

# Voice, reflexivity and say: governing access to and control of land in China

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## *DRAFT*

**Abstract.** This essay develops a sceptical view of functionalist accounts of resources and need assessment as a basis for just allocation of resources, in particular, land. It considers the implications of such scepticism for the essential resources thesis, drawing on the example of access to land in the People's Republic in China ('China'), a country ostensibly governed in accordance with welfare-maximising principles of land use. The main social problem that prompts this discussion is the need to understand, redress and if possible prevent injustices in the context of evictions and land-grabs (or 'demolition and relocation' and expropriation decisions), widespread phenomena in today's rapidly urbanising China. At a time when land disputes are abounding and social conflict over land is rife in China, the state-driven exclusive focus on the role of land and buildings as transferable resources is wrong, as it prevents us from seeing dimensions of injustice that resource distribution does not capture. On this basis, I propose that a good governance regime for (essential) resources must address a requirement which we might term (individual) 'say' and which affirms rights' intrinsic interconnectedness, in addition to the principles of 'voice' and 'reflexivity'.

### *Situating the argument*

The essential resources argument is based on an intuitively appealing conception of human need. Defining essential resources as those 'absolutely necessary for the survival of every human being, such as drinking water and basic food, or indispensable for minimum existence in a given society,'<sup>1</sup> de Schutter and Pistor formulate criteria ensuring access to essential goods for all. Such access can be achieved by

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<sup>1</sup> Olivier De Schutter and Katharina Pistor, Chapter 1 in *Governing Access to Essential Resources*, (Columbia University Press, forthcoming) ('Essential Resources'). Essential resources (goods) are also defined by their consumption being subtractive (it results in there being less of them), and exclusion from them, e.g. by private owners, being feasible and maybe economically efficient. The position developed here agrees with the essential resources thesis' critical argument that properties of certain goods cannot dictate the rules governing access to them. This, as the authors point out, would seem to be the mistake underlying theories that treat goods as private *because* they are subtractive and excludable. For the project on Governing Essential Resources see <http://web.law.columbia.edu/global-legal-transformation/justice-allocation-scarce-resources#Governing Access to Essential Resources> .

‘governance regimes that embrace as guiding principles Voice, defined as the ability to collectively choose the rules by which one wishes to be governed; and Reflexivity, which stands for the ability to recognize competing claims as legitimate and the willingness to accommodate them.’<sup>2</sup>

In many specific contexts the idea of need underlying the essential resources thesis also seems plausible, not least given persistent suffering in the world that is caused by people lacking access to certain resources:

‘Nobody should be excluded from resources that serve to satisfy basic needs, and the exploitation of the resource today should not jeopardize the ability of the next generation to satisfy its own needs.’<sup>3</sup>

The argument, too, that certain economic analyses of the problem at hand, such as the theory of the ‘tragedy of the commons,’<sup>4</sup> cannot successfully deal with the challenge of securing fair access to certain goods, is persuasive; and certainly, collective autonomy to make rules of governance and mutual understanding (i.e. voice and reflectivity) are generally desirable – even though my actual personal recognition of another’s claim on assets in my possession could not be sensibly *required* to justify a taking of those assets from me, e.g. through expropriation.

I focus here on whether the requirements of voice and reflexivity, and the underlying definition of essential goods, give appropriate and sufficiently clear guidance from the perspective of the social problem I have chosen to address, and point to problems with an account of land treating solely as a resource. From this particular perspective, a good conception of just access to land must take legitimate interests in protection from arbitrary interference with housing and property into account. If exclusion must not lead to grave injustice, the same is true of forcible redistribution, the goal (or at least the intended consequence) of expropriations and evictions. Current occupants of land and housing must not be treated like figures on a chessboard, easily moved around by other decision-makers. The problem of governing access to and control over land and housing must be understood as also one of distribution of resources, but not only as such.

On this basis, it is useful to be critically aware of the implicit consequentialism of the essential resources thesis, as well as of its commitment to a definition of human need. First as to the consequentialist underpinnings of the essential resources thesis, it is a thesis reminiscent of the global theory of responsibility associated with philosophers such

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<sup>2</sup> ‘Essential Resources,’ *supra*.

<sup>3</sup> *Ibid.* p.4. The paper may mean (only) that if someone happens to be already in control of a good that is essential to someone else’s survival, and they (actively) prevent this other person from gaining access to the essential good they control, they act immorally. Perhaps for the purposes of the paper the difference between these two positions is not in focus.

<sup>4</sup> The authors discuss this briefly at p. 3 and in note 3, criticising the identification of this theory with Adam Smith’s and Locke’s respective theories.

as Peter Singer, who advances the possibility of negative responsibility:<sup>5</sup> if there are sufficient resources to satisfy basic needs yet some people fail to get them, anyone who would have been able to prevent this result has responsibility for the suffering of those excluded.<sup>6</sup> There are well-known arguments generally critical of utilitarian and consequentialist theory.<sup>7</sup> The point here is merely to say that in devising rules and practices for governing resources, an exclusive focus on the distributive consequences of one or another regime may programme us to overlook injustices in the process of redistribution.

An exclusive focus on distributive consequences can also reinforce a tendency to think of the good in question as a resource of value to impersonal users, abstracting from the good's multiple potential legitimate purposes and ways of being important. Since land, in particular, is significant in many different ways, some of which are related to its location and history while others are not, its relevance to survival may differ from user to user, relative to a given society,<sup>8</sup> further complicating its assessment as a resource. The Chinese example in particular cautions against treating land entirely as a resource whose value is to be determined with reference only to purposes or functions it could serve for anyone indiscriminately, obliterating the history (and location) that may have made it especially significant to particular individuals or communities.

A good regime of governance for land, which of course *can* be (also) a resource, should therefore not exclusively aim at achieving fairness of access to a subtractive resource, because this definition does not allow us to take all the iniquities of takings into appropriate consideration. If this argument is correct, the requirements of Voice and Reflexivity must be critically examined with regard to what they can do to address the problem of process injustices and more complex rights violations. Although much narrower in scope, this examination draws on the wider criticisms of consequentialist and welfare-utilitarian theory, and of economic-efficiency based assessments of development.<sup>9</sup>

A second, related concern is that making sense of the idea of (basic) needs, which essential resources are expected to satisfy, is difficult, because it is difficult to measure and compare needs. . The above, two-pronged definition on the one hand suggests that

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<sup>5</sup> 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.").

<sup>6</sup> Even so, one must account for the fact that in the real world we always start with some sort of de facto distribution of control over goods, including many essential goods (cp. Nagel and Murphy, *The Myth of Ownership: Taxes and Justice* (Oxford: 2004) arguing that pre-tax income and property should not be seen as what people are morally entitled to).

<sup>7</sup> Rawls famously criticized utilitarianism for its inability to take seriously the difference between persons. Rawls, *A Theory of Justice* (1970) chapter 1.

<sup>8</sup> So far as the reality of land redistribution in China is concerned, there appear to be no contemporary examples for land takings to give access to others so that these others will not starve..

<sup>9</sup> Cp. Margot E. Salomon and Colin Arnott, 'Better Development Decision-Making: Applying International Human Rights Law to Neoclassical Economics,' *Nordic Journal of Human Rights*, 2014, Vol. 32, No. 1, 44–74, <http://dx.doi.org/10.1080/18918131.2013.878892>.

essential resources are those that are necessary for survival -- however, survival on the very lowest terms of mere subsistence – say, of having adequate food and drinking water - is in many places less of a problem than survival on slightly more generous terms.<sup>10</sup> The second prong of the above definition, on the other hand, implicitly defines need as relative to the conditions in a particular society. However, if human need is relative not merely to the condition of being human but relative to particular human societies, why not address the question of what is due to one the members of a particular society by use of a more explicitly and manageably relative moral concept such as that of equality?<sup>11</sup> Such a broader moral concept might better serve the need to deal with understanding and addressing different kinds of injustice in property regimes, including that of arbitrary expropriation. It could serve as a reminder that no evaluative requirement can be understood in isolation from other values of political morality.

In sum, despite its intuitive appeal and importance in addressing a pressing global concern, the essential resources thesis may have undesirable implications that are not immediately evident as long as it is only examined in the context of certain, evidently shocking practices of exclusion. It must be asked if the requirements of collective voice and reflexivity adequately capture what is required to protect people from injustices; or whether further or different requirements should be articulated. Saying as much is not to say that the principles of voice and reflexivity must be rejected; rather, it may be good to consider if a non-consequentialist account can give these principles a more persuasive foundation that also addresses their inherent limitations.

