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Waste No Land: Property, Dignity and Growth in Urbanizing China

Eva M. Pils

Chinese University of Hong Kong Law School, evapils@cuhk.edu.hk

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Waste No Land: Property, Dignity and Growth in Urbanizing China

Eva Pils¹

Abstract. *The Chinese state does not allow rural collectives to sell land, but takes land from them and makes it available on the urban property market. While rural land rights are thus easily obliterated, the newly created urban rights in what used to be rural land enjoy legal protection. The state justifies these land takings by the need for urbanization and economic growth. The takings have resulted in an impressive contribution of the construction and property sector to state revenue and GDP growth, but also in unfairness toward peasants evicted from their land and homes. The example discussed here shows that certain economic theories of property rights are consistent with discrimination and should therefore be rejected. A further conclusion is that we must reconsider the claim that property rights are desirable because they serve economic growth. The discussion here contributes to an understanding of property in terms of dignity, rather than wealth.*

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¹ Associate Professor, Faculty of Law, The Chinese University of Hong Kong. Thanks to the participants of a research seminar on this topic at CUHL Faculty of Law in April 2009, as well as to Stephen Guest, Swati Jhaveri and Frank Upham for their comments on this paper.

I. Introduction

“I want our land back.” As one of an estimated 50 to 60 million Chinese rural residents or “peasants”² affected by government takings of their land,³ Ms L seemed to know that this was next to impossible; but she had nevertheless come to Beijing to petition in a case affecting her and, she said, around 8400 other villagers’ households on the outskirts of Hangzhou, a prospering coastal city. In retaliation, her husband had been permanently disabled in a violent attack by unidentified thugs that cowed many of their neighbors into submissive acceptance of the terms the municipal government “offered” the villagers. Their teenage daughter, she had just been informed, need not think of trying to enroll for high school in the City of Hangzhou: she would be sure not to get a place anyway. Ms L and her immediate family had become outlaws in their hometown – it was longer safe for her even to go back to the land and house she had so desperately tried to protect, for more than a brief visit.⁴ Her house, from which the authorities had removed the furniture and fittings, was hung with slogans, including the phrase, “the storm may enter, the rain may

² The term “peasants” is used advisedly throughout this paper – not although but because the corresponding Chinese expression *nongmin* 农民 rather than denoting an occupation as in “farmer,” has a class meaning. See Hu Meiling (胡美灵, editor), *当代中国农民权利的嬗变* (Beijing:2008) at p. 3, arguing that peasants are a status group (身份群体), not an occupational group (职业群体). See also Eva Pils, “Citizens? The Legal and Political Status of Peasants and Peasant Migrant Workers in China,” in Liu Xiangmin (editor), *Zhidu, fazhan yu hexie [System, Development, and Harmony]* (Ming Pao Press, Hong Kong: 2007), 173-243.

³ As in the case of Ms Liang, land takings often include the destruction of homes owned by the peasants. The estimate was provided by Chinese Academy of Social Sciences Yu Jianrong in 2007 and therefore does not include later expropriations. The figure must have grown by now. Yu Jianrong (于建嵘, editor) *Subaltern Politics – Dialogues and Lectures* (底层政治—对话与演讲), Beijing: 2009), p. 122. Yu estimates that of these 50-60 million, about half do not find new jobs and lack social security, therefore becoming destitute (*ibid.*).

⁴ Author conversations, Beijing and Hangzhou, December 2008, April, June, July, August 2009 with Ms L (梁丽婉) from Nongkou village, Jianqiao Town, Jianggan district, Hangzhou City, Zhejiang Province (浙江省杭州市江干区笕桥镇弄口村).

enter [this house] but the Emperor and King cannot enter.”⁵ She had also written the titles of China’s Property Rights Law, Land Administration Law, and Constitution on its outer walls.

Land is widely considered to be the single most important cause of social unrest in China today,⁶ and many view the Chinese land tenure and property law as part of the problem. Since the 1980s, China’s legal and economic reforms have spurred the growth of the Chinese urban real estate market. Property development has contributed significantly to China’s economic miracle. But many disputes about the property that is the basis of this market growth through construction and the real estate market have been caused by takings of rural or suburban land from peasants, affecting, it has been calculated, around 770 square kilometers annually (as of 2006).⁷ The economic gains made by some urban governments and individuals in the course of this great transformation have been considerable,⁸ as have been the experiences of loss and wrong, often though not exclusively on the part of the peasants.⁹

⁵ In Chinese, 风能进，雨能进，王帝老儿不能进。This phrase is adapted from a famous dictum by William Pitt the Elder in Parliament (1763).

⁶ Yu Jianrong’s research suggests that this was so until about 2006, but that the trend may now have changed to unrest in which the participants have less clear stakes. Yu Jianrong, “Social Conflict in Rural China,” *China Security*, Vol. 3 No. 2, Spring 2007, “Emerging Trends in China’s Riots,” *China Security* Vol. 4 No. 3 (2008). Also Zhao Ling and Su Yongtong (赵凌, 苏永通), “First national *xinfang* report taken very seriously (国内首份信访报告获高层重视), 6 November 2004 in *Southern Weekend* (南方周末), available at <http://www.nanfangdaily.com.cn/southnews/zmzg/200411041014.asp>.

⁷ Gaoming Jiang, “Toward Sustainable Urbanization in China,” 6 September 2006 at <http://www.chinadialogue.net/article/show/single/en/348>. Erie distinguishes different kinds of construction project, including industrial parks, residential (urban) construction and infrastructure projects such as dams. Erie, Mathew, “China’s (Post) Socialist Property Rights Regime: Assessing the Impact of the Property Law on Illegal Land Takings,” *Hong Kong Law Journal*, 2007, Vol. 37, Part 3, pp. 919-949.

⁸ Zhou Tianyong, an academic at the Chinese Communist Party Central Party School, estimated the total value of land taken from peasant collectives each year at three trillion Yuan Renminbi (ca. 400 billion USD). Zhou Tianyong (周天勇) *Breaking Through the Obstacles to Development* (突破发展的体制性障碍) Guangzhou, 2005, pp. 2 – 6.

⁹ Zhou Tianyong estimates that peasants get between 5 and 10% of the value added through the transfer of land from agricultural to urban construction purposes, and that in the period between the early 1980s and

This paper argues against legal and political constraints that seem to limit the recognition of peasant land claims in China, and shows that paradoxically, these constraints are the result of an enthusiastic embrace of law and property rights as tools to modernize and develop Chinese society. They are closely connected to certain accounts of law and property widely used in the international Law and Development field, which have advocated the formalization and strengthening of (private, individual) property rights.¹⁰ The World Bank and other institutions believe that a system of secure and well protected private property rights is best justified through its function of promoting growth in developing societies. Drawing on aspects of a long tradition of liberal economic theory, De Soto wrote in 1989:

“The importance of property rights is not that they provide assets which benefit their holders exclusively, but that they give their owners sufficient incentive to *add value to their resources by investing, innovating, or pooling them productively for the prosperity and progress of the entire community.* (...) if a government cannot give its citizens secure property rights and efficient means of organizing and transferring them – namely contracts – it is denying them one of the main incentives for modernizing and developing their operations.” (Emphasis added.)¹¹

The discussion here focuses on the spin that growth and value-increase-oriented arguments have been given in the context of rural and suburban land grabs in China, where the need to achieve economic growth has been turned against peasants and their rights to land and housing. This is how the reasoning goes here: “Peasants can’t sell their land, because the law says so (and therefore it is doubtful if they really “own” the land anyway). Since they can’t sell, it is better to take the land away from the peasants, so that

2003, peasant collectives across the country were denied 4,5 trillion Yuan Renminbi, which, he said, ought to have been their legal compensation. *Id.*

¹⁰ Hernando De Soto, *The Other Path. The Economic Answer to Terrorism* (New York, 1989), esp. pp. 177 et seq. and pp. 244 et seq.

¹¹ De Soto, *ibid*, p. 178. et seq.

it can enter an urban property market run by public officials and property developers, because doing so will maximize the value of the land.” This line of thinking is flawed and harmful; it is wrong not on empirical but conceptual and rights-based grounds.

In the following two parts II and III of this article, I first discuss how authoritarianism and an economic growth orientation shape the understanding of property rights in China, and then go on to analyze certain arguments that seem to weaken peasant land ownership, which is organized on a collective basis. I criticize these weakening conceptions but argue that they are in conformity with the Chinese state’s overwhelming interest in economic growth. This interest is thought to be best served by a discriminatory property regime whose role in the law on land takings (or “expropriations,” *zhengshou*)¹² is discussed in part IV. Yet as argued in part V, utilitarian conceptions of property rights are blind to violations of dignity such as those experienced by Ms L, and this blindness urges the conclusion (part VI) that property is better understood in terms of dignity than in terms of wealth and growth.

II. Authoritarianism and growth: two conceptual constraints on property rights

China has achieved enormous economic growth and poverty reduction, and remained to some extent authoritarian country in its thirty-year-long reform period, which began with the close of the Mao Zedong era. Both facts and the way they are understood in China have influenced conceptions of property rights there, especially amongst the academic and bureaucratic establishment:

¹² In Chinese, 征收.

The authoritarian constraint. There is, firstly, a strong sense that property claims must be derived from authoritative rules created by the power that enforces those claims. Accounts of this kind may be called authoritarian. They are also positivistic in spirit, in the sense that they assume that the validity of law is separate from its moral justification. Importantly in the case of the systems that 20th century legal positivists have drawn on, such authority itself is bound by other rules of the system; by contrast, this is not quite the case in China.¹³ Following the positivistic method, identifying the law e.g. on property rights becomes a fact-finding mission to answer the question what kind of rules the authorities have made and promulgated on this subject. Despite legal positivists' insistence on distinguishing what is legally valid from what is morally right, their basic premise that these two notions are separate is prone to be hijacked by a simplified, authoritarian account of law that claims that the law ought to be followed just because it is the law, derived from unquestionable authority. It is this authoritarian understanding, rather than merely a positivistic approach to law, that constrains conceptions of property rights widely used in China.

Leaning on scholarship in the German tradition,¹⁴ Chinese textbooks often emphatically characterize property rights as “defined by law,”¹⁵ and property law as possessing an “inherent” nature. This aspect of property rights is not only related to their

¹³ It would not be fair to modern legal positivism to claim it was identical with prevalent attitudes to law in China, not least because the model of a municipal legal system contemplated by such scholars as, for instance, H.L.A. Hart, is widely different from China in that it has functional courts faithfully applying rules of recognition, rules of adjudication, and other rules. See also Chapter 10 of *CoL* in which Hart contemplates the status of imperfect legal systems. H.L.A. Hart, *The Concept of Law*, Oxford: 1961.

¹⁴ Cp. Manfred Wolf, *Sachenrecht*, 20th edition, Munich: 2004, pp. 13 et seq (“Typenzwang und Typenfixierung”).

¹⁵ This corresponds to the principle of a fixed number or *numerus clausus* of property rights – also in other legal orders, it is impossible to create property rights with *erga omnes* effect simply by contract.. This principle is under attack from the widespread practice of “minor property rights” discussed below. See e.g. Cai Yongmin, Tuo Jianfeng, Li Zhihong (蔡永民, 脱剑锋, 李志忠), *New Property Rights Theory (物权法新论)* Beijing: 2008, at p. 28 f.

absolute character and effect *erga omnes*, but also taken to mean that it is not merely the result of arbitrary political and legislative choices but instead “inherent” to national, economic, social and cultural characteristics,¹⁶ which include the finding that China is in an initial stage of socialism, and that the Chinese national condition requires the system of ownership it has got.¹⁷ Typically, therefore, the current property system is portrayed as ordained by authority *and* best for the nation. One of this property system’s peculiarities, however, is its combination of socialist and liberal conceptions of property, and its related, much-criticized dualist setup distinguishing between “urban” and “rural” land rights.¹⁸ This distinction is one of the root causes of discrimination against peasants.

Insisting on the “inherent” and “immutable”¹⁹ character of a state-defined set of property rules can not only facilitate acceptance of unreasonable rules, but also lead to denying the relevance of historical changes those rules have undergone. This is the case especially in contexts where, as in China, revolutionary changes of the legal and political order have occurred in the relatively recent past. In the complex history of property law in China,²⁰ at least four eras remain relevant to the present: the era of the late Qing, the Republican era, the socialist PRC era, and the PRC reform era. In the imperial era, property transactions were conducted in accordance with rules that varied from place to place, and that were recognized more than they were centrally prescribed by the imperial

¹⁶ Cai Yongmin et al, *ibid* at p. 26 (critically noting that China has in fact received many rules of property law from western countries).

¹⁷ “The Six ‘Whys’” (六个“为什么”), Beijing: 2009 at p. 96 f (in answer to “Why” number six, namely “Why the path of Reform and Opening must be continued without wavering, and why we cannot go back”).

¹⁸ On dualism in Chinese property law, see Ben James, “How the Rural Property System Exacerbates China’s Urban Rural Gap, 20 *Columbia Journal of Asian Law* 20 (2007) 451 especially at pp. 486 et seq.; Eva Pils, “Land Disputes, Rights Assertion and Social Unrest: a Case from Sichuan”, 19 (2006) *Columbia Journal of Asian Law* 365.

¹⁹ The Chinese word used here is *guyouxing* (固有性).

²⁰ A more extended description and analysis of this history is provided in Geoffrey Korff, “The Village and the City: Law, Property and Economic Development in China,” (2008) 35 *Syracuse Journal of International Law and Commerce* 399.

government. Government largely limited itself to resolving disputes concerning property,²¹ and to edicts issued to preserve its tax prerogatives and ensure, for instance, that land was registered in some way allowing for it to be taxed.²² The Republican period was characterized by a plurality of norms, including the still- practiced property law of the late Qing, and the new law of the Republican codifications which were modeled on Japanese, German, Swiss and French codes and which stood for a modernity whose forms and instruments were to come from western civilization, even if Chinese essence was to be preserved. In rural areas, the new codes were widely ignored.²³ Families kept, as they had done for generations, their land deeds proving traditional rights in plots of land, and continued making transactions accordingly.²⁴

In the socialist PRC era, the new ideas embraced, in conformity with orthodox state socialism, repudiated private ownership as the root cause of various social ills, including crime.²⁵ The socialist revolution and the first three decades of Communist Party rule brought a gradual diminution of “capitalist” private property, through formal expropriation decisions or through various kinds of restrictions imposed on private property right holders. In the countryside, this culminated in the establishment of the

²¹ Madeline Zelin, “A Critique of Rights of Property in Prewar China,” in Zelin, Ocko and Gardella (eds), *Contract and Property in Early Modern China* (Stanford, 2004), 17-36. Zelin points out that by deciding cases, the government also influenced the law.

