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RESEARCH ARTICLE

WANG Liming

Rural land ownership reform in China's property law

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Abstract With regard to rural land ownership, there exist many problems, such as absence of the subject of right, ambiguity of the definition of right quality, and imperfection of the taking system. To perfect the rural land ownership system in China, we should continuously take villagers' groups and villages as the subject of collective ownership and affirm the right of the members of collective organizations. In order to promote the development of the rural economy and realize the value of land, the contractual management right should be deemed as a property right and allowed to be transferred. The transferability of collective land ownership should be gradually established and the process of taking should be further normalized. Meanwhile, the farmers must receive sufficient compensation. The house site usage right is a special form of right of usufruct. To follow the principle that property should be made best use of, the house site usage right should also be transferable.

Keywords collective land ownership, contractual management right, right of members of collective organization, house site usage right

I Introduction

China's economy is now overheated. This has affected its sound, orderly, and sustainable development, and raised an urgent need for macro control. The overheating of the Chinese economy has a close connection with the rural collective land system.

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WANG Liming(✉)
Renmin University of China School of Law, Beijing 100872, China

The local governments, in order to develop the local economy, have expropriated too much collective land, thus causing the "land expropriation boom (*quandi re*)". China had lost 60 million *mu* ($1m^2$=0.0015*mu*) of cultivated land from 1996 to 2002, i.e., about 10 million *mu* per year. This severely threatened China's food security. It is estimated that the total area of cultivated land in China will be 1.728 billion *mu* in 2010. According to the latest results of the *Research on Alteration Of Land Utilization in China* announced by the Ministry of Land and Resources of the P.R.C., up to Oct. 31, 2005, the total cultivated land in China was 1.831 billion *mu*, and cultivated land per person decreased from 1.41 *mu* in 2004 to 1.40 *mu*; in the year 2005, China lost 5.424 million *mu* of cultivated land.[1] However, according to expert's statistics, to ensure food security, the cultivated land in China must reach 1.824 billion *mu*. In fact, the current amount of cultivated land in China is close to this minimal requirement.

On the other hand, the land developers and investors can obtain land at very low price, and can even use the land for financing and gain huge profit. All these factors have stimulated the occupation of land. Ever since 1999, the capital invested on real estate has increased 41% per year (or 100 billion *RMB* per year). This is partially because of the low land price. The availability of land also promotes land mortgage, which is the main form of mortgage for loans, and then causes the overheating of investment. To solve this problem, we must reform and perfect the land ownership system.

China is drafting the Property Law. Rural land ownership is one of the most important issues that should be prescribed by the law. This essay discusses the existing problems in China's rural land ownership system and provides some suggestions.

II The problems in current legal rules regarding rural land ownership

Article 74 of the General Principles of the Civil Law prescribes: *"The property of collective organizations of the working people shall be owned collectively by the working people."* The collective ownership right, as a kind of public property right prescribed by the Constitution and the law, is an important type of ownership right that should be affirmed and protected by the new Property Law of China. It is the right of the collective organizations of the working people to possess, utilize, profit from, and dispose their owned property. The rural land ownership is the main form of collective ownership.

The rural land ownership system of China has experienced an unsmooth

[1]He Zhenhong: The Cultivated Land Area per Person in China is Only 1.40 *Mu* (in Chinese). *Economic Daily*, 2006-4-25

development. In the early days after the Liberation, the Chinese government carried out the Land Reform in rural areas. It abolished the ownership right of non-cultivating landowners over the land, and replaced it with farmers' land ownership system.

Article 10 of the Law on Land Reform, which was enacted in 1950, prescribed: *"All the confiscated or expropriated land and other means of production, except those owned by the state according to this legislation, shall be fairly and reasonably distributed by the township farmers' unions to the poor farmers who have no land, or lack land or other means of production."*

Through the Land Reform, the farmers' individual land ownership was established in Chinese rural areas, giving farmers full ownership right over their distributed land. After the middle of the 1950s, the Chinese government promoted establishing the cooperative groups and primary unions in rural areas. The land was still owned privately by the members of the groups and unions. But after 1955, the step to establish the agricultural cooperatives was hastened. The advanced cooperatives were established very fast throughout the country. By the end of 1956, the advanced agricultural cooperatives had prevailed in most provinces of China. The land and other main means of production were owned collectively by the cooperatives. The production team is the basic unit of labor organization. The collectives arranged the members' work and owned the products collectively. Then the system of ownership on three levels—the communes, production brigades, and production teams—was established.