The discussion in the following examines general features of the Chinese land tenure system and of Chinese eviction and expropriation practices, which as I show also centre on welfare and utility considerations, with these concerns in mind. The argument here therefore in some ways reverses the perspective from which the essential resources thesis was formulated. It considers how this thesis, in some ways directed against exclusion, plays out when it is not the excluded, but the would-be excluders who are in a socially, politically and legally weak and persecuted position, on the assumption that a reasonable legal system must take both types of social group into consideration.

### ***The current regime governing access to and control over land***

It is necessary, to understand the background against which current discussions of the land-grab and eviction problem in China take place, to take a very brief look at basic

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<sup>10</sup> The goods just mentioned are directly related to land use; the availability of a number of further goods (say, education) can be indirectly related to it e.g. where agriculture is the exclusive basis of income. If we attach preferential value to the function land has with regard to food and water to ensure barest physical survival (say, not starving) we may fail to understand the real problems a property regime leads to ‘on the ground.’ One can easily imagine specific situations where land could be taken away from people for other reasons than in order to secure others’ survival.

<sup>11</sup> It would have to be acknowledged that in specific situations, even a fair and equal distribution of resources might leave people with less than what is essential, a fact which the discussion based on a concept of ‘need’ may unhelpfully obscure.

features of the extant land tenure system, the rules governing takings and evictions, and the way in which these rules have come into being. Prior to the reforms introduced by the Chinese Communist Party ('the Party'), the Chinese state recognized private land ownership. The land reforms introduced by the Party from the 1930s onward began with expropriations of rural landowners deemed to be better off and redistribution of land to poorer or politically privileged households. The forcible creation of very big rural collectives, however, culminated in the great famine 1958-9, resulting from policies and measures described in recent research. Scholars have argued that this famine, during which between 20 and 40 million excess deaths are supposed to have occurred, was man-made: that it was the consequence of centralised control over land use combined with disastrous agricultural policies and repressive withholding of agricultural output (especially grain) destined for urban consumption or export.

In urban areas, by contrast, the institution of private land ownership was not abolished, despite strident political rhetoric against it; the introduction of compulsory government lease schemes and individual expropriations; control of all economic activity under the planned economy; and the breakdown of the legal system in the last decade under Mao.<sup>12</sup>

The post-Mao Constitution of 1982, last revised in 2004, said in its Preamble that China would 'remain in the primary stage of socialism for a long time to come.'<sup>13</sup> This was a signal meant to justify the introduction of reforms, in particular the recognition of private property rights and a private market of sorts in land. However, it did not mean privatisation of land ownership. On the contrary, the State wrote not only a principle of 'socialist public ownership' of all land into the reform era Constitution of 1982, but also specified that rural and suburban land was to be collectively owned, whereas urban land was to be State-owned. The 1982 Constitution's stipulation that all urban land was owned by the State effectively expropriated those who had privately owned urban land until then.  
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On the basis of these changes, new rules in the 1980s (especially the 1988 Constitutional amendment and Land Administration Law) created rights of use or 'usufruct' rights (*yongyi wuquan* 用益物权) in land. Such rights allowed farming families to produce for private profit. Maintaining collective land ownership, it yet freed farming households from many restraints of the planned economy era (even though prices and production continued to be regulated for some time) and it allocated a 'residential plot' land use right

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<sup>12</sup> 'Contending conceptions of ownership and property in urbanizing China,' in John Gillespie (ed.), *Resolving Land Disputes in East Asia*, Cambridge University Press, forthcoming. ('Contending Conceptions')

<sup>13</sup> Preamble, Constitution of the People's Republic of China. The Preamble quoted Mao Zedong here; but Mao had never elaborated on the phrase.

<sup>14</sup> Zhou Qiren (周其仁), '城市土地国有化之谜 – 城乡中国系列评论之二十六' [The mystery of the nationalisation of urban land – urban and rural China review no. 26], at <http://zhouqiren.org/archives/1329.html>.

<sup>15</sup> Hua Xinmin (华新民), 华新民拆迁律师点评：土地私有产权从来就没有消失过[Chaqian lawyer comment: private ownership of land has never disappeared], '4 July 2011 at <http://news.qq.com/a/20110701/000579.htm>.

to each family belonging to a rural collective. As a consequence of these reforms, rural incomes rose rapidly especially in the early 1980s and until the (early) 1990s. While initially, reallocation of use rights in collectively owned plots was possible. Reforms since the 1980s have created more stable rural land use rights, making the system less flexible but also more predictable and reliable. In the neo-liberal analysis of research institutions such as Landesa and of the World Bank, this amounts to creating stronger individual rights and encouraging farmers to have the confidence to invest in their land.<sup>16</sup> Of course *yongyi wuquan* were limited to the right to use and draw gains from the land, but this hardly mattered the just-mentioned economic analysis. Of course, such a definition could not limit how people defined their actual relationship with the land; even less how actual takings affected them.

In urban areas, a new right of land use for construction purposes was created; and the State, represented by urban governments, was therefore able to grant or allot such urban land use rights to individuals for the purpose of urban (residential or industrial) property development. The urban right of use has become the basic building block of China's real estate market.<sup>17</sup> To make land available for urban construction purposes, the State created mechanisms for expropriating (*zhengshou*) collectively owned (rural or suburban) land and turning it into state-owned land. Urban land can be 'reclaimed' or 'resumed' (*shouhui*) as it is deemed to be already in State ownership; and buildings on it can be expropriated for the same purpose.

A property developer normally turns to the State for the legal acquisition of new rights of use for construction. The State remains owner of urban construction land, but urban rights of use can be privately held and freely circulated on the urban real estate market; and buildings on the land can be privately owned.<sup>18</sup> Laws and regulations from the 1980s onward, including the 2007 Property Rights Law and the 2011 State Council Regulation on Expropriation of Buildings on State-owned Land, introduced procedures that the State must follow to expropriate rural and suburban land-owning collectives or private homeowners in urban areas.

This system has resulted in ample opportunities for coercive redistribution of land, for purposes such as urban construction (urbanisation) and infrastructure projects such as dams etc.. Urbanisation, which has already caused one of the biggest migrations in human history, is set to continue (with some 250 m more Chinese citizens expected to

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<sup>16</sup> Landesa, 'Our Progress' [undated] at <http://www.landesa.org/where-we-work/china/> (accessed 7 June 2013). See also Landesa, 'China's Farmers Benefitting from Land tenure Reform,' February 2011, available at <http://www.landesa.org/where-we-work/china/research-report-2010-findings-17-province-china-survey> / (accessed 7 June 2013).

<sup>17</sup> Patrick Randolph, "The New Chinese Basic Law of Property: A Real Estate Practitioner's Perspective," at <http://www.law.umkc.edu/faculty/randolphlinks.htm>, at p. 2.

<sup>18</sup> Scholars argue about whether the urban land use rights acquired in this process come close to fee simple absolute rights over land. See Don Clarke, 'China's Stealth Urban Land Revolution,' (draft on file with author).

have moved from rural to urban areas by 2025),<sup>19</sup> and is considered the cause of much social unrest,<sup>20</sup> the scale of which is significant. The mechanisms of expropriation as well as forced transfers of rural land use rights are also used for the purpose of creating large agribusinesses. As a further result, the State has become a chief recipient of revenue generated through fees for land use rights in the context of ‘property development’ while dispossessing and dislocating many citizens.

The rules on expropriation and demolitions read superficially similar to those of liberal legal systems centred in private property rights: expropriation and urban demolition decisions are subject to strict requirements of ‘public interest’ and compensation,<sup>21</sup> in some cases including re-settlement.<sup>22</sup> But these rules function differently, if at all, in a system that often does not allow private land transfers, so that expropriation and demolition are the only ways of changing land use.. The legal rules are further weakened by systemic incentives for corruption amongst a predatory complex of land and real estate administration working in collusion with the private real estate industry;<sup>23</sup> and it has given rise to extensive circumvention of the rules, especially to the creation of what is widely referred to as ‘minor property rights’ or *xiaochanquan*. These are informal ‘rights’ in land that are not (generally) recognised by the State but that are traded on a grey-zone (and hence also corrupt) urban real estate market.<sup>24</sup>

The discussion in the following considers how this property regime affects access to and control over land. In the first two of the following sections, I discuss causal relations between the existing regime and poverty and causal relationship between the existing regime and waste (or ‘sustainability’ of land use), in order to assess the system’s ability to deal with access to and control over land as a problem of resource distribution. These sections primarily discuss the type of welfare considerations addressed by the essential resources thesis. They point to numerous problems with the land tenure system’s role in

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<sup>19</sup> Ian Johnson, ‘Leaving the Land: China’s Great Uprooting,’ *New York Times*, 15 June 2013 at <http://www.nytimes.com/2013/06/16/world/asia/chinas-great-uprooting-moving-250-million-into-cities.html?pagewanted=all&r=0>. See also Ian Johnson, ‘Leaving the Land: Pitfalls Abound in China’s Push from Farm to City,’ *New York Times*, 13 July 2013 at <http://www.nytimes.com/2013/07/14/world/asia/pitfalls-abound-in-chinas-push-from-farm-to-city.html>.

