to the fact that many courts still rely on the litigation fees to survive,[40] it is unprofitable to take administrative cases of any kind. Then secondly, since local government revenue is the major resource for local court funding and that local government revenue is highly dependent on land expropriation, courts may have the incentive to assist the governments in maximizing land-taking profit by the court decions.

The circular of Guangxi High Court, which instructed Guangxi courts to reject land disputes, supports the above observation. The very low rate of success in administrative litigations in this and other empirical studies also supports this conclusion. It is especially notable that most first instance decisions tend to support government decision, while second instance courts decisions are more likely to invalidate government decisions or support individual litigants. This makes sense in term of the degree of dependence of different levels of courts. The fact that lower courts are generally more dependent on the governments have made them more sympathetic to takings decisions whereas the higher courts are not.

However, there is also at least one institutional argument unsupportive of the above-mentioned hypothesis. The adjudicatory system in China is based on the finality of second instance review with unlimited retrial as exceptions. Even if local courts feel they are obligated to support local government agencies, higher-level second instance courts do not share the same degree of solidarity with the challenged agencies of lower level government. This is especially the

System of the People's Court] (promulgated by Sup. People's Ct., Jan. 11, 2010, effective Jan. 11 2010) (CHINA L. INFO.).

[38] Caizhengbu Zuigao Renmin Fayuan Guanyu Yinfa Renmin Fayuan Caiwu Guanli Zanxing Banfa de Tongzhi (财政部、最高人民法院关于印发人民法院财务管理暂行办法的通知) [Notice of the Ministry of Finance and the Supreme People's Court on Temporary Measures for Finance Management of People's Courts] (promulgated by Sup. People's Ct. & Ministry of Fin., Jan. 11, 2010, effective Jan. 11 2010) (CHINA L. INFO.).

[39] Susong Feiyong Jiaona Banfa (诉讼费用交纳办法) [Measures on the Payment of Litigation Costs] (promulgated by St. Council, Dec., 19, 2006, effective Apr., 1, 2007) (CHINA L. INFO.).

[40] Ting Gong, *Dependent Judiciary and Uncountable Judges: Judicial Corruption in Contemporary China*, 4(2) CHINA REV., 33, 33-54 (2004); He Xin (贺欣), Zhongguo Fayuan de Caizheng Buzu yu Sifa Fubai (中国法院的财政不足与司法腐败) [*Insufficient Financial Resources and Judicial Corruption in Chinese Courts*], 105 ERSHIYI SHIJI (二十一世纪) [TWENTY FIRST CENTURY] 12, 12-23 (2008).

case when the intermediate courts or high court find the local government superseded the authority of higher-level government agencies or national laws. This invites further explanation of the courts' behavioral choices in land-taking cases.

C. Further Deterrence from China's Statutory Interpretation System

The logic of this argument is as follows. According to the Constitution, the National People's Congress Standing Committee (the NPCSC) has authority to interpret law. Although the SPC and the Supreme People's Procuratorial (the SPP hereinafter) are also authorized to interpret laws when applying statutes for specific cases, their interpretative authority are considered derivative or subordinate to the NPCSC's. This secondary authority was made clear after the NPCSC issued a decision in 2005, which requires the SPC and the SPP) to submit their judicial interpretations for review 30 days after the promulgation.[41]

Moreover, since the CCP is the dominant authority in every aspect of Chinese political life, the courts also have to conform their decisions to the Party's policies regarding rural and legal issues. To be precise, the courts and the judges are personally responsible to the Committee for Politics and Law at various levels, especially instructions from the Central Committee for Politics and Law (the CCPL). According to the official website of the CCPL, its major function is to unify the minds and actions of respective departments according to the Party's guidelines, roadmaps and polices, and to deliberate and make polices related to politics and law. The so-called "politics and law departments" include courts and the procuratorials,[42] which therefore are inevitably subordinate to the Party's policies and the specific instructions from the CCPL.

The courts' secondary authority role can be easily demonstrated by the policy shift made by the SPC around 2004. Before 2004, the SPC's basic policy over farmers' claim for land compensation was judicial deference, which in practice meant refusal to review such claims on the basis of lack of standing. In a response to the local high court, the SPC made it clear that only disputes over compensation for attachments and young crops will be accepted, as these are "disputes

[41] Sifa Jieshi Beian Shencha Gongzuo Chengxu (司法解释备案审查工作程序) [Working Process for Record and Review of Judicial Interpretation], (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 16, 2005, effective Dec. 16, 2005) (2005) (Literally speaking, this is not a NPCSC decision but a decision made by the chairs of NPCSC. But in practice, it has a legal effect to subordinate the judicial interpretation. Whether this decision is constitutional or legitimate is another interesting question).

