



Assessing evictions and expropriations in China: Efficiency, credibility and rights



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ABSTRACT

Examining three possible ways of interpreting China's laws on expropriation and eviction, I argue in this paper that a persuasive evaluative assessment of China's property regime needs to examine the impact of forced evictions not only on property rights but also on basic rights such as the human right to be protected from forced evictions, and the problem of access to justice in cases of contentious evictions. Some (neo-liberal) arguments for secure property rights, while popular, are based on a simplistic understanding of rights, because they reduce the value of rights to their assumed utility. The 'credibility' thesis advanced by Peter Ho can be used to assess evictions under China's property rights and land tenure system, but according to the view taken here, a truly credible system must protect basic rights.

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As according to some assessments, some 120 million rural residents as of 2012 have made way for property development projects¹; and some tens of millions more (at a guess) may count among urban evictees, State expropriation and eviction is an important part of the Chinese law on immoveable property and land tenure. Its importance is further heightened by the fact that, while many evictees are compliant and some reportedly pleased with the process,² an unknown fraction of the unknown total number of rural and urban evictees have been evicted forcibly; and protests against rural land takings are widely thought to be among the most important causes of social unrest in China.³

This paper argues that a persuasive evaluative assessment of China's property regime needs to examine the impact of forced

evictions not only on property rights but also on basic rights such as the human right to be protected from forced evictions, and the problem of access to justice in cases of contentious evictions. The argument proceeds in three steps. First, some (neo-liberal) arguments for secure property rights not only inappropriately predict that private property rights (always) serve economic growth, but that they are also based in a simplistic understanding of rights, because they reduce the value of rights to their assumed utility. In fact, the destruction of property rights in the process of urbanisation in China is a good example illustrating that utility-driven justifications of rights are unstable, because such destruction can be persuasively argued to promote economic growth in China.

Second, drawing on fieldwork on urban and rural evictions in China, uses of 'credibility' as a concept 'drawing attention to institutional performance over time and space [i.e. function], rather than to desired form postulated by theory or political conviction' to assess evictions under China's property rights and land tenure system are discussed (Ho, 2014: 15). It is argued that, in addition to assessing 'how actors perceive institutions as a jointly shared rule' (an element of the definition of credibility), a comprehensive functional assessment of a system must also consider how it does in terms of preventing and providing redress for potential harm done to individuals when land and buildings are redistributed; and how it deals with situations of conflict and lack of 'shared rules'. These considerations are all the more important considering that, suffer-

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¹ 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. Yu (2009: 122). More recent statements mention a current number of rural evictees of ca 120 million, adducing various government statistics, as the 'most conservative estimate.' Boxun (2012). No information has been made publicly available on the number of urban residents affected by building demolitions.

² Cp. E.g. CJYI Net (2010), mentioning Beijingers '... who are dressed modestly and who behave with restraint ... [but] may well be already worth a million and own several properties – those are the 'demolition billionaires' who got rich through demolition and relocation. ...'

³ Hou, (2014) cites pollution, land takings, demolitions, and labour conflicts as primary causes of 'mass incidents.'

ing as a consequence of eviction or expropriation might not detract from the system's overall 'credibility,' as defined above.

On this basis, third, the relevance of China's rights-centred discourses of property relations and evictions, and the implications for the credibility thesis is examined. From the explicitly normative perspective taken here, a truly credible system must protect basic rights. Whereas the credibility thesis operates on the basis that "an institution perceived as credible at one given time and location could well be entirely non-credible, thus empty, at another time and location, and vice versa," (Ho, 2014: 15) the present paper argues that credibility is affected by injustice, and that systemic injustice in current Chinese eviction conflicts is best understood and addressed in terms of rights violations. This is not to say that cultural, historical and social context should be ignored. Rather, inevitably, when engaging with Chinese discourse on evictions, we add our views and voices to debates that are not closed off by national borders or the history that has led to these borders' creation.

The three perspectives examined in the following can also be read as interpretive approaches to the legal framework for protecting rights centrally affected by the urbanisation and urban renewal process, and to the legal rules on land use and land governance, as well as on demolition and expropriation of land and buildings. These include the right to own land use rights and (shares in) buildings in accordance with the Constitution, the 2007 Property Rights Law, the 1998 Land Administration Law and other laws and regulations; the rules allowing Chinese citizens, within limits, to engage in private property transactions. They also include the rights of liberty of the person, freedom of expression, and access to justice. Their textual bases include the Constitution, laws and regulations, as well as international human rights treaties, in particular the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, which China has signed but not yet ratified. Within the international framework, the protection of the right against forced evictions (OHCHR, 2010) is of particularly great relevance.

