

THE STUDY ON THE ECONOMIC RELATIONS IN PROPERTY RIGHT UNDER THE NEW COLLECTIVE LAND RIGHTS FRAME

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Abstract:

The **purpose of this study is to** put forward the basic principles of collective land rights reform and constructs new type of the collective land property right structure that is seasoned with land circulation. Based on it, the study of the relations between the subjects and objects of land ownership rights and land use rights and the powers and functions under the new type of property right structure were deeply studied to further clarify the inherent economic relations in the property right circulation process. Methods of documentation and logic analysis were applied. The results show that to clearly define ownership rights, regulate use rights and establish land tenure rights of collective members is the suitable way. And The separation of collective land ownership rights, the tenure of collective members and collective land use rights will be helpful to build the Economic Relations in Property Right for collective land circulation.

In the current frame of land system of China, the collective land circulation has been restricted in the narrow range by laws. Even so, along with the gradual establishment of the socialist market economy and the development of the rural society and economy, the variation of the industrial structure, this system is developing along with the behavior and ideals of the adjustment of the configuration of the collective land resources. On one hand, the theoretical research goes deeper and deeper, and on the other hand, the trial point and practices are performed gradually. At the same time, the policy adjustment of the central and local government also predicts that the collective land circulation is permitted under certain conditions. As for the collective agricultural land, *The People's Republic of China's Law on Rural Land Contracting* released in 2002 has confirmed the right of circulation and benefiting of the contractors under the certain conditions for the first time. As for the land for collective construction use, the Ministry of Land and Resources determined the trial points for circulation in 9 cities^[1]. In 2004, the State Council released *The Determination on Deepening the Land Reformation and Making Strict Land Management*, and it determined the orientation of the reforming of construction land circulation under the certain conditions; in 2005, Guangdong Province released *The Management Method of the Circulation of the Using Right of the Land for Construction of Guangdong Province* and it presented the

collective land for construction use the right of direct market transaction for the first time.

In the new stage of the domestic economical and social development, the central government emphasized on “improving the market configuration of the land resource”, “to use the price mechanism to suppress the invalid occupation and wasting of the lands”; as the fundament and prerequisites of the market construction, the deeply research and innovation of the system of collective land property right are extremely urgent. Currently there are four kinds of points of view on the reforming of the system of collective land property right: the total nationalization of the property right, the total privatization of the property right, performing consummation and adjustment on the basis of the current collective ownership and establishing the complex property right ^{[2]-[9]}. Setting the consummation of the land market as the destination, the author here raises some points of view on constructing the new kind of framework of the collective land property right, and he will analyze the property right and economical relationship in the circulation of the collective land under the new kind of property right infrastructure at a further step.

1. The basic thought of constructing the new kind of property right system of collective land

1.1 Define the concept of the modernized land property right scientifically

The property right is one of the basic concept in the modern economics, and the property right research is also the core of the land system reform in China. However, the different schools of researchers have the different understanding to the concept of the property right. The analysis shows that, the legal understanding of the property right stresses in the research of the static relationship between person and matters. For example, the “property right” is defined as the following in *The Chinese Dictionary on Law Science*: The generalized property right is the rights on property being necessary for the civil subject to maintain its position as subject, it includes the ownership, limited property right, intellectual right and other property right, but it doesn't include personal right, debt right, right of inheritance and other rights. The property right under the aspect of modern economics is based much on the social-economical functions of the property right and it emphasizes on the dynamic relationship among the persons.^[10] Even though, there are some economists who think that: only if the private using right, the right of enjoying the income and the right of free transferring have been defined clearly, the “ownership” will be the unimportant and abstract economic concept (Zhang Wuchang). Based on the points of view of many parties, the author thinks that the concept range of the modernized land property right should meet the requirements of the economic and social development, and it can be simply defined as the relationship between the person and the land; we should

pay attention to the behavioral relationship among the people when the land is being utilized, and emphasized on the functional feature of the property right; at the same time, in terms of the composition of the property right, we should construct a group of right restriction including other possible rights (including the right of the person to the land property) with the ownership and using right as the core.