<sup>20</sup> Renewed acknowledgements of the fact that land-grabs and demolitions are a prime cause of social unrest or ‘mass incidents’ are issued periodically. See e.g. Cary Huang; ‘Land grabs are main cause of social unrest, experts say,’ *South China Morning Post*, 20 December 2012; Hou Liqiang (侯黎强), ‘2014 《法治蓝皮书》揭示群体性事件诱因 [Rule of Law bluebook exposes causes of mass incidents],’ 16 April 2014 at <http://language.chinadaily.com.cn/article-211716-1.html> (citing pollution, land takings, demolitions, and labour conflicts as primary causes of ‘mass incidents’).

<sup>21</sup> It is important to note that the 2011 Regulation no longer contemplates compensation or resettlement arrangements for residents who are merely tenants. 2011 国有土地上房屋征收与补偿条例 [State Council Regulation on expropriation of and compensation for buildings on state-owned land], at [http://www.gov.cn/jwqk/2011-01/21/content\\_1790111.htm](http://www.gov.cn/jwqk/2011-01/21/content_1790111.htm).

<sup>22</sup> Like the Fifth Amendment and unlike the Declaration of the Rights of Man and the Citizen the PRC Constitution does not prescribe prior compensation.

<sup>23</sup> Jiangnan Zhu, ‘The Shadow of the Skyscrapers: Real Estate Corruption in China,’ *Journal of Contemporary China*, Vol.21, No.74, (March 2012), pp.243-260.

<sup>24</sup> Pils, ‘Peasants’ Struggle for Land in China’, in Yash Ghai and Jill Cottrell (eds.), *Marginalized Communities and Access to Justice* (Routledge, 2009), pp. 136-160 (‘Peasants’ Struggle’).

reducing poverty and ensuring sustainability of land use, but also attribute these problems to wider governance issues in China. The section following turns to what I term 'eviction injustices' – the iniquities of rules and practices in eviction contexts.

### ***Growth and poverty concerns***

Great progress in the effort to overcome poverty especially in the early 1980s was widely attributed to the rural land reforms of that era. Nevertheless, after this initial success, income gaps between rural and urban areas started widening; and basic subsistence remains a challenge for the many Chinese citizens who are deemed to live in 'poverty' in accordance with domestic and international standards.<sup>25</sup> According to China's government records, 99 million people still lived beneath the poverty line as of March 2013.<sup>26</sup> A significant proportion of the poor are rural residents or migrants with a rural residence status. Poverty has many different causes; but in different ways, it can be causally connected to the system for land rights. The discussion here merely points to some obviously relevant, possible causal connections, without attempting to be complete. It suggests that the existing property system has produced desirable (e.g. overall economic growth) and undesirable consequences (e.g. relative impoverishment of rural residents -- that economic growth, enabled in part by the land tenure system, has come at a cost to some.

First, there is the issue of the rural-urban divide, described above as an aspect of different regimes for urban and rural land. Due to the 'household registration' system, *membership* in rural collectives is in effect compulsory for many; and due to the rules of the property regime and household registration system, rural residents can find themselves 'tied' to the land and the conditions of poverty in their location. As members of landowning collectives they are deemed to get not only food but also social security from legal entitlement to land use. If migrant workers become jobless or ill, for example, they are not entitled to social welfare in the cities they have migrated to. Rather, the State's expectation is that they will return to their home villages and a safe workplace as farmers, because they have retained membership of the rural collectives they originated from. In their places of household registration, they are also entitled to social services, but the level of welfare is generally far lower than in urban areas.

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<sup>25</sup> Liu Chang and He Dan, 'China to increase efforts to alleviate poverty,' *China Daily*, 25 March 2013 at [http://www.chinadaily.com.cn/china/2013-03/25/content\\_16341128.htm](http://www.chinadaily.com.cn/china/2013-03/25/content_16341128.htm). To quote, 'over the past 12 months, China's rural population considered to be in poverty declined to about 99 million from 122 million — the first time the country has started to consider those with a yearly net income of less than 2,300 yuan as "destitute".'

S.C., 'Life at the bottom of the middle kingdom,' 2 December 2011 at <http://www.economist.com/blogs/freeexchange/2011/12/chinas-poverty-line>.

<sup>26</sup> Liu Chang and He Dan, 'China to increase efforts to alleviate poverty,' *China Daily*, 25 March 2013 at [http://www.chinadaily.com.cn/china/2013-03/25/content\\_16341128.htm](http://www.chinadaily.com.cn/china/2013-03/25/content_16341128.htm).

While collective land ownership may afford a safety net, this net can also become a trap where rural residents are legally tied to land that is unproductive, for whatever reason. As long as they must stay there, they are limited to the economic options their place of household registration offers. There are many places in China where due to a variety of factors such as environmental degradation, pollution of land, air and water, and infrastructure, it is extremely difficult to continue growing food and draw water from the land. In the south of the province of Ningxia, for example, agriculture is plainly almost impossible due to desertification, and malnutrition clearly leads to stunted growth in children and adults.<sup>27</sup> In precisely those places, on the other hand, there is little other work to be found. As a result those who can leave to try to find work in the cities (leading to the phenomenon of ‘hollow villages’, *kongxincun*); but as rural migrants they are severely discriminated against face a lack of welfare provisions in urban locations. For these ‘rural residents’ the property regime and household registration system is a source of economic hardship. It works as a safety net only if one accepts the prior determination that rural residents are not entitled to the same welfare as urban residents.

The problem described here is closely related to a fiction that underlies the land system designed by the Party-State: the fiction, namely, that collectives whose size, property (resources) and membership are determined by Party-State rules provide adequate resources for the collectives’ members. The Party-State also postulates that there is a certain ‘red line’ demarcating a minimum amount of arable land that China as a nation must have, without however having offered an adequate explanation as to why the red line is set where it is, or indeed why China might not resort to alternative ways of procuring food.<sup>28</sup> As the demand for food rises and consumption patterns change China is increasingly using resources such as land in other countries; yet this has not led to any changes in the basic property system locking many rural families into poverty.

Second, similar problems affect those parts of the rural population who are locked into collective land ownership in areas where natural resources are so polluted that they represent health hazards. The legal reasons for why rural residents find themselves ‘tied’ to such land are the same as discussed above. In these cases the issue is not so much access to any land or water as it is access to *safe* food and water satisfying minimum standards; but in terms of their effect the problems are similar to those discussed above.

According to a study published in May 2013, of the 1.86 trillion *mu* (Chinese acres) of farming land in China, 1.3 trillion are deemed to have ‘medium’ or ‘low’ productivity;

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<sup>27</sup> Observation (2005, 2008, 2010 in Tongxin County).