1. The efficiency of China's property institutions in urbanisation contexts

China's economic rise from the ashes of the Mao era has been closely connected to the changes made from the 1980s onward to its property and land administration systems. It was only with the creation of private land use rights, as well as mechanisms allowing the State to take land from current occupants and give new land use rights to developers, that real estate could become the very important economic sector it now is. As noted, the basic framework for this process is established by the PRC Constitution, Property Rights Law and Land Administration Law. Within the constitutional framework, two fundamentally important provisions reflected in further laws and regulations are Article 10, which states that all land is in public (i.e. State or collective) ownership, but that use rights may be privately held and transferred; and Article 13, which protects private property rights, including private ownership of buildings. According to Article 10 of the Constitution, land is owned by the State in urban areas, and by collectives in rural and suburban areas. Both Article 10 and Article 13 make provision for the expropriation of – immovable or moveable – property by the State, stating that

'The State may, for public interest uses, expropriate or requisition land [Article 10]/private property [Article 13] and make compensation in accordance with the provisions of the law.' (PRC Constitution, revised 2004).

Further details are regulated by statutory laws and numerous administrative regulations. Property 'development' is almost

always premised on the granting of urban land use rights to a developer, a private entity, by the urban government representing the land-owning state. Before granting 'clean' land to the developer, the state takes that land from its current occupants – technically by a decision to expropriate (*zhengshou*) the collective in rural or suburban contexts, and a decision to 'demolish and relocate' (*chaiqian/banqian*) in urban contexts. The owners of any privately owned buildings are expropriated (*zhengshou*) in such cases.

Official arguments supporting have supported this system using the familiar languages of classical economic liberal theory and utilitarianism. They have defended the creation of private property rights drawing on classical liberal theorists such as Hayek,⁴ and defended the mechanisms for expropriations, forced evictions, and (re-)distribution of land use rights for the purpose of urban development using efficiency arguments.

Turning first to the argument for strong private property rights, Hayek argues, on the one hand, that 'constructivist' attempts by the state to regulate society, especially to intervene in market processes distributing wealth among citizens must fail because of a lack of knowledge on the part of central planners. On the other hand, and this is Hayek's more centrally political argument, the protection of private rights against public power serves a democratic or liberal purpose, hence state intervention must remain minimalist. In China, this latter line of argument has been advanced, among others, by the political science scholar Liu Junning (Liu, 2000) and the legal scholar Jiang Ping (Jiang, 2011).

Both the efficiency argument and the political argument could be used to justify wealth inequality along conservative, 'neo-liberal' lines, since the 'neo-liberal' view of property as a legal institution encourages an understanding of law as sets of rules which clearly spell out rights and obligations, and whose operation is morally neutral. Indeed, contemporary scholars attracted to liberal ideas have generally tended to accept inequality as an inevitable consequence of liberty, and been wary of coercive redistribution for the purpose of achieving greater equality. The justifications the academic and political establishment proffered for the revision of the Constitution's Article 13, as well as for the enactment of the 2007 Property Rights Law, largely drew on these ideas. Defending the draft, Professor Yang Lixin, for example, commented as follows.

Please be clear about it, the divide between the poor and the rich is not a problem of the Property Law. It is a problem of society itself. The protection of the law has a guiding function; in the sense that if you have one *kuai*, can't you develop it to ten thousand *kuai*, or a million *kuai*? [The property law] encourages people to acquire wealth by legal means. It encourages the poor to earn money (Law and Life, 2006).⁵

If we took Hayek's political argument for property rights seriously, however, even though we would have to accept unequal distribution of property, the currently vast powers of the Chinese state in allocating and reallocating land and other resources would have to be criticised.⁶ But, these powers were also acknowledged in the 2007 Property Rights Law. Even though its drafters have sought to defend the law using the market efficiency related aspects of

⁴ Hayek became popular in China from the (late) 1980s. See e.g. Liu (2000), mentioning as influences on Chinese liberal discourse Wilhelm von Humboldt, Thomas Jefferson, Alexis de Tocqueville, Herbert Spencer, Frederic Bastiat, Ludwig von Mises, Karl Popper, F.A. Hayek, Milton Friedman, James Buchanan, Robert Nozick, Douglass C. North, Michael Novak, Isaiah Berlin, and Ayn Rand.

⁵ Professor Wang Weiguo, similarly, commented that even for beggars, the order created by private property rights was important as the basis for "acting charitably" (China Law Prof Blog, 2003; see also China Youth Daily, 2006).

⁶ In addition, liberalism is also capable of an egalitarian interpretation that emphasises the interdependence of equality and liberty and justifies principles of redistribution, along the lines of John Rawls (Rawls, 1971), Ronald Dworkin (Dworkin, 2002, Chapter 2), and others.

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