1.2 The basic thought of constructing the new type of the framework of the collective land property

After learning and analyzing the points of view of various parties in two aspects – the theoretical maturity and practical feasibility, the author thinks that, the following thoughts should be taken into consideration when constructing the new type of the framework of the collective land property

1.2.1 To clarify and not “weaken” the ownership. In terms of the attitudes toward the ownership, besides two kinds of extreme points of view (total nationalization and total privatization), the most frequently stated point of view is “to weaken the ownership and to strengthen the using right”. The author can’t agree with this here. On one hand, the property ownership is not unimportant, just stated by some economists; the importance of the ultimate disposition of the ownership to the property in the joint-stock company and other modernized operation modes is known to all; on the other hand, the current ownership of collective land is “too weak” and not “too strong” in some aspects, its exterior presentation is the weakness comparing with the ownership of the state-owned land, and its interior presentation is that it hasn’t the regulated way of obtaining the benefits of ownership – the rent. Besides, the regulation of the ownership will not threaten the acquisition right and police power of the state; in fact, even in the country of private ownership, the state also enjoy such super-management right; there doesn’t exist the ownership which is absolutely not restricted in the modern society. The regulation of the ownership of the collective land also includes the clarification of the subject of the ownership, the clarification of the content and restriction of the rights and the regulation of the method of implementing the rights.

1.2.2 Establish the land holding right of the collective members. The individual farmers under the collective ownership are the co-owners of the collective lands. The occupation and using relation between them and the collective land is not totally equal to the “land using right” of the state-owned lands in the cities; and what is more, such difference can’t be neglected, for the ownership is bearing many functions of the farmers, such as warrants, livelihood and welfare, etc; at least under the condition that other auxiliary system hasn’t been consummated, such land can’t be “assimilated” with the state-owned lands directly. Therefore, we suggest to clarify and regulation such special rights of the collective members; on the reference of the point of view of

Doctor Xu Hanming [11], (Doctor Xu Hanming issued the concept of “the holding property right of the land of farmers” in his work *The Research on the System of Holding Property Right of the Land of Chinese Farmers*, such name is also used by the author here, but its concrete conception is a bit different), the author can call it “the holding right of the land of the collective members” for the time being.

1.2.3 To regulate the using right, and not to “reinforce” the using right. On the basis of establishing the holding right of the land of the collective members, the legal position of the using right of the collective land will be determined in a further step. The using right of the collective land for construction and the land for agricultural use should be regulated and defined under the same concept, and the difference between it and the land holding right of the collective members should also be noted. The regulation of the using right of the collective land tends to provide the main bodies of the right with the defined and unified legal positions and benefits, and not to pursue to “mere reinforcing the using right”. On one hand, we should eliminate the arbitrary interference of the ownership, holding right of the members and various kinds of administrative rights to the legal using right; on the other hand, the implementation of the using right should also be restricted and managed properly, for example, the wasting, usage-conversion and paid using of the agricultural lands should be managed strictly and with regulations according to the laws and regulations.

1.2.4 To consummate the other rights. Currently, the other right system of the state-owned land in China is still not regulated and consummated; therefore, the consummation of the other rights of the collective lands should be in the same range of the construction of the other rights of the state-owned lands; they should be taken into consideration uniformly and regulated in coordination. The legal regulations and management measures on the conception setting, registration, circulation and benefits of the rights should be defined.

2 The framework of the new-type collective land property right and the analysis to the rights and functions

According to the descriptions above, the framework of the new-type collective land property right can be presented in the Figure 1