<sup>28</sup> Bai Chong'en, Cai Hongbin, Huang Haizhou, Li Bo, Ma Jun, Wei Jianing, Wu Ge, Xu Lin, Yuan Li, Zhou Chengjun, Zhou Hanhua (白重恩、蔡洪滨、黄海洲、李波、马骏、魏加宁、伍戈、徐林、袁力、周诚君、周汉华), ‘土地制度改革与新型城镇化 [Chinese Land Reform and a New Form of Urbanisation],’ published as a draft for discussion at a gathering of a group known as ‘China Forum 40’ (CF40), 27 May 2013 at <http://www.yicai.com/news/2013/05/2734345.html> (‘Chinese Land Reform’) is explicitly critical of the ‘red-line’ approach. Discussion group member (co-author) Xu Lin is head of the National Development and Reform Commission Planning Department (see <http://baike.baidu.com/view/1353085.htm#sub6150060>) and this text may be considered to contain useful data.

and ‘70% of farmland is polluted due to overuse of fertiliser and pesticides or industrial effluent pollution and similar reasons, affecting the nation’s food safety.’<sup>29</sup> The issue of environmental pollution even more starkly illustrates that future-generation members of rural collectives depend for their subsistence and well-being on decisions made by the present-day generation, and that the actual members of rural collectives lack the (political ) power to protect land against degradation. Pollution affects communities whose members are tied to polluted land and water resources via the collective ownership system in especially harsh ways, as the existence of ‘cancer villages,’<sup>30</sup> the prevalence of lead poisoning in certain areas,<sup>31</sup> etc. well illustrates; and it reaches far into rural areas where there is little industry but a lot of pollution..<sup>32</sup>

While being tied to collectives whose land is inadequate or polluted can be described as a consequence of a dual-track land tenure system that features compulsory rural collectives, however, it would hardly be fair to attribute all of these problems to the land tenure system; in fact, they are related to a number of wider flaws in the legal-political system, including the lack of judicial oversight of administrative decisions, and the repression of calls for transparency and fairness as ‘factors of social instability.’

A third aspect of the land tenure system that affects the material welfare of the poor and can lead to impoverishment are land and building expropriations for purposes including that of gaining land available for new urban construction. This problem is directly related to the ‘eviction injustices’ discussed further below . Between 1991 and 2005, some three million rural residents a year were thought to have been affected by land takings and demolitions, an estimated total of 50-60 million as of 2007.<sup>33</sup> After 2007 no numbers on rural takings became publicly available, and no information, not even an estimate, has become available on the number of urban residents affected by evictions and building demolitions;<sup>34</sup> although official media in 2010 quoted a government official saying that

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<sup>29</sup> Bai et al, ‘Chinese Land Reform,’ *supra*.

<sup>30</sup> Lee Liu, ‘Made in China: Cancer Villages,’ *Environment: Science*, 2010 at <http://www.environmentmagazine.org/Archives/Back%20Issues/March-April%202010/made-in-china-full.html>. accessed 7 June 2013; Cancer Villages Google Map. Liu argues that cancer villages are connected to ‘model city’ developments. He mentions the property regime as a factor that renders ‘the poor ... unable to leave the poisoned land.’

<sup>31</sup> Human Rights Watch, ‘My Children Have Been Poisoned: A public Health Crisis in Four Chinese Provinces,’ 15 June 2011 at <http://www.hrw.org/reports/2011/06/15/my-children-have-been-poisoned-0>.

<sup>32</sup> In the abovementioned arid areas in Ningxia, for example, groundwater is called ‘bitter’ and widely thought to be the cause of a high prevalence of cancer. Observation (2005, 2008, 2010 in Dongxin County).

<sup>33</sup> Yu Jianrong (于建嵘, editor) 底层政治—对话与演讲 (Subaltern Politics, Dialogues and Lectures) 122 (2009). estimated in 2007 50-60 million had been affected by then and that about half could not find new jobs and lacked social security, therefore at risk of becoming destitute.

<sup>34</sup> China Social Law Net cites information from the Ministry for Human Resources and Social Security according to which some 59 million rural residents affected by land takings have been put on social welfare payments in ‘pilot projects’ which, as of July 2010, ‘covered’ 23% of the entire country, presumably referring to the total population or (!) the total number of people similarly in need. 人社部：累计 2500 多万被征地农民纳入基本保障 [Ministry for Human Resources and Social Security: Over 25 m peasants have been included in social welfare programme], 23 July 2010, at [http://www.cslnet.cn/show\\_title.aspx?id=949&r=8472912](http://www.cslnet.cn/show_title.aspx?id=949&r=8472912).

‘more than half of China's existing residential structures...will be demolished and rebuilt in the coming 20 years.’<sup>35</sup>

The prevalence of such evictions is causally connected to the existing property regime which gives extensive control to the State both as current owner of urban and potential expropriator of rural and suburban land.

Expropriation and eviction do lead to destitution in some cases: for example, when no compensation is paid; or when protesting citizens are driven to seek justice in urban centres, where they tend to become socially and economically impoverished, in addition to being persecuted by the government. However, not all citizens affected by expropriations or evictions are economically left clearly worse off, let alone destitute. Important though the problem of becoming impoverished through expropriation is, the problem with expropriation and demolition appears to lie more centrally in what is discussed as wider eviction injustices below.

### ***Productivity and sustainability concerns***

Even though it may be argued that the Party-State’s extensive control of land use has enabled China’s real estate boom and thus helped its economic growth, it is also apparent that the rigidity of rural land tenure and the wide powers given to the Party-State affect productivity and sustainability adversely, likely to produce undesirable consequences, at least in the longer term.

First, the productivity (‘economic gains that enhance welfare’) of agriculture on the current, household-oriented model is a matter of concern. Issues arise in the context of land lying untilled by absentee ‘farmers’ (*nongmin*) who have gone to the cities to work. Bai et al. estimate that

‘... between 230 and 260 million rural residents [i.e. people with rural household registration] are currently working in the cities and that the village population is shrinking even as the amount of rural construction land is rising; this leads to a large amount of rural land lying waste. We estimate the proportion of rural wasteland currently reaches 1.85-2.85 million hectares, equalling one fourth to one third of the total of land currently available for urban use.’<sup>36</sup>

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<sup>35</sup> This official in August 2010 was quoted saying that China ‘annually sees more construction than any other country.’ In recent years, the official said, China had had ‘up to 2 billion square meters of development annually;’ and ‘around 40 per cent every year [had been] created by the demolition of older buildings.’ Qian Yanfeng, “‘Most homes’ to be demolished in 20 years,” *China Daily* 7 August 2010 at [http://www.chinadaily.com.cn/china/2010-08/07/content\\_11113982.htm](http://www.chinadaily.com.cn/china/2010-08/07/content_11113982.htm).

<sup>36</sup> Bai et al, ‘Chinese Land Reform,’ *supra*.

In addition, a rather large area of good-quality farmland has been expropriated and built on. The just-cited report puts the amount of such land at 2.42 million hectares over the past ten years.<sup>37</sup>

According to some researchers and institutions, such as for instance Landesa, productivity is also affected by the weakness of rights of use currently held by farmers.<sup>38</sup> An added, second productivity concern, albeit one only indirectly affecting the availability of farmland, is that of construction meeting investor but not potential users' demands therefore enhances welfare only marginally, it would appear.<sup>39</sup> Possibly the systems for expropriation and eviction themselves also lead to low productivity so far as the use of land for construction purposes is concerned, e.g. when land is taken and developers 'sit' on it to wait until prices go up (the State tries to control such conduct).

While some believe that strengthening individual-household-based rural land use rights helps to boost productivity, others argue that larger-scale agriculture would serve this goal better. In recent years, the Party-State has apparently expressed preference for this approach as part of a wider campaign to modernise the Chinese countryside. The New Countryside as it is propagated by the authorities will have tall residential buildings with modern appliances, and it will be economically efficient through the establishment of large agribusinesses, thus concentrating the use of land both for agriculture and housing;<sup>40</sup> it appeals to those primarily seeking economic efficiency, such as Premier Li Keqiang.<sup>41</sup>

Scholars have argued, critically, that the concentration of farmland in the hands of large agribusinesses undermines the original purpose of the current system for rural land (ensuring each household's basic welfare) and leads to eviction injustices similar to those discussed below;<sup>42</sup> and abuses of the 'New Countryside' policy to build luxury homes

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<sup>37</sup> Bai et al, 'Chinese Land Reform,' *supra*; also Victoria Ruan, 'Debts weigh down new push for urban reform,' 6 June 2013 at <http://www.scmp.com/business/economy/article/1254145/debts-weigh-down-new-vision-urban-push>.

<sup>38</sup> Landesa, 'Our Progress' [undated] at <http://www.landesa.org/where-we-work/china/> (accessed 7 June 2013). See also Landesa, 'China's Farmers Beenfitting from Land tenure Reform,' February 2011, available at <http://www.landesa.org/where-we-work/china/research-report-2010-findings-17-province-china-survey/> (accessed 7 June 2013).

<sup>39</sup> This argument runs into the general difficulty with understanding and defining welfare. Perhaps even when no one gets to move in, the construction activity and increase in wealth generated through current urban construction does enhance welfare overall. Langi Chiang, 'Flood of empty homes exceeds needs of first-time buyers in China,' *South China Morning Post*, 11 June 2014 (mentioning an estimated number of 49 m vacant homes).

