

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

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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. In this process, rural land rights are obliterated, while newly created urban rights in what used to be rural land enjoy legal protection. The state justifies this practice by the need for urbanization and economic growth. Land takings from rural collectives have in fact been a precondition for the growth of the real estate market, and resulted in an impressive contribution of the construction and property sector to state revenue and GDP growth. Yet they have also led to unjustifiable suffering on the part of members of rural collectives, who have been evicted from*

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their land and homes, and whose rights have in many cases been violated. The example of Chinese rural takings practices shows that certain economic theories of property rights that originated in the west and came to be embraced in China are consistent with invidious discrimination. In particular, this example compels us to reject 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 and growth.

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; she had nevertheless come to Beijing to petition. The case that brought her here affected 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, who have cowed many of their neighbors into submissive acceptance of the terms the municipal government “offered” the villagers. She had been informed that her teenage daughter need not think of trying to enroll for high school in the City of Hangzhou as she would be sure not to get a place anyway. Ms L and her immediate family had become outlaws in their hometown. It was no longer safe for her 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. One of these read, in a surprising

² The term “peasants” is used advisedly throughout this paper. Unlike the corresponding Chinese expression *nongmin* 农民, rather than denoting an agricultural occupation, as in “farmer,” the term indicates class. See HU MEILING (胡美灵, editor), 当代中国农民权利的嬗变 3 (2008) (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] 173-243 (Ming Pao Press 2007).

³ As in the case of Ms. Liang, takings often include the destruction of homes owned by peasants. The estimate was provided by the 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) 底层政治—对话与演讲 [SUBALTERN POLITICS – DIALOGUES AND LECTURES] 122 (2009). Yu estimates that of these 50-60 million, about half do not find new jobs and lack social security, therefore becoming destitute. *Id.*

⁴ Interview with Ms. L (梁丽婉), in Beijing and Hangzhou, China (Dec. 2008, Apr., June-Aug. 2009).

reference to an eighteenth century English Member of Parliament, “the storm and the rain may enter this house but the Emperor cannot enter.”⁵ She had also written the titles of China’s Property Rights Law, Land Administration Law, and Constitution on her house’s 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 have been caused by takings of rural or suburban land from peasants, which affect 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 If income generated through land has been considerable, so has been the experience of loss and wrong by peasants and others.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 the English Parliament (1763):

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail, its roof may shake; the wind may blow through it; the storm may enter, the rain may enter -- but the King of England cannot enter; all his force dares not cross the threshold of the ruined tenement!

⁶ See Yu Jianrong, *Social Conflict in Rural China*, Vol. 3 No. 2 CHINA SECURITY (2007); *Emerging Trends in China’s Riots*, Vol. 4 No. 3 CHINA SECURITY (2008), (suggesting that this was so until about 2006; however, that the trend may now have changed to unrest in which the participants have less clear stakes). See also Zhao Ling and Su Yongtong (赵凌, 苏永通), *国内首份信访报告获高层重视* [First National Xinfang Report Taken Very Seriously], 南方周末 [SOUTHERN WEEKEND], Nov. 6, 2004, available at http://www.nanfangdaily.com.cn/southnews/zmzg/20041104_1014.asp.

⁷ Gaoming Jiang, *Toward Sustainable Urbanization in China*, CHINA DIALOGUE, Sept. 6, 2006, <http://www.chinadialogue.net/article/show/single/en/348>. See also, Erie, Mathew, *China’s (Post) Socialist Property Rights Regime: Assessing the Impact of the Property Law on Illegal Land Takings*, 37 H.K. L.J. 919, 919-949, (2007) (distinguishes different kinds of construction project, including industrial parks, residential (urban) construction and infrastructure projects such as dams).

⁸ See, e.g., 去年全国“卖地”收入近 1.6 万亿元 [Last Year’s National Income from Selling Land Amounted to Nearly 1.6 Trillion Yuan RMB], CHINA DAILY, Feb. 3, 2010, http://www.chinadaily.com.cn/hqcj/2010-02/03/content_9420885.htm. See also, ZHOU TIANYONG (周天勇), *突破发展的体制性障碍* [BREAKING THROUGH THE OBSTACLES TO DEVELOPMENT], 2-6 (2005). In 2005, Zhou Tianyong, an academic at the Chinese Communist Party Central Party School, estimated that the total value of land taken from peasant collectives each year to be at three trillion Yuan Renminbi (ca. 400 billion USD). *Id.*

⁹ Peasants get between 5% and 10% of the value added through the transfer of land from agricultural to urban construction purposes. *Id.* Between the early 1980s and

This paper argues that legal and political constraints that limit the recognition of peasant land claims in China are, paradoxically, 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 a long tradition of politically conservative 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*. . . . [I]f 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.¹¹

The discussion here describes the spin that growth and value-increase oriented arguments were given in the context of urbanizing 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 has gone: “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 it can enter an urban property market run by public officials and property developers, because doing so will maximize the value of the land.” It is argued here that this line of thinking is flawed and harmful. It is wrong not because the predicted value maximization has failed or that maximization was unrelated to the protection of property rights, it is wrong because the underlying conception of property has morally unacceptable ramifications.

In 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

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

¹⁰ HERNANDO DE SOTO, *THE OTHER PATH. THE ECONOMIC ANSWER TO TERRORISM* 177, 244 (1989).

¹¹ *Id.* at 178 (emphasis added).

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 (*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. 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 has remained to some extent an authoritarian country in its thirty-year long reform period, which began with the close of the Mao Zedong era. Both authoritarianism and growth have influenced conceptions of property rights in China. This is especially true amongst the academic and bureaucratic establishment.

A. *The Authoritarian Constraint*

There is a strong sense in China that property claims must be derived from authoritative rules created by the power that enforces those claims. This is an authoritarian view that is also legally positivistic in spirit, in the sense that it assumes that the validity of law is separate from its moral justification. But while 20th century legal positivism regards legal authority as bound by other rules of the system, this is not quite the case in China.¹³ The authorities are largely free to make whatever rules they wish, and as shall be explained below, it is virtually impossible to contest these rules in court. This results in an authoritarian conception of law, which claims that the law ought to be followed just because it is the law.

Leaning on scholarship in the German tradition,¹⁴ Chinese

¹² In Chinese, 征收 *zhengshou*.

¹³ It would not be fair to modern legal positivism to claim it was identical with prevalent attitudes to law in China, because the model of a municipal legal system contemplated by such scholars as 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 H.L.A. Hart, *THE CONCEPT OF LAW*, (1961) (in Chapter 6 in which Hart contemplates the status of imperfect legal systems).

¹⁴ CP. MANFRED WOLF, *SACHENRECHT*, 13 (20th ed. 2004).

textbooks not only characterize property rights as “defined by law,”¹⁵ but also as possessing an “inherently defined” nature that is determined by China’s national, economic, social and cultural characteristics.¹⁶ In China, one aspect of the national condition is thought to be that China is in an initial stage of socialism, which requires the system of ownership China already has.¹⁷ Typically, therefore, the current property system is portrayed as ordained by authority and best for the nation.

Insisting on the “inherent” and “immutable”¹⁸ character of a state-defined set of property rules potentially facilitates acceptance of unreasonable rules. It may also lead to denying the relevance of historical changes. 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,¹⁹ four eras remain particularly 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 by locality. The government largely limited itself to resolving disputes concerning property²⁰ by issuing edicts to preserve its tax prerogatives and to make sure that land was registered in some way allowing for it to be taxed.²¹ 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. In rural areas, the new codes were widely ignored.²² As they had done for generations,

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., 蔡永民, 脱剑锋, 李志忠 [CAI YONGMIN, TUO JIANFENG & LI ZHIHONG], 物权法新论 [NEW PROPERTY RIGHTS THEORY] 28 (2008).

¹⁶ *Id.* at 26 (critically noting that China has in fact received many rules of property law from western countries).

¹⁷ See, CENTRAL PROPAGANDA DEPARTMENT WORKING GROUP ON THEORY, 六个“为什么” [THE SIX ‘WHYS’] 96 (2009) (addressing why the path of Reform and Opening must be continued without wavering, and why it cannot go back).

¹⁸ The Chinese word used here is *guyouxing* (固有性).

¹⁹ For an analysis of this history, see Geoffrey Korff, *The Village and the City: Law, Property and Economic Development in China*, 35 SYRACUSE J. INT’L L. & COM. 399, 402-407 (2008).

²⁰ See, Madeline Zelin, *A Critique of Rights of Property in Prewar China*, in CONTRACT AND PROPERTY IN EARLY MODERN CHINA, 17-36 (Zelin, Ocko and Gardella, 2004) (arguing that by deciding cases, the government also influenced the law).

²¹ Discussed in FRANKE, RIGHTS IN REAL ESTATE IN CHINA (Leipzig, 1903).