²² Discussed in Franke, *Rights in real estate in China (Die Rechtsverhältnisse am Grundeigentum in China)* (Leipzig, 1903).

²³ Schurmann, “Traditional Property Concepts in China”, *The Far Eastern Quarterly* vol. 15 no. 4 (1956), p. 508. For a discussion of different regimes under the Chinese Nationalist and Communist Parties see Lou Jianbo, Patrick Randolph, *Chinese Real Estate Law* (1999) Chapter 1 (“History of Chinese Real Estate Law”); for a more general discussion of the reception of civil law in China see Epstein, “Codification of Civil Law in the People’s Republic of China: Form and Substance in the Reception of Concepts and Elements of Western Private Law,” 32 *U.B.C. L.Rev.* 153 (1998).

²⁴ Michael Palmer, “The Surface-Subsoil Form of Divided Ownership in Late Imperial China: Some Examples from the New Territories of Hong Kong,” in 21 *Modern Asian Studies* (1987) provides a discussion of the deed system.

²⁵ Jerome A. Cohen, *The Criminal Process in the People's Republic of China, 1949-63: An Introduction* (Harvard, 1968).

People's Communes,²⁶ economic and political entities in which the production and consumption of goods were almost entirely brought under centralized control, a system that contributed to the catastrophic consequence of the 1958/59 Great Famine. Power distribution within villages changed, and families stopped keeping the proof of landownership that had been preserved for generations, as the deeds had become not only useless but also “incriminating” evidence. Today, if villagers refer to historical land ownership by entire villages rather than individual families or clans, this may be because they have lost proof of more individuated rights. But of course, that does not mean that they have no orally transmitted knowledge of that more detailed history; in many cases, visitors will be told for how many generations a particular plot of land has been in a particular family.

Since the launch of the Reform and Opening policy under Deng Xiaoping, China has experienced another transition. It has changed from a socialist property regime premised on the theoretical superiority of socialist public ownership of the means of production, to the current, hybrid property regime. In 1978, according to reports now assiduously spread by the official media, a community of peasants in Xiaogang village in Anhui province started a prototype mechanism for distributing land use (or “usufruct”) rights of its own accord, at the time without statutory basis and risking incrimination as counterrevolutionaries, according to what is now party folklore.²⁷ In 1986 a statutory law for the first time enacted the principles of socialist public ownership by collectives in the

²⁶ P.R.C. *Draft directive on the work of rural People's Communes* (农村人民公社工作条例修正草案), 1962.

²⁷ See for a description e.g. Ye Weimin (叶伟民) “Thirty Years: From people's liberation to land liberation; from the experience of Xiaogang to the experiment in Zhaozhuang” (30年：从人的解放到土地的解放. 从小岗经验到赵庄试验), *Nanfang Zhoumo* 16 October 2008 at <http://www.infzm.com/content/18560/1>.

countryside and by the state in urban areas, and combined this with rules allowing the creation of land use or “usufruct” rights derived from the respective landowners.²⁸ The Constitution did not articulate the principles on the basis of which such new rights were created until 1988. Over time, more and more of this new regime’s land use rights – rural and urban - were created through grants and allocations.

A legal analysis identifying land rights in the positivistic way by reference to “currently valid” law is problematic if “currently valid” law does not address the fate of land rights created before the new laws were enacted. The current Chinese property regime stipulates that urban land shall be state-owned and rural land shall be collectively owned,²⁹ but does not explicitly address the individual or collective entitlements of persons or families already living on particular plots of land, unless they can be subsumed under the concepts created by current law. It is assumed that the previous property regime or regimes do not matter. But as is discussed toward the end of this paper, both land transaction practices and popular conceptions can remain divergent from what many legally trained professionals and the “law on the books” say, and the fact of long possession within a particular family or village is considered relevant by peasants affected by land takings.

The utilitarian constraint. A second widely recognized type of constraint could be called utilitarian: it says that good legal rules, policies and administrative decisions are those that, judged by the long-term consequences of enacting them, will further the happiness

²⁸ General Principles of Civil Law, Land Administration Law; see discussion in Huang, Xianfeng Frank, “The Path to clarity: development of property rights in China,” 17 Columbia Journal of Asian Law (2003/2004) 191 .

²⁹ The rules are more detailed and complex, but this is their main import. See Articles 6 ff of the PRC Constitution.

or welfare of the people. One widely used metric for assessing welfare consequences is economic growth measured by *per capita* GDP growth. I will refer to this kind of argument as “the growth argument,” and show that the growth argument has been used in different ways in the present context.

One of its classical uses in western countries has been to call for the protection of private property rights in a market economy whose natural consequence was understood to be growth in wealth. In China, a phrase used to express this maxim in the context of property law is “exhaust the utility of the thing” or *wu jin qi yong*,³⁰ or in a narrower but more idiomatic translation, ‘waste not.’ Chinese property law scholars have used the neo-classical argument in order to justify the enactment of the new Chinese Property Rights Law in 2007,³¹ arguing, for instance, that the new Property Rights Law would help the poor get richer³² by creating better conditions for secure investments and value maximization of property. Evidently, the growth argument relies on a conception of property as wealth.³³

But scholars critical of this stance, in particular Frank Upham,³⁴ have shown that, on the contrary, well-protected property rights were *not* needed to enable growth in China in the early decades of its reform process, arguing that the supposed nexus between clearly defined property rights and economic development is a myth of certain types of liberal

³⁰ Huang Songyou (黄松有), editor, *Understanding and applying the provisions of the “Property Rights Law of the PRC”* (“《中华人民共和国物权法》条文理解与适用”), Beijing: 2007 at p. 39 (物尽其用).

³¹ Upham uses Demsetz as most important proponent in Frank Upham, “From Demsetz to Deng: Speculations on the Implications of China’s Growth For Law And Development Theory,” forthcoming in *JILP*.

³² Interview with Yang Lixin (杨立新) in Lu Jian (吕娟) and Lu Nan (鲁楠), “Peking University Law Professor submits letter vehemently opposing Draft Property Rights Law, delaying vote on the bill” (北大教授上书激烈反对导致物权法草案推迟表决), *Law and Life Magazine* (法律与生活杂志) 9 February 2006 at <http://www.ahjcg.cn/Article/ShowArticle.asp?ArticleID=172>.

³³ See for a discussion of this conception Harris, *ibid*.

³⁴ Frank Upham, “From Demsetz to Deng: Speculations on the Implications of China’s Growth For Law And Development Theory,” forthcoming in *JILP*.

economic theory. Regardless of their stance in this debate, those who assess property regimes in terms of their function for growth evaluate particular decisions and general rules in the area of property law in terms of their overall economic consequences.³⁵ Chinese officials keep using a variant of the growth argument to justify taking property away from individuals and other entities for construction and property development projects “in the public interest.”

Undeniably, property development has been an important factor in GDP growth, notwithstanding the fact that it has involved a lot of illegality. Both the authoritarian conception of property, and the growth argument are historically associated with the ideas of the Reform and Opening policies under Deng Xiaoping, Jiang Zemin and Hu Jintao, although these ideas have undergone some modification in recent years. A main national goal of the reform era has been economic growth measured by reference to national annual GDP growth. Since Deng, it has been thought that annual GDP growth must not fall below eight percent, the “magic number”.³⁶ When this goal was threatened in 2008 and 2009 by the world-wide economic crisis, the government responded by encouraging, among other things, more property development,³⁷ reflecting the fact that property development represents an important share of the state revenue’s contribution to the national GDP.³⁸ Government revenue from land rights sales (grants) has equaled or

³⁵ By discussing property rights as the result of an enactment of particular rules, they also commit to a positivistic understanding of law, as Upham recognizes (*Ibid.* p.5).

³⁶ Russell Leigh Moses, “What Beijing’s Growth Plan Means,” *Taipei Times* 25 March 2009.

³⁷ Denise Tsang, “IMF Official sees mainland as oasis of stability in global turmoil,” *South China Morning Post* of 4 November 2008; Moses, *ibid.* Joy Shaw, “In China, Property Sales Show Signs of Picking Up,” *Wall Street Journal* 12 April 2009; Stephen Chen, “Think-Tank urges Beijing to end frantic urbanization,” *South China Morning Post* 16 June 2009; “Developers buy property at hefty rates to ride boom,” *China Daily* 23 July 2009.

³⁸ Cary Huang, “Going backward ever faster,” *South China Morning Post* 2 August 2009; *Xinhua News*, “Zhou Tianyong: China’s tax burden reaches 31%” (周天勇：中国宏观税负高达31%) , 13 July 2007 at <http://pl.smesd.gov.cn/asp/2007/03/20070316082352.asp>. According to a statement attributed to Zhou

even exceeded tax revenue in some major cities.³⁹ Available statistics remain unreliable, as illustrated by the fact that the sum total of provincial GDP figures did not equal the figure of the national GDP, as officially calculated, for the first half of 2009.⁴⁰

Under the current leadership, state propaganda in 2007 adopted the slogan “Scientific Development Perspective, (*kexue fazhan guan*),”⁴¹ meaning a perspective on development that includes growth, but also sustainable development, social welfare, a person-centered society and a harmonious society.⁴² The “Scientific Development Perspective” is now portrayed as the correct basis for economic and related policies.⁴³ It has been interpreted as an effort to modify the development goal by abandoning the exclusive focus on GDP growth.⁴⁴ But the focus on “protecting growth,” in particular GDP growth remains very important, as can be seen from the measures taken to boost growth and to ensure that it not fall below the “magic” eight percent; and the current legal framework for land rights, cemented by the 2007 Property Rights Law, is largely a product of the earlier reform era in which the propagation of GDP growth as a national goal was less restrained.

Tianyong, the volume of state revenue from land sales in 2007, for instance, was 1,2 trillion Yuan Renminbi out of a total of internal revenue of 9 trillion Yuan Renminbi, and state revenue represented about 36% of the national GDP. Zhou Tianyong (周天勇) as quoted in ‘Party School Professor: 4 trillion Yuan Renminbi not counted in last year’s state revenue statistics,’ (党校教授：去年财政收入少算了四万亿) 29 August 2008 *Lianhe Zaobao* at http://www.360doc.com/content/080829/12/62146_1587997.html.

³⁹ Li Guo, Jonathan Lindsay, and Paul Munro-Faure, “China: Integrated Land Policy Reform in a Context of Rapid Urbanization,” available at the World Bank website <http://siteresources.worldbank.org/EXTARD/Resources/Note36.pdf>. To quote, “studies consistently show that land transfer fees account for some 30-50 percent of total sub-provincial government revenues... These revenues are often kept off-budget, making their use non-transparent.” (at p. 3).

⁴⁰ Jane Cai, “Parts greater than the GDP sum,” 4 August 2009, *South China Morning Post*.

⁴¹ In Chinese, 科学发展观.

⁴² For various formulations of the Scientific Development Perspective by President Hu Jintao and Premier Wen Jiabao see http://news.xinhuanet.com/ziliao/2005-03/16/content_2704537.htm.

⁴³ Zhang Huaihai (张怀海 editor) 科学发展观/深入学习时实践科学发展观丛书, 人民出版社 Beijing (2008) differentiates between different generations of development perspectives (p. 56), but leaves no doubt that China’s development thus far has been dominated by the “growth” conception of development.

⁴⁴ Joseph Fewsmith, “Promoting the Scientific Development Concept,” *China Leadership Monitor No. 11* at http://media.hoover.org/documents/clm11_jf.pdf.

In the propaganda slogan adopted by the Ministry of Land and National Resources, “Scientific Development Perspective” translates into the “Two Protects” - “Protect Growth” and “Protect the Red Line” of a minimum of 1,8 trillion *mu* of arable land nationwide that China must not fall below.⁴⁵ While this slogan recognizes the importance of preserving land for agricultural uses, and of balancing the goal of growth with that of keeping arable land, the rights or individual interests of peasants are not often mentioned in this rhetoric of national wealth; individually, peasants or other citizens do not matter to these arguments. The following section describes how this attitude translates into a general skepticism about whether peasants really own land, as the written law suggests they do in a form of socialist collective ownership.

III. “They don’t own it anyway:” the arguments weakening peasant land ownership

Often, people in China will assert that “land in China is all owned by the state,” and many news reports in the English speaking media have repeated this statement.⁴⁶ In fact, however, the 1982 PRC Constitution (as amended 2004), 1988 Land Administration Law, 2007 Property Rights Law and other legislative and Party documents say that land in the

⁴⁵ See website of the Ministry for Land and Resources at http://www.mlr.gov.cn/wszb/20090331bzzbhxdzjk/jiabin/index_999.htm.

⁴⁶ See e.g. Edward Cody, “Farmers Rise in Challenge to Chinese Land Policy”, *The Washington Post* of 14 January 2008 at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/13/AR2008011302383.html> (“all of China’s rural land is still owned by the state”); Philip Pan, “Chinese Peasants Attacked in Land Dispute,” *The Washington Post* of 15 June 2005, at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/14/AR2005061401542.html>. (Pan writes, more vaguely, that “*the government* owns all land and gives farmers only long-term leases”); David Stanway,, “Chinese farmers could be allowed to sell land”, *The Guardian* of 12 October 2008, at <http://www.guardian.co.uk/world/2008/oct/12/china> (“proposals aimed at liberating 700 million peasants from state-owned land”); Verna Yu, “China’s farmers can bank on land,” *Asia Times Online* of 10 October 2008 at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/13/AR2008011302383.html> (“the Chinese Constitution, which stipulates that all land resources are owned by the state”).

rural and suburban areas is collectively owned by “villagers’ collective economic organizations” (whereas urban land is, indeed, owned by the state; there is no private landownership). But *these* statements in the written law are also hard to accept at face value, for a number of reasons. Most importantly, the political and legal status of collectives is widely regarded as weak, and while collectively owned land can be easily taken away by the state, the written law does not allow collectives to figure as market actors in commercial land transactions.

Rural households belonging to particular rural collectives can hold land use or “usufruct” rights limited in time. Such land use rights include plots for farming (*chengbao* rights) and plots for housing (*zhaijidi* rights). Some scholars and research institutes have argued that the security of these land use rights should be strengthened, by protecting them from redistribution, and extending their duration, currently limited to 30 years in most cases.⁴⁷ In these arguments, rural land use rights can become part of a good narrative of privatization to overcome “bad” (socialist) collectivization,⁴⁸ following the arguments of Hayek or De Soto in the west⁴⁹ and of Chinese academics committed to similar views in China.⁵⁰ In fact, however, land use rights are held not by individual

⁴⁷ For instance, Prostermann, Roy, and Zhu Keliang, “Securing Land Rights for Chinese Farmers: A Leap Forward for Stability and Growth,” Cato Development Policy Analysis Series, No. 3, October 15, 2007 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1066812.