<sup>40</sup> Kan Liu, 'Upheaval in Chinese Villages: A Case Study of Rural Land Expropriation for "Large-Scale" Commercial Farming in Rural China,' *The Land Deal Politics Initiative*, February 2013.

<sup>41</sup> Li Xueren, 'Premier underlines developing scale farming,' 31 March 2013 at [http://www.china.org.cn/china/2013-03/31/content\\_28408103.htm](http://www.china.org.cn/china/2013-03/31/content_28408103.htm).

<sup>42</sup> Kan Liu, 'Upheaval in Chinese Villages: A Case Study of Rural Land Expropriation for "Large-Scale" Commercial Farming in Rural China,' *The Land Deal Politics Initiative*, February 2013.

occur.<sup>43</sup> To the extent that these criticisms are borne out by facts on the ground, they illustrate competition between different goals, and suggest that productivity increase at the cost of individual rural households is not necessarily desirable.<sup>44</sup>

Third, sustainability (environmental and resource preservation) concerns arise from environmental pollution issues, as already mentioned above. Closely related additional concerns arise from overuse of land for particular purposes, for instance for urban construction purposes in areas whose natural environment does not support an urban population density – Beijing, for example, is too arid to support its current population, which leads to the redirecting of water from the surrounding Hebei Province.<sup>45</sup>

In addition, large infrastructure projects such as giant dams have raised a plethora of concerns not only with the difficulties they have caused to evictees (see below) but also regarding the environmental consequences of such projects. These problems have been discussed at length with regard to the Three Gorges Dam, for example; and reports suggest that not only long term critics but also officials and authorities responsible for the project are now willing to concede that it has resulted in problems with sediments, greater risks of flooding, and a reduction of biodiversity.<sup>46</sup>

It is difficult to assess the seriousness of these issues in a quantitative way, not only for lack of expertise, but also because it is difficult to access information regarding environmental pollution in China. These issues involve questions of accountability as well as -- from a Chinese government perspective -- social stability; and publicly available reports are often vague and reticent. It arises in a system with an extensive, labyrinthine and widely criticised State Secrets Law, which until recently treated even meteorological survey data as State secrets,<sup>47</sup> and according to which reports on soil pollution remain so classified;<sup>48</sup> and in the context of intense suppression of environmental, as well as land rights activism, where even the dissemination of legal regulations to rural pollution victims can trigger retaliation from officials, as Chinese researchers report.<sup>49</sup> What can be said with confidence is that the pollution and

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<sup>43</sup> Own case study, outskirts of Beijing, 2010. Residents showed photos of official events announcing the establishment of 'New Countryside' villages from a few years ago, and real estate developer brochures of high-end luxury villas, some of which had already been built, in the same spot.

<sup>44</sup> In urban areas, some public discussion also links the property system to the existence of a real estate bubble: it is observed that the system encourages officials to take land at 'prices' (expropriation or eviction compensation standards) they can effectively set themselves, for example. However, bubbles also occur under entirely different property regimes.

<sup>45</sup> This point is mentioned e.g. in Chen Tian, 'Beijing's Limits to Growth Detailed,' *Global Times* 21 March 2013 at <http://www.globaltimes.cn/content/769548.shtml>.

<sup>46</sup> Jonathan Watts, 'China Warns of "Urgent Problems" facing Three Gorges Dam,' 20 May 2011 at <http://www.guardian.co.uk/world/2011/may/20/three-gorges-dam-china-warning>.

<sup>47</sup> Cp. Epoch Times at <http://www.theepochtimes.com/news/7-2-6/51328.html> / <http://www.epochtimes.com/gb/7/1/14/n1589688.htm> and HRW report on state secrets.

<sup>48</sup> <http://www.scmp.com/news/china/article/1158602/report-mainland-soil-pollution-state-secret>.

<sup>49</sup> Yang Sujuan and at a public seminar in January 2013; discussed more more generally e.g. in O'Brien, 'Suing the Local State: Administrative Litigation in China,' *China Journal*, No. 51, pp. 76-96.

contamination of land and water is a problem widely understood to diminish sustainability and productivity, in particular also of farmland.

The severe pollution issues China is experiencing at present are likely aggravated by the presence of a powerful authoritarian State that not only wields control over land but is also characterised by political power concentration at all local and central levels of the State administration, rendering efficient environmental impact assessment and similar mechanisms introduced to prevent further pollution difficult, and generally hampering efforts to hold polluters accountable. Lee Liu moreover argues that the rural-urban divide privileges urban areas over rural ones and leads to a diversion, as it were, of urban pollution into the countryside (e.g. cancer villages).<sup>50</sup> In addition, the ease with which the government can take land contributes to the phenomenon of mammoth infrastructure projects with adverse environmental impact .

In sum, the rigidity of the rural-urban divide enforced through the land tenure and household registration systems is widely held responsible for the fact that so much farmland remains uncultivated, resulting in low productivity; and there is a debate about whether enhancing power concentration through the creation of agribusinesses, or enhancing individual-household-based land rights would spur productivity. At the same time, wide powers wielded by the Party-State with regard to land have enabled or at least failed to prevent unsustainable (e.g. polluting) kinds of land use. It could be argued that the comprehensive power of the Party-State over land, and more widely its authoritarian exercise of political power, should also be factors allowing the authorities to address unproductive or unsustainable land use, for instance by changing the performance criteria whereby officials are assessed, and to address lack of productivity for instance by reallocating land rights to large agribusinesses. However, the success of such policy changes would depend at least in part on the degree to which officials' incentives do, in fact, consist in official performance criteria, etc., as opposed to rent-seeking and various other forms of corruption.<sup>51</sup> More generally, a public discussion of the goals of productivity and sustainability can hardly get off the ground where information is withheld and popular criticism is suppressed.

### ***Land-grab and eviction injustices***

In order to assess the questions mentioned at the outset, namely whether the essential resources thesis and the requirements of voice and reflexivity work well in the context of evictions and land-grabs and China, it is necessary first to take stock of these injustices. The grievances produced by this system are vast and serve to throw a light on the many different ways in which, depending on social and political circumstances, control over land is important. Above, it was observed that material dispossession can lead to impoverishment and material disadvantage that can be considerable, and that is certainly

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<sup>50</sup> Lee Liu, *supra* ..

<sup>51</sup> Jiangnan Zhu, 'The Shadow of the Skyscrapers: Real Estate Corruption in China,' *Journal of Contemporary China*, Vol.21, No.74, (March 2012), pp.243-260.

among the grievances evictions and expropriations produce. But land takings and housing demolitions do not invariably deprive people of essential goods needed for survival, even though both access to land as a food resource and access to housing are often not secured. The problems evictees face are not limited to access to goods, even if these were defined generously along ILO terms as including, e.g., *security* of shelter and/or land tenure. A brief survey of the grievances typical in these contexts shows that not all of them can be captured in economic terms.

The problems discussed in the following are, first, evictions not in the public interest; second, compensation, when denied or inadequate; third, the problems of coerciveness and fourth, violence. Economic analysis can help us, up to a point, to understand the first two problems. I argue here that the more broadly conceived injustice of a denial of ‘say’ is related to the tendency to *reduce* analysis to the first two mentioned issues, ignoring or dismissing the third and fourth ones as a merely incidental complications in some cases.

First, to understand when an eviction or expropriation is ‘for a public interest purpose,’ it is important to remember that Chinese law uses similar words as those articulated originally in liberal property regime contexts, but largely prohibits private transactions that make state expropriation an exception in those regimes (due to socialist public ownership and its attendant limitations on transferability). At the same time, the State actively encourages development, and therefore generally takes the view that ‘public’ interest must be understood so broadly as to become virtually meaningless. A major property developer once commented that

‘[There is] no such thing as demolition and relocation that is not in the public interest. As long as it is [for the purpose of] urban construction, it is in the public interest.’<sup>52</sup>

And, as pointed out earlier, attempts to restrict expropriations by explicitly excluding certain scenarios from ‘public interest’ have been largely unsuccessful in practice.

While according to this mainstream interpretation the ‘public interest’ restriction has no restrictive effects and therefore appears next to meaningless, it is important to see that the argument advanced here is not unreasonable and may be correct from the perspective of economic aggregate welfare analysis. At least, we can observe that property development has generally contributed to GDP growth. How could this not be in the public interest, understood on purely economic terms?