²² Schurmann, *Traditional Property Concepts in China*, 15 no.4 THE FAR EASTERN QUARTERLY 508 (1956). For a discussion of different regimes under the Chinese

families kept their land deeds, which recorded traditional rights in plots of land, and continued making transactions accordingly.²³

With the rise of socialist orthodoxy in the socialist PRC era, private ownership was repudiated as the root cause of various social ills, including crime.²⁴ The socialist revolution and the first three decades of Communist Party rule brought a gradual diminution of “capitalist” private property. This was done either through formal expropriation decisions or through various restrictions imposed on property owners. In the countryside, this culminated in the establishment of the People’s Communes.²⁵ These communes were economic and political entities in which the production and consumption of goods were almost entirely brought under centralized control. Power distribution within villages changed and families stopped keeping the proof of landownership that had been preserved for generations as the deeds had become useless and even “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. Even so, there is still orally transmitted knowledge of the more detailed history; in many cases, visitors will be told for how many generations a particular plot of land or house has been in a particular family.

Since Deng Xiaoping led the Reform and Opening policy, China has experienced yet another transformation. It has changed from a socialist property regime to the current hybrid property regime. According to reports now assiduously spread by the official media, in 1978, 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. According to what is now party folklore, the people of the village would have risked incrimination as counterrevolutionaries.²⁶ Later, in 1986, a statutory law enacted the principles of socialist public

Nationalist and Communist Parties see LOU JIANBO & PATRICK RANDOLPH, CHINESE REAL ESTATE LAW 1-28 (1999). 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).

²³ Michael Palmer, *The Surface-Subsoil Form of Divided Ownership in Late Imperial China: Some Examples from the New Territories of Hong Kong*, in MODERN ASIAN STUDIES 21 (1987) (provides a discussion of the deed system).

²⁴ JEROME A. COHEN, THE CRIMINAL PROCESS IN THE PEOPLE’S REPUBLIC OF CHINA, 1949-63: AN INTRODUCTION (Harvard 1968).

²⁵ 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.

²⁶ For a description, see 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>.

ownership by collectives in the countryside, and by the state in urban areas. This was combined with rules allowing the creation of land use, known as “usufruct” rights, derived from the respective landowners.²⁷ The Constitution did not articulate these principles on the basis of such new rights until they were created in 1988. Over time, more and more of this new regime’s land use rights—rural and urban—were created through grants and allocations.

The 2007 enactment of a new Property Rights Law consolidated this development. It further cemented China’s peculiar and problematic combination of socialist and liberal conceptions of property, and its related, much-criticized dualist setup distinguishing between “urban” and “rural” land rights,²⁸ reiterating the basic principle that urban land shall be state-owned and rural and suburban land shall be collectively owned.²⁹ The 2007 enactment also superimposed itself on any individual or collective entitlements of persons or families acquired prior to the currently valid property regime, leaving many people’s legal entitlements unclear.

B. *The utilitarian constraint*

A second widely recognized type of constraint could be called utilitarian. This is the view that good legal rules, policies and administrative decisions are those that, judged by the long-term consequences of enacting them, will further the happiness 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, the natural consequence of which was understood to be growth in wealth. Property rights were thought to be good, because they were socially useful, allowing for the most efficient exploitation of any given resource by making that resource available through a market mechanism. Correspondingly, a central assumption of economic theories of property rights is that property right holders will seek to maximize the value of

²⁷ For a discussion on the general principles of civil and land administration law, see Huang, Xianfeng Frank, *The Path to Clarity: Development of Property Rights in China*, 17 COLUM. J. ASIAN L. 191 (2003-2004).

²⁸ For a discussion of dualism in Chinese property law, see Ben James, *How the Rural Property System Exacerbates China’s Urban Rural Gap*, 20 COLUM. J. ASIAN L. 451, 486 (2007). See also, Eva Pils, *Land Disputes, Rights Assertion and Social Unrest: a Case from Sichuan*, 19 COLUM. J. ASIAN L. 365 (2006).

²⁹ The rules are more detailed and complex, but this is their main import. See XIAN FA [CONSTITUTION] art. 6 (1982) (P.R.C.).

their property, measured in market terms. In China, one basic phrase used to express a similarly efficiency-oriented maxim is “exhaust the utility of the thing” (*wu jin qi yong*)³⁰ or in a narrower but more idiomatic translation, “waste not.” In 2007, Chinese property law scholars used this maxim, as well as classical or neo-classical liberal theory arguments, to explain and justify the Property Rights Law.³¹ They argued, 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, this growth argument relies on a conception of property as wealth.³³

On the contrary, scholars critical of this stance have shown that 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 economic theory. Frank Upham has recently argued that China’s example shows that growth is possible in a system that fails to protect property rights, drawing on examples of rural land expropriations also discussed in this context.³⁴ Indeed, when they make expropriation decisions, Chinese officials themselves often use a variant of the growth arguments to justify taking property from individuals and other entities for construction and property development projects “in the public interest.”

The view adopted here is that both the creation and protection, and the destruction of property rights has contributed to economic growth in China. It is important, in discussing options for China’s further development, to realize that particular decisions and general rules in the area of property law should not be evaluated only in terms of their overall economic consequences or social utility.³⁵ An exclusive focus on such

³⁰ 中华人民共和国物权法» 条文理解与适用 [UNDERSTANDING AND APPLYING THE PROVISIONS OF THE PROPERTY RIGHTS LAW OF THE PRC] 39 (Huang Songyou (黄松有) ed., 2007).

³¹ See, Frank Upham, *From Demsetz to Deng: Speculations on the Implications of China’s Growth For Law And Development Theory*, 41 N.Y.U. J. INT’L L. & POL. 551 (2009).

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

³³ For a discussion of this concept *see id.*

³⁴ Upham, *supra* note 31.

³⁵ By discussing property rights as the result of an enactment of particular rules,

consequences would blind one to the dimension of individual rights. Undeniably, property development has been an important factor in GDP growth, and notwithstanding that much of it has involved illegality, such development was premised on legal reforms. 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” that has never since been abandoned.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 exceeded tax revenue in some major cities.³⁹ The absolute numbers available are also impressive. In February 2010, domestic news reported from a central government land administration official that state income from the granting or allocating of urban land use rights in 2009 was nearly 1.6 trillion Yuan RMB, which is

they also commit to a positivistic understanding of law, as Upham recognizes. *Id.* at 5.

³⁶ Russell Leigh Moses, *What Beijing’s Growth Plan Means*, TAIPEI TIMES, Mar. 25, 2009.

³⁷ Denise Tsang, *IMF Official Sees Mainland as Oasis of Stability in Global Turmoil*, SOUTH CHINA MORNING POST, Nov. 4, 2008; Joy Shaw, *In China, Property Sales Show Signs of Picking Up*, WALL STREET JOURNAL Apr. 12, 2009; Stephen Chen, *Think-Tank Urges Beijing to End Frantic Urbanization*, SOUTH CHINA MORNING POST, June 16, 2009; *Developers Buy Property at Hefty Rates to Ride Boom*, CHINA DAILY, July 23, 2009.

³⁸ Cary Huang, *Going Backward Ever Faster*, SOUTH CHINA MORNING POST, Aug. 2, 2009; 周天勇：中国宏观税负高达31% [*Zhou Tianyong: China’s Tax Burden Reaches 31%*], XINHUA NEWS, July 13, 2007, <http://pl.smesd.gov.cn/asp/2007/03/20070316082352.asp>. According to a statement attributed to Zhou Tianyong, the volume of state revenue from land sales in 2007 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. 党校教授：去年财政收入少算了四万亿 [*Party School Professor: 4 Trillion Yuan Renminbi not Counted in Last Year’s State Revenue Statistics*], LIANHE ZAobao, Aug. 29, 2008, http://www.360doc.com/content/080829/12/62146_1587997.html.

³⁹ Li Guo, Jonathan Lindsay, & Paul Munro-Faure, *China: Integrated Land Policy Reform in a Context of Rapid Urbanization*, 3 (2008), World Bank, http://siteresources.worldbank.org/EXTARD/Resources/Note_36.pdf. The authors point out that “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.” *Id.*

63% higher than the previous year.⁴⁰ It should be noted, however, that official statistics are not necessarily reliable.⁴¹

Under the current leadership, state propaganda in 2007 adopted the slogan “Scientific Development Perspective” (*kexue fazhan guan*),⁴² which means a perspective on development that includes growth, but also sustainable development, social welfare, a person-centered society and a harmonious society.⁴³ The “Scientific Development Perspective” is now portrayed as the correct basis for economic and related policies.⁴⁴ It has been interpreted as an effort to modify the development goal by abandoning the exclusive focus on GDP growth.⁴⁵ 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. The current legal framework for land rights, cemented by the 2007 Property Rights Law, is largely a product of the first two decades of the reform era, in which the propagation of GDP growth as a national goal was more single-minded. 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.⁴⁶

⁴⁰ 去年全国“卖地”收入近 1.6 万亿元 [Last Year's National Income from Selling Land Amounted to Nearly 1.6 Trillion Yuan RMB], CHINA DAILY, Feb. 3, 2010, http://www.chinadaily.com.cn/hqcj/2010-02/03/content_9420885.htm. The Land and State-Owned Resources Ministry websites claims that between 1999 and 2008, total state revenue from such allocations (grants) amounted to merely five trillion Yuan RMB. Government-affiliated academics, on the other hand, have suggested much higher figures. See also ZHOU TIANYONG *supra* note 8, at 2-6.