⁴⁸ Prostermann, Roy, and Zhu Keliang, *ibid.*; Margo Rossato-Stevens, “Peasant Land Tenure Security in China’s Transitional Economy” 2008 Boston University International Law Journal 97 122.

⁴⁹ Hayek, *The Road to Serfdom* (Chicago: 1944); De Soto, *ibid.* On the reception especially of Hayek’s work see Liu Junning, “Classical Liberalism Catches On In China,” 2000 *Journal of Democracy* (11) 48.

⁵⁰ In the past thirty years of “reform and opening” in China socialist views rejecting private ownership have been rejected, and many intellectuals and officials have adopted economically “liberal” ideas. See Cao Siyuan (曹思源), “Revising the Constitution, Protecting everyone’s legal rights”(修改宪法, 保护每个人的合法权利), September 2003, at <http://copies.sinoshu.com/copy3054017/>. Yale-based Chen Zhiwu argues similarly in “Returning Land to the Peasants: a Dialogue between Chen Zhiwu (陈志武) and Yu Jianrong (于建嵘),” (对话陈志武: 把地权还给农民), 14 February 2008, at http://www.infzm.com/review/pltt/200802/t20080204_36453.shtml. See also Peter Ho, “Who Owns China’s Land? Policies, Property Rights and Deliberate Institutional Ambiguity”(China Quarterly

persons but by households (*hu*); they remain tied to the collective setup of the rural economy. Some scholars convinced of the correctness of the neo-liberal argument have therefore advocated an outright privatization of rural land ownership.⁵¹

Dismissively, American property law professor and practitioner Patrick Randolph observes that “Chinese rural agricultural land has, under the Constitution, been “*owned*” by agricultural collectives - mysterious socio/political organizations left over from the early years following Liberation. Although the Collectives are said to own the land, they could not sell it” (emphasis added).⁵² In a similar albeit more nuanced vein, De Lisle observes that “[a]ny discussion of property rights in the People’s Republic of China is in some ways an odd topic. After all, everywhere throughout the formal Constitution and legal code in China one sees reference to it still being a socialist, Marxist-Leninist system in one form or another, with property *presumptively owned* by some collectivity, and indeed, often the state. *In a technical, legal sense*, of course, land in the urban areas remains state owned, and land in the countryside remains collectively owned...”(emphases added).⁵³

Despite their critical nature these comments reflect a state-centered view of rural land tenure close to the positivistic attitude mentioned above. On the state-centered view, the state allocates things to people through the rules of property law it makes and enforces.⁵⁴ On a positivistic view, property rights can be thought of as a “bundle” of composite rights

(2001) 394 at <http://www.rug.nl/cds/medewerkers/peterho/isi> on the repudiation of private property under Mao.

⁵¹ E.g. Chen Zhiwu, *ibid* .

⁵² Patrick Randolph, “ The New Chinese Basic Law of Property: A Real Estate Practitioner’s Perspective,” at <http://www.law.umkc.edu/faculty/randolphlinks.htm>. at p. 2.

⁵³ Congressional-Executive Commission on China, “Property Seizure in China: Politics, Law, and Protest,” 21 June 2004 at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:94854.pdf at p. 2.

⁵⁴ E.g. Huang Songyou, *ibid* , at p. 39, 2nd paragraph.

(Honoré),⁵⁵ and the thicker the bundle the greater the indication that someone holds “full ownership” or “full-blooded” ownership (Harris).⁵⁶ It is the rights to sell and exclude that are most essential to someone’s characterization as an owner of a particular thing (e.g. Penner).⁵⁷ On such an account, rural collectives are indeed weak property rights holders. Their rights to exclude and sell others appear to have been severely curtailed or entirely denied by the state, and it is perhaps not even clear what or who these collectives themselves are.

In the following, I discuss what the arguments weakening peasant land ownership are and why, in my view, these arguments are flawed. In the fourth section of this article I point out that a “weakening” conception of peasant land ownership, albeit flawed, conforms to the growth argument: it facilitates the taking of land that is needed to achieve GDP growth through the property sector.

The “no owner” argument. The tradition of legal positivism, on the one hand, treats collectives as legal fictions derived from legally valid rules⁵⁸ that allocate legal rights and obligations to the collective. In the socialist and Leninist tradition, on the other hand, the collective is an institution serving the political goals of socialism, embedded in a political hierarchy. These two in China equally important perspectives combine to make it hard to

⁵⁵ Tony Honoré, (1961), “Ownership” in A.G. Guest (ed.) *Oxford Essays in Jurisprudence*, Oxford : Oxford University Press.

⁵⁶ Jim Harris, *Property and Justice*, pp. 29 et seq.

⁵⁷ James E. Penner, *The Idea of Property in Law* (1997), *passim*.

⁵⁸ The concept of the “valid rule” is central to legal positivism. In one of the most influential modern accounts of this type of theory, that of H.L.A. Hart, such identification takes place through the application of criteria of validity contained in the Rule, or Rules, of Recognition. Hart, *ibid*. The positivistic skepticism toward legal fictions motivated by this understanding of “validity; Bentham famously rejected legal fictions altogether. Jeremy Bentham, *Anarchical Fallacies* (1871) and other works.

identify the Chinese rural collective as a holder of meaningful rights of ownership, as the case of Ms L's collective may serve to demonstrate.

Ms L, at the time of writing, individually owns a house standing on a certain formerly collectively owned plot of land, in which she held a land usufruct or use right called "housing plot use right." Her land use right was derived from the collective; a decision by the government to expropriate the collective led to the extinction of this right.⁵⁹ But which collective? Ms L originally set out to complain on behalf of her village, formerly comprising a few hundred members, whose signatures in protest against Hangzhou municipal government taking of the village's land she gathered in late 2008, before travelling to Beijing to present her petition to the central government and party authorities. At that time the village was already facing the demolition of their houses by the municipal demolition teams hired for this purpose. Then on 13 December 2008, after her husband's ribs were broken,⁶⁰ many other villagers changed their mind. They decided to comply with the authorities' request to sign forms on which they "agreed" with the compensation package they were offered, because – Ms L believes – they were afraid.⁶¹

Documents in the case indicate that Nongkou village was the collective that owned the land in question.⁶² But could the Nongkou villagers actually have brought a legal challenge against the municipal Hangzhou government's administrative decision? The

⁵⁹ This is implicit in Articles 132, 42 of the 2007 Property Rights Law (PRL). The status of her rights regarding her house is debatable. She will in any case cease to be an owner with its destruction, imminent at the time of writing.

⁶⁰ See for a domestic media reports Chen Xin (陈欣), "Ruthless beating by four unknown youths with sticks" (四个陌生伙子拿着棍子气势汹汹), *Qingnian Shibao* (青年时报) 14 December 2008, p. 2, and for an overseas account Ms L (梁丽婉) "Ms L: a landless peasant's appeal" (梁丽婉: 失地农民的呼吁), *Boxun* 10 March 2009 at <http://www.peacehall.com/news/temp/200903092016182.tif>.

⁶¹ Author interview, April 2009.

⁶² See for instance "Protocol of a meeting by the village (representative)" (村民(代表)会议纪要) dated 21 January 2008, copy on file with author. The document purports to record that all 60 village representatives participating in the meeting agreed to the arrangements for the land taking (*zhengshou*).

villagers may have wanted to, at least before the thugs arrived in their neighborhood and attacked Ms L's husband.⁶³ However, according to Article 60 of the Property Rights Law, "ownership of properties collectively owned by peasants shall be exercised collectively by the village's collective economic organization or the villagers' committee."⁶⁴ The head of the villagers' committee in Nongkou was a woman named Wang Meihua who, according to Ms L's allegation, had deceived the other members of the villagers' committee by obtaining a list of their signatures in another matter, and then appending the list of these representatives' signatures to an "agreement" they had in fact never seen.⁶⁵ Through this alleged maneuver, the village had collectively "agreed" to the plan to take its land away.⁶⁶ Article 63 of the PRL would give Ms Ms Land others a right to seek annulment of collective decisions infringing her individual rights by a court but this would require her not only to substantiate an infringement of her rights, it would also be premised on a court of law filing her complaint, which under the circumstances is very unlikely.⁶⁷ In any case, for a village to take collective legal action, it would still have to be represented by the village cadres, who are often in collusion with the urban government, especially in land cases;⁶⁸ and lawsuits against government decisions to

⁶³ A one point Ms Ms L had succeeded in collecting her fellow villagers' signatures on a letter protesting the taking, the deceptive methods used and the violence against her husband. Letter entitled "Urgent Appeal" (紧急呼吁), dated 14 December 2008, copy on file with author.

⁶⁴ See for a more detailed description Cai Yongmin, Tuo Jianfeng, Li Zhihong (蔡永民, 脱剑锋, 李志忠), *New Property Rights Theory (物权法新论)* Beijing: 2008, at pp. 98 f.

⁶⁵ *Author conversations (supra note 4)*. A copy of the "minutes" of a villagers' representative meeting purportedly agreeing to the taking, as well as of the list of signatures on a separate sheet, is on file with author.

⁶⁶ Such collective agreements are usually sought by the expropriating government, prior to seeking agreements from individual households. See Yi Ming, *ibid.*

⁶⁷ Nor is any Chinese court so far known to have ruled that the villagers' expressed will can supersede the will of their leadership. The behaviour of the judiciary is discussed at length in another study of suburban expropriation: "Land Disputes, Rights Assertion and Social Unrest: a Case from Sichuan," 19 (2006) *Columbia Journal of Asian Law* 365

⁶⁸ Eva Pils, *ibid.*

evict and demolish will in any case not stop the enforcement of a demolition decision.⁶⁹ From this it can be seen that the “collective” is a very fragile entity; its position as landowner is undermined by its political weakness.

The situation of the Nongkou villagers may have been more complicated yet. It is not entirely clear whether the land in question was indeed a plot owned by Nongkou village, or whether some other collective comprising Nongkou or representing a part of it was the owner.⁷⁰ The question who belonged to this particular village or collective has not been raised in this case but it, too, can lead to perplexing problems.⁷¹ Due to imperfect or altogether unavailable registration and other issues, it may be difficult to determine which particular collective owns a particular plot of land as well as who belongs to a particular collective, and de facto, decisions are often made at the level of the administrative village even where it is not the owner.

Yu Jianrong, a professor at the Chinese Academy of Social Sciences, in a published dialogue in 2007 deplored the vagueness of the identity of the collective owner as one of the central problems of peasant land ownership.⁷² From the perspective of the above

⁶⁹ For Hangzhou, see the 2007 Hangzhou City Regulation for Handling conflicts in the context of the Demolition and Relocation regarding houses on collectively owned expropriated land (杭州市征用集体所有土地房屋拆迁争议裁决办法), Articles 19 and 20 at <http://www.hangzhou.gov.cn/main/fggz/bmgf/T154233.shtml>; see also the 2007 Hangzhou City Regulation on Demolition and Relocation Work regarding houses on collectively owned expropriated (requisitioned) land in urban areas (杭州市区征收(用)集体所有土地房屋拆迁服务工作管理办法) at <http://www.hangzhou.gov.cn/main/wjgg/hzzb/200710/szfwj/T201311.shtml>.

⁷⁰ The Land Administration Law and PRL characterize as one form of rural collective economic organization the so-called administrative village (*xingzheng cun*) which also exercises political functions of rural governance. Collectives may also exist within an administrative village, which may comprise several natural villages (*ziran cun*); or they may comprise several administrative villages in some cases. Peter Xianfeng Huang, *supra*.

⁷¹ Registered residence does not necessarily correspond to actual residence, due to the peculiarity of the Chinese household China's 100-200 million peasant migrant workers when they leave the countryside to work in the cities. Peasant migrant paper, peasants' struggle paper. Problems arise, for instance in the case of women “marrying out.” Huang Songyou (黄松有), editor, *Understanding and applying the provisions of the “Property Rights Law of the PRC”* («中华人民共和国物权法» 条文理解与适用), (Beijing, 2007).

⁷² Yu Jianrong, *ibid*.

analysis, the collective as a holder of rights and obligations is indeed a defective entity as long as no clear allocation of rights to one or another collective is achieved. Although it is likely that this defect affects not all but only some villages, its roots are not likely to be cured, as long collectives are part of a power hierarchy within a state organized on authoritarian principles and plagued by corruption.

The “no ownership” argument. Even assuming that particular collectives could be clearly identified as holders of land rights, the bundle of rights held by these nominally “landowning” collectives may be too thin for them to be real owners, because they cannot sell land, and because their private-law-based right to exclude others from the use of their land seems worthless in confrontations with the government. Not only are they not allowed to sell, they are also widely powerless against the government taking and selling rights in “their” land.

Article 39 of China’s recent (2007) Property Rights Law (PRL) says that “An owner shall enjoy the rights to possess, use, seek the fruits (benefits) of and *alienate* his own immovable or movable property pursuant to the law” (emphasis added).⁷³ Article 39 PRL applies in a general way to all three kinds of owners of property recognized by China’s hybrid property regime, which according to Article 4 enjoy “equal protection.” Article 39 thus seems to apply to collective rural landowners as much as to private individuals and the state.

But although the PRL fails to mention it, another law says that Chinese rural collectives are not allowed to alienate land they hold as owners. The 1986 PRC Land Administration Law (LAL, last revised 2004) states in its Article 2 that “no unit or

⁷³ See also Art 71 of the 1986 General Principles of Civil Law (民法通则).

individual is allowed to occupy or trade land, or illegally to transfer land by other means.”⁷⁴; but the *rural* land use rights of peasants cannot be legally transferred “for non-agricultural purposes” according to Article 62 of the LAL, and this rule applies to both residential plot (*zhaijidi*) and to land management (*chengbao*) use rights.⁷⁵ From the perspective of enacted, written legislation, then, Articles 2 and 62 LAL answer the question about alienability in the negative: peasants cannot legally transfer land, except for a transfer of rural land use rights for purposes attributed to rural land (i.e. mainly agriculture). Land use rights pertaining to urban (and hence state-owned) land, on the other hand, can be transferred, and such transfers will be protected by law according to the rules of the LAL and PRL.

Similarly, while the PRL in its Articles 2, 34 and 35 stipulates the right of property rights holders to exclude third persons⁷⁶ in ways functionally equivalent to the trespass rules of common law property systems,⁷⁷ these rules acquire little meaning in the relationships between individual peasant household and the collective,⁷⁸ and between

⁷⁴ This provision, which applies to all land - i.e. also to land in state ownership - is consistent with the idea of socialism enshrined in the PRC Constitution. Whether it makes sense, and is it constitutional, in the context of a legal and economic system that has in the meantime embraced fierce real estate capitalism, is considered further below.

⁷⁵ Even within this purpose restriction, peasants are not allowed to transfer *chengbao* land use rights without explicit approval of the land-owning collective. Huang Songyou, *ibid*. The transfer of a *chengbao* right could be viewed in analogy with assigning a contract to a third party – the other contracting party, the collective, could decide to agree to the assignment or not.