This general-welfare perspective also explains the official approach to the question of how to compensate those affected by evictions and/or expropriations. Compensation is

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<sup>52</sup> Yang Ming, (杨明), Chairman of Beijing Huayuan Group Ren Zhiqiang says: ‘There is no such thing as demolition and relocation that is not in the public interest. As long as it is [for the purpose of] urban construction, it is in the public interest’ (北京华远集团董事长任志强: ‘不存在非公共利益拆迁 只要是城建都是公共利益’), *Oriental Outlook Weekly* (瞭望东方周刊) <http://finance.ifeng.com/opinion/zjgc/20100210/1822226.shtml>.

generally viewed as a matter of weighing individual, private interest (of evictees) against the supposed public interest (in eviction and expropriation). There is, consequently, some debate about appropriate standards for compensation. According to current legal rules, rural residents are compensated not for the market value land will have once it becomes part of urban real estate, but instead for lost putative agricultural output (even in cases where land is no longer used as farmland);<sup>53</sup> while in urban areas, compensation is for the market value of the buildings but not the land taken from urban residents. In both cases it falls (often) far short of future market value of the land; Landesa Institute has concluded in a long term study that on average that value was 40 times the amount of compensation actually paid, not taking into account the 40 percent in which no compensation at all was paid.<sup>54</sup> More in-depth individual cases studies confirm this impression in anecdotal ways;<sup>55</sup> they also suggest that the denial of compensation and uses of violence are reactions to citizens' attempt to protect their rights in these cases.

What is remarkable about the officially accepted, mainstream way of discussing compensation issue is that by focusing on a balancing exercise between private and public 'interest' (in Chinese, *liyi*), it can submerge and suppress other grievances. Thus, having rendered 'public interest' restrictions ineffective, official discourse generally directs attention away from the fact that in addition to posing problems of assessing any conflicting material interests on sides (evictors and evictees), evictions and expropriations are coercive and may involve violence. The eviction or expropriation is treated as though it were a transaction between consenting individuals, where only the 'price' at which land is acquired were at issue, and as though a compulsory acquisition of land were justified as long as that price was right. Mainstream discourse can then easily criticise those who resist and ask for more (compensation) for their greed and selfishness, since their demands can be juxtaposed with an abstract public interest in evicting and/or expropriating them, and contrasted with the silent majority of evictees' compliance. By suppressing awareness of the coercive nature of evictions and expropriations, mainstream discourse maintains a focus on problems that can be understood in accordance with cost-benefit analysis.

The coerciveness that distinguishes expropriations from private transactions is in many concrete cases rendered a more serious issue by party-state-centred violence. In many cases, for example, 'consent' declarations by evictees are obtained under duress, through violence or threats of violence, which can occur from the point when the government reaches out to rural or urban households to 'negotiate' compensation and resettlement with them. Because the government is required to secure 'agreements' before the process

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<sup>53</sup> Efforts are underway to reform compensation standards at the time of this writing. They have not yet led to legislative changes.

<sup>54</sup> Landesa, *supra*.

<sup>55</sup> In a case in Zigong, Sichuan (expropriation decision announce in 2002), the ration was ca. 70:1 whereas in a more recent case in Hangzhou (decision announced in 2009) the ratio was ca. 23:1. Pils, 'Waste No Land: Property, Dignity and Growth in Urbanizing China', *Asian-Pacific Law & Policy Journal* Vol. 11, issue 2 (2010) pp. 1-48, available at [http://www.hawaii.edu/aplpj/articles/APLPJ\\_11.2\\_pils.pdf](http://www.hawaii.edu/aplpj/articles/APLPJ_11.2_pils.pdf); 'Land Disputes, Rights Assertion and Social Unrest: a Case from Sichuan,' 19 (2006) *Columbia Journal of Asian Law* 365

of clearing the land in question to prepare it for construction, there is a positive incentive to put evictees under pressure to sign.<sup>56</sup> In cases of refusal to sign, orders to evict and demolish forcefully can be made – evictees do not really have a meaningful option to refuse - and the process of implementing such orders can involve further violence.<sup>57</sup>

Compounding the problems discussed above, access to justice is frequently denied. In a climate of intimidation, only the very determined will try to seek the protection of the law against an eviction decision, via the court litigation system or a system for petitioning the Party-State, known as ‘Letters and Visits.’ But both the courts and the ‘Letters and Visits’ system often fail people when they complain about the illegalities of land-grabs or demolition orders. The courts use a number of techniques, sometimes in combination, to refuse to admit complaints (*bu yu shouli*) in administrative or civil litigation.<sup>58</sup> Even when they take a case, they normally narrow down the scope of their review and address only the issue of compensation, but not that of the legality of an expropriation or demolition, and litigation may only in exceptional cases stay execution orders for demolition, so that ‘your house may be gone by the time you’ve won your case,’ as one lawyer put it.<sup>59</sup> Once a decision awarding more compensation has been won, it may still be difficult to enforce.

Partly because access to justice through the courts is so difficult, citizens often use the court and petitioning systems concurrently. Petitioning, however, puts them at further risk of retaliation which can again include State-centred violence as well as forceful ‘deportation’ back to one’s hometown, and extra-legal detention in special facilities for petitioners. In the course of petitioning, individual human lives can become entirely unhinged.

The experience of people facing land grabs and forced evictions (again, not all those affected would describe themselves as victims) suggests that the value of having access to goods essential to survival cannot easily be separated from numerous other goods. Rather, a just property rights system must give consideration to the process of taking property away from a particular individual or group. These processes can be harmful to

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<sup>56</sup> The laws of course do not allow, and indeed many rules prohibit the fear tactics and measures commonly used to get residents to move out; explicit prohibitions reflect the fact that demolition zones are zones of coercion and danger. 2011 国有土地上房屋征收与补偿条例[State Council Regulation on expropriation of and compensation for buildings on state-owned land], at [http://www.gov.cn/zwqk/2011-01/21/content\\_1790111.htm](http://www.gov.cn/zwqk/2011-01/21/content_1790111.htm)

<sup>57</sup> Amnesty International, ‘Standing Their Ground: thousands face violent evictions in China,’ released in October 2012, at <http://www.amnesty.org/en/library/info/ASA17/001/2012/en..>

<sup>58</sup> Both are used in practice.

<sup>59</sup> Cp. Pils, ‘Contending Conceptions,’ April 2013 instructions from the Supreme People’s Court to lower courts suggest that courts try to avoid getting involved altogether. 最高人民法院关于违法的建筑物、构筑物、设施等强制拆除问题的批复[SPC Answer regarding the forced demolition of dangerous buildings, structures and facilities], 2 April 2013 at [http://www.court.gov.cn/qwfb/sfjs/201304/t20130402\\_182970.htm](http://www.court.gov.cn/qwfb/sfjs/201304/t20130402_182970.htm); 中国法院不再受理行政机关的强拆申请案 引发热议 [SPC decision no longer to accept administrative authorities’ applications for forceful demolition orders triggers heated debate], *Radio free Asia*, at <http://www.rfa.org/mandarin/yataibaodao/renquanfazhi/cq-04032013105224.html>.

property rights or security of tenure as an aspect of the human right to housing, for example; but they can also be harmful to a plethora of other rights and legitimate interests, including life and liberty. A property system which, like the Chinese one, is set up to rely on large scale expropriations for goals as varied as urban construction, dam projects, reforestation and large scale farming, must be understood as one crucial cause of these further evictions and injustices. Experiences of such injustices lead to reactions that would make no sense if its victims were focused exclusively on their property holdings or vested interest in housing. Nothing illustrates this more forcefully than the suffering of evictee protestors, especially those who take risks to liberty and life to resist, such as suicide protesters. In their cases, the problems of land-grabs and evictions can become so serious that they lead to the destruction of human lives.

In conversation, a liberal scholar once vehemently rejected my suggestion that people who resorted to extreme forms of protest were defending their ‘dignity’ (*renge zunyan*) because, in his view, ordinary people in China did not ‘yet’ have such a concept.

‘What they will think is just: “I have no way of going on living (*wo wufa huoxiaqu*).”’<sup>60</sup>

This mental state may be responsible for the suicides that have occurred in eviction contexts.<sup>61</sup> They challenge (albeit indirectly) the interest-oriented view preferred by the authorities, as discussed in the next section, because they illustrate that not only scarce material goods, but also imponderable goods and considerations are material to survival.