⁴¹ This is 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. Jane Cai, *Parts Greater than the GDP Sum*, S. CHINA MORNING POST, Aug. 4, 2009.

⁴² In Chinese, 科学发展观.

⁴³ 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; *The Scientific Development Perspective* (科学发展观), <http://english.peopledaily.com.cn/90001/90776/90785/6525403.html>.

⁴⁴ 科学发展观/深入学习实践科学发展观丛书, 人民出版社 [THE SCIENTIFIC DEVELOPMENT PERSPECTIVE: DEEPLY STUDYING PRACTICE. SCIENTIFIC DEVELOPMENT PERSPECTIVE BOOK SERIES] (Zhang Huaihai (张怀海) ed., 2008). The author points out the difference between different generations of development perspectives, but leaves no doubt that China's development thus far has been dominated by the “growth” conception of development. *Id.* at 56.

⁴⁵ Joseph Fewsmith, *Promoting the Scientific Development Concept*, CHINA LEADERSHIP MONITOR NO. 11 at http://media.hoover.org/documents/clm11_jf.pdf.

⁴⁶ See, Ministry for Land and Resources, http://www.mlr.gov.cn/wszb/20090331bzbhxdzzk/jiabin/index_999.htm.

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 for 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 under a system 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.⁴⁷ 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 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, which is currently limited to

⁴⁷ See, e.g., Edward Cody, *Farmers Rise in Challenge to Chinese Land Policy*, WASHINGTON POST, Jan. 14, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/13/AR2008011302383.html> (stating all of China’s rural land is still owned by the state); Philip Pan, *Chinese Peasants Attacked in Land Dispute*, WASHINGTON POST, June 15, 2005, available 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*, GUARDIAN, Oct. 12, 2008, <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, Oct. 10, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/13/AR2008011302383.html> (the Chinese Constitution stipulates that all land resources are owned by the state).

30 years in most cases.⁴⁸ According to the arguments of Hayek or De Soto in the west⁴⁹ and of Chinese academics committed to similar views in China,⁵⁰ rural land use rights can become part of a good narrative of privatization to overcome “bad” (socialist) collectivization⁵¹. In fact, however, land use rights are held not by individual 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.⁵²

Rather 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).⁵³ In a similarly skeptical albeit more nuanced vein, law professor Jacques 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

⁴⁸ See, e.g., Prostermann, Roy & Zhu Keliang, *Securing Land Rights for Chinese Farmers: A Leap Forward for Stability and Growth*, 3 CATO DEVELOPMENT POLICY ANALYSIS SERIES (2007) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1066812.

⁴⁹ HAYEK, *THE ROAD TO SERFDOM* (1944); DESOTO, *supra*, note 10; See also, Liu Junning, *Classical Liberalism Catches On In China*, 11 J. DEMOCRACY 48, 49 (2000).

⁵⁰ In the past thirty years of “reform and opening” in China, socialist views have been rejected and many intellectuals and officials have adopted economically “liberal” ideas. See CAO SIYUAN (曹思源), 修改宪法, 保护每个人的合法权利 [REVISING THE CONSTITUTION, PROTECTING EVERYONE’S LEGAL RIGHTS] (Shidai Chaoliu Publishers 2003). See also, Chen Zhiwu, 对话陈志武: 把地权还给农民 [Returning Land to the Peasants: a Dialogue between Chen Zhiwu (陈志武) and Yu Jianrong (于建嵘)], Feb. 14, 2008, available at http://www.infzm.com/review/pltt/200802/t20080204_36453.shtml; Peter Ho, *Who Owns China’s Land? Policies, Property Rights and Deliberate Institutional Ambiguity*, CHINA QUARTERLY 394 (2001), available at <http://www.rug.nl/cds/medewerkers/peterho/isi> (on the repudiation of private property under Mao).

⁵¹ *Id.*; Margo Rossato-Stevens, *Peasant Land Tenure Security in China’s Transitional Economy*, 97 B.U. INT’L L.J. 97, 106 & 122 (2008).

⁵² See, e.g., Chen Zhiwu, *supra* note 50.

⁵³ Patrick Randolph, *The New Chinese Basic Law of Property: A Real Estate Practitioner’s Perspective* 2, available at <http://www.law.umkc.edu/faculty/randolphlinks.htm>.

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 owned⁵⁴

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.⁵⁵ On a positivistic view, property rights can be thought of as a “bundle” of composite rights (Honoré),⁵⁶ and the thicker the bundle, the greater the indication that someone holds “full ownership” or “full-blooded” ownership (Harris).⁵⁷ 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).⁵⁸ On such an account, rural collectives are indeed weak property rights holders. Their rights to exclude and sell to 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 are.

In the following, arguments weakening peasant land ownership are briefly described. While these arguments have flaws, a “weakening” conception of peasant land ownership conforms to the growth argument and thus far serves government purposes; it facilitates the taking of land that is needed to achieve GDP growth through the property sector.

A. *The “No Owner” Argument*

The tradition of legal positivism, on the one hand, treats collectives as legal fictions derived from legally valid rules⁵⁹ 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 equally important

⁵⁴ Congressional-Executive Commission on China, *Property Seizure in China: Politics, Law, and Protest*, June 21, 2004, 2, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:94854.pdf (emphasis added).

⁵⁵ See, e.g., Huang Songyou, *supra* note 30, at 39.

⁵⁶ Tony Honoré, *Ownership*, in A.G. GUEST, OXFORD ESSAYS IN JURISPRUDENCE 107-24 (Oxford University Press, 1961).

⁵⁷ JIM HARRIS, PROPERTY AND JUSTICE 29 (Oxford University Press 1996).

⁵⁸ JAMES E. PENNER, THE IDEA OF PROPERTY IN LAW (Oxford University Press 1997).

⁵⁹ The concept of the “valid rule” is central to legal positivism. The early legal positivist Bentham famously rejected legal fictions altogether. Jeremy Bentham, *Anarchical Fallacies*, in THE WORKS OF JEREMY BENTHAM 489 (John Bowring ed., 1843).

influences in the Chinese legal system make it hard to identify the Chinese rural collective as a holder of meaningful rights of ownership. As the case of Ms. L's collective illustrates, the institution of collective rural land ownership is a fragile one at best.

Ms. L owned a house on a 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.⁶⁰ But which collective? Ms L originally set out to complain on behalf of her village after having gathered signatures of former occupants in 2008 to protest the Hangzhou municipal government's taking of the village's land 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. After her husband's ribs were broken on December 13, 2008,⁶¹ many other villagers changed their mind. They complied with the authorities' request to sign forms showing that they agreed with the compensation packages they were offered, because, as Ms. L believed, they were afraid.⁶²

Documents in the case indicate that Nongkou village was the collective that owned the land in question.⁶³ The Nongkou villagers, however, would have found it hard to bring a legal challenge against the municipal Hangzhou government's administrative decision. The villagers may have wanted to do so, at least before the thugs arrived in their neighborhood and attacked Ms. L's husband.⁶⁴ However, Article 60 of the Property Rights Law states that, "ownership of properties collectively owned by peasants shall be exercised collectively by the village's

⁶⁰ This is implicit in Articles 132 and 42 of the 2007 Property Rights Law (PRL). Ms. L may retain ownership of her house beyond this point, but will cease to be an owner with its destruction, imminent at the time of writing.

⁶¹ For domestic media reports, see Chen Xin (陈欣), *四个陌生伙子拿着棍子气势汹汹* [*Ruthless Beating by Four Unknown Youths with Sticks*], *青年时报* [QINGNIAN SHIBAO], Dec. 14, 2008, at 2. For an overseas account of Ms. L see 梁丽婉: *失地农民的呼吁* [*Ms. L: A Landless Peasant's Appeal*], BOXUN, Mar. 2009, at 10 available at <http://boxun.tv/news/gb/pubvp/2009/03/200903101051.shtml>.

⁶² Interview, *supra* note 4 (April 2009).

⁶³ See *村民 (代表) 会议纪要* [*Protocol of a Meeting by the Village Representative*] (Jan. 21, 2008) (unpublished, copy on file with author) (recorded that all 60 village representatives participating in the meeting agreed to the arrangements for the taking).

⁶⁴ At one point, 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. See, Letter from Ms. L, *紧急呼吁* [*Urgent Appeal*], (Dec. 14, 2008) (on file with author).

collective economic organization or the villagers' committee."⁶⁵ The head of the villagers' committee in Nongkou was a woman named Wang Meihua who, according to Ms L's allegation, 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.⁶⁶ Through this alleged maneuver, the village had collectively "agreed" to the taking,⁶⁷ and there was nothing the collective could do to get it back.⁶⁸ For a village to take collective legal action, it would have to be represented by the village cadres, who are often in collusion with the urban government, especially in land cases.⁶⁹ Moreover, lawsuits against government decisions to evict and demolish will not stop the enforcement of a demolition decision.⁷⁰ From this, it can be seen that the "collective" is a very fragile entity and 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 who owned the land in question. The owner may possibly be the Nongkou village or some other collective comprising Nongkou or representing a part of it.⁷¹ The question of who

⁶⁵ For a more detailed description, see CAI YONGMIN, TUO JIANFENG, & LI ZHIHONG (蔡永民, 脱剑锋, 李志忠), 物权法新论 [NEW PROPERTY RIGHTS THEORY] 98 (2008).