Since the beginning of the 1980s, China has adopted two reforms on rural people's commune system. One was to introduce the household land contract responsibility system. The farmers got the land management right by signing the land contract responsibility. The term of contract management is rather long, but the land is still under collective ownership. The other reform was to separate the government from the farmers' union. The township governments, villagers' committees, and cooperative economic organizations of township and villages have been established in rural areas. Therefore, since the beginning of the 1980s, rural cooperative economic organizations have become the representative of collective land ownership.

Article 10 of the Constitution of China prescribes: *"Land in the rural and suburban areas is owned by collectives except for those portions that belong to the state in accordance with the law; house sites and private plots of cropland and hilly land are also owned by collectives."* Although this Article affirms that the rural land is owned by collectives, it does not clarify the specific owners of rural land. This issue has to be solved by legislation.

The National People's Congress enacted the General Principles of the Civil Law in 1988. Article 74 (2) of this law prescribes: *"Collectively owned*

land shall be owned collectively by the village farmers in accordance with the law, and shall be managed and administered by the village agricultural production cooperatives, other agricultural economic collectives, or villagers' committees. Land already under the ownership of township (town) farmers' economic collectives may be collectively owned by the farmers of the township (town)."

Article 10 of the Land Reform Law, which was amended in 1998, prescribes: *"Farmers' collectively owned land that is owned collectively by the farmers of the whole village according to law shall be managed and administered by the village economic collective or villagers' committee; the land that is already owned collectively by the farmers of two or more rural economic collectives within a same village shall be managed and administered by the respective rural economic collectives or villagers' groups; the land that is already owned collectively by township (town) farmers shall be managed and administered by the township (town) rural economic collectives."*

Therefore, there are 3 types of subjects of the ownership of the rural collective land, i.e. (1) Land collectively owned by the farmers of villages and managed and administered by the village economic collective or villagers' committee; (2) Land collectively owned by the farmers of the townships (towns); (3) Land owned collectively by the farmers of two or more rural economic collectives within the same village.

There are several problems in current legislation regarding rural land ownership as the follows:

1 The subjects of collective land ownership

The Constitution does not clarify the specific subjects of the collective land ownership. The above prescriptions of the General Rules of Civil Law and the Land Administration Law also have not solved this problem completely.

First, these prescriptions have not clarified which rural economic collectives shall be the subjects of rural land ownership, and no other legislation makes clear who represents the ownership. Therefore, the collective land ownership certificate has not been issued in many areas. This results in the absence of the subjects of collective land ownership, [2] thus causing severe problems of unlawful transfer of rural collective land and loss of lots of cultivated land in many areas.

Second, the township or town authority, as a government agency, cannot

[2]Lin Kejing: Research on Rural Collective Land Ownership. *Chinese Land Science*(ZHONGGUO TUDI KEXUE), 1993(5), p. 6.

fully represent farmers to exercise the land ownership right. This violates the principle of separation between government and enterprises. If the village can be the subject, it will mislead people to think that the villagers' committee has the ownership right as the subject especially since the collective land is owned collectively by the members of collectives. According to Article 2 of the Villagers' Committee Organization Law (Interim): *"The villagers' committees are mass organizations of self-management at the grass roots level for villagers' self-management, self-education, and self-service."* The villagers' committee is not a rural collective economic organization, but a rural mass organization of self-management. Because of the organizational slack of the villagers' committees, the power of villagers' groups falls to be a very few leaders of the villagers' committee. The ownership of the villagers' group actually gives way to a small group of people's dominant power over the land.

The ambiguity of the subjects of collective land ownership has caused many legal problems as the follows:

First, it makes it difficult to establish the land registration system, and brings significant troubles to the cadastre administration. Because the collective land is owned by plural subjects, it is hard to find which one should register as the owner. The township and town, as the basic level of state authorities, more represents the will of the state. Although they also represent farmers' interest, due to the realistic interest mechanism, the officials of township (town) governments have incentives to protect the state interest at the cost of farmers' interest when there are conflicts.