In sum, in the state-driven discourse about eviction, welfare interests, or *liyi*, play a prominent role. According to official views, all eviction conflicts are defined as being about welfare interests; and it follows, from a state perspective, that all such conflicts can in principle be solved with money, or material compensation, of the evicted. But in fact, cost-benefit analyses of the consequences of evictions cannot serve to understand the rights violations occurring in the context of demolition, forced eviction and expropriation. . There is no moral neutrality in the process and purposes of an expropriation and hence one cannot determine whether it was unjust merely by, for example, comparing property holdings before and after the expropriation. Any welfare argument is at base a consequentialist argument; and its limitations lie in the fact that concern for what produces more welfare, however measured, is not necessarily conducive to treating a person with respect – it is not always the same as concern for persons; and hence as Rawls argued in his criticism of utilitarianism it may fail to take into account the difference amongst persons. The State-led discourse about evictions not only fails to capture some eviction injustices through its inability to comprehend them as anything other than economic losses; it would also implausibly suggest that any protest against

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<sup>60</sup> #77 2013-1.

<sup>61</sup> It has been argued that China has a tradition of suicide protests (舍身取义), and with regard to Tibetan suicide by self-immolation, it has been argued that this is a form of self-empowerment, not mere despair. These motivations could coexist. Sing Lee & Arthur Kleinmann, ‘Suicide as Resistance in Chinese Society,’ in *Chinese Society: Change, Conflict and Resistance* 221, 228 (Elizabeth Perry and Mark Selden eds., 2000).

evictions and land-grabs was in essence a fight for better compensation, with disregard for any other concerns and demands expressed by protestors.

Therefore, more comprehensive (and abstract) concepts accommodating different kinds of potential rights violations must be involved in assessing property regimes. It is important to recognize the dependency of the good that lies in land on other goods, which include the protection of basic rights and of access to justice.

### ***Reconsidering the requirements of justice in property regimes: ‘say’ and rights***

After Tang Fuzhen, standing on the roof of her house and facing what she regarded as the unlawful, unjustified and violent demolition of her home by a demolition team physically attacking members of her family, committed suicide by self-immolation in 2009,<sup>62</sup> officials concerned in her case complained that she had failed to take a correct moral stance. Reportedly, one said that she had ‘put personal interests above the public interest.’<sup>63</sup>

The officially propagated view reflected in such comments is not only broadly welfare-utilitarian (grounded in the argument that expropriations and demolitions are necessary to support construction which in turn supports GDP growth) but also authoritarian (grounded in the view that the State, or the Party and State, have the authority to make rules as they see fit). Such attitudes find expression not only in criticisms of recalcitrant individuals, like Tang Fuzhen, but also in legislation and other rules and ‘normative documents’, and ‘red-letterhead documents,’ as well as collective exhortations of the public.. Official billboards at eviction sites, for example, will typically read, ‘Support the National Construction Project,’ ‘Thoroughly Implement the Scientific Development Perspective, Build a World City with Chinese Characteristics!’ and ‘Advance in Solidarity, Revive China, Love the Motherland, Build the Motherland!’ and so on.

The case of Tang Fuzhen captured the public imagination, not least because it exposed what was inappropriate about the state-led discourse. Tang Fuzhen was by no means the first or last such suicide protester against evictions; there have been dozens of reported cases,<sup>64</sup> and may have been more cases that went unreported.<sup>65</sup> It was her case, however,

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<sup>62</sup> Roger Cohen, ‘A Woman Burns’, *New York Times*, 25 January 2010, at <http://www.nytimes.com/2010/01/26/opinion/26iht-edcohen.html?pagewanted=all>; ‘唐福珍其人 凤凰卫视/[Tang Fuzhen as a Person],’ Phoenix Television 15 December 2009 at <http://www.youtube.com/watch?v=Pt6cvNq3Umw>.

<sup>63</sup> Yu Jianrong, ‘Will China’s Tang Fuzhens regret self-immolation?’, translated by Stacy Mosher, in Marina Svensson and Eva Pils, Marina Svensson, ‘Yu Jianrong: From concerned scholar to advocate for the marginalized,’ *Contemporary Chinese Thought*, vol. 46, no. 1, Fall 2014, forthcoming. Yu attributes such attitudes, *inter alia*, to the tendency to contrast evictee protesters in a dehumanising, ‘them vs. us’ way.

<sup>64</sup> Cp. Amnesty International, ‘Standing Their Ground: thousands face violent evictions in China,’ released in October 2012, at <http://www.amnesty.org/en/library/info/ASA17/001/2012/en>.

<sup>65</sup> For example, in conversation, a rights lawyer mentioned two unreported cases of deaths attributable to forced evictions in one month in Beijing alone. #6 2014-1. Another lawyer drew attention to the large

that triggered a national debate. It illustrated that, when evictees protest, they do not, in fact, merely seek better compensation for their land or homes. Not all of their complaints, nor indeed all of their adverse experiences, can be captured by an assessment of their economic losses. Rather, much of what they protest against is the lack of individual and substantive ‘say’ in the decisions the State makes over their land, homes and lives.

While it is of course not possible to assess the distribution of views about evictions and expropriations across the Chinese nation,<sup>66</sup> anecdotal evidence suggests that criticism of eviction injustices has in recent years implicitly or explicitly begun to emphasise the interconnectedness between rights immediately protecting welfare interests in eviction contexts, and broader constitutional and human rights. Popular views of eviction conflicts are reflected in the banners, graffiti, and other protest slogans of evictees: ‘Defend Our Homes! Return Our Land! No Violence! Down With Corruption!’,<sup>67</sup> for example, and ‘Uphold and protect the Constitution, defend Human Rights;’ ‘Give me my land back, protect my home;’ ‘Severely punish violent thugs; safeguard citizens’ lives and property.’ ‘The wind and rain may enter but the Emperor may not.’<sup>68</sup> Graffiti in demolition zones have compared evictees’ experience to ‘foreign invasion’ and compared the perpetrators of eviction injustices to fascist regimes.<sup>69</sup> A ‘Citizen Broadcasts,’ similarly, featured a group of citizens holding up two banners and chanting the slogans, ‘Lawful Private Property Is Sacrosanct And Must Not Be Violated! Return My Home! Rebuild My Home!’<sup>70</sup>

From the perspective of some of these popular views, the government’s decisions and the claim to control over land and buildings underpinning such decisions violate their rights of ownership, understood in a broad and non-positivistic way, as well as other individual rights. Since the idea of private property rights captures with great simplicity the classical liberal demand that the State must respect the rights and interests of individual citizens, and the idea of protection of economically and socially weak against arbitrary power exercise, private property is an especially popular concept used in protest action.

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number of ‘hidden cases’ of eviction violence at . seminar: ‘苏州城镇化与拆迁研讨会 -- 范木根等案分析 [Seminar on urbanisation and demolition and relocation in Suzhou – an analysis of the case of Fan Mugen and other cases],’ 19 January 2014 in Beijing; ‘阵容庞大：范木根自卫杀人案和维稳拆迁研讨会/视频[Great turnout: Seminar on the self-defence homicide case of Fan Mugen and stability-preservation style demolition and relocation],’ 22 February 2014 at <http://news.boxun.com/news/gb/china/2014/02/201402220159.shtml#.UzxWtLmPI5p>.

<sup>66</sup> This attempt to sum up some of the lessons from eviction processes (eviction injustices) draws on evidence from individual cases of protests by communities facing evictions, and it does not attempt to assess the popular mood in a quantitative way. Doing so would be difficult, partly due to the politically repressive environment.

<sup>67</sup> Pictures on file with author (August 2009 and July 2010).

<sup>68</sup> Pils, ‘Waste no Land,’ *supra*.

<sup>69</sup> Pictures on file with author (July 2009); Ni Yulan in He Yang (何杨) 紧急避难场所[*Emergency Shelter*], independent documentary film (2010)..

<sup>70</sup> Citizen Radio (公民博报), ‘私有财产神圣不可侵 [Private property is sacrosanct and must not be Violated],’ 28 May 2013 at [http://v.youku.com/v\\_show/id\\_XNTYzOTIwOTQ4.html](http://v.youku.com/v_show/id_XNTYzOTIwOTQ4.html). This report is said to have been produced at an eviction site in Changzhou (Jiangsu Province).

In the cities, some argue that the 1982 Constitution unfairly took away land ownership that had been left untouched throughout China's socialist era, and transferred it to the state.<sup>71</sup> References to 'thuggery' and 'robbery' and 'foreign invasion,' not only criticise the violence that often accompanies expropriation and eviction processes, but also make an underlying claim about the rightful allocation of homes destroyed or land taken.