⁶⁶ Interview, *supra* note 4.

⁶⁷ Eva Pils, *supra* notes 2 & 28.

⁶⁸ Nor is any Chinese court so far known to have ruled that the villagers' expressed will can supersede the will of their leadership.

⁶⁹ 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, *The Path to Clarity: Development of Property Rights in China*, 17 Colum. J. Asian L. 191, 192-213 (2003/2004).

⁷⁰ See, 杭州市征用集体所有土地房屋拆迁争议裁决办法 [The 2007 Hangzhou City Regulation for Handling Conflicts in the Context of the Demolition and Relocation Regarding Houses on Collectively Owned Expropriated Land], art.19-20, available at <http://www.hangzhou.gov.cn/main/fggz/bmgf/T154233.shtml>; see also, 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 [The 2007 Hangzhou City Regulation on Demolition and Relocation Work Regarding Houses on Collectively Owned Expropriated (Requisitioned) Land in Urban Areas], available at <http://www.hangzhou.gov.cn/main/wjgg/hzzb/200710/szfwj/T201311.shtml>.

⁷¹ The Land Administration Law and PRL characterize the administrative village (*xingzheng cun*) as one form of rural collective economic organization, which also exercises political functions of rural governance. Collectives may also exist within an administrative village, which may comprise of several natural villages (*ziran cun*) or comprise of several administrative villages in other cases. Peter Xianfeng Huang, *supra*

belonged to this particular village or collective has not been raised in this case, but it too, can lead to perplexing problems.⁷² 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. *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.⁷³ Yu recently reiterated his assessment that rural land conflicts on the basis of inadequately defined and protected land rights are the major source of social unrest, occurring especially on the outskirts of cities.⁷⁴ From Yu's perspective, 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 only some villages, its roots are not likely to be cured so long as collectives are part of a power hierarchy within a state that is organized on authoritarian principles and plagued by corruption.

B. *The "No Ownership" Argument*

Even assuming that particular collectives could be clearly identified as holders of land rights, the bundle of rights they hold may be nominal, because they cannot sell land or exclude others from the use of their land in confrontation with the government. They are also powerless against government takings and selling rights in "their" land.

Article 39 of China's recent Property Rights Law (PRL) states 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).⁷⁵ Article 39 of PRL applies in a general way to all three kinds of owners of property recognized by China's hybrid property

note 69.

⁷² Registered residence does not necessarily correspond to actual residence. Due to the peculiarity of the Chinese household, 100-200 million peasant migrant workers have left the countryside to work in the cities.

⁷³ Zhiwu, *supra* note 50.

⁷⁴ Yu Jianrong, 守住社会稳定的底线—于建嵘在北京律师协会的演讲 [Maintaining a Baseline of Social Stability—Yu Jianrong's lecture at the Beijing Lawyers' Association], (Dec. 26 2009), *available at* <http://www.xici.net/main.asp?url=/u13796269/d111249657.htm>. For an English translation of this lecture *see* China Digital Times, <http://chinadigitaltimes.net/2010/03/you-jianrong-maintaining-a-baseline-of-social-stability-part-i/>.

⁷⁵ *See* 民法通则 [General Principles of Civil Law] art. 71 (1986).

regime, which according to Article 4 enjoy “equal protection.” Article 39 thus seems to apply to collective rural landowners as much as it does to private individuals and the state.

Although the PRL fails to mention it, however, another law states that Chinese rural collectives are not allowed to alienate land as owners. The 1986 PRC Land Administration Law (LAL, last revised in 2004) states in Article 2 that “no unit or individual is allowed to occupy or trade land, or illegally to transfer land by other means.”⁷⁶ Urban land use rights may be sold, bought and transferred freely. According to Article 62 of the LAL, however, rural land use rights cannot be legally transferred “for non-agricultural purposes;” this rule applies to both residential (*zhaijidi*) and land management (*chengbao*) use rights.⁷⁷ From the perspective of enacted and written legislation, Articles 2 and 62 of the 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 Articles 2, 34 and 35 of the PRL stipulate the right of property holders to exclude third persons⁷⁸ in ways functionally equivalent to the trespass rules of common law property systems,⁷⁹ these rules acquire little meaning in the relationships between individual peasant household and the collective,⁸⁰ and between peasant collectives and the

⁷⁸ This provision, which applies to all land (i.e. land in state ownership), is consistent with the idea of socialism enshrined in the PRC Constitution. Whether it makes sense and whether it is constitutional in the context of a legal and economic system that has embraced fierce real estate capitalism is considered further below.

⁷⁷ 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, *supra* note 72. 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. *Id.*

⁷⁸ The PRL recognizes this right in Art. 2 (“Property rights referred to in this Law shall mean the rights to direct control and exclusivity (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 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”).

⁸¹ HARRIS, *supra* note 57, at 24.

⁸⁰ 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. *Id.* 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

government. Given the practical significance of government takings of rural land illustrated by the numbers quoted at the beginning of this article, government takings 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.⁸¹ 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 the substance of 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,⁸² and they resorted to building houses on the remaining land in which, with permission by the local officials,⁸³ they rented out flats to urban residents. After the second decision to take the remainder of their land 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.⁸⁴

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” classical and positivistic understanding;⁸⁵ it is at best a deficient sort of “ownership,”⁸⁶ “at the mercy of the government.”⁸⁷ In the language of Calabresi and Melamed, one could say that the rules on collectively owned land viewed in their entirety, are not “property rules.” They were not rules “giving an individual the right to keep an entitlement unless and until he chooses to part with it voluntarily” but merely “liability rules,” that is to say, rules denying an individual the right to keep the thing in question (here: land) but entitling him to compensation when it is taken away.⁸⁸

the owner.” *Id.* Compare with Harris’ didactic example of “Red Land” in which he “questions whether the terms of any license have been infringed . . . are settled according to the spirit of the license, having regard to the general goals of fraternal living.” *Id.* at 18.

⁸¹ It is therefore substantively dissimilar with the expropriation mechanisms discussed by Honore under the heading “expropriability.”

⁸² Interview, *supra* note 4.

⁸³ *Id.*

⁸⁶ Interview, August 20, 2009.

⁸⁵ HARRIS, *supra* note 57.

⁸⁶ *Id.*

⁸⁷ Gregory Stein, *Acquiring Land Use Rights in Today's China: A Snapshot from on the Ground*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=942813.

⁸⁸ See, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules*

C. *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 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 taking—never mind that this “agreement” was apparently fraudulently obtained. Without a doubt, Ms. L legally owns the house⁸⁹ now threatened with demolition,⁹⁰ from which the authorities have already removed the furniture and other belongings. Ms. L believes that if the government had not resorted to brutal violence, the other villagers of Nongkou would stand behind her in legitimate resistance to the taking of their land. She would not be 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)⁹¹ at all. Our grasp of its existence does not depend on our ability to associate it with particular people or particular plots of land.⁹² The collective as a landowner appears fragile, weak, and vague. The state views collectives as entities defined by the measurements of membership, location and land.⁹³ From the state’s

and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972). The authors introduce the distinction purely with a view to discussing the merits and demerits of either set or rules from an economic efficiency perspective. *Id.* The distinction has been used to infer that “genuine” property rules provide, in Richard Epstein’s language, “property rights . . . made absolute.” Richard Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, in *ECONOMICS OF PROPERTY LAW* 363 (2007).

⁸⁹ According to the Chinese Property Rights Law, property rights in land and building erected thereupon are conceptually separate.

⁹⁰ Online interview with Ms. L. (Mar. 7, 2010).

⁹¹ Huang, *supra* note 71.

⁹² 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. AI XIAOMING & HU JIE, *TAISHI VILLAGE* (太石村) (2005). For a Sichuan case, see Pils, *supra* note 28 at 292-365. There are more 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 defense lawyer, Liu Yao (July 2009 report and copy of complaint on file with author).

⁹³ See, JAMES SCOTT, *SEEING LIKE A STATE*, 33 (1998). The author describes the perspective with explicit reference to “seeing” land. *Id.*

authoritarian viewpoint, “in China, all land is owned by the state,” because the state does, in fact, have nearly unlimited power to take land as long as its arbitrary exercise of power cannot be challenged in court. The narrower question of what rules have been created dissolves into the broader 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 define their boundaries; they have legal significance also by virtue of their social reality. The authoritarian view 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 the province of Jiangsu, 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?”⁹⁴

Similarly, the “argument against land ownership” by rural collectives is the result of a state-centered perspective. Seeing like a state, government authorities are unwilling to acknowledge the discriminatory nature of legal rules that deny peasants a right to exclude and rights to sell found in Articles 2 and 39 of the PRL. These rules make peasants second-class property right holders. At the same time state propaganda continues to praise socialist public ownership as one of the fundamentals of the Chinese legal system.⁹⁵ The original purpose of collective socialist public land ownership was to protect peasants and to ensure collective decisions over land use. Changed laws and altered circumstances have now brought

⁹⁴ 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’ [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”], Dec. 16, 2007, available at <http://www.fireofliberty.org/article/6694.asp>.