[42] *See* generally the official website of the CCPL, http://www.chinapeace.org.cn/ (last visited at Apr. 22, 2015).

among equal parties."[43] All kinds of administrative litigations against government agencies, which expropriate lands from the farmers as well as other claims between the farmers and the collective organizations, were excluded. Due to the 2004 Constitutional Amendments, the SPC extended the judicial power to disputes between individual farmers and collectives regarding land compensation. The jurisdiction was extended to resettlement the following year. With the promulgation of 2005 Supreme People's Court Interpretation Regarding Laws Applied in Adjudication of Rural Land Contract Disputes,[44] courts started to play more active roles in adjudicating land disputes, especially in allocation of land compensation among the villagers' committee and individual farmers.

In a press conference held by the SPC, the then Vice-President Huang Songyou explained the policy concerns and the theory of property rights underlying the new interpretation. According to Huang, disputes over allocations of compensation for contracted land had become a prominent and complicated problem; and petitions of this type constituted a considerable proportion of farmer-related complaints. Based on the principle set by State Council's Decisions on Deepening Reform and Tightening Land Management,[45] any compensation for land expropriation should be mainly distributed to the farmers. As a result, the SPC for the first time viewed resettlement subsidy and land compensation as land rights of individuals as opposed to rights of the collective: resettlement subsidy is considered as compensation for farmers' land contracting right; and land compensation is taken as the membership right of the farmers in a collective community.[46]

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[43] Zuigao Renmin Fayuan Guanyu Xu Zhijun Deng Shiyi Ren Su Longquan Shi Longyuan Zhen Diba Cun Cunweihui Tudi Zhengyong Buchangfei Fenpei Jiufen Yian de Pifu (最高人民法院关于徐志君等十一人诉龙泉市龙渊镇第八村村委会土地征用补偿费分配纠纷一案的批复) [Supreme Court Response to Xue Zhijun and Other 11 People v. 8th Villager's Committee of Longquan City Longyuan Township] (promulgated by Sup. People's Ct., Aug. 19, 2008, effective Aug. 19 2008) (CHINA L. INFO.).

[44] Zuigao Renmin Fayuan Guanyu Shenli Sheji Nongcun Tudi Chengbao Jiufen Anjian Shiyong Falü Wenti de Jieshi (最高人民法院关于审理涉及农村土地承包纠纷案件适用法律问题的解释) [Interpretation of the Supreme People's Court Regarding Laws Applied in Adjudication of Rural Land Contract Disputes] (promulgated by Sup. People's Ct. Jul. 29, 2005, effective Sep. 1, 2005) (CHINA L. INFO.).

[45] Guowu Yuan Guanyu Shenhua Gaige Yange Tudi Guanli de Jueding (国务院关于深化改革 严格土地管理的决定) [State Council's Decision on Deepening Reform and Tightening Land Administration] (promulgated by St. Council, Oct., 21, 2004, effective Oct., 21, 2004) (CHINA L. INFO.).

[46] Zuigao Renmin Fayuan Fuyuanzhang Huang Songyou Jiu Zuigao Renmin Fayuan Guanyu Shenli Sheji Nongcun Tudi Chengbao Jiufen Anjian Shiyong Falü Wenti de Jieshi Da Jizhe Wen (最高人民法院副院长黄松有就最高人民法院关于审理涉及农村土地承包纠纷案件适用法律问题的解释答记者问) [Vice President of State Council Huang Songyou Answered Journalists' Questions About State

Ever since 2008, courts have been under even more intensive political pressure to comply judicial polices with political policies after top CCP leader required the judiciary to apply "Three Supremacies" in their work. According to the new requirements, judges shall always keep in mind the supremacy of the CCP's course, the supremacy of the people's general interests, and the supremacy of the Constitution.[47] Although many tried to interpret the three in harmony with each other[48], there is no doubt that judges are expressly required to place politics together with law or even before law.[49] Correspondingly, although the SPC has produced new instructions and guidelines for lower courts to adjudicate land disputes, these are responses to political policies of the new leadership rather than responses to the claims of farmers. It may be too extreme to conclude that these new instructions will not help farmers' protect their land property rights in specific cases. However, it will not be surprising if court judges consistently prefer "bigger plan" of the government at the cost of the stability of land property rights of the farmers such as development and social stability.

V. CONCLUSION AND IMPLICATIONS FOR PROPERTY RIGHTS ENTRENCHMENT IN CHINA

By examining the 204 cases across the country, this article finds that although the Land Management Law has provided procedural

Council's Decision on Deepening Reform and Tightening Land Administration], CHINACOURT ORG. (Jul. 29, 2005), http://old.chinacourt.org/public/detail.php?id=171297.