⁷⁶ The PRL recognizes this right, for instance, in its Art 2 (“Property rights referred to in this Law shall mean the rights to direct control and exclusivity (the translation for exclusivity is *paitaxing* 排他性) . for specific properties enjoyed by a rights holder pursuant to the law and shall include ownership, usufruct rights and security rights”) as well as more specifically in Article 34 (“A right holder may request a person without right to take possession of immovable or movable property to return [possession of] the original property”) and Article 35 (“Where property rights are impaired or may be impaired, the right holder may request elimination of the impairment or danger of impairment”).

⁷⁷ Harris, *ibid* , p., 24

⁷⁸ The purpose of collective ownership is to serve some – however defined – collective goals, not to serve the liberal principle that individual right holders may do what they want with their property. Article 40 of the PRL stipulates that “exercise of rights by a usufruct right holder or a security right holder shall not harm the interests of the owner.” Compare with Jim Harris’ didactic example of “Red Land” in which

peasant collectives and the government. Given the practical significance of government takings of rural land, illustrated by the numbers quoted at the beginning of this article, it is government takings that are the most real and important “threat” to rural land tenure. Use of the expropriation mechanism, while verbally resembling mechanisms used in western jurisdictions, is the rule not the exception in cases of urban or infrastructural construction.⁷⁹ Expropriation is governed by Article 13 of the PRC Constitution, Article 42 of the PRL and the more detailed rules contained in the LAL and its Implementation Regulation.

Ms L is well acquainted with these rules. Were the villagers of Nongkou able to sell (some of) the land of their village, they might have done so. They could perhaps have made better plans for their future. In fact, in Nongkou, the villagers were forced to supplement income from agriculture after a first round of land takings in the 1990s,⁸⁰ and they resorted to building houses on the remaining land in which, with permission by the local officials,⁸¹ they rented out flats to urban residents. When the second decision to take the remainder of their land was announced to them, they were not only facing the loss of the value of that land, but also the loss of the houses they had built only a few years ago in order to generate a new income out of the remaining land.⁸²

Since no right to sell and no clear right to exclude others can be “found” in the law on collective rural land ownership, Randolph’s and De Lisle’s misgivings are apparently confirmed. Collective rural land ownership is not really ownership in the “full-blooded”

“questions whether the terms of any licence have been infringed....are settled according to the spirit of the licence, having regard to the general goals of fraternal living.” *Ibid* at p. 18.

⁷⁹ It is therefore substantively dissimilar with the expropriation mechanisms discussed by Honore under the heading “expropriability.”

⁸⁰ *Author conversations (supra note 4).*

⁸¹ *Author conversations (supra note 4).*

⁸² *Author conversations, 20 August 2009.*

classical and positivistic understanding;⁸³ it is at best a deficient sort of “ownership,”⁸⁴ “at the mercy of the government.”⁸⁵ In the language of Calabresi and Melamed, one could say that the rules on collectively owned land viewed in their entirety, were not “property rules” in the sense of rules “giving an individual the right to keep an entitlement unless and until he chooses to part with it voluntarily” but merely “liability rules” – rules denying an individual the right to keep the thing in question (here: land) but entitling him to compensation when it is taken away.⁸⁶

The argument for recognition of peasant land ownership. The problems with identifying the rural collective as a holder of land rights undeniably present obstacles to understanding the rural collective as an independent legal person holding rights to be exercised freely through a collective decision-making process. But as the case of Ms L well illustrates, they had no impact on her belief that the land of Nongkou belonged to the villagers of Nongkou, and it would be hard to argue that her belief was unjustified. After all, the authorities treated the collective as an owner when they sought its collective “agreement” to the land taking - never mind that this “agreement” was apparently fraudulently obtained. Without doubt, moreover, Ms L legally owns the house now

⁸³ Jim Harris, *Property and Justice*, pp. 29 et seq.

⁸⁴ Harris, *ibid.*

⁸⁵ Stein, Gregory, “Acquiring Land Use Rights in Today's China: A Snapshot from on the Ground”; at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=942813.

⁸⁶ Calabresi and Melamed introduce the distinction purely with a view to discussing the merits and demerits of either set of rules from an economic efficiency perspective. The distinction has been used to infer that “genuine” property rules provide, in Richard Epstein’s language, “property rights (...) made absolute Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 *Harvard Law Review* 1089 (1972); Richard Epstein, “A Clear View of *The Cathedral: The Dominance of Property Rules*” in Richard Epstein (ed.) *Economics of Property Law* (Cheltenham, UK/Northampton/USA: 2007) at p. 363.

threatened with demolition,⁸⁷ from which the authorities have already removed the furniture and other belongings. Ms L believes that if only the government had not resorted to brutal violence, the other villagers of Nongkou would stand behind her in legitimate resistance to an illegal (they argue) taking of their land. She would not be much impressed by the argument that it was not clear which collective owned the land of Nongkou village.

As a natural community, a collective entity like Nongkou is not “mysterious” (Randolph) or “ambiguous” (Huang)⁸⁸ at all. Our grasp of its existence does not depend on our ability precisely to associate it with particular people or particular plots of land.⁸⁹ The collective as landowner appears fragile, weak, or vague only from the perspective of the state that views collectives as entities defined by the measurements of membership, location and land.⁹⁰ From its viewpoint, it may seem true that “in China, all land is owned by the state” – ultimately the party-state controls the collectives, and the less serious the efforts of the legal system to provide courts in which arbitrary exercise of power can be challenged, the less point there may be in pondering the question if a particular exercise of power by the village leadership, for instance, was based in “good legal authority” or

⁸⁷ According to the Chinese Property Rights Law, property rights in land and building erected thereupon are conceptually separate.

⁸⁸ Huang, Xianfeng Frank, “The Path to clarity: development of property rights in China,” 17 *Columbia Journal of Asian Law* (2003/2004) 191.

⁸⁹ The collective’s identity may on occasion even be strengthened by the experience of loss of property through expropriation.. This was well documented in the Taishi Village case of Guangzhou (Panyu) in Guangdong Province, one of the best documented cases of a village’s challenges to the authority of their leadership in the reform era. See also for a Sichuan case Eva Pils, “Land Disputes, Rights Assertion and Social Unrest: a Case from Sichuan,” 19 (2006) *Columbia Journal of Asian Law* 365-292. There are moreover known cases in which a rural economic collective as such took legal action against state authorities in a land taking case, such as a collective of Dongyuan, Guangdong, advised by rural rights defence lawyer Liu Yao (July 2009 report and copy of complaint on file with author).

⁹⁰ A perspective described by James Scott in *Seeing Like A State* (New Haven and London: 1998) with explicit reference to “seeing” land at pp. 33 et seq.

merely in power abuse.⁹¹ The narrower factual question of what rules have been created dissolves into the wider factual question of what the institutions in power do with or without authorization. But collectives, like other legal entities, cannot simply be understood by reference to a power that allows them to exist and defines their boundaries; they have legal significance also by virtue of their social reality. The authoritarian definition ignores this reality. It relies on a correct identification of the power that represents the law's source; but if law is understood in this simplistic way, it may easily be challenged by counter-assertions of power.

In a case in Jiangsu Province, for instance, the villagers of Shengzhuang found their identity and voice in protest, and it led them to contend the party-state's view of the meaning and function of the rural collective in the following terms.

“We would like to ask, (...) whose collective is ‘the collective?’ Each time new land was possessed [in a takings process], the whole village [the people of the entire village] disagreed, the whole village signed their names in open protest; and yet the village head and the township party secretary forcibly ‘represented’ the whole village in the name of the collective. Aren't these people just like the corrupt officials, the land grabbers and bad gentry that Chairman Mao had called on us to overturn?”⁹²

Similarly, the “argument against land ownership” by rural collectives, though apparently compelled by classic theories of ownership that regard the right to exclude as a central or even indispensable feature of property (cp. Art 2 PRL) and assess property by its market utility associated with alienability (cp. Art 39 PRL), is the result of a state-centered

⁹¹ This insight is captured in the work of the legal positivist H.L.A. Hart, whose theory of law in a modern legal state conceptually requires secondary rules of adjudication safeguarding that other rules of the system are efficiently applied (in addition to rules of recognition and of change).

⁹² “250 peasant household of Shengzhuang village, Yixing city, in Jiangsu province maintain their ownership right in residential land and demand realization of the policy “each resident should have a home”” (江苏省宜兴市省庄村 250 户农民坚持宅基地所有权 要求实现“居者有其屋”), 16 December 2007, at <http://www.fireofliberty.org/article/6694.asp>.

perspective. “Seeing like a state” the authorities are unwilling to acknowledge the legally and morally problematic discriminatory implications of legal rules. These rules disallowing make second-class property right holders of peasants, even though socialist public ownership is often described as one of the fundamentals of the Chinese legal system.⁹³ The original purpose of this arrangement was to spell out a socialist principle and provide special protections of ownership and ensuring collective decisions over land use. While this goal was once to be attained by *withdrawing* rural land from the reach of commercial activity, changed laws and altered circumstances have now brought about a situation in which the peasants have become helpless victims of the land’s commercialization from which they, the designated owners according to the Constitution and PRL, are excluded. If we chose to interpret the position of rural collectives in the light of classical property theory, then, we would be forced to add rationalization to injury by concluding that peasants did not, after all, “really” own the land that is taken from them.

The above analysis has prompted at least one academic commentator to argue that *because* the peasants “own” land, and in light of the new Article 39 PRL, they “ought to” have a right to alienate it.⁹⁴ In fact, Chinese peasants have some good constitutional arguments for claiming that they already have rights to alienate land. As mentioned above, the current Chinese property regime bears traces of an historical shift from socialist to liberal principles. While Art 2 of the 1988 LAL strictly prohibits the sale of land, the

⁹³ Cp. Article 6 of the PRC Constitution. See also Communist Party Central Propaganda Department Bureau for Theory (中共中央宣传部理论局), “The Six “Whys”” (六个“为什么”), Beijing: 2009 at p. 96 f (in answer to “Why” number six, namely “Why the path of Reform and Opening must be continued without wavering, and why we cannot go back”).

⁹⁴ Li Yingli (李应利), “Why Should Minor Property Housing Be Legalized” (小产权房为什么应该合法化), July 2009 at http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=48338.

2007 PRL is silent on this important restriction, and in fact the sale of urban land use rights is the basis of the urban real estate market.⁹⁵ The constraints currently placed on rural land right holders discriminate against peasants and are in tension with the general principle of equal protection of the law contained in Article 33 of the Constitution, for instance. They are also in tension with the idea of “equal protection” of individuals, collectives and the state as property holders explicitly upheld in Article 4 Property Rights Law.⁹⁶

For any of the above arguments to have immediate practical significance, however, there would have to be a reasonable system to decide which one(s) of competing rules or principles prevailed, and to ensure that the norm hierarchy that places the PRC Constitution at the top was respected.⁹⁷ But no such rules or mechanisms exist in China’s authoritarian political environment; and political or legal challenges to particular rules of the law such as we are used to observing in systems with a vibrant parliamentary and judicial practice are very difficult. Available mechanisms have been tried, for instance by Professor Hu Xingdou who in 2004 petitioned in vain for a change in the household registration and land tenure system to rid it of its discriminatory elements.⁹⁸ His petition

⁹⁵ Patrick Randolph, *supra*.

⁹⁶ Gong Xiantian (巩献田), “A Property Law (Draft) that violates the constitution and basic principles of socialism. An open letter prompted by the annulment of section 12 of the constitution and section 73 of the General Rules of the Civil Law of 1986,” posted online on 12 August 2005; at <http://www.europe-solidaire.org/spip.php?article4161> and Gong Xiantian, 一部违背宪法和背离社会主义基本原则的《物权法（草案）》----为《宪法》第12条和86年《民法通则》第73条的废除写的公开信, available at http://www.lawyerstown.com/newlaw/news_page.asp?id=0000000031&lawid=0000000020.

⁹⁷ This, of course, is one of the most innovative and attractive features of the conception of a modern municipal legal system developed in the work of the great legal positivist H.L.A. Hart, which envisages rules of adjudication and recognition to be operative in a legal system.

⁹⁸ Hu Xingdou (胡星斗) characterizes the land tenure system as a result of the general dualistic setup of laws about household registration, land and other matters, and petitions for the abolition of these systems, in his 2004 petition “Suggestion to carry out unconstitutionality review concerning the dualistic hukou

remained unanswered; and the institutional reason for this is that there is no obligation on the part of the institutions (The NPC Standing Committee) to provide any answer; nor is there any other truly functional mechanism of constitutional or judicial review of norms.⁹⁹ Instead of waiting for a decision, or of waiting for legislative reforms, rural communities in China have in many cases decided to circumvent the law and “sell” their land anyway, as is briefly discussed below in section V.

IV. “It is better if we take it from them:” arguments for expropriation

It could be seen in the example of Nongkou village that according to allegations made by villagers, the procedure leading up to the taking of land from Nongkou was marred by illegality in several ways: the village head was alleged to have procured fellow village committee members’ signatures in a fraudulent way; the authorities allegedly intimidated the majority of villagers into “agreeing” to specific compensation plans by hiring thugs who carried out a brutal assault on one villager; and the taking exceeded the limits of the approval the municipal government of Hangzhou had obtained. Instead of taking two square kilometers for an intended railway station construction project,¹⁰⁰ the villagers

system and urban-rural system” (对二元户口体制及城乡二元制度进行违宪审查的建议书) at <http://wlccg.blogchina.com/blog/217573.html>.

⁹⁹ There is no entity that could be properly identified as exercising overarching authority to make law in China; rather there are many contending institutions producing various kinds of rules. Cheng Jie (程洁), in *The Essence of Constitutional Government: Open Government under the Rule of Law* (宪政精义: 法治下的开放政府, China University of Politics and Law Press, Beijing: 2002), at 299, argues that China’s administrative organs [especially the State Council] have “become China’s most powerful [authoritative] legislative organs.”

¹⁰⁰ A document issued by the provincial government of Zhejiang dated 20 November 2008, copy on file with author, mentions roughly 2 sq km as approved area of expropriation (浙江省建设用地审批意见书, 浙土字 A [2008]—0173).

said, the city had kept extending the scope of the taking and ultimately ended up taking about twenty.¹⁰¹ Most of the land taken would be used for commercial housing construction projects.¹⁰² According to the allegations, all of Nongkou's land was outside the area that would have been originally affected by the two-square-kilometer taking.¹⁰³

Each of these mentioned problems would, if true, undermine the legality of the takings process affecting the village. But it remains important to understand that the land of Nongkou *could* have been legally taken, as long as the taking was justified by “the needs of public interest” and obtained higher-level approval. This requires a discussion of “public interest” in rural land takings, in a situation in which the land to be taken by the government could not be sold privately on a free and generally accessible private property market.¹⁰⁴ In the following it is explained why the utilitarian logic of “not wasting” and achieving economic growth is served well by a property system that weakens property rights on the part of peasants yet strengthens them for those involved in the process of property development, and adapts the interpretation of “public interest” to suit this overall goal.