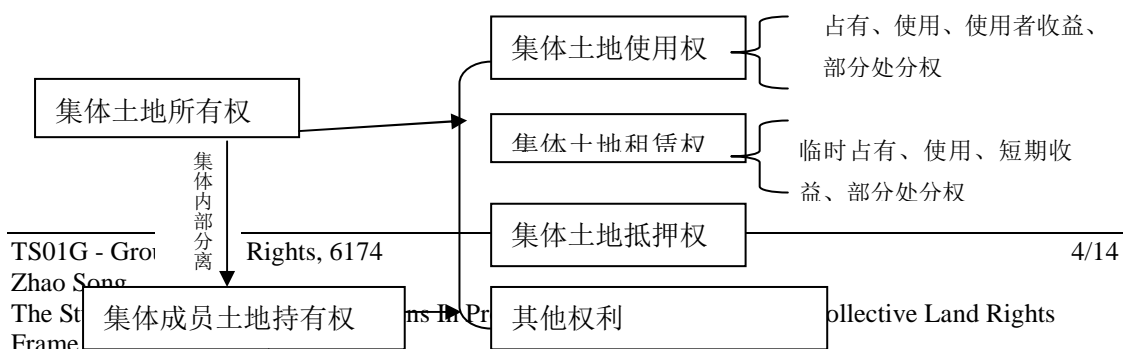


FIG W 占有、使用、准所有者收益、有限处分权

Knowing to manage the territory, protect the environment, evaluate the cultural heritage
Rome, Italy, 6-10 May 2012

集体土地所有权 ownership of the collective land
 集体内部分离 collectively internal separation
 集体成员土地持有权 land holding right of the collective members
 占有、使用、准所者收益、有限处分权 the right of occupying, using and limited disposing
 集体土地使用权 the using right of the collective land
 集体土地租赁权 the leasing right of the collective land
 集体土地抵押权 the mortgage right of the collective land
 其他权利 other rights
 占有、使用、使用者收益、有限处分权 the right of occupying, using, user benefits and limited disposing
 临时占有、使用、短期收益、部分处分权 the right of temporary occupying, using, short-term benefits and partial disposing

Figure 1 The structure drawing of the new-type property of collective land

Here we only analyze the rights and functions of several kinds of typical property right of collective land:

2.1 The ownership of the collective land

The new-type ownership of the collective land has the absolute and exclusive rights and functions of occupying, using, benefiting and depositing; besides the legal acquisition of the state, any unit and individual person cant occupy and use the land of the collective farmers at ease. Among the rights of circulation and benefiting, not only the circulation of part of the rights, but also the entire circulation of the ownership is included; not only the circulation among the collective economical organizations in the rural areas, but also the circulation from the collective to the state is included. However, in order to maintain the foundation of the public ownership, the ownership of the collective land is prohibited to pay to the individuals or the organizations other than the collective economic organization in rural area. Under the prerequisite of obeying the national laws and regulations, the collective farmers have the right of

disposing by themselves. When the collective farmers are implementing their ownership, they should be restricted by the national laws and regulations, as well as the land utilization planning. At the same time, the farmers cant object to the police power of the state (such as land acquisition), and the ownership of the state-owned land should also be restricted in the same way. Therefore, the regulation of the ownership of the collective land will not threaten the plow land protection, the management of the land usage, the land acquisition and the national macro adjustment and controlling measures; on the contrary, via the regulated and legalized management, it is beneficial to oppose and suppress the arbitrary and illegal behaviors in the administration above.

2.2 The land holding right of the collective members

The land holding right of the collective members means the right of occupying, using, benefiting and limited disposing of the co-owned land which is allocated to the individual members according to the certain principles, and such right should be enjoyed by the individual farmers as the special identification of the collective members; it is a kind of right with the effect of right over things created on the basis of the ownership of the collective lands, and it is the refining and realization to the subject implementing the co-owned rights. The subject of such right must be the member of the collective members, and the object of the right is as same as that of the ownership, while it is mainly applied in the collective land for agricultural use and homestead. The prerequisites of obtaining the holding right of the land of the collective members are that the collective owning of the identities and ownership of the commune members, therefore, the obtaining of such right is legal and inheriting; at the same time, in order to maintain the authority and ultimate rights of the collective ownership, the duration of the right should be defined; the author claims that, the period of validity of the agricultural land can be extended properly, as well as the period of the current contracting and operating righting, and such period should be set as 50 years (for the forest land, it can be extended properly); the period of holding right of the members of homestead can be negotiated with the state-owned residential land, that is, such period can be 70 years. When such period is to expire, the principle of “if there are no special circumstances, the period can be renewed on the application of the obligee, if the obligee doesn’t apply for period extension, he is regarded to waive. The collective takes back the land holding right of the corresponding members and compensates for the invested capital.