In the countryside, from the perspective of rural evictee activists, the state has expropriated many collectives without regard to its own rules supposed to protect against land takings. Some also perceive it as having violated a social pact that gave rural residents security of their land holdings under socialism; or they regard it as having destroyed traditional land rights it had no right to interfere with. Periodically, such views find expression. For example, in a number of peasant land ownership declarations emerged toward the end of 2007, villagers asserted comprehensive rights of ownership in excess of the letter of current Chinese law.<sup>72</sup> In Wukan Village in Guangdong Province, where protest of this nature erupted in late 2011 and early 2012, villagers vocally asked for 'their' land back, although this resulted neither in a return of 'their' land, nor in a genuine amelioration of village self-rule (democracy) under the village autonomy system.<sup>73</sup> Apart from such explicit declarations and demands, there are also entrenched practices which implicitly reject the hold the Party-State claims to have on 'their' land, such as the grey-zone 'minor property rights' transactions mentioned above.

Evictees also protest dispossession and violations of housing rights, for example by use of the ubiquitous phrase 'No Home To Return To.'<sup>74</sup> As they become more aware of international housing rights standards, they add these standards and the vocabulary associated with them to their repertoire, for instance in actions taken on World Habitat Day.<sup>75</sup> Going beyond individual cases and experiences, they address the more complex flaws of the system, and organise collective protests, such as 'surround-and-observe' actions (since unlicensed 'demonstrations' are illegal), which often take place near

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<sup>71</sup> Hua Xinmin's and others advocacy in this regard is discussed in Pils, 'Contending Conceptions.' See also Zhou Qiren (周其仁), 城市土地国有化之谜 – 城乡中国系列评论之二十六 [The mystery of the nationalisation of urban land – urban and rural China review no. 26], at <http://zhouqiren.org/archives/1329.html>; Hua Xinmin (华新民), 华新民拆迁律师点评: 土地私有产权从来就没有消失过[Chaqian lawyer comment: private ownership of land has never disappeared], ' ; 4 July 2011 at <http://news.qq.com/a/20110701/000579.htm>.

<sup>72</sup> Letter entitled '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[40,000 peasants from 72 villages in Fujin City, Heilongjiang, declare their ownership of land to the entire nation], 9 December 2007, at <http://www.peacehall.com/news/gb/china/2007/12/200712091236.shtml>. This and the other 2007 declarations mentioned here are discussed in Pils, 'Peasants' Struggle,' *supra*.

<sup>73</sup> James Pomfret, 'Freedom Fizzles Out in China's Rebel Town of Wukan,' 28 February 2013 at <http://www.reuters.com/article/2013/02/28/us-china-wukan-idUSBRE91R1J020130228>.

<sup>74</sup> This phrase is used e.g. in *Emergency Shelter*, *ibid*.

<sup>75</sup> The text of a protest poster used for this action runs, 'I want a home / A home where the wind may enter, the rain may enter, but no mafia 'emperor' may enter / 9.6 million square kilometres of land / Yet year after year I cannot find a home that belongs to me!' It was used on 4 October 2010, in a World Habitat Day action in Beijing. Document on file with author.

government or court buildings, and in sometimes organising in-courtroom actions (such as the shouting of slogans).<sup>76</sup>

Claims that the State must recognise a more comprehensive right of private land ownership than currently articulated under Chinese law, implicit arrogations of such a right by informal (illegal) private land transfers (in the transfer of ‘minor property rights’), and wider activism making explicit the connection between private rights of access to and control over material resources and other, including civil and political rights. They point to the importance of recognising that individuals must have a degree of ‘say’ in the affairs that closely affect them, that they must have some minimum control over their lives. As an eviction rights lawyer commented,

‘These issues do not merely concern *liyi* (welfare interests), they do not merely have to do with money. They directly concern the right to speak (*huayuquan*)...’<sup>77</sup>

The anecdotal evidence from on the ground briefly surveyed above suggests, moreover, that merely the ability to influence collective decisions over land would not be adequate to protect such control, to give individuals a sufficient amount of ‘say’ in their lives. While there is no intention here of disputing that collective interest may justify (land) takings and evictions, there must be a principled recognition of the ability of individuals, absent such overriding and (according to a principle of ‘voice’) collectively articulated concerns, to be in control of their property, and to be protected from arbitrary acts of the state affecting their right to housing (which includes security of tenure). And, the mere fact that a particular legal regime purports to recognise private property and housing rights does not ensure protection as long as other vital rights are unprotected, including of course the right of the individual to speak up against decisions made in the name of a collective entity. While this may seem so uncontroversial as not to be worth mentioning in many systems, it is important to emphasise such a principle of ‘say’ in the Chinese legal system, and this particular system may serve as an example of what can happen when the state denies individual, private property rights are systematically denied to certain (large) groups of the population, arguing that asserting private rights would in these contexts be selfish.

It is therefore necessary to complement the requirements of voice and reflexivity in the sense that, while these principles hold, individual rights must in principle also be respected. Any required limitations of the right of (private) property owners to exclude, for example, must be understood in this light. They must recognise that, in principle, those affected by redistribution of their homes or land to others must have a say in this process, and that public interest restrictions on expropriation can only make sense in the context of a property system committed to a principle of proportion of private property rights. Conversely, the adequacy of a regime (or set of legal rules and institutions)

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<sup>76</sup> Author conversation, July 2011.

<sup>77</sup> # 2014-1. This lawyer continued to comment that ‘the government uses violent demolition and relocation, because that helps them raise GDP. It’s a very simple logic.’

governing expropriations and evictions is not ensured simply by ensuring adequate compensation for takings. Their many vilifications and glorifications notwithstanding, private property rights, like housing rights, capture important aspects of individual freedom and dignity for those who have built lives relying on the security they afford, even though there is nothing in the present discussion suggesting that such rights are absolute. On the contrary, their boundaries can only be sensibly determined by taking other principles and legitimate goals into appropriate account.

## **Conclusion**

This discussion urges three principal conclusions. First, rising political contention about land use, including in particular the problem of evictions, suggests that in many contexts land should not be thought of in a *tabula rasa* sort of way, as a resource to be distributed in accordance with measurable goals, no matter what would be required to redistribute access to and control over it. This does not compel us to embrace neo-classical or neo-liberal conceptions of natural or economically efficient private property rights; but it does require us to respect individual rights and dignity as an integral aspect of legitimate property regimes. It reminds us that private rights can serve the important goals of empowering potential victims of power abuse. This conclusion amounts to an argument *for* exclusion, but not on neo-liberal terms: rather, it would empower people facing evictions to resist these measures even if their eviction would apparently serve economic growth. It would acknowledge some functional similarity between the right to exclude of property owners and individual housing rights ('security of tenure'); and it would not serve as argument against redistribution of other resources or (certain kinds of) taxation.

Second, in making rules to govern access to and control over resources, we are required to pay attention to non-material goals such as that of freedom<sup>78</sup> and other non-consequentialist types of consideration affecting what arrangements we should make for access to essential goods. As decisions about rules governing land are political in nature; the political nature of property related decisions should prompt us pay attention to all political values that should be pursued by a political system; these are not limited to the values most closely associated with property but include, for instance, civil and political rights. The problem is one of appropriately weighting the different kinds of *competing* principles; but these goals are amenable to 'practical concordance.'<sup>79</sup>

Third, on the basis of the discussion of eviction and land-grab injustices, 'Voice' and Reflectivity require to be complemented by a principle of 'Say' that can more conventionally be described by reference to central moral-legal rights such as the classic liberal foundation of private property rights, *not* misinterpreted as a right against

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<sup>78</sup> Addressing Locke, Sen and Nussbaum 'Essential Resources' argues that 'it follows that property regimes are not just an expression of freedom but both a product and determinant of access to resources and abilities.' (p. 10)

<sup>79</sup> 'Essential Resources,' *supra*, pp. 17 f. ) ... '[The concept of practical concordance] holds that some norms are so important that they cannot be trumped by others or balanced out but also takes into account the decreasing marginal utility of protecting any single interest.' ('Essential Resources,' *supra*, p. 18)

redistribution, but understood correctly as a right of limited economic freedom and against arbitrary (or predatory) takings, as well as of the right to housing as recognised, for example, in the UDHR. These rights and the civil and political rights central to the defence of these other rights by no means justify disregard for collective goals, or the exclusion of others in all cases, but recognising their possible independent weight is important to deal with situations where the collective principle of 'Voice' would be ineffective in articulating the requirements of justice.