¹⁰¹ Author conversations, *supra* note 4; Yan Xiu (严修), “Several hundred police officers carry out forceful demolition of a household in Hangzhou” (杭州江干区数百公安武警强拆一户居民), Radio Free Asia (Mandarin), 31 August 2009, at <http://www.rfa.org/mandarin/yataibaodao/qiangchai-08312009141112.html>. It has been impossible to verify the claim that as much as twenty square kilometers were taken, but the state implicitly confirmed that more was taken than was approved in its letter to Ms Ms L(*supra* note 103).

¹⁰² The purposes of residential and commercial construction are mentioned in a document of the Land and National Resources Administration Bureau of the municipal government of Hangzhou, on file with author: 杭州市国土资源局 杭土资预(2007) 509 号, dated 25 October 2007.

¹⁰³ The government, indeed, rejected Liang's application for access to government files concerning the takings process, on the grounds that her own plot of land and home, depicted in its gutted state above, were not affected by the approved taking. This document, dated 22 August 2008, is entitled 杭州市国土资源局 政府信息公开不予公开告知书 (2008 第 110 号) (copy on file with author).

¹⁰⁴ This fact constrains the usefulness of comparative studies of “takings law” in China and other countries. A different view is taken by Liu Chenglin, “The Chinese Takings Law from a Comparative Perspective” (2008) 26 *Washington University Journal of Law and Policy* 301.

The economic efficiency argument behind the recent property law reform. In the run-up to its enactment in March 2007, the drafters of the new PRL were overflowing with neoclassical “liberal” rhetoric in support of the draft law, while careful also to make reference to China’s “socialist market economy.” It was argued that economic growth in China had entirely relied on and would continue to rely on the protection of property rights based on the legal reforms described earlier on, which started in the early 1980s. The drafters of the PRL argued that the proposed “represented the brilliant political decisions of three generations of Party Central leaders,”¹⁰⁵ and that its enactment would be “a monument and conclusion to twenty years of Reform and Opening [and] to the socialist market economy.”¹⁰⁶ A critical observer had commented already in 2000 that Hayek’s popularity “is attributed to the fact that he’s the most anti-socialist economist around.”

Neoclassical arguments for private individual property rights could be grouped into three kinds: the argument based in historical entitlement, claiming that property is held justly if justly acquired (e.g. Nozick);¹⁰⁷ the argument based in liberty, seeking to establish a right to private property of certain resources (e.g. Locke);¹⁰⁸ and the argument based in efficiency, claiming that private property rights increase efficiency or utility more than any other type of property regime (e.g. Hayek, Demsetz).¹⁰⁹ Hayek argued that only competitive liberal systems founded on private property are efficient enough to

¹⁰⁵ The generations meant here are those of Deng, Jiang and Hu/Wen, leaving out Mao.

¹⁰⁶ Zhao Lei (赵蕾), “Debating the Real Property Law” (辩论物权法), *Southern Weekend* (南方周末), 10 March 2006, at <http://www.nanfangdaily.com.cn/southnews/jwxy/200603100073.asp>. The meeting of over 50 scholars is said to have taken place on 25 February 2006.

¹⁰⁷ Robert Nozick, *Anarchy, State and Utopia* (1974).

¹⁰⁸ For a more differentiated account of a right to private property leaning on Locke see Jeremy Waldron’s *The Right to Private Property* (Oxford: 1988).

¹⁰⁹ Harold Demsetz, “Toward a Theory of Property Rights,” *57 American Economic Review*, volume 57, No. 2, Papers and Proceedings of the Seventy-Ninth Annual Meeting of the American Economic Association, pp. 347-359.

produce the kind of growth required in modern society. Only a competitive price system “records all relevant data,” a task central (state) planning is unable to perform.

“Modern civilization has been possible precisely because it did not have to be consciously created. The division of labor has gone far beyond what could have been planned. Any further growth in economic complexity, far from making central direction more necessary, makes it more important than ever that we should use the technique of competition and not depend on conscious control.”¹¹⁰

A central assumption underlying Demsetz’ analysis and his critical argument against communal property rules is that private owners view their property as wealth, and will be incentivized to maximize the value of their land, in ways communal owners would not be.

“Property rights (...) help a man form those expectations which he can reasonably hold in his dealings with others. (...) If a single person owns land, he will attempt to maximize its present value by taking into account alternative future time streams of benefits and costs and selecting that one which he believes will maximize the present value of his privately owned land rights.”¹¹¹

As a consequence, over time, and assuming (as this theory does) that people will make rational decisions oriented toward value maximization, private property rights will lead to growth in wealth. The distribution of such wealth is by definition not in the focus of interest of this kind of theory. Some neo-liberal authors have argued explicitly that disparity of wealth may be viewed as morally irrelevant (Nozick)¹¹² or that redistribution motivated by “socialist” conceptions of equality is an unjustifiable invasion of liberty for no justifiable goal (Hayek).¹¹³

¹¹⁰ Hayek, *ibid.*, p. 52.

¹¹¹ Harold Demsetz, *ibid.*

¹¹² Nozick’s argument against distributive justice is articulated especially in chapter 7 of *Anarchy, State, and Utopia* - he believes that any distributive pattern is “overturnable” by the voluntary actions of persons, and that distributive justice conceptions require coercive redistributive measures that unjustifiably limit a person’s choices.

¹¹³ Hayek’s argues that “property is the foundation of liberty,” that socialist forms of ownership lead to an “equality of servitude,” and that redistribution cannot achieve absolute equality. *The Road to Serfdom*.

The property reform establishment in China – experts of property law pushing for the enactment of the current PRL – used neo-liberal arguments. But it did not focus on the idea of just acquisition and did not accord great weight to the idea of natural property rights.¹¹⁴ “Just acquisition” in the current Chinese situation presents problems that are the subject of this article. The notion of natural rights to private property and related theories, on the other hand, would have supported the idea of a “law beyond law” rejected in many other contexts in China, not to mention its contradiction with official propaganda related to socialism.

In its defence of the property law, which became necessary when orthodox Marxists protested against the draft of the Property Rights Law,¹¹⁵ the academic establishment concentrated on the growth argument: on the utilitarian notion that “the utility of the thing” should be “exhausted” (*wu jin qi yong*) and that utility maximization could be achieved by protecting private property rights, including notably urban land use rights. “Waste No Land;” maximize value, grow rich fast and – in the famous phrase attributed to China’s former President Deng Xiaoping, “let a few people grow rich first.” Challenged to respond publicly to critics pointing out growing social disparity amongst rich and poor,¹¹⁶ the PRL drafters asserted that the protection of property rights would not only spur growth but also eventually help the poor get richer. Echoes of Demsetz’s and Hayek’s arguments can be found in much of what the proponents of the PRL said in the tense months before its enactment in March 2007. The most important scholar behind

¹¹⁴ Cao Siyuan is perhaps an exception, *supra*.

¹¹⁵ Mathew Erie tells this story in his “China's (Post) Socialist Property Rights Regime: Assessing the Impact of the Property Law on Illegal Land Takings,” *Hong Kong Law Journal*, 2007, Vol. 37.

¹¹⁶ Professor Gong’s famous open letter focused on the implications of SOE reorganization. *Ibid*

the PRL in its final, enacted shape, Professor Wang Liming of Renmin University, combined the language of economic theory with a quotation from the Chinese classics:

“Mengzi said, “Having steadiness of mind without a steady income/wealth [*chan* 产] is within the ability only of the masters [*shi* 士] only, ordinary people cannot be perseverant even when they have a steady income/wealth.” The Property Rights Law has now created a complete set of rules that affirms and protects property rights. This way, people can truly build up wealth [*chan*] and confidently make investments, [they can develop] the desire to put aside wealth and have a motivation for being entrepreneurial”¹¹⁷

This, while not flattering to entrepreneurs, traces the tenets of the neo-classical argument for property rights and their function for growth. Similarly, Professor Yang Lixin said:

The divide between the poor and the rich is not a problem of the Property Rights Law. It is a problem of society. The protection of the law guides people in the sense that if you have one buck, can't you develop it to ten thousand bucks, or a million bucks? [The Property Rights Law] encourages people to acquire wealth by legal means. It encourages the poor to make money.”¹¹⁸

Professor Wang Weiguo went even further in extolling the virtues of a private property regime by commenting

“Even if someone begs, this still involves [the same] rules. Begging someone for food indeed shows respect for the property rights of another, and when a “gentleman acts charitably,” the one who is begged from exercises his right of disposal, handing a part of his property over. This is in fact an order without which even beggars could not exist.”¹¹⁹

¹¹⁷ Wang Liming (王利明), 化物权保护增加财产性收入, 党的十七大特别报道。 , at http://www.pahc.gov.cn/E_ReadNews.asp?NewsID=814.

¹¹⁸ Yang Lixin, *ibid.* 北大教授上书激烈反对导致物权法草案推迟表决, 2 March 2006, at <http://www.ahjcg.cn/Article/ShowArticle.asp?ArticleID=172>.

¹¹⁹ “Jiang Ping: Formulating the Real Property Law must not go backwards,” *China Industrial and Commercial Times*, Feb. 27, 2006, posted in translation at *China Law Prof Blog* at http://lawprofessors.typepad.com/china_law_prof_blog/2006/03/chinas_draft_pr.html.

It is unclear how convincing the Chinese public considered these arguments. The PRL was eventually enacted in March 2007, but not after some effort had been spent on suppressing continued public criticism of this new legislation.¹²⁰ Since its enactment, the Property Rights Law, along with the Chinese Constitution, has become one of the laws Chinese petitioners against land grabs and rural and urban evictions will refer to in their protests; like others, Ms L wrote the titles of these laws in red paint on the façade of her condemned house.¹²¹ But how far do these laws really protect against takings?

“Cheap” land through government takings. Takings of rural land are governed by the Constitution (Article 13), the Land Administration Law and Property Rights Law and further legal provisions. Article 13 of the PRC Constitution, revised in 2004, says that the state “may, for the public interest, expropriate or take over private property of citizens for use in the public interest,¹²² and pay compensation in accordance with the law.”

When drafting the new 2007 Property Rights Law, the question how to define “public interest” was one of the hotly debated issues, and various definitions were suggested. All of the suggested definitions of “public interest” would have had the effect of narrowing down the scope of takings by offering specifying criteria of “public interest” or by enumerating types of situation in which a “public interest” in the taking would be given. The scholar Ms LHuixing, for instance, suggested in his draft Property

¹²⁰ There were no further domestic media reports on the continued opposition to the PRL. Professor Gong was reportedly ordered to shut up, although he denied the existence of such an order. Radio Free Asia, “Chinese Scholars Sign Letter Opposing the Property Rights Law” (中国学者签名反对物权法), 21 February 2007 at <http://peacehall.com/news/gb/china/2007/02/200702222307.shtml>; Radio Free Asia, “Peking University Professor Gong Xiantian requested by Party Committee to withdraw signature from letter opposing Property Rights Law” 北大教授巩献田被校党委要求退出反物权法签名, 9 March 2007, at <http://www.rfa.org/mandarin/shenrubaodao/2007/03/09/gong/>.

¹²¹ See above picture.

¹²² The Chinese expression is 公共利益的需要.

Rights Law disallowing all projects except those “serving public roads and communications, public health, prevention of calamity, scientific and cultural education, environmental protection, protection of cultural relics and scenic areas, protection of headwaters and harbors, protection of forests, and other public interests as stipulated in constitutional law.”¹²³

It is not surprising that in its final form, the PRL contained none of these carefully debated and well-meant restraining conditions and definitions. Including them would have been against the dominant philosophy of economic growth embraced by China’s lawmakers. There is no legal alternative to government takings of rural land, if such land is to be transformed into land for urban construction. This fact explains not only the enormous scale of land takings from rural collectives, but also the fact that the “public interest” requirement, though in wording the same as in other jurisdictions, has very little meaningful restricting function in the Chinese context. A wide definition of “public interest” gives more power to the government, but also helps economic development by allowing construction projects to go forward. Functionally, the expropriation replaces voluntary transfers of rural land to urban developers in commercial transactions, because the law does not allow for voluntary, commercial transfers.

If public interest is equated with a supposed national interest in construction and urbanization, there is no principled reason left for distinguishing between infrastructural projects such as roads, hospitals, or railway stations, and other construction projects such as that of the building of a new commercial or residential area. This, precisely, is the idea reflected by numerous government authorities and committees for demolition and relocation around the country. The logic of “necessary” construction, urbanization and

¹²³ Erie, *ibid.*, at note 106.

growth is upheld and propagated even as the state produces rules and circulars requiring curbs on land takings, emphasizes existing approval requirements, proclaims the “Two Protects” to emphasize the concurrent need to preserve agricultural land, and designates areas of “basic agricultural land” not allowed to be expropriated.¹²⁴

So far as the general aim of contributing to growth through property development is concerned, the land taking that was approved by higher authorities and the land taken in excess of the approved area do not appear significantly different in the case of Nongkou village, because both serve the purpose of construction. The entire expropriation, from a national perspective, may still be viewed as furthering GDP growth: it spurs the construction industry, contributes more valuable land to the urban real estate market, and if property values rise, further raises the GDP through the market transactions occurring on this market.

This, at least, is the view generally taken by government authorities and committees, such as the Authority Directing the Urban Renewal and Demolition and Relocation Work of Jianggan District. Such authorities portray “support for construction” as a civic duty; and perhaps this goes some length toward explaining why pressure, threats and violence are applied against residents in order to obtain their “agreement.” State authorities claim that they are enforcing a moral duty owed by individual residents to the wider community. In a public announcement dated 24 January 2008, for instance, the Authority chastised 18 householders in an area close to Nongkou for not having signed “agreements” regarding their eviction and compensation packages yet. It said that “in order to safeguard the timely beginning of the construction project and the common interests of the masses”

¹²⁴ The villagers of Pengbu 彭埠 town, another part of Hangzhou, took pictures, on file with author, of fields designated by a Pengbu town government sign as “basic agricultural land,” before and after they were taken from them for urban construction.

these residents, listed by name, were required to sign their “agreements” within seven days. Otherwise they would “be dealt with through legal, administrative and other measures.”¹²⁵ As mentioned above, later that year Fan Yongsheng was attacked by thugs in an attempt to intimidate another group of residents belonging to Nongkou village.