[47] This was originally presented by Hu Jintao, in his address to All China Politics and Law Representatives Meeting with Senior Judges and Prosecutors on Dec.26, 2007 and was soon promoted by Chief Justice Wang Shengjun as the guiding principles for adjudicatory works.

[48] See Jinyibu Shenhua "Sange Zhishang" Zhidao Sixiang de Lilun Yanjiu—Renmin Fanyuan Gongzuo Zhidao Sixiang Lilun Yantaohui Xuezhe Fayan Zhaiyao (进一步深化"三个至上"指导思想的理论研究——人民法院工作指导思想理论研讨会学者发言摘要) [Further Deepening Theoretical Study of Three Supremacies—A Summary of Scholars' Remarks in the Symposium of Theoretical Guidelines for People's Courts], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S CT. DAILY], Jun. 26, 2009, available at http://www.chinacourt.org/article/detail/2009/06/id/363600.shtml.

[49] Wang is the Chief Justice of the Supreme Court. He urged that judges at all levels shall keep in line with the socialist path and the CCP's leadership so as to ensure the political correctness of the people's courts and to ensure that the courts serve the larger plan of the CCP and the State, *see* Wang Shengjun (王胜俊), *Shenru Guanche Luoshi Dang de Shiqida Jingshen Zhashi Zuohao Renmin Fayuan Gexiang Gongzuo* (深入贯彻落实党的十七大精神 扎实做好人民法院各项工作) [*Thoroughly Implement the Principles of the 17th CCP Congress, Do All Work of the Courts in A Down-to-earth Manner*], 16 QIUSHI (求是) [QIUSHI]3, 3-5 (2008).

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requirements as well as compensation computation methods for land takings, claims based on these clauses may be supported only if (1) they are cases that simultaneously involved with errors for substantive legal reasons; or (2) the government agencies in question do not have the authority of expropriation, such as county level government or otherwise unauthorized agencies. Therefore, for the courts, Article 46 is mainly understood as a clause to authorize the governments at or above the county level as expropriators, as opposed to a due process of law clause to restrain the government eminent domain power. For the same reason, Article 48 of the Land Management Law is considered irrelevant to illegal takings. The courts either refuse to examine the proprieties of the takings decision or reject the claim on the basis of violation of legal procedures.

Another finding is that the courts' decision demonstrated an ideological preference for collectivism in land property rights. This finding is supported by the courts decisions in favor of collective decisions made by the village at he cost of affected individuals' interests. Correspondingly, the courts' understanding of Article 47 and Article 49 is that the compensation should be paid to the village instead of affected individual farmers. Some may argue that this is derived from collective ownership of the rural land. However, with the Land Contracting Law expressly providing for the land use right of the affected individuals, this interpretation can only be understood as the courts' preference to the collective claim over individual land property rights.

The judicial perception of land property rights is consistent with the socialist ideology of collective ownership. However, a more important reason for the pattern tends to be the self-image of the court as the secondary authority to interpret the law and to enforce state policies.

The observations above are mainly descriptive and have focused on the courts' enforcement of the procedural requirements set by the Land Management Law. But it also have some theoretical implications for improvement of land property law. First of all, the above observation would disagree with the interpretative approach. According to this approach, in order to prevent illegal takings, relevant statutes should introduce a whole list of items categorized as public interests.[50] This approach is objectionable according to the above observation. Because when the courts apply judicial deference to interpret "public interest", almost any project can be viewed as "public interest". Indeed, this approach has been proved not very effective after the "Regulation on Expropriation and Compensation of Houses

[50] Jinguang & Kai, *supra* note 2.

on State-owned Land in Urban Areas" was promulgated with the relevant provision.[51]

Another implication relates to the idea of privatization. Privatization seems to be a convenient way to address the 'tragedy of the commons' in rural areas. However, privatization does not preclude nationalization or the eminent domain power unless an independent authority, such as the judiciary, can restrain the arbitrariness of state power effectively. Otherwise, it makes little difference with or without privatization of collective ownership. Large-scale demolition of private houses in urban areas makes good illustration of the vulnerability of private property. The fact is, although urban real properties have been privatized, the courts still fail to provide strong protection according to the statutory entitlement.