⁹⁵ Compare, XIAN FA [CONSTITUTION] art. 6 (1982) (P.R.C.). See also CENTRAL PROPAGANDA DEPARTMENT WORKING GROUP ON THEORY, *supra* note 17.

about a situation in which the peasants have become helpless victims of the land's commercialization from which others benefit while they, the owners, are excluded.

The above analysis has prompted at least one academic commentator to argue that because peasants "own" land, and in light of the new Article 39 of the PRL, they "ought to" have a right to alienate it.⁹⁶ In fact, Chinese peasants have strong 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 Article 2 of the 1988 LAL strictly prohibits the sale of land, the 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.⁹⁷ 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. 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 of the PRL.⁹⁸

For any of the above arguments to have immediate practical significance, however, there would have to be a reasonable system to decide which of the competing rules or principles prevailed, and to ensure that the norm hierarchy that places the PRC Constitution at the top was respected.⁹⁹ But no such rules or mechanisms exist in China's authoritarian political environment; 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 experimented with. In 2004 for instance, Professor Hu Xingdou unsuccessfully petitioned for a change in the

⁹⁶ Li Yingli (李应利), *小产权房为什么应该合法化* [Why Should Minor Property Housing Be Legalized], (July 2009) (available at http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=48338).

⁹⁷ Patrick Randolph, *The New Chinese Basic Law of Property: A Real Estate Practitioner's Perspective*, available at <http://www.law.umkc.edu/faculty/randolphlinks.htm>.

⁹⁸ Gong Xiantian (巩献田), *A Property Law (Draft) that Violates the Constitution and Basic Principles of Socialism*, Aug. 12, 2005, available at <http://www.europe-solidaire.org/spip.php?article4161>; 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.

⁹⁹ This 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.

household registration and land tenure system to eliminate its discriminatory elements.¹⁰⁰ His petition was not answered and the institutional reason for this is that there is no obligation on the part of the the NPC Standing Committee to provide an answer, nor is there any other truly functional mechanism of constitutional or judicial review of norms.¹⁰¹ 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

According to allegations made by the Nongkou 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. 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,¹⁰² the villagers said, the city kept extending the scope of the taking and ultimately ended up taking about twenty.¹⁰³ Most of the land taken would

¹⁰⁰ Petition from Hu Xingdou (胡星斗), 对二元户口体制及城乡二元制度进行违宪审查的建议书 [Suggestion to Carry Out Unconstitutionality Review Concerning the Dualistic Hukou System and Urban-Rural System] (2004), available at <http://wlccg.blogchina.com/blog/217573.html> (characterizing the land tenure system as a result of the general dualistic setup of laws about household registration, land, and petitions for the abolition of these systems).

¹⁰¹ 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), *宪政精义: 法治下的开放政府* [*The Essence of Constitutional Government: Open Government Under the Rule of Law*], CHINA UNIVERSITY POLITICS & LAW PRESS, 299 (2002) (arguing that China’s administrative organs, especially the State Council, have “become China’s most powerful legislative organs”).

¹⁰² 浙江省建设用地审批意见书, 浙土字 A [2008]—0173 (Nov. 20, 2008) (A document issued by the provincial government of Zhejiang which mentions roughly 2 sq km as the approved area of expropriation, copy on file with author) [hereinafter *Zhejiang document*].

¹⁰³ Interview with Ms. L, *supra* note 4; Yan Xiu (严修), *杭州江干区数百公安武警强拆一户居民* [*Several Hundred Police Officers Carry Out Forceful Demolition of a Household in Hangzhou Radio*], FREE ASIA, Aug. 31, 2009, available at <http://www.rfa.org/mandarin/yataibaodao/qiangchai-08312009141112.html>. It has been

be used for commercial housing construction projects.¹⁰⁴ 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.¹⁰⁵

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.¹⁰⁶ 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.

A. *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 proposal "represented the brilliant political decisions of three generations of Party Central leaders,"¹⁰⁷ and that its enactment would be "a monument and

impossible to verify the claim that as much as 20 square kilometers were taken, but the state implicitly confirmed that more was taken than was approved in its letter to Ms. L.

¹⁰⁴ 杭州市国土资源局 杭土资预 (2007) 509 号 (Oct. 25, 2007) (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 the author).

¹⁰⁵ 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) (Aug. 22, 2008) (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, copy on file with the author).

¹⁰⁶ This fact constrains the usefulness of comparative studies of "takings law" in China and other countries. For a different view see Liu Chenglin, *The Chinese Takings Law from a Comparative Perspective* 26 WASH. U. J. L. & POL'Y 301 (2008).

¹⁰⁷ The generations meant here are those of Deng, Jiang and Hu/Wen, but not the Mao.

conclusion to twenty years of Reform and Opening [and] to the socialist market economy.”¹⁰⁸ 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. First is the argument based in historical entitlement, claiming that property is held justly if justly acquired (e.g. Nozick).¹⁰⁹ Second is the argument based in liberty, seeking to establish a right to private property of certain resources (e.g. Locke).¹¹⁰ Third is the argument based on efficiency, claiming that private property rights increase efficiency or utility more than any other type of property regime (e.g. Hayek, Demsetz).¹¹¹ Hayek argued that only competitive liberal systems founded on private property are efficient enough to 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.¹¹²

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

¹⁰⁸ Zhao Lei (赵蕾), *辩论物权法* [Debating the Real Property Law], 南方周末 [SOUTHERN WEEKEND], Mar. 10, 2006, available at <http://www.nanfangdaily.com.cn/southnews/jwxy/200603100073.asp>. On February 25, 2006, there was a meeting of over 50 scholars. *Id.*

¹⁰⁹ ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974).

¹¹⁰ For a more differentiated account of the right to private property from Locke, see JEREMY WALDRON THE RIGHT TO PRIVATE PROPERTY (1988).

¹¹¹ Harold Demsetz, *Toward a Theory of Property Rights*, 57, no.2 AMERICAN ECONOMIC REVIEW 347, 347-359 (papers and proceedings of the 79th Annual Meeting of the American Economic Association).

¹¹² HAYEK, *supra* note 49, at 52.

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.¹¹³

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),¹¹⁴ or that redistribution motivated by “socialist” conceptions of equality is an unjustifiable invasion of liberty for no justifiable goal (Hayek).¹¹⁵

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.¹¹⁶ “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 defense of the property law, which became necessary when orthodox Marxists protested against the draft of the Property Rights Law,¹¹⁷ the academic establishment relied primarily on the growth argument. It argued that wealth maximization could be achieved by protecting private property rights, including 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

¹¹³ Demsetz, *supra* note 111.

¹¹⁴ NOZICK, *supra* note 109. 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. *Id.*

¹¹⁵ HAYEK, *supra* note 49. 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.

¹¹⁶ See also, Cao Siyuan, *supra* note 50.

¹¹⁷ Mathew Erie, *China's (Post) Socialist Property Rights Regime: Assessing the Impact of the Property Law on Illegal Land Takings*, 37 H. K. L. J. (2007).

growing social disparity amongst rich and poor,¹¹⁸ the PRL drafters asserted that the protection of property rights would spur growth and 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 the PRL, 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"¹¹⁹

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."¹²⁰

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

¹¹⁸ Gong Xiantian, *supra* note 99 (focused on the implications of SOE reorganization).

¹¹⁹ 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, available at http://www.pahc.gov.cn/E_ReadNews.asp?NewsID=814.

¹²⁰ Interview with Yang and Lu, *supra* note 32.

fact an order without which even beggars could not exist.¹²¹

It is unclear how convincing these arguments were to the Chinese public. 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.¹²² Since its enactment, the PRL and the Chinese Constitution have become laws that Chinese petitioners protest against; like others, Ms. L wrote the titles of these laws in red paint on the façade of her condemned house.¹²³ But how far do these laws really protect against takings?

B. “Cheap” Land Through Government Takings

Takings of rural land are governed by Article 13 of the Constitution, LAL, PRL and other legal provisions. Article 13 of the PRC Constitution, which was revised in 2004, states that the government “may, for the public interest, expropriate or take over private property of citizens for use in the public interest,¹²⁴ 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 the scope of takings by offering specific criteria of “public interest,” or by enumerating types of situations in which a “public interest” in the taking would be given. In his Property Rights Law draft, scholar Liang Huixing suggested 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

¹²¹ Posting of Jiang Ping: Formulating the Real Property Law Must Not Go Backwards, translation by David Kelly, Mar. 5, 2006, to China Law Prof Blog, *available at* http://lawprofessors.typepad.com/china_law_prof_blog/2006/03/chinas_draft_pr.html.