Once one assumes that urbanization projects are an overriding need and that affected citizens have a civic duty to promote it by agreeing to have their land and homes taken, individual residents’ such as Ms L’s opposition to the taking of their land and home becomes as irrelevant, as it becomes impossible to take into account these residents’ wrongs; to regard them as problems flawing the urban renewal process. In particular, it becomes difficult to measure the value of what is lost to them by any other metric than that of monetary value. Viewed impersonally, the fact that expropriations are involuntary¹²⁶ can only matter to the goal of economic growth, if and insofar as it leads to costs detracting from this goal. As seen in the example of the Nongkou village, the developers do, in fact, incur some expenditure in dealing with the negative effects of land takings, usually in collaboration with officials. They need to resettle and/or to some extent compensate the peasants, at rates of compensation which, while they may be far from low, are unlikely to reach the level of negotiated market prices. The fact that the authorities, or property developers in collusion with the authorities, coerce villagers into signing “agreements” about compensation, and that they suppress resistance by to some extent violent means, does not as such detract from the success of the property development project, as long as success is defined in growth terms. The land thus taken from peasants is thus relatively cheap for the developers and governments, as discussed

¹²⁵ Copy of the public announcement on file with author.

¹²⁶ Although at least according to law, negotiations about compensation had to be held and agreements were envisaged, so far as possible.

further in section V.¹²⁷ This is not to say that criminal activity such as assaults on evictees, or taking bribes, *never* have adverse consequences for the perpetrators, of course. But neither the perpetration nor the prosecution of such offences can disturb the successful completion of urban development projects. The case of Jianggan district in Hangzhou, where Liang’s house is situated, provides an example in point. In April 2009 a vice-mayor of Hangzhou was quietly taken into *shuanggui* party detention (an illegal form of detention outside formal law enforcement) on suspicion of having taken tens of millions of Yuan Renminbi of bribes from local property developers; this fact did not become public knowledge until domestic media reports emerged in August 2009, when he was divested of his official (government) functions. A few days after these first reports,¹²⁸ another forceful demolition was carried out near Nongkou village.¹²⁹

The incompleteness of the economic argument. At first glance, the fact that the drafters of the PRL subscribed to the logic of “liberalism” and absolute property rights is at odds with the fact that China achieved very impressive growth - at the same time as it also achieved great poverty reduction – by keeping the protection of private property rights and rules of the property law, as well as wider institutional law enforcement, weak. Upham has argued, therefore, that the conventional argument, used by the World Bank and other institutions, that economic development depended on the creation of clear,

¹²⁷ It is generally cheaper even than urban land taken from urban original residents, for which on occasion quite high sums of compensation were paid under a different legal regulation governing urban demolitions.

¹²⁸ Chen Xiaoying (陈小莹) and Yang Lan (杨澜), “Former Hangzhou Vice Mayor Xu Wanyong in *shuanggui* detention, case started from Xixi Wetlands development project,” (杭州原副市长许迈永被双规事发西溪湿地项目), *Shiji Jingji Baodao* (世纪经济报道), 1 September 2009 at http://news.ifeng.com/mainland/200909/0901_17_1328702_3.shtml.

¹²⁹ Yan Xiu (严修), “Several hundred police officers carry out forceful demolition of a household in Hangzhou” (杭州江干区数百公安武警强拆一户居民), *Radio Free Asia (Mandarin)*, 31 August 2009, at <http://www.rfa.org/mandarin/yataibaodao/qiangchai-08312009141112.html>.

strong and enforceable property rights did not work, at least not in those early decades of the Reform and Opening period when the protection of property rights was weak.¹³⁰

From the perspective of the present analysis, however, it is possible and even likely that the creation of strong property rights, available on a commercial real estate market, was crucial to economic growth, so far as growth was achieved through the construction and real estate market. For there are indications that real estate accounts for an important proportion of the national GDP, and what is traded on the real estate market are legally protected property rights. “Minor” property rights that are not legally protected are traded at a “discount” for illegality or informality, quite similar to what De Soto discusses in the case of informally held property in Peru, where the price of such “informal” property is lower.¹³¹ So far as economic development was achieved through property development, it appears to have followed, at least in the majority of cases,¹³² the creation of precisely the kind of property rights that the law and development “orthodoxy”¹³³ contemplates.

But this does not mean that the classical or “orthodox” argument for clear and secure property rights, relying on a causal connection between such property rights and economic growth, is correct. It means even less that this argument is morally attractive. Applied to the Chinese case, the argument is fatally incomplete, because it fails to address the possibility of property rights discrimination. Property rights discrimination has been a striking feature of the Chinese property regime, and it appears to have been an enabling condition for China’s rapid economic growth. For on the basis of the present analysis, it is also true that an effective protection of their property rights has been denied

¹³⁰ Upham, *ibid* .

¹³¹ De Soto, *ibid*.,

¹³² See discussion below for illegal property development in the context of “minor property rights.”

¹³³ Upham, *ibid* .

to tens of millions of peasants (as well as to urban residents affected by “demolition and relocation” in many cases falling outside the scope of this article). In fact, the denial of protection in the context of takings processes has been the direct precondition *sine qua non* for many (or most) urban land use rights grants, and therefore a precondition of rapid urban property development. In 2007, in their laudations of the draft Property Rights Law soon to be enacted, its proponents failed to mention this fact, although some of the drafters were well aware of it.¹³⁴

What unites the establishment’s rhetoric of protecting property rights with the practice of denying such rights protection in takings processes, then, is the nature of the justifications relied on, both in rhetoric and practice – both are utilitarian in nature and represented as ultimately furthering economic growth. The strategy of argument flips from destruction to construction – literally and figuratively - in the moment in which new urban land use rights are created and distributed by urban governments: until then, welfare arguments justified taking land and destroying the buildings on it, but from then on, welfare is to be increased by protecting the property rights of the new owners -- predominantly albeit not necessarily urban property developers and urban residents.

The new urban land use rights created out of these processes may well have been better protected than the rights of the expropriated peasants and evicted residents (rural and urban) making way for them. It was these urban land use rights that became the “building blocks”¹³⁵ of the booming real estate market responsible for so much of China’s economic growth until 2007 or 2008, a market described by one exulting

¹³⁴ See e.g, Ting Shi, “Debate on ideology defined Property Law’s formation,” *South China Morning Post* including an interview with Professor Yin Tian, 24 May 2007.

¹³⁵ Randolph, *ibid.*, suggests that these building blocks are functionally equivalent to ownership rights in the urban real estate market.

observer as “one of the greatest real estate booms in world history” and “a truly remarkable development in a nation in which all land still is owned by the state [*sic*] and the state is firmly controlled by a single political party that remains Communist at least in name.”¹³⁶ If, as seems *prima facie* likely, “secure property rights” did spur economic growth, such secure rights rested on takings from another part of the population (including peasants and original occupants of older urban residences).

This practice accords with an understanding of property based in the maxim “exhaust the utility of the thing.” It also calls to mind argumentative strategies employed elsewhere in place and time to justify taking land away from entrenched local populations making economically less “efficient” use of the land. One of the best known cases may be that of the European settlers on Amerindian land in the 17th and 18th centuries. Using Locke’s theory of rights to property in land that one had “mixed one’s labor” with, apologists of colonialism at the time argued that settling on the land and staking out private property claims on it was morally correct and even laudable, because it served to increase the land’s value without harming the original occupants.¹³⁷ As in the present context, the justification of the colonial process also relied on *first* arguing that the current occupants of the land had not really got ownership rights in it,¹³⁸ and then arguing that occupation would spur growth. As in colonial contexts, so also in China, some of the language created to describe the new property developments tends to reflect the perspective of the acquirers. Thus, for instance, a colloquial way of referring to land ready for construction teams is “cleared” or “clean” land (*jingdi* 净地) whereas the land that still has buildings

¹³⁶ Stein, *supra*. Later on in his article the author does mention that there is a distinction between state and collective ownership.

¹³⁷ Barbara Arneil, *John Locke and America: the Defence of Colonialism* (Oxford: 1996), especially chapters 6 (“Colonialism: Locke’s Theory of Property”) and 7 (“Locke, Jefferson and the Amerindian”).

¹³⁸ *Johnson v MacIntosh*.

on it is referred to as “hairy land” (*maodi* 毛地) – a little as though the occupants of such land and their homes were like hairs to be plucked out.¹³⁹

Of course, the officials of expanding city governments, property developers and urban homebuyers are in many ways very different from colonialists conquering (in the language of the time) another people’s land: they are citizens of the same state and share much of peasants’ cultural identity. However, there is considerable social prejudice against peasants as a social group in China; they are by some seen as forces of backwardness, possessing “low quality,” and requiring to be “raised” to the level of the modern (and urban) Chinese citizen.¹⁴⁰ The effect of such prejudice can be heightened by difference in income levels, at the same time as poverty may prevent peasants from articulating and realizing demands for information and protection of their rights. In the case of the relatively affluent villagers of Nongkou, on the other hand, there was allegedly an official perception that the villagers were “too rich” and “too greedy,”¹⁴¹ a perception a website commenting on the “too rich” homes of peasants in the area may illustrate.¹⁴²

In the case of peasants affected by reforestation and similar programmes (not urbanization) in a certain township of Ningxia, one of China’s poorest provinces, the

¹³⁹ Chen Yongqing (程永清) “The granting of “hairy land” presents risks for property development enterprises in China (“毛地出让”中房地产开发企业的法律风险), Anhui Legal Consultancy Website (安徽法律顾问网) at <http://www.fl168.com/Lawyer9374/View/47281/>. See also Stein, *ibid.*, on the process of “clearing” land.

¹⁴⁰ Rachel Murphy, “Turning Peasants into Modern Chinese Citizens: “Population Quality” Discourse, Demographic Transition and Primary Education,” 2004 *The China Quarterly* 1.

¹⁴¹ Author conversation, August 2009. See also Yi Ming (佚名), “An analysis of the behaviour of the parties in a case of demolition and relocation of homes on collectively owned land – using the example of the outskirts of Hangzhou” (集体土地房屋拆迁当事人行为解读——以杭州城郊为例, 22 November 2007, at <http://www.lunwentianxia.com/product.free.3028108.4/>.

¹⁴² Anonymous, “Too rich! Pictures of peasant villas taken from the Zhejiang highway” (太有钱了!浙江高速上抓怕的农民别墅) Xinlang zatan, 27 July 2009, at http://xinwen.xm.haozhai.com/news_138728.html

author was told that “as a rule” peasants affected by takings would be told that their land was taken, but not whether or when they would be given any compensation. The economic destitution of those affected played a great role in stifling any effort to oppose the takings and related arrangements.¹⁴³ In one case, the government gave 400 Yuan RMB per household for the land and buildings it took from a couple living in Yinwa, a natural village that collectively owned the land. But it then sent officials to ask for 16,000 Yuan RMB per household as fees to move residents into new houses on supposedly better plots of land. Living in extreme poverty, the couple’s only chance of obtaining better terms for the removal from their home village was by organizing collective opposition to this scheme from all thirty households in the village; but they knew, Mr Ma said, that in the end they would have no chance. The government could cut off their electricity and come and demolish their house; then they would have to leave, whether or not they could afford to participate in the relocation programme.¹⁴⁴ The project in question here was a programme for removing peasants from land too arid to support agriculture. The programme is described as according with “Scientific Development Perspective” by the County government of Tongxin and while it is not an “urbanization” project, it is described as a project for “concentrating rural residents.”¹⁴⁵ Its intended effects for the national economy and ecology are beneficial; and it may in addition have led to construction projects raising GDP growth; yet for the elderly residents of Yinwa village, the measure seemed devastating.

¹⁴³ Author conversations, 27-29 July in Tongxin County, Ningxia.

¹⁴⁴ Author conversation, 29 July 2009, Yinwa Village, Magaozhuang Township, Tongxin County, Ningxia (宁夏省同心县马高庄乡阴洼村).

¹⁴⁵ Tongxin government website, “Central Ningxia plan for resettlement from arid regions in Tongxin (宁夏中部干旱带同心县生态移民规划), 2 February 2009, at <http://www.nctx.gov.cn/show.php?contentid=72>.

From cases like these, affecting peasants living in great poverty, as well as from the Hangzhou case affecting peasants living in comparative affluence, it can be seen that the two growth-oriented arguments for and against property protection for different groups in society are complementary, not mutually exclusive. Upham, then, is correct in pointing out that growth has been made possible by massive denials of property rights. But this does not entirely undermine the Demsetzian, Hayekian argument for strong property rights to enable prosperity, as it has been used by Chinese proponents of the PRL (quoted above). These arguments have not been directly refuted; rather the Chinese example shows that the economic theory of property at its basis is consistent with discrimination. It is consistent with the aim of furthering economic growth to take property away from one group and give it to another. The group at the receiving end of this transfer may then go on to engage in economic activity on the “liberal” or libertarian principles envisaged by the classics of neo-liberal economic thought. Empirical evidence, in particular the statistical evidence mentioned at the beginning of this discussion, is not reliable enough to quantify the extent to which the creation of secure and stable urban land use rights has been crucial to the creation of wealth, nor can the stability of these urban rights be asserted with perfect certainty. But it is hard to doubt that the real estate market based on these rights has made some contribution to economic growth in China and we cannot overlook the fact that the property regime consolidated over the past two decades has on the whole protected the new urban land use right holders, and sought to solve their problems. One of the celebrated successes of the 2007 Property Rights Law, for instance, was that it solved the problem of allocating rights in parking lots and similar common spaces in residential compounds.¹⁴⁶

¹⁴⁶ Wang Zhaoguo (Vice Chairman of the Standing committee of the NPC Committee), “Explanation

It is the considerations of “protecting growth” (*bao zeng*), to use the abovementioned words of the Land and Resources Ministry, that provide the state with a plausible reason for taking away the land and homes of Nongkou village, and replacing the three-to-five storey houses built upon it by the peasants with taller, even more valuable buildings built by property developers, who can afford to pay the municipal government and its officials and still through their own economic activity spur further growth.¹⁴⁷ Viewing the actions, legal and illegal, of the government against the villagers of Nongkou in their totality, it becomes clear how powerless they are against the inexorable logic of growth that is now touted even by the Ministry for the Administration of Land and National Resources,¹⁴⁸ and that also underlies, it seems, many of the illegal land takings. The Ministry does, it is true, also proclaim the national goal of preserving a minimum area of arable land (*bao hongxian*).¹⁴⁹ But as is well-documented, this “national goal” has had a hard time in recent years to contend with the need and desire for growth.¹⁵⁰ The failure of the judiciary and other authorities to help implement even the existing laws intended to provide protection to peasants¹⁵¹ has the consequence, whether intended or not, of supporting this supposed need. The present discussion has shown, therefore, that as applied to China, the argument for property rights has been elliptical: it has tended to

on the Draft Property Law delivered 8 March 2007 at 5th session of 10th NPC,” at <http://www.civillaw.com.cn/en/article.asp?id=1283>.