Alternatively, the empirical study seems to suggest that, (1) it is important to reconstruct property rights in the rural areas, especially land use rights so as to provide the equivalent degree of protection as land use rights in urban areas. (2) Another possible reform should aim to recognize the membership rights in the collective organization, without necessarily abolishing the collective ownership regime altogether. (3) Last but not least, improvement in resolving land property issues in China requires the empowerment of the judiciary, by relaxing the financial and personal dependence between the local governments and local courts, authorizing the courts to review government land taking decisions before they are enforced, and eventually, vesting the judiciary with full-fledged interpretative power of the statues. The proposed prescriptions will need institutional change in the constitutional and legal system. But the arrangements are consistent with China's national policy of rule of law and sustainable development in a long run.

VI. APPENDIX: TEXT OF ARTICLES 46-49 OF THE LAND MANAGEMENT LAW[52]

Article 46: (Procedure and qualification for expropriation) Where land is to be expropriated by the State, the expropriation shall, after

[51] Article 8 of the Regulation lays out a list of projects that may be considered as 'public interest', but it does not preclude other projects that are not listed in the provision, which leaves room for further interpretation in the law enforcement proceedings, *see* Guoyou Tudi Shang Fangwu Zhengshou yu Buchang Tiaoli (国有土地上房屋征收与补偿条例) [Regulation on the Expropriation of Buildings on State-owned Land and Compensation] (promulgated by St. Council, Jan., 21, 2011, effective Jan., 21, 2011) art. 8 (CHINA L. INFO.).

[52] This is based on the official translated provided by the NPCSC, *see* Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xiugai Zhonghua Renmin Gongheguo Tudi Guanli Fa de Jueding (全国人民代表大会常务委员会关于修改中华人民共和国土地管理法的决定) [Decision of the Standing Committee of the National People's Congress on Amending the Land Administration Law of

approval is obtained through legal procedure, be announced by people's governments at or above the county level, which shall help execute the expropriation.

Units and individuals that own or have the right to the use of the land under expropriation shall, within the time limit fixed in the announcement, register for compensation with the land administration department of the local people's government by presenting their certificates of land ownership or land-use right.

Article 47 (Computation of compensation) Land expropriated shall be compensated for on the basis of its original purpose of use.

Compensation for expropriated cultivated land shall include compensation for land, resettlement subsidies and compensation for attachments and young crops on the expropriated land. Compensation for expropriated of cultivated land shall be six to ten times the average annual output value of the expropriated land, calculated on the basis of three years preceding such expropriation. Resettlement subsidies for expropriated cultivated land shall be calculated according to the agricultural population needing to be resettled. The agricultural population needing to be resettled shall be calculated by dividing the area of expropriated cultivated land by the average area of the original cultivated land per person of the unit the land of which is expropriated. The standard resettlement subsidies to be divided among members of the agricultural population needing resettlement shall be four to six times the average annual output value of the expropriated cultivated land calculated on the basis of three years preceding such expropriation. However, the maximum resettlement subsidies for each hectare of the expropriated cultivated land shall not exceed fifteen times its average annual output value calculated on the basis of three years preceding such expropriation.

Rates of land compensation and resettlement subsidies for expropriation of other types of land shall be prescribed by provinces, autonomous regions and municipalities directly under the Central Government with reference to the rates of compensation and resettlement subsidies for expropriation of cultivated land.

Rates of compensation for attachments and young crops on expropriated land shall be prescribed by provinces, autonomous regions and municipalities directly under the Central Government.

For expropriation of vegetable plots in city suburbs, the land users shall pay towards a development and construction fund for new vegetable plots in accordance with the relevant regulations of the State.

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the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2004, effective Aug. 28, 2004) (2004), *available at* http://law.npc.gov.cn/page/browseotherlaw.cbs?rid=en&bs=30036&anchor=0#go0 (last visited at Apr. 22, 2015).

If land compensation and resettlement subsidies paid in accordance with the provisions of the second paragraph in this Article are still insufficient to enable the peasants needing resettlement to maintain their original living standards, the resettlement subsidies may be increased upon approval by people's governments of provinces, autonomous regions and municipalities directly under the Central Government. However, the total land compensation and resettlement subsidies shall not exceed 30 times the average annual output value of the expropriated land calculated on the basis of three years preceding such expropriation.

The State Council may, in light of the level of social and economic development and under special circumstances, raise the rates of land compensation and resettlement subsidies for expropriation of cultivated land.

Article 48 (obligation of the government to publicize the compensation) Once a plan for compensation and resettlement subsidies for expropriated land is decided on, the local people's government concerned shall make it known to the general public and solicit comments and suggestions from the collective economic organizations, the land of which is expropriated, and the peasants.

Article 49 (obligation of the collective organization to publicize the compensation) The rural collective economic organization, the land of which is expropriated, shall accept supervision by making known to its members the income and expenses of the compensation received for land expropriation.

The compensation and other charges paid to the unit for its land expropriated are forbidden to be embezzled or misappropriated.