The holding right of the land of the collective members includes the rights and functions of occupying, using, benefiting and partial disposing. The core of partial disposing is the circulation; during the period of enjoying the rights, the obligee can circulate the land holding right with some limitation, and it can be divided into two

layers; the first is the circulation of the land holding right itself, because the subject of this right must be the collective members, such circulation can only be performed within the collective members, and it can't be obtained by applying to the collective after circulation, but it can be obtained by the voluntary transaction with the collective members (presented as transferring and inheritance, etc); the second is to strip and circulate part of the rights and functions of the land holding rights, and such circulation can be performed beyond the border of the collective, such as leasing and mortgage of the using right, etc. What should be emphasized is that, in order to prevent the over-collection, though the right is permitted to be circulated and inherited in a certain range, the maximum permitted share (or amount) should be regulated, when the land held by the members goes beyond this limit, the surplus share can't be obtained by the ways of transferring, renewal or inheritance. Then, the collective should take back the portion of the land right generated by the expiration of the period, death of the former holder and the waiving; such rights can be transferred to other members according to the demands.

2.3 The using right of the collective land

After establishing the land holding right of the collective members solely, the new-kind using right of the collective land is no more the integration and general term of the previous using right of the land for construction use and the contracting and operating right of the agricultural land; it refers to the using right of the collective land obtained by the individuals (or units) not belonging to the collective, or the members of the collective as the common citizens, and it excludes the special rights and functions of the collective members as the co-owners, and it is the usufruct of the collective land. The obtaining way of the rights can be the sales, renting, converting into shares, joint operation and appropriation of the farmer collective, and it can also be obtained by the transferring, leasing, converting into shares and joint operating of the land holder of the collective members after the holding rights and functions have been isolated, and it can also be obtained by the transferring, leasing, converting into shares and joint operating among the users. The maximum period of validity of such right can be determined on the references of the period of the using right of the state-owned land for construction and the contracting and operating right for the current agricultural land, however, the period of validity of the using right of the collective land circulated from the land holding right of the collective members can't be longer than the remaining period of the land holding right of the members.

The subject of the new-kind using right of the collective is no more restricted within the members of this collective economic organizations, and its completed rights and functions include the occupation right, benefiting right and part of the disposing right; the obligee has the right to take protective actions to his/her rights and has right to

legally use or circulate such right during the specified period and obtain the benefits, at the same time, the obligee is also obliged to accept the relative restrictions exerted by the laws, regulations and planning, and the right and duty of the obligee should be set on the reference of the using right of the state-owned land.

It should be emphasized that, according to the setting of the right system above, the main difference between the land holding right of the collective members and the using right of the collective lies in that, the former is based on the specific identification of the collective members, and it has the feature of semi-ownership; the latter has no specific limitation to the obligee, and its feature is similar to that of the using right of the state-owned land. The abstract differences can be presented via the economical relationship in the property right circulation.

Besides, what should also be indicated is that, the notation of “development right” is not raised solely here, I think that the so-called “development” which changes the using of the land has been included in the ownership, while it is also restricted by the laws and regulations on planning and division. Such point of view is also applied for the state-owned land. The problem of how to define the development right can be resolved by the scientific, transparent planning which can be participated in by the public sufficiently as well as the relative system.

3 The analysis of the property right and economic relationship under the framework of the new-type collective land property

The critical problem of the land circulation is the property right economic relationship, i.e., the variation of the economic relationship during the procedure of land circulation caused by the variation of the ownership. Based on the structure of the new-type property right of collective land, this essay will analyze the property right and economic relationship during the circulation of the collective land in the following several aspects with the circulation direction of the collective land.

3.1 The property right and economic relationship of equal and free exchange in the land market

The equal and free exchanging relationship is the basic feature of the market economy [12]. In the collective land market, such equal relationship is presented in the two following aspects: the first, the position of the ownership are equal and it won't be different for the different levels, that is to say, the farmer collective of villager group level is as same as the farmer collective of village (town) level; the second, the both parties of the property right transaction are equal, they are restricted by the market rules and not the administrative power; of course, such freedom and equality are still the relative freedom and equality under the large framework of the state laws,

regulations and market orders. Therefore, the compelling interference of the state acquisition and planning management can't be excluded from the transaction of land property right.

Besides, what should be pointed out is the relationship between the farmer collective to the representative of the collective ownership in the market of the collective land, such relationship is not only a kind of trust and agency relationship, but also a kind of property right and economical relationship formed during the circulation of the land management and operation right. In order to obtain the land benefits, the farmers entrust the relative land rights to the specified organizations (the ownership representative), and the ownership representatives execute the relative resolutions of the collective land owners and perform the relative management and operation activities in the authorized ranges, and they will receive the entrusting fees as the reward.