¹⁴⁷ The Yinwa Village example has been introduced here on purpose as an example for a taking in which there long term goals not immediately related to growth are being pursued – in this example, too, some gain is apparently made out of construction to replace Yinwa Village, for part of which the impoverished villagers are asked to pay themselves.

¹⁴⁸ Ministry website, *ibid*.

¹⁴⁹ *Ibid*.

¹⁵⁰ Al Guo, “Doubts Cloud Top Official’s Pledge on Amount of Arable Land,” *South China Morning Post*, 23 June 2009.

¹⁵¹ Eva Pils, “Land Disputes, Rights Assertion and Social Unrest: a Case from Sichuan”, 19 (2006) *Columbia Journal of Asian Law* 365.

emphasize the creation of “new” rights and keep silent about the “old” property rights destroyed on the basis of the same principle of “exhaust the utility of the thing.”

V. Understanding land rights through land wrongs

The problem with the growth argument, as discussed above, is thus not that it does not work but that its implications are morally deeply unattractive. The conception of property as wealth built on it should be rejected. A better conception of property is not purely wealth-based; a better justification for the protection of property rights does not rely on the likelihood of particular rules of property law promoting growth.

Understanding wrongs beyond compensation. Discussions around the issue of compensation for land takings can illustrate this. There is some debate about the question of how the peasants’ losses of land should be compensated: in terms of lost agricultural production for a certain number of years, or in terms of prospective market value. According to the rules of the LAL and further regulations compensation to rural communities requires no more than compensation for lost agricultural production during thirty years at maximum, and some further items of compensation such as compensation for green crops.¹⁵² Currently, therefore, compensation is for lost agricultural value. The value of lost agricultural production and fair market value may differ very widely.

¹⁵² In the Zigong case discussed in Eva Pils, “Land Disputes, Rights Assertion and Social Unrest: a Case from Sichuan”, 19 (2006) *Columbia Journal of Asian Law* 365, the compensation that was owed in accordance with decisions purportedly made “on the basis of the law,” the compensation owed to persons over 40 years old was a monthly stipend of under 7 USD per person. The amount of land allotted to one

There are arguments on both sides of this debate. On the one hand, one may point out that since peasant communities own the land, rather than merely being tenants on it, the losses caused to them by expropriation exceed those of tenants deprived of the prospective income during the time of their lease, and compensation they receive ought to reflect that fact. On the other hand, it is not immediately clear that it would be fairer toward an expropriated rural community to provide compensation to that community on the basis of the prospective market price; even less that it would be fair for the community to keep the full value of the market price, assuming that such a market price could be successfully estimated prospectively. For instance, there might be good reasons to tax the community in question, just as there might be if the community, a rich landowner, had been able to sell the land and gain a lot of money through the sale.

It is in any case not self-evident either that the price of land determined by a market process would be fair or that compensating the evicted with the market price would make evictions from their land and homes fair. Recalling the example of Mr. Ma in Yinwa Village, for instance, it is not clear how much money, if any, might have been obtained by selling the land his village is situated in – it is arid and difficult to cultivate, and it sits on top of a hill that cannot be accessed by car. Yet it is intuitively clear that forcing him and his wife off the land that supports their meager existence, giving them just 400 Yuan RMB but making their resettlement conditional upon the payment of 16,000 Yuan RMB

household was on average one Chinese acre (*mu* 亩) and the market price per acre was over USD 73,000. And the money was not paid in full; in some cases, it was not paid at all. People between 18 and 40 yrs old were promised lump sum payments of under USD 1000.

which the couple do not have, is not fair. They will end up uprooted, and perhaps even more deprived than before.¹⁵³

In the case of Ms L, on the other hand, deducting her investment of 600,000 Yuan in her house, about to be demolished, and 210,000 yuan in “fees” demanded by the government for the family’s relocation, from the sum of 1,300,000 Yuan she has been offered in compensation, she would get less than 500,000 Yuan Renminbi and 40 years of government housing in a flat in a less eligible location than Nongkou.¹⁵⁴ The urban land use rights to “her” land (meaning the land formerly owned by Nongkou village, in which she held land use rights), half a Chinese *mu* situated in a prime location, will be sold for about 30,000,000 Yuan Renminbi;¹⁵⁵ and she and her husband will not obtain any new land use right, or ownership of the flat they have been offered. According to her information, then, she is offered far less than the land’s market value, but she would not be left destitute. Yet what is the value, in monetary terms, of her nine months of petitioning the Beijing authorities against an illegal expropriation, living in constant fear of reprisals? How to count her husband’s broken ribs, and her daughter’s troubles at school, all of which have been brought about by her resistance to the taking which, as explained above, was legally flawed in several respects? How to count the value that Ms L apparently attributed to living in Nongkou as her husband’s ancestral village?¹⁵⁶

¹⁵³ See also Wu Hao (伍皓), Meng Zhaoli (孟昭丽), Gu Ling (顾玲), “Returning farmland for reforestation: Some peasants face lapse back into poverty after programme is over” 退耕还林:部分农民面临“政策到站—夜返贫”窘境, 经济参考报, 27 June 2006 at http://www.cpad.gov.cn/data/2006/0710/article_2286.htm.

¹⁵⁴ Conversation, 28 August 2009.

¹⁵⁵ *Ibid.*

¹⁵⁶ Ms L did not, she insisted in conversation, want to be offered more compensation for the land on which her newly built house stood. She declared that she just wanted the village to keep its remaining land, and she may have been motivated by various considerations, including an emotional response to the violent attack on her husband, or the thought that the land would give her and her family more economic safety than any other asset, or that she had a responsibility to her offspring to preserve it. *Author conversations (supra note 4)*.

What is wrong about the expropriations and what is lost through them cannot be (fully) captured by reference to lower-than-market-value compensation; nor indeed can it be fully measured “from outside:” for instance, we cannot tell how important it would be to Ms Lor to Ma to continue living in their respective old neighborhoods, and why. If someone sold their land and got a bad deal, this might be wrong from various angles - e.g. if the seller had been under undue pressure from economically more powerful buyers; or if their commercial inexperience had been exploited. But such a deal would not be wrong for the same reasons as are discussed here.

What is wrong about the current expropriation mechanism is at least *also* that the peasants have no say in it; that they are given no real choice and may be lied to, threatened and physically harmed if they seek to assert themselves, all in the name of asserted national interests in urban construction and economic growth. Yet this is an injustice that cannot be understood from the “Scientific Development Perspective” or the (simpler) perspective of the growth argument, because from such a perspective, the harm done to peasants is exhausted in monetizing their losses, and can therefore be compensated. From the perspective of the growth argument, property must be understood as wealth that can be measured. Because the growth argument is consequentialist and utilitarian in nature, because it looks to the welfare consequences of a particular property distribution or redistribution; it must assume that such consequences are measurable.¹⁵⁷ But by understanding peasant responses as mere demands for better compensation, and implicitly accepting the fact that peasants have no chance to fight the loss of their

¹⁵⁷ One of the attractions of utilitarianism, according to Bernard Williams, is that it “(...) provides a common currency of moral thought: the different concerns of different parties, and the different sorts of claims acting on one party, can all be cashed (in principle) in terms of happiness.” Bernard Williams, “Utilitarianism” in *Morality*, Harper & Row 1972, CUP edition, Cambridge: 1993 at p. 85.

property - in the sense of 'property as thing' not merely 'as wealth'¹⁵⁸ the peasants are exposed to another, subtler wrong. Even sympathetic commentators highly critical of the current 'dualist' system tend to resign themselves to such a viewpoint.¹⁵⁹

The growth argument and the conception of property as wealth are therefore subject to criticisms that have been leveled at consequentialist and utilitarian arguments in general. A general argument against utilitarianism is that it cannot make sense of the idea of wrongs done *to individuals*, because there could always be considerations of collective welfare overriding these wrongs. Applying this criticism to the present case, certain aspects of what is wrong about not letting the peasants make a decision about their land have nothing to do with the substantive correctness of what the decision is, but with whose decision it is. Even if it increased the welfare of all Chinese people viewed together (or indeed of all people) to take their land away from these peasants, give them very little compensation, such takings would not be justified unless one took properly into account what the person affected by the taking wanted.

Consequentialists and utilitarians have argued that our choices are morally constrained by negative responsibility. If, for instance, we are in fact able to share our wealth with starving people we may bear moral responsibility for their starvation, if we do not share.¹⁶⁰ A difficulty with the application of this argument in the Chinese example is that normally, those who are asked to share are the ones who are already poorer. Urban

¹⁵⁸ Harris, *ibid.*

¹⁵⁹ Yi Ming (佚名), "An analysis of the behaviour of the parties in a case of demolition and relocation of homes on collectively owned land – using the example of the outskirts of Hangzhou" (集体土地房屋拆迁当事人行为解读——以杭州城郊为例, 22 November 2007, at <http://www.lunwentianxia.com/product.free.3028108.4/>).

¹⁶⁰ Peter Singer, "Famine, Affluence, and Morality," 1 *Phil. & Pub. Aff.* 229, 231 (1972) ("If it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it.").

property developers and governments are not starving.¹⁶¹ Utilitarianism as a moral theory is committed to measuring the happiness or welfare of people, without any principled regard to the question of whose welfare or happiness it is. Rawls famously criticized utilitarianism for its inability to take seriously the difference between persons.¹⁶²

“Minor property rights.” In the circumstances of China’s rapidly urbanizing present, peasants are wronged by being denied the right to sell land, not because this is an immutable feature of ownership, or because there is some mystical natural right to property, but because it violates their personal dignity to be deprived of control over their lives and made instruments of the state’s “Scientific Development Perspective.” The right to sell would importantly include the right *not* to sell, and this would be important in essentially commercial contexts such as that of the transformation of Nongkou village into a modern, high-end residential and commercial part of the city of Hangzhou. In contexts such as these, the decision not to sell would allow the peasants to retain some control over their lives in a changing environment. The decision to sell, on the other hand, would allow them to participate in the real estate market. From the perspective of the characteristically impersonal growth argument, it does not matter whether it is Ms L, or anyone else, who makes a profit from the sale of the land she currently (still) occupies. But of course whose profit it is, does matter in reality.

“Sales” of land directly by peasants or by villager communities outside the framework set by state law have, in fact, occurred on a large scale in recent years. These

¹⁶¹ Depriving the peasants of their rights to land on the ground that they do not make good enough use of it, would therefore be a little like depriving the “miserable tramp,” in a famous example used in philosophical arguments, of his life, on the grounds that all he produced with it was misery, detracting from the overall calculus of happiness advocated by utilitarianism’s famous founder Jeremy Bentham.

¹⁶² Rawls, *A Theory of Justice* (1970) chapter 1.

practices are comprehensively known as “minor property rights” or “minor property right housing.”¹⁶³ Individual peasant households or whole peasant communities circumvent the law by selling land directly to urban developers or urban residents seeking houses on the city outskirts. This is viewed as illegal by the government, and as a consequence, the price of such plots of land and/or houses built on it is much lower than the price of property acquired in accordance with the rural expropriation process. Obviously, a grey or black market in land cannot be run underground. According to some accounts, the practice of “minor property rights” transactions began on the basis of local experiments allowing the circulation of rural land use rights for urban construction in Guangdong provinces and other places on the basis of local regulations, and then expanded uncontrollably beyond the scope of these experiments.¹⁶⁴ According to a July 2007 report by Xinhua News Agency, 18 percent of the 400 residential developments then on sale in the Beijing market were “minor property right” projects.¹⁶⁵ Whatever its exact size was, the market in minor property rights had developed, according to official media reports, over a period of about ten years.¹⁶⁶ People who bought “minor property right” properties certainly appear to hope that, their acquisition of flats and land these flats were built on in contravention of Land Administration Law will eventually be recognized by the law. Or

¹⁶³ In Chinese, 小产权 and 小产权房.

¹⁶⁴ Hu Xingdou, *supra*.

¹⁶⁵ Xinhua News Agency, “Minor Property Right – Better than none?,” 19 July 2007, at http://english.sinoec.net/story/english_17211.html. *Nanfang Zhoumo* reported in December 2007 that there were about 5 billion square metres of “minor property right” houses in China at the time. It claimed that minor property housing amounted to 40% of the total (120 billion square metres) of current residential properties in cities and towns “Not allowing the sale of minor property rights does not mean that the problem is not being solved,” *Southern Weekend*, 20 December 2007, at <http://house.hexun.com/2007-12-20/102402937.html>. Others have put the percentage at 30%. John Garnaut, “Peasants take law into their own hands,” *Sydney Morning Herald* of 29 December 2007, available at <http://www.smh.com.au/news/world/peasants-take-law-into-their-own-hands/2007/12/28/1198778702606.html> (last visited 30 August 2008).

¹⁶⁶ “Why have minor property rights suddenly become risky after ten years,” *China Youth Daily*, 9 July 2007, at http://news.xinhuanet.com/house/2007-07/09/content_6346980.htm.

perhaps, they merely hoped that they would not be thrown out. Crackdowns, so far as they have occurred, have been half-hearted and inefficient,¹⁶⁷ and an October 2008 Party Central document¹⁶⁸ announced that reforms might introduce mechanisms for nationwide circulation of land use rights derived from collective rural owners, without answering the difficult question how such a mechanism would be feasible.¹⁶⁹

Some Chinese scholars have argued that “sales” of minor property rights ought to be recognized by the state.¹⁷⁰ Amongst these scholars is Hu Xingdou, who has argued that minor property rights transactions are legal, because they do not violate the Constitution – without apparently regarding as relevant the argument that mechanisms for the recognition of property rights must be explicitly ‘created’ before they can produce an effect *erga omnes*.¹⁷¹ Other scholars have explicitly referred to the fact that the Property Rights Law characterizes alienability as a feature of ownership as the “most complete” property right and argued that *because* peasant collectives own land, they also ought to have a right to alienate.¹⁷²

¹⁶⁷ “Not allowing the sale of minor property rights does not mean that the problem is not being solved” (小产权房不得买意味着不解决问题), *Nanfang Zhoumo* (南方周末), 20 December 2007, at <http://house.sina.com.cn/dcpl/2007-12-20/1417230527.html>; notice entitled “State Council office notice on strictly implementing the laws and policies concerning collectively owned rural land for construction” (国务院办公厅关于严格执行有关农村集体建设用地法律和政策的通知) at http://www.gov.cn/zwzk/2008-01/08/content_852399.htm.

¹⁶⁸ Decision of the CCP on several major issues concerning the promotion of rural reform (Chinese), 12 October 2008, at http://www.gov.cn/jrzq/2008-10/19/content_1125094.htm; Yu Jianrong, “Farmers have the rights to keep land for themselves,” *Danwei* blog post, 287 October 2008, at http://www.danwei.org/real_estate/you_jianrong_on_land_rights.php; *Nanfang Zhoumo*, “30年：从人的解放到土地的解放,” 16 October 2008 at <http://www.infzm.com/content/18559>.