¹²² 中国学者签名反对物权法 [Chinese Scholars Sign Letter Opposing the Property Rights Law], Radio Free Asia, (Feb. 21, 2007), <http://peacehall.com/news/gb/china/2007/02/200702222307.shtml>. There were no further domestic media reports on the continued opposition to the PRL. *Id.* Professor Gong was reportedly ordered to keep quiet, although he denied the existence of such an order. 北大教授巩献田被校党委要求退出反物权法签名 [Peking University Professor Gong Xiantian Requested by Party Committee to Withdraw Signature from Letter Opposing Property Rights Law], Radio Free Asia, (Mar. 9, 2007), <http://www.rfa.org/mandarin/shenrubaodao/2007/03/09/gong/>.

¹²³ *Id.*

¹²⁴ The Chinese expression is 公共利益的需要.

forests, and other public interests as stipulated in constitutional law.”¹²⁵

It is not surprising that in its final form, the PRL contained none of these carefully debated and well-meant restraints. 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 growth is upheld and propagated, even as the state produces rules and circulars requiring curbs on 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.¹²⁶ It can hardly be expected to be abandoned while the government continues to perceive urbanization as necessary. A recent reform proposal concerning the preconditions under which urban land may be taken from urban residents—a context not discussed in any detail here, despite some structural similarities—deserve to be greeted with skepticism, as long as the more complex, wider issue of the distribution of public and private control over land is left unchanged.¹²⁷ In the rural and suburban context here discussed, a reordering of control would require new legal

¹²⁵ Erie, *supra* note 117.

¹²⁶ The villagers of Pengbu 彭埠 town, another part of Hangzhou, took pictures of fields designated by a Pengbu town government sign as “basic agricultural land,” before and after they were taken from them for urban construction.

¹²⁷ Article 3 of the State Council ‘Regulation for Expropriation of Buildings on State-owned Land (Draft for the Solicitation of Comments)’ (above note) contains a definition of public interest. See State Council, Regulation for Expropriation of Buildings on State-owned Land (Draft for the Solicitation of Comments) [国有土地上房屋征收与补偿条例(征求意见稿)], January 29, 2010, available at http://www.gov.cn/gz dt/ 2010-01/29/content_1522355.htm.

mechanisms for privately transferring rural or suburban land for the purposes of urban development.

In the case of Nongkou village, the land taking that was approved by higher authorities and the land taken in excess of the approved area equally seem to serve the purpose of construction, and further GDP growth. It spurs the construction industry, contributes more valuable land to the urban real estate market, and if property values rise, further raises GDP through the market transactions occurring on this market. The fact that part of the construction process may have violated the law makes no difference from a growth perspective. It is not surprising that government authorities and committees like the Authority Directing the Urban Renewal and Demolition, and Relocation Work of Jianggan District in the case of Nongkou, portray “support for construction” as a civic duty.

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 on January 24, 2008, the government chastised eighteen 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” 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.”¹²⁸ As mentioned above, later that year Ms. L’s husband was attacked by thugs in an attempt to intimidate another group of residents belonging to Nongkou village.

Clearly in this case, the government regarded the urbanization project as an overriding need, and thought that affected citizens had a civic duty to promote it by ‘agreeing’ to have their land and houses taken. It felt justified in suppressing individual opposition to land takings based in legal rights. From this standpoint, it becomes difficult to measure the value of what is lost to residents by any other metric than that of monetary value. Viewed impersonally, the fact that expropriations are involuntary¹²⁹ 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 and government do, in fact, incur some expenditure to resettle and compensate the peasants, but they are generally still able to generate great wealth. 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

¹²⁸ Copy of the public announcement on file with author.

¹²⁹ Although at least according to law, negotiations about compensation had to be held and agreements were envisaged, so far as possible.

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 taken from peasants is thus relatively cheap for the developers and governments, as discussed further in section V.¹³⁰

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, will usually disturb the successful completion of urban development projects. The case of Jianggan district in Hangzhou, where Liang's house is situated, provides an example on 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. In August 2009 he was divested of his official (government) functions.¹³¹ A few days later, another forceful demolition was carried out near Nongkou village.¹³² In January 2010, domestic media reported that the Hangzhou government collected 100 billion RMB (about 14.6 billion USD according to current exchange rates) in land transfer fees 2009, and that compared to the previous year, Hangzhou's fee revenue had grown by 238%.¹³³

C. *The Incompleteness of the Economic Argument*

The drafters of the PRL subscribed to the logic of "liberalism" and absolute property rights, but, in fact, China achieved very impressive growth and great poverty reduction by keeping the protection of private property rights, rules of the property law and law enforcement weak. Frank Upham has therefore argued that the conventional argument used by the World Bank and other institutions, that economic development depended on the creation of clear, 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.¹³⁴

From the perspective of the present analysis, however, it is

¹³⁰ It is generally cheaper 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.

¹³¹ Chen Xiaoying (陈小莹) & Yang Lan (杨澜), *杭州原副市长许迈永被双规 事发西溪湿地项目* [Former Hangzhou Vice Mayor Xu Wanyong in Shuanggui Detention, Case Started from Xixi Wetlands Development Project], 世纪经济报道 [SHIJI JINGJI BAODAO] (Sept. 1, 2009), available at http://news.ifeng.com/mainland/200909/0901_17_1328702_3.shtml.

¹³² Yan Xiu (严修), *supra* note 103.

¹³³ Soufun website, 2009 年中国土地出让金达 15000 亿元 杭州全国第一 [1.5 trillion in Land Transfer Fees Taken in 2009, Hangzhou Ranging in First Place], Jan. 7, 2010, <http://qyb.soufun.com/news/2010-01-07/3013338.htm>.

¹³⁴ Upham, *supra* note 31.

possible and even likely that the creation of strong property rights, available on a commercial real estate market, was crucial to economic growth, in so far as growth was achieved through the construction and real estate market. 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.¹³⁵ So far as economic development was achieved through property development, it appears to have followed, at least in the majority of cases,¹³⁶ the creation of precisely the kind of property rights that the law and development “orthodoxy” contemplates.¹³⁷

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. On the basis of the present analysis, it is also true that an effective protection of property rights has been denied 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 PRL draft soon to be enacted, its proponents failed to mention this fact, although some of the drafters were well aware of it.¹³⁸

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

¹³⁵ DE SOTO, *supra* note 10.

¹³⁶ See discussion below for illegal property development in the context of “minor property rights.”

¹³⁷ Upham, *supra* note 31.

¹³⁸ See, e.g., Ting Shi, *Debate on Ideology Defined Property Law’s Formation*, SOUTH CHINA MORNING POST, May 24, 2007 (including an interview with Professor Yin Tian).

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”¹³⁹ 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 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.”¹⁴⁰ 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.¹⁴¹ 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,¹⁴² and then arguing that occupation would spur growth. As in colonial contexts, as well as 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

¹³⁹ Randolph, *supra* note 53, (suggesting that these building blocks are functionally equivalent to ownership rights in the urban real estate market).

¹⁴⁰ Stein, *supra* note 87. The author mentions that there is a distinction between state and collective ownership. *Id.*

¹⁴¹ 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”).

¹⁴² *Johnson v MacIntosh*, 21 U.S. 543 (1823).

the land that still has buildings on it is referred to as “hairy land” (*maodi*, 毛地)—as though the occupants of such land and their homes were like hairs to be plucked out.¹⁴³

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 as they are citizens of the same state and share the same cultural identity. However, there is considerable social prejudice against peasants as a social group in China. Peasants are seen by some as forces of backwardness, possessing “low quality” and need to be “raised” to the level of the modern (and urban) Chinese citizen.¹⁴⁴ The effect of such prejudice can be heightened by difference in income levels. At the same time, 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.”¹⁴⁵ A website showing houses very similar to those of Nongkou, also just off the road to the Hangzhou airport, comments that the “peasants” owning these houses are “too rich,” an assessment apparently based on their status in Chinese society.¹⁴⁶

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 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.¹⁴⁷ In one case, the

¹⁴³ Chen Yongqing (程永清) “毛地出让”中房地产开发企业的法律风险 [The Granting of “Hairy Land” Presents Risks for Property Development Enterprises in China], 安徽法律顾问网 [Anhui Legal Consultancy Website], <http://www.fl168.com/Lawyer9374/View/47281>; See also Stein, *supra* note 87 (on the process of “clearing” land).

¹⁴⁴ Rachel Murphy, *Turning Peasants into Modern Chinese Citizens: “Population Quality” Discourse, Demographic Transition and Primary Education*, THE CHINA QUARTERLY 1 (2004).

¹⁴⁵ Interview with Ms. L., *supra* note 4, (August 2009). See also Yi Ming (佚名), *集体土地房屋拆迁当事人行为解读—以杭州城郊为例* [An Analysis of the Behavior of the Parties in a Case of Demolition and Relocation of Homes on Collectively Owned Land—Using the Example of the Outskirts of Hangzhou], Nov. 22, 2007, <http://www.lunwentianxia.com/product.free.3028108.4>.

¹⁴⁶ 太有钱了! 浙江高速上抓怕的农民别墅 [Too Rich! Pictures of Peasant Villas Taken from the Zhejiang Highway], July 27, 2009, http://xinwen.xm.haozhai.com/news_138728.html.