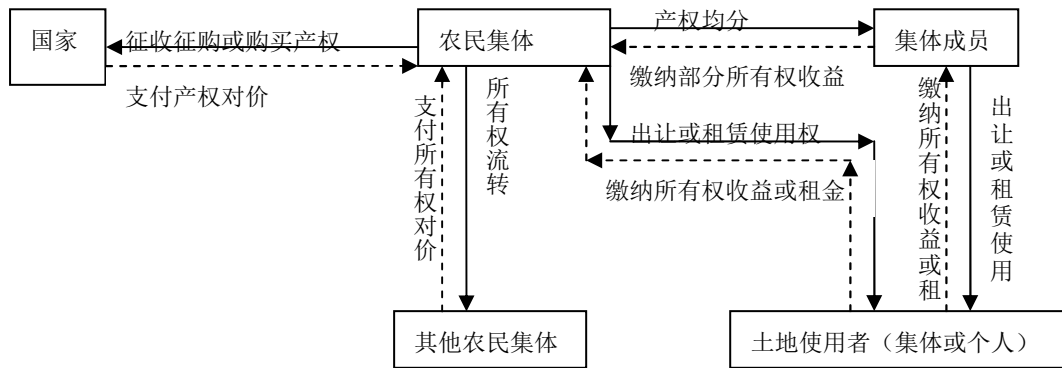
3.3 The property right and economical relationship between the ownership of the collective land and the land holding right of the collective members

As for the collective land, the relationship between the ownership of the collective land and the land holding right of the collective members is the inclusion relationship, or the relationship between integral and part. The land holding right of the collective member is the division and refining of the collective ownership, and it is not equal to the common ownership, as well as the using right separated from the ownership. Therefore, the establishment of the land holding right of the collective members are not realized via the total economical behaviors. On one hand, the subject of the holding right is special, and its identification is given by law directly, and it is not obtained via the contracts, agreements and various kinds of transactions; on the other hand, the initial obtained holding right is equalized, and it won't be affected by the competition mechanism. I still think that, the procedure of isolating the holding right of the members from the collective ownership should present the equality and authoritativeness of the right itself in a certain degree, i.e., the subject of the ownership has the right to demand the rights and benefits of the ownership. However, because the subject of the holding right of the member is a part of the subject constituting the ownership, it is not equal to the subject of the using right after separation and transferring on the position of the property right. The ownership benefit here only presents as a part but not all of the total ownership right. When the individual farmers have got the holding right of the members of the collective land, they should hand in part of the ownership rights and benefits to the collective farmers – the subject of the ownership, and it should be regarded as the counterprice held for holding the co-ownership. Analyzing in this sense, we can see that the contracting expense paid by the collective farmers contracting the land is actually the payment for

part of the owner benefits to the collective; whether or not expense amount is rational, such behavior has presented the property right and economical relationship between the collective holders and the collective members. The current reduction of the contracting expenses is only the requirement of doing favor of the farmers in the policies, and it doesn't present the real property right and economical relationship. The ownership of the homestead can be regarded as the holding right of the members of the lands used for collective construction. In order to present the property right and economical relationship, the situation that the collective members obtain the homestead for free should be changed.

3.3 The property right and economical relationship among the ownership, land holding right of the member and the using right

The using right of the collective land is similar with the using right of the state-owned land, and they belong to the other property rights; and it also includes the corresponding rights of occupying, using, benefiting and partial disposing, the differences between the two lies in that, the primary isolating way of the using right of the collective land is not only the direct separation from the ownership, and it can be also from the holding right of the collective members. If the first payable separation of the using right of the collective land is also called "sales", such sales can be divided into two categories in the aspect of the property right and economical relationship: the first is the owner sells the using right and obtain the benefits of the ownership, the second is that the collective member holder sells the using right and obtains the benefits as the semi-owner. The using rights obtained by two methods are the same in terms of the right and position, but because of the period limit of the member holding right, the maximum period for sales of the second method will vary according to the remaining period of the holding right of the member. Therefore, there are the weakening factors for the rights and benefits realized by the collective members as the land holders, comparing with the rights and benefits of the owner, i.e., the sales period might be shorter. However, if the affects of sales period can be eliminated, when the two kinds of sales method can get the same periods of using right, the benefit of the ownership paid by the user should also the same; then, the difference between the sum paid by the farmers holding the land when they get the holding right and the sum obtained when they sells the using right (the variation of the land price caused by the capital investment and market variation are not taken into consideration for the time being) are the rights and benefits of the farmers as the collective owners. Because there are no identification restriction in the new-kind land property right structure designed in this essay, the member should pay the right and benefit sum of the same level when the using right is obtained by the way of sales, and accept the same legally restrictive terms, no matter whether he/she is the collective member or not.