¹⁶⁹ One problem with the proposed reform is that it would have to address the requirement for owner’s consent in cases of transfers of land use rights derived from rural collective owners.

¹⁷⁰ See e.g. Hu Xingdou (胡星斗), 胡星斗:小产权房并不违宪 让三方受益, 10 August 2007 at http://finance.ce.cn/cjmedia/scb/200708/10/t20070810_12455380.shtml; Li Yingli (李应利), 小产权房为什么应该合法化, July 2009 at http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=48338; author conversation with Yu Jianrong, July 2009.

¹⁷¹ See above on the principle of “legal definition” of property rights (*Typenzwang* in German).

¹⁷² Li Yingli, *supra*.

It is important to be clear about the somewhat duplicitous nature of official arguments pretending a commitment to collective ownership and the preservation of collectively owned land, while at the same time taking property away in large scale expropriations from peasant communities. It is important realize the basic unfairness of barring hundreds of millions of citizens from participation in the national real estate market, just because they are “peasants” locked in a collective ownership system that allows them to live on the land, but not to exchange that land for money and a different life somewhere else. Nor is the law on the books effectively enforced, to judge from the apparent prevalence of “minor property rights” transactions. The more one looks for authoritative meanings of “property” and “ownership” in Chinese law and legal decisions, therefore, the less one can find anything there. On a non-authoritarian understanding of property law, then, incoherence and wide disregard – including official disregard – for the written, promulgated rules of the law, as well as the tension between these rules and constitutional principles and commitments (such as equality before the law) cannot be irrelevant to these rules’ effectiveness. They also matter to the supposed requirement that property rights must be defined by the laws of the state. The less sense the laws in existence make, the less important they seem to property law relations ‘created’ and recognized in social life.

But even so it would be naïve to assume that the problem of “minor property rights housing” could be solved simply by deciding to recognize property rights “acquired” though the minor property right mechanism, or simply by allowing the creation national market for circulation of rural land use rights. It would be hard, in a rapidly urbanizing China, to limit the legal recognition of minor property rights only to

rights acquired in the past. But if the circulation of rural land use rights on a national market were allowed prospectively for future transactions, on the other hand, collective rural ownership would only remain meaningful if collectives could retain some power of decision about the transfer of such rights. Yet if that were the case, the state might remain just as much in control of land transfers of rural land, as under the current law, and nothing much would change in reality. If the collective owners of land retained no influence over the decision to alienate (sell) rural land use rights, however, little point would remain in retaining the derivative nature of the rural land use right as a use right allotted to its members by rural collectives. And even if the collective nature of rural land tenure were ultimately abandoned, as some speculate, it is impossible to tell if the state would be willing to abandon its wide-reaching powers to expropriate rural landowners in the interests of urban development.

Assertions of “full” ownership in peasant land rights declarations. As the social tensions surrounding land are constantly rising, and as no judicial or legislative avenue to redress past wrongs and prevent future ones has been found, some peasant communities have taken the step of publicly declaring ownership rights in land that openly challenge the definitions of the authorities.

In one of the most well-known cases, the peasants of Jiamusi in Heilongjiang asserted land rights in a petition drive led by peasant rights leader Yang Chunlin in December 2007. Their letter had declared that the ownership of their land “belongs to the peasants belonging to the 72 administrative villages concerned and shall be distributed equally to the peasants” on a village by village, household by household basis.

Ownership, according to the declaration, comprises “the right to revenue from the land, the right to inherit land, the right to alienate land, and the right to negotiate and ask for a price in case the government and property developers want to develop the land.” Certain plots currently occupied by property developers and the government are “taken back,” according to the declaration, which says that a corrupt village official colluding with government officials in the expropriation process has been recalled from office. The Communist Revolution, the letter says, “promised that every farmer should have their plot of farmland, every resident should have a home.” But this promise has been broken, according to the authors: the land tenure system has become a pretext for local government officials to act as *de facto* landowners, merely in the name of the state, whereas the peasants, supposedly the landowners, have become serfs on the land (*nongnu*),¹⁷³ farming it as mere tenants of the landlords.

The letter concludes with a reference to the introduction of the *chengbao* land use rights some twenty-five years ago, the reform which had brought a period of wealth increase and relative prosperity in the countryside. “We trust that just as peasants then struggled for the right to manage the land and brought about a great change at the beginning of the Reform and Opening era, so we will now achieve an even greater change by struggling for the peasants’ ownership rights in the land. We peasants have suffered enough deprivation and betrayal. We have had enough of a life of crying to heaven and hearth but not being heard. (...) Land is the life-line of the peasantry, it is the peasants greatest human right. Only when we have obtained true ownership of the land

¹⁷³ In Chinese, 农奴.

can we live in peace and security, can the Chinese countryside live in peace and security, can the entire country live in peace and security.”¹⁷⁴

In a similar letter by the villagers of Shengzhuang in Jiangsu Province (mentioned above), the authors, signing “in the name of” 250 peasant households, also cite some of the revolutionary promises, but rely mainly on a different argument. They write, “Shengzhuang, our village, lies on the border of three provinces, Jiangsu, Anhui and Zhejiang. It is a national level travel resort famous for its ‘bamboo ocean’ and the village reaches back 1500 years in history. Generation after generation of villagers lived together harmoniously; they lived in harmony with the land they had been given by Heaven, and they lived in harmony with the officials of the various ages. Throughout all the dynasties and generations, the peasants had their own land to farm, it was clear to whom the bamboo and the hills belonged, and the peasants respected each others’ land rights. Land transactions were carried out in accordance with local custom, which the law of the government protected.

“Since the revolution, the new terms of ‘villagers’ collective ownership’ and ‘*chengbao* land management’ have been introduced. But we peasants always thought: no matter what we call it, the land is ours, the peasants’; it has served us for many generations as land to build houses on, to farm, and to develop. Like the old governments, the new government should take responsibility for protecting the land ownership rights of

¹⁷⁴ “40,000 peasants from 72 villages in Fujin City, Heilongjiang, declare their ownership of land to the entire nation” (黑龙江 72 村 4 万农民宣布拥有土地所有权向全国的公告 南岗村, 富锦市), 9 December 2007, at <http://www.peacehall.com/news/gb/china/2007/12/200712091236.shtml>.

the peasants. It should protect the rights of the masses and help it develop. Only then can it be called a government (...)"¹⁷⁵

As documents testifying to property rights conceptions openly divergent from the state-centered one, these are important documents; and as such they are significant even though, as Yu Jianrong observed, the peasants had been “helped” by a professional lawyer.¹⁷⁶ But land rights declarations of this kind were predictably ineffective. The Shengzhuang protest was quickly suppressed.¹⁷⁷ Yang Chunlin, the initiator of the Heilongjiang letter, was detained, tortured in police detention and later convicted of inciting subversion.¹⁷⁸ After his conviction, more Heilongjiang peasant leaders were sentenced to labor camp sentences. Reportedly, the peasant protests of Jiamusi have since then died down, and Yang Chunlin is serving a five-year prison sentence. The peasants had sought to take their challenge against the written law one step further than the many rural communities who have chosen merely to ignore, but not publicly to reject the its authority. Their experience indicates that this kind of public challenge is not a viable way of bringing about change in the present political conditions.¹⁷⁹

¹⁷⁵ “250 peasant households of Shengzhuang village, Yixing city, in Jiangsu province maintain their ownership right in residential land and demand realization of the policy ‘each resident should have a home’ (江苏省宜兴市省庄村 250 户农民坚持宅基地所有权 要求实现“居者有其屋”), 16 December 2007, at <http://www.fireofliberty.org/article/6694.asp>.

¹⁷⁶ He is supposed to have been supported by a trained lawyer pursuing his own political agenda in Yu Jianrong (2009), *ibid*.

¹⁷⁷ Yu Jianrong, *ibid*.

¹⁷⁸ See the report detailing the torture at <http://www.amnestyusa.org/actioncenter/actions/uaa24007.pdf>. The torture and humiliation consisted in tying him to a bed by his arms and legs for days on end, and also in forcing him to remove the defecation made by other prisoners in that position. At the end of the trial he was led out – again shackled, handcuffed and hooded - by the court’s police officers. Just as he was turning round, perhaps to try and greet some family members walking out after him, the officers used an electric baton to knock him to the ground. Then they quickly put him in a car that carried him off.

¹⁷⁹ For a discussion of this case and two similar cases, see Eva Pils, “Peasants’ Struggle for Land in China.” draft (May 2008) available at http://americanbarfoundation.org/research/World_Justice_Project0/Papers_Group_on_Access_to_Justice.html.

VI. Conclusion

An impoverished conception of property solely by utilitarian reference to the “value” of property in market terms can lead to facile acceptance of the argument that ongoing takings of land from peasant communities are justified because they further some wider national interest in growth. It encourages a dismissive interpretation of collective rural ownership as “not really” amounting to ownership, because weakening rural citizens’ ownership by not allowing them to alienate land rights indirectly strengthens the state’s ability to expropriate and thereby control the urbanization process. From the perspective of these arguments, many peasant responses to takings are misunderstood as demands for more compensation. Such requests can be dismissed by arguments focused on the economic value of property; they are blind to the violations of dignity suffered in expropriation contexts. From the perspective of the growth argument and from the “Scientific Development Perspective,” peasant responses to property wrongs, such as the sale of land in defiance of the official viewpoint or audacious calls for better protected rights of ownership, can and should be dismissed.

The Chinese legal system has not so far been able to accommodate such claims as contributions to an ongoing debate about the meaning of (land) ownership and property rights. In contrast to some jurisdictions where debates over property are constitutional debates,¹⁸⁰ such claims have instead in some cases been treated as politically subversive. If this debate could be taken into the courtrooms and into free and open discussion, it might be possible to avoid further wrongs from accumulating amongst citizens deprived

¹⁸⁰ Gregory Alexander, *The Global Debate over Constitutional Property*, Chicago and London: 2006.

of land and homes, wrongs that keep adding to the great tensions within contemporary Chinese society. But as the experience of Ms Land others illustrate, such a development is currently unlikely. Ms Land others may invoke Pitt's dictum, "the storm may enter, the rain may enter, but the King cannot enter" in protests against expropriation, but such claims have no chance of being heard. The 2007 Property Rights Law does not in its current form support them, and arguments based in constitutional principle have no force against the overwhelming rhetoric of "preserving growth". When she managed, after months, finally to present herself before an official of the Letters and Visits Office of the Land and National Resources Ministry, the official barely looked at her petition materials before saying that 'we can definitely not do anything for you,' according to Liang's account. Shooing her out of the office, she called Ms La *diao fu*¹⁸¹ - a disrespectful term for a (female) 'bad and unreasonable' person.¹⁸²

The conclusions to be drawn here, if correct, have implications beyond the Chinese legal system, however. The promotion of secure property rights by World Bank employees and research institutes continues to rely on the argument that a system of secure and well protected private property rights promotes growth. The comment by De Soto, cited earlier in this article, made this point very clearly by claiming that property rights were important because they "give their owners sufficient incentive to *add value to their resources by investing, innovating, or pooling them productively for the prosperity and progress of the entire community.*"¹⁸³ On the basis of the present discussion this argument is not empirically wrong; but it is morally unattractive, because of the

¹⁸¹ In Chinese, 刁妇。

¹⁸² Author conversation, July 2009. The stated inability of the Ministry to handle Liang's case may have been related to the fact of the vice-mayor Xu's party detention.

¹⁸³ De Soto, *ibid.*, p. 178. et seq.

consistency of a growth-based justification of property rights with discrimination against certain groups of property rights holders. In the Chinese example, the same discrimination that gives rise to “minor” property rights practices similar to the *informales* described by De Soto for Peru, is also the discrimination enabling the coercive, relatively rapid and large-scale taking of land from Chinese peasants. There is no evidence to doubt that property rights discrimination is economically “efficient” in producing growth overall, and some evidence to think that in fact it is efficient. Of course, this does not mean that economic efficiency has become undesirable. But considerations of economic efficiency yield no argument against the discriminatory practices considered in this article and such considerations therefore have to be given independent weight, unless we want to accept it.

This conclusion is not reached by the World Bank, however, which in a recent joint publication with the Chinese State Council said that the urban growth relying on takings from Chinese peasants was “inefficient” because land prices were kept “artificially low”.¹⁸⁴ This assumes without any argument that market prices would be more “natural,” invoking a liberal rhetoric to the effect that market mechanisms *always* lead to maximum efficiency. But even if, as the authors of this text say to support their claim, much of the land requisitioned (or expropriated) by government remains “idle” (neither built on nor farmed), one cannot follow from this fact that the takings processes are economically inefficient overall, measured by a GDP growth metric. It would be better to concede that

¹⁸⁴ Li Guo, Jonathan Lindsay, and Paul Munro-Faure, “China: Integrated Land Policy Reform in a Context of Rapid Urbanization,” February 2008, available at the World Bank website <http://siteresources.worldbank.org/EXTARD/Resources/Note36.pdf>. This article also asserts that there is “perceived unfairness” to Chinese peasants “disadvantaged” in the land takings processes.

aspects of a property regime may be unfair and unacceptable, even though they are economically efficient.

Similarly, exploitative and discriminatory urban development practices may occur in other legal systems, where private property rights are recognized with formal equality (unlike in China), but where certain groups of property rights holders are repressed and discriminated against for other reasons. Considerations concerning the economic efficiency of property rights are unable to constrain their exercise to prevent such injustices. Different normative considerations, such as political obligations on the part of the state to protect housing rights and to protect human dignity, therefore constrain any acceptable interpretation of property rights, as Alexander has shown with comparative reference to South Africa and other countries:¹⁸⁵ property rights are inherently constrained by a “social obligation norm”; they are not absolute but relative to other rights and obligations.

In sum, the simplistic understanding of property as wealth favors justifications of property rights too much focused on value maximization and economic growth. The fact that these growth and wealth oriented conceptions of property are insensitive to the distribution of property across a society means also that they are insensitive to the wrongs that can be caused to a person by changing that distribution, or in other ways. These problems do not affect every neo-liberal conception of property rights,¹⁸⁶ but they do

¹⁸⁵ For a discussion of the South African cases *Government of the Republic of South Africa v. Grootboom* (2001) and *Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd.* (2005) see Gregory Alexander, *ibid.*, chapter 4.

¹⁸⁶ They do not affect Nozick’s conception, for instance, because Nozick argues for respect for historical entitlement. However, from the perspective of the present discussion such “respect” may be exaggerated where other normative concerns such as the dignity of those threatened with deprivation weigh in and require redistribution of wealth. Nozick, *ibid.*

show a serious flaw in the most influential one, that views the protection of property rights as a vehicle for economic growth.