¹⁴⁷ Interview with Ms. L., *supra* note 4, (July 27-29 in Tongxin County, Ningxia).

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.¹⁴⁸ The project in question was a programme for removing peasants from land too arid to support agriculture. The programme is described as complying 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."¹⁴⁹ Its intended effects for the national economy and ecology are beneficial. It may also have led to construction projects raising GDP growth. Yet for the elderly residents of Yinwa village, the measure seemed devastating.

From cases like these, which affect 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 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 and 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, because the Chinese example does suggest that making legally protected property rights (such as urban land use rights) amenable to a nationwide market may result in wealth maximization throughout the real estate market.

But, the Chinese example also shows that this economic theory of property is consistent with invidious 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 envisioned by the classics of neo-liberal economic thought. Empirical evidence, in particular the statistical evidence

¹⁴⁸ *Id.*, July 29, 2009, Yinwa Village, Magaozhuang Township, Tongxin County, Ningxia (宁夏省同心县马高庄乡阴洼村).

¹⁴⁹ Tongxin Government, 宁夏中部干旱带同心县生态移民规划 [Central Ningxia Plan for Resettlement from Arid Regions in Tongxin] (Feb. 2, 2009), <http://www.nctx.gov.cn/show.php?contentid=72>.

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.¹⁵⁰

It is the considerations of “protecting growth” (*bao zeng*), to use the above mentioned 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 story 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.¹⁵¹ 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,¹⁵² and that also underlies, it seems, many of the illegal takings. The Ministry does also proclaim the national goal of preserving a minimum area of arable land (*bao hongxian*).¹⁵³ 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.¹⁵⁴ The failure of the judiciary and other authorities to help implement even the existing laws intended to provide protection to peasants has the consequence,¹⁵⁵

¹⁵⁰ Vice Chairman Wang Zhaoguo, Standing committee of the NPC Committee, Address at 5th session of the 10th NPC, Explanation on the Draft Property Law (Mar. 8, 2007) (transcript available at <http://www.civillaw.com.cn/en/article.asp?id=1283>).

¹⁵¹ 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.

¹⁵² Ministry for Land and Resources website, *supra* note 46.

¹⁵³ *Id.*

¹⁵⁴ Al Guo, *Doubts Cloud Top Official's Pledge on Amount of Arable Land*, SOUTH CHINA MORNING POST, June 23, 2009.

¹⁵⁵ Pils, *supra* note 28.

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 emphasize the creation of “new” rights, while keeping 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 not that it does not work, but that its implications are morally 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.

A. *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’ loss 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 other 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.¹⁵⁶ Currently, therefore, compensation is for loss of agricultural value. The loss of agricultural production value and fair market value may differ widely.

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. Accordingly, 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

¹⁵⁶ *Id.* In the Zigong case, Pils pointed out that 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. *Id.* The amount of land allotted to one household was on average one Chinese acre (*mu* 亩) and the market price per acre was over USD 73,000. *Id.* And the money was not paid in full; in some cases, it was not paid at all. *Id.* People between 18 and 40 yrs old were promised lump sum payments of under USD 1000. *Id.*

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.

In any case, it is 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, which the couple does not have – is not fair. They will end up uprooted and perhaps even more deprived than before.¹⁵⁷

In the Nongkou case, according to information received from Ms. L, she has invested 600,000 RMB in her house, which is about to be demolished, and has been asked to pay 210,000 RMB in “fees” demanded by the government for the family’s relocation. She has been offered the sum of 1,300,000 RMB in compensation,¹⁵⁸ and in addition, 40 years of government housing in a flat in a much less eligible location than Nongkou.¹⁵⁹ The urban land use rights to her family’s land (the land formerly owned by the Nongkou village collective, in which her family held land use rights), which is half a Chinese *mu* situated in a prime location, will be sold for about 30,000,000 RMB.¹⁶⁰ She and her husband will not obtain any new land use rights, or ownership of the flat they have been offered. According to her, 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, and living in constant fear of reprisals? How should her family be compensated for 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

¹⁵⁷ See Wu Hao (伍皓), Meng Zhaoli (孟昭丽), & Gu Ling (顾玲), *退耕还林: 部分农民面临“政策到站一夜返贫”窘境*, *经济参考报* [Returning Farmland for Reforestation: Some Peasants Face Lapse Back into Poverty After Programme is Over] June 27, 2006, available at http://www.cpad.gov.cn/data/2006/0710/article_2286.htm.

¹⁵⁸ We understand that the rental income she had while renting out flats (until the summer of 2008) went to support her after the loss of her livelihood through farming but are not clear about how much money she made out of it.

¹⁵⁹ Interview, *supra* note 4, Aug. 28, 2009.

¹⁶⁰ *Id.*

in several respects? How should she quantify the value that Ms. L apparently attributed to living in Nongkou as her husband's ancestral village?¹⁶¹

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 the outside." For instance, we cannot tell how important it would be to Ms. L or to Ma to continue living in their respective old neighborhoods. 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 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. Moreover, this is done 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 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.¹⁶² 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 property—in the sense of property as a "thing" not merely as "wealth,"¹⁶³ 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

¹⁶¹ *Id.* Ms. L did not want to be offered more compensation for the land on which her newly built house stood. *Id.* 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. *Id.*

¹⁶² According to Bernard Williams, one of the attractions of utilitarianism 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, 85 (Harper & Row ed., Cambridge 1993) (1972).

¹⁶³ HARRIS, *supra* note 57.

viewpoint.¹⁶⁴

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 these peasants' land away and give them very little compensation is unjust, unless one took proper account of what the person affected 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.¹⁶⁵ 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 poor. Urban property developers and governments are not starving.¹⁶⁶ Utilitarianism as a moral theory is committed to measuring the happiness or welfare of the 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.¹⁶⁷

B. "Minor Property Rights"

With regards to China's rapid urbanization, 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

¹⁶⁴ Yi Ming (佚名), *supra* note 145.

¹⁶⁵ 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." *Id.*

¹⁶⁶ Depriving the peasants of their rights to land because 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.

¹⁶⁷ JOHN RAWLS, A THEORY OF JUSTICE (1970).

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 that profits from the sale of the land. But, who pockets the profit 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 practices are comprehensively known as “minor property rights” or “minor property right housing.”¹⁶⁸ 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. The government periodically denounces such practices as illegal, and the price of such plots of land and/or houses built on those plots is much lower than the price of property acquired in accordance with the rural expropriation process.

While the phenomenon of ‘minor property rights’ share important features with black—or gray—markets, it is a market in a commodity that is startlingly difficult to hide away, and that can only be thought to exist because it is to some degree tolerated by officials. 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.¹⁶⁹ 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.¹⁷⁰ According

¹⁶⁸ In Chinese, 小产权 (minor property right) and 小产权房 (minor property rights housing).

¹⁶⁹ Hu Xingdou, *supra* note 100.

¹⁷⁰ Sinoec.net, *Minor Property Right—Better than none?*, (July 19, 2007), http://english.sinoec.net/story/english_17211.html; See, Nanfang Zhoumo, *Not Allowing Sale of Minor Property Right Housing Does Not Mean the Problem Is Not Being Solved* (小产权房不得买不意味着不解决问题) 20 December 2007, available at <http://house.hexun.com/2007-12-20/102402937.html> The author reported in December 2007, that there were about 5 billion square meters of ‘minor property right’ houses in China at the time. *Id.* It claimed that minor property housing amounted to 40% of the total (120 billion square meters) of current residential properties in cities and towns. *Id.* “Not allowing the sale of minor property rights does not mean that the problem is not being solved.” *Id.* Others have put the percentage at 30%. John Garnaut, *Peasants Take Law into Their Own Hands*, SYDNEY MORNING HERALD, Dec. 29, 2007, available at <http://www.smh.com.au/news/world/peasants-take-law-into-their-own->

to official media reports, this market in minor property rights developed within a decade.¹⁷¹ Buyers of “minor property right” properties may have hoped for eventual legalization, or at least have hoped that they would never be evicted. Thus far, crackdowns have been half-hearted and inefficient.¹⁷² An October 2008 Party Central document¹⁷³ announced that reforms might introduce mechanisms for nationwide circulation of land use rights derived from collective rural owners, without answering the difficult question of how such a mechanism would be feasible.¹⁷⁴

Some Chinese scholars have argued that “sales” of minor property rights ought to be recognized by the state.¹⁷⁵ Amongst these scholars is Hu Xingdou, who believes that minor property rights transactions are in fact already legal. His argument is that such transfers do not violate the Constitution. Hu seems to discount the argument that mechanisms for the recognition of property rights must be explicitly ‘created’ before they can produce an effect *erga omnes*.¹⁷⁶ Other scholars have explicitly referred to the fact that the PRL 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.¹⁷⁷

hands/2007/12/28/1198778702606.html (last visited Aug. 30, 2008).

¹⁷¹ *Why Have Minor Property Rights Suddenly Become Risky After Ten Years*, 北京小产权房为何卖了十年后才有“风险”？ CHINA YOUTH DAILY, July 9, 2007, available at http://news.xinhuanet.com/house/2007-07/09/content_6346980.htm.