国家 The state

征收征购或购买产权 Property right acquisition or purchasing

支付产权对价 pay for the property right counterprice

支付所有权对价 pay for the ownership counterprice

农民集体 farmer collective

所有权流转 ownership circulation

其他农民集体 other farmer collective

产权均分 average property right division

缴纳部分所有权收益 hand in part of the ownership benefits

出让或租赁使用权 sell or lease the using right

缴纳所有权收益或租金 hand in the ownership right benefits or rents

集体成员 collective members

缴纳所有权收益或租金 hand in the ownership right benefits or rents

出让或租赁使用权 sell or lease the using right

土地使用者 (集体或个人) land user (collective or individuals)

Figure 2 The property right and economical relationship of the circulation of the collective land property right

In the figure, the arrow of active line indicates the relationship of property right flow, and the arrow of dotted line indicates the economical relationship

4 Conclusion and discussion

The separation of the ownership, member holding right and using right of the collective land is helpful to clarify and define the property right and economical relationship in the collective land circulation. Each member of the collective is given the land holding right on the basis of keeping the collective holding right, and this right includes the rights and functions such as the occupying, benefiting and using in the normal land using rights, as well as the ownership benefits which can be obtained from the land by the farmer as a part of the collective owners, when it is presented in the property right and economical relationship, if the farmer obtains the land holding right, he/she has the right to keep a part of the owner benefits which should be belonged to the land owners. Such right, which is subordinate to the ownership and superior to the using right, is similar with the semi-ownership. On one hand, the design of the new-kind of property right structure keeps the unification and authoritativeness of the collective ownership and conforms to the preference of the socialist system; on the other hand, it has recovered the right position of the farmers. The difference and connection between the using right of the collective land and the land holding right of the collective members are as the following: the conception of the using right doesn't include special rights and benefits of the land given to the collective members, during obtaining the using right, the collective members and the non-collective members have the same important positions; the using right can be separated from the ownership directly, or it can be separated from the land holding right of the collective members directly; the obtaining and circulation of the land holding right of the collective members are constrained within the collective, and the special rules should be obeyed.

The establishment of the land holding right of the collective members and the regulation of the using right, can not only maintain the fundamental position of the ownership of the collective land, but also make the rights, functions and implementation measures of the ambiguous ownership concrete, and it has constructed the fundament of property right infrastructure for the collective land market which is coordinative with the state-owned land market. However, during the construction of the collective land market, the following problems should still be discussed in a further step:

1. What is the effect of the market transaction of the collective land to the “unified market”? The author thinks that, the so-called “unified land supplying” claimed by the government is the ideal of “one pool receives the water, and another pool drains the water”, the “unified” should be understood as “the unified market mechanism, the unified opening and public order, and the unified legal constraints”, and it doesn't refer to “the unified subject of land supplying”. As the

unified administrator of the state, the government doesn't have the identification of owner to the collective land, however, it is still powerful in the administration. Only the positioning is accurate and the policies and measures are proper, the circulation of the collective land won't disturb the market, and its effect to the state-owned market should be the fine market competition, and not the vicious shocking.

2. How to construct the price system and price adjustment and controlling mechanism of the collective land which is coordinative with the state-owned land market. According to the thought designed in this essay, the right-price system in the collective land circulation is not totally corresponding to the current state-owned land market, and we should research the price categories and price comparison relationship of various "commodities" in the land market, and to construct the scientific price adjustment and controlling system on such basis is the natural requirement of establishing the regulative and unified market.

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