¹⁷² Zhoumo, *supra* note 170; Government Notice, 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), available at http://www.gov.cn/zwgk/2008-01/08/content_852399.htm.

¹⁷³ Decision of the CCP on Several Major Issues Concerning the Promotion of Rural Reform (Chinese), October 12, 2008, available at http://www.gov.cn/jrzq/2008-10/19/content_1125094.htm; Postings of Yu Jianrong: Farmers Have the Rights to Keep Land For Themselves to http://www.danwei.org/real_estate/yu_jian_rong_on_land_rights.php (last visited Oct. 27, 2008); Nanfang Zhoumo, *Thirty Years: From Liberating the People to Liberating the Land* [30年：从人的解放到土地的解放], Oct. 26, 2008, available at <http://www.infzm.com/content/18559>.

¹⁷⁴ 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.

¹⁷⁵ See e.g., Hu Xingdou (胡星斗), *胡星斗：小产权房并不违宪 让三方受益* [*Minor Property Rights Housing not Unconstitutional, Let All Three Parties Benefit*], Aug. 10, 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* [*Why Should Minor Property Right Housing Be Legalized*] July 2009, available at http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=48338; Author’s conversation with Yu Jianrong, July 2009.

¹⁷⁶ See above on the principle of “legal definition” of property rights (*Typenzwang* in German).

¹⁷⁷ Li Yingli, *supra* note 175.

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. There is a basic unfairness in 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. Judging from the apparent prevalence of “minor property rights” transactions, the law on the books is not effectively enforced.

The more one looks for authoritative meanings of “property” and “ownership” in Chinese law and legal decisions, the less one can find anything there. On a non-authoritarian understanding of property law, 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” through the minor property right mechanism, or simply by allowing the creation of a national market for circulation of rural land use rights. It would be difficult, 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. If that were the case, however, 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, or 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.

C. *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 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.” Ownership, the declaration’s authors assert, 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, have been “taken back.” The Communist Revolution, it is added, “promised that every farmer should have their plot of farmland, every resident should have a home,” but this promise has been broken. The land tenure system has become a pretext for local government officials to act as *de facto* landowners while the peasants, supposedly the landowners, have become serfs on the land (*nongnu*).¹⁷⁸

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 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.¹⁷⁹

A letter signed by villagers of 250 households of a village called Shengzhuang relies mainly on a different argument. They write:

¹⁷⁸ In Chinese, 农奴.

¹⁷⁹ 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], Dec. 9, 2007, available at <http://www.peacehall.com/news/gb/china/2007/12/200712091236.shtml>.

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 the peasants. It should protect the rights of the masses and help it develop. Only then can it be called a government ...¹⁸⁰

Documents testifying to property rights conceptions are openly divergent from the state-sponsored view and are thus still significant; even though, as Yu Jianrong observed, the authors of these documents were apparently helped and guided by a professional lawyer.¹⁸¹ Land rights declarations of this kind, however, were predictably ineffective. The Shengzhuang protest was quickly suppressed.¹⁸² Yang Chunlin, the initiator of the Heilongjiang letter, was detained, tortured in police detention and later convicted of inciting subversion.¹⁸³ After his conviction, more Heilongjiang peasant leaders were sentenced to labor

¹⁸⁰ 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” [250 Peasant Households of Shengzhuang Village, Yixing city, in Jiangsu Province Maintain Their Ownership Right Inn Residential Land and Demand Realization of the Policy Each Resident Should Have a Home], Dec. 16, 2007, at <http://www.fireofliberty.org/article/6694.asp>; For further discussion of these and similar letters see Eva Pils, *Peasants’ Struggle for Land in China*, in YASH GHAI & JILL COTTRELL, *MARGINALIZED COMMUNITIES AND ACCESS TO JUSTICE* (Routledge, 2009).

¹⁸¹ He is supposed to have been supported by a trained lawyer pursuing his own political agenda in YU JIANRONG, *supra* note 3 at 121.

¹⁸² *Id.*

¹⁸³ See Amnesty International, Further Information on UA 240/07 and Follow-up, Feb. 21, 2008, available at <http://www.amnestyusa.org/actioncenter/actions/uaa24007.pdf>.

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 sought to take their challenge against the written law one step further than the many rural communities who have merely chosen to ignore, but not publicly to reject 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.¹⁸⁴

VI. CONCLUSION

As the preceding discussion has shown, current Chinese property law unfairly discriminates against rural residents. Neither Chinese laws nor mainstream professional and academic discourse about property, provide the vocabulary needed to criticize these injustices. Instead, statutory law, government policies and practices and mainstream discourse, combine to defend much of the ongoing practices of urbanization in the name of a wider national interest in GDP growth and “development.” Such discourse also facilitates a dismissive interpretation of collective rural ownership as “not really” amounting to ownership, and of peasant claims as primarily demands for more compensation. These arguments are largely blind to the violations of liberty and dignity suffered in expropriation contexts, especially by peasants, because they do not account for peasant communities’ legitimate interest in making their own decisions about their own land.

In contrast to some jurisdictions where debates over property are also constitutional debates,¹⁸⁵ the Chinese legal system has largely neglected calls for better legal protection of peasant land rights, and in some cases treated such calls as politically subversive. If this debate could be taken into the courtroom and open public discussion, it might be possible to avoid further wrongs from accumulating amongst citizens deprived of land and homes, wrongs that keep adding to the great tensions within contemporary Chinese society. But, as the experiences of Ms. L and others illustrate, such a development is currently unlikely. Ms. L and others may invoke the PRC Constitution; to use Pitt’s dictum, “the storm may enter, the rain may enter, but the King cannot enter” in protests against expropriation. But claims of a constitutional nature have currently no chance of being heard. The 2007 PRL does not in its current form support them, and arguments based in constitutional principle have no force against the overwhelming rhetoric of “preserving growth.” Like other people in similar situations, Ms. L has tried the courts in a process of

¹⁸⁴ For a discussion of this case and two similar cases, see Eva Pils, *supra* note 180.

¹⁸⁵ GREGORY ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY* (2006).

litigation that has stalled without producing any result as of this writing,¹⁸⁶ as well as the more traditional petitioning system. But 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 Ms. L’s account. Shooing her out of the office, she called Ms. L a *diao fu*¹⁸⁷—a disrespectful effeminate term for a ‘bad and unreasonable’ person.¹⁸⁸

The conclusions to be drawn from this discussion have implications beyond the Chinese legal system. 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, claimed 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.*”¹⁸⁹ On the basis of the present discussion, this argument is not necessarily empirically wrong, but, it is morally unattractive because of the consistency of a growth-based justification of property rights with discrimination against certain groups of property rights holders.

Similar to the discrimination that gives rise to “minor” property rights practices among the *informales* described by De Soto for Peru, discrimination in the Chinese case enables the coercive, relatively rapid and large-scale government takings from Chinese peasants. In the latter case, property rights discrimination may be economically “efficient” in producing growth overall, and there is at least some evidence to think that in fact it is efficient, but it cannot serve as a justification for the status quo. It is hard to see, then, how De Soto’s efficiency arguments can be maintained as justifications for the legal reforms he proposed in Peru, or how the World Bank can continue to promote property law reform agendas on the basis that they would make the law more efficient.

The World Bank, however, continues to disseminate its neoclassical liberal views. In a recent joint publication with the PRC State Council, it said that the urban growth relying on takings from Chinese peasants was “inefficient” because land prices were kept “artificially

¹⁸⁶ Online interview, *supra* note 90.

¹⁸⁷ In Chinese, 刁妇。

¹⁸⁸ Interview with Ms. L., *supra* note 4. 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.

¹⁸⁹ DE SOTO, *supra* note 10, at 178.

low.”¹⁹⁰ This assumes without any argument that market prices would be more “natural” and that market mechanisms maximize the efficiency of wealth increase. In the face of evidence to the contrary and in light of the Chinese example, it would be better for the World Bank to concede that aspects of a property regime may be unfair and unacceptable, even though they are economically efficient. As Alexander has shown with comparative reference to South Africa and other countries,¹⁹¹ property rights are inherently constrained by a “social obligation norm.” They are not absolute, but relative to other rights and obligations. Political obligations to protect housing rights and to protect human dignity constrain any acceptable interpretation of property rights. The fact that growth and wealth oriented conceptions of property are insensitive to the distribution of property across a society also means that they are insensitive to the wrongs that can be caused to a person by changing that distribution. The problems arising from this insensitivity do not affect every neo-liberal conception of property rights,¹⁹² but they expose the currently most influential one as seriously flawed.

¹⁹⁰ Li Guo, Jonathan Lindsay & Paul Munro-Faure, *supra* note 39. This article also asserts that there is “perceived unfairness” to Chinese peasants “disadvantaged” in the land takings processes.

¹⁹¹ 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, *supra* note 185, at 192-196.

¹⁹² 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, normative concerns such as the dignity of those threatened with deprivation require redistribution of wealth. NOZICK, *supra* note 109.