Second, the plurality of the occupiers of rural land has caused many difficulties in land administration. In many places, it is the villagers' committees that manage the collective land. Because of corruption and lack of supervision, the villagers' committees often dispose the land and change the land contract arbitrarily, thus harming the farmers' interest. The villagers' committee, as the villager's organization of self-management, is neither a juridical person, nor a government agency. Given the villagers' weak consciousness of rule of law, the collectively owned land usually becomes owned actually by the head of the village or a few members of the villagers' committee. This causes the head of the village and the villagers' committee to rent or virtually sold land, misappropriate the state compensation for the land expropriation [3]and adjust the land contract frequently, thus harming farmers' interest.

Third, the existing land system of three-level ownership (the town, the village and the villager group) has caused many troubles for the definition of

[3] Chen Xiaojun et al. *Law System-Explanation on the Field Survey*. China University of Political Science and Law Press (Beijing), 2004. p. 264

rural collective land ownership and resulted in many ownership disputes, mainly appearing as the land ownership disputes between villager groups and villagers' committee, and the disputes between the first level villagers' committee and the township government.[4] These not only affected the stabilization and development of the rural economy, but also hindered the course of constructing a new socialistic rural area in China.

2 About the nature of collective land ownership

The nature of land ownership and collective ownership is still under controversy. There are basically two theories - the juridical person ownership argument and the joint ownership argument. [5]

The juridical person ownership theory argues that the land ownership should belong to a juridical person. [6] The members of rural collectives have the member's rights, hold shares in accordance with the charters of the collectives, and gain profits according to their shares. Now, this model is adopted in some areas of Guangdong province. Under this model, the rights and interests over the land are divided into shares held by villagers and the profits are distributed according to the shares.[7] However, this model only solves the issue of distribution of profits such as rental. Many other types of collective property cannot be divided into shares held by the members of collectives, and thus cannot be put into the conceptual box of "juridical personal ownership". Even though the land is divided into shares, it can only determine how to distribute the profits. The villagers cannot transfer their shares and do not take any risk. This is the difference between the collective ownership and juridical person ownership.

The joint ownership theory argues that the collective land is jointly owned by all the villagers. The decision of land transfer should be commonly made by villagers. But there are still two problems unsolved in this theory. First,

[4]Wu Kening. Ma Sulan: Discussion on the Reform of Chinese Rural Land Ownership System. *China Land Science*, 2005(4).

[5] For detailed discussion about this dispute, please see *The Theory of the Law of Property* (revised edition), China University of Political Science and Law Press, 2003. p. 283.

[6] Kong Xiangjun, New Problems in Civil and Commercial Law and the Research on its Judgement. People's Court Press (Beijing), 1996. 378.

[7]A relatively typical one is the south China sea model, which adopts the "three powers separation" system, i.e., realize the separation between ownership right and contracting right through contracting the land and fixed assets to farmers by the collective, and then the farmers become shareholders with their contracting right, and the collective manage the lands uniformly and gain the actual usage right of the lands, thus to realize the separation between the contracting right of the farmers and the actual usage right. In the process of carrying out the land cooperative shares system, the stock right of the farmers shall not be increased when they are alive and shall not be decreased after they die. The south China sea model carried out the cooperative shares system with lands as its center, its achievements are: first, appraise the value of rural lands and fixed assets and converse its value into shares, affirm the economic share of the farmers in the collective property, and realize real benefits for everyone.

under this argument, the land is actually privatized. Secondly, the co-owners shall have right to dispose his/her own shares. [8] But under the current situations, villagers should not do it. Especially once a villager leaves the collective, he/she will totally lose his/her entitlement to the land.

The unclearness of land ownership directly results in the uncertainty of farmers' rights over the land, and fails to provide incentives for farmers to care about land. Accordingly, a great amount of collective land has been expropriated. Some local governments expropriated collective land at a very low price by name of "public interest". This causes the loss of cultivated land, and harms the farmers' interest. The collectives often adjust the land contracts arbitrarily. In some areas land is illegally transferred and rent, and the land unbound by contract is disposed unlawfully. Especially when local governments expropriate a great amount of land to establish development zones, farmers often only receive very little compensation.

3 About the expropriation of collective land ownership

According to Article 10 of the Constitution, *"the usage right of land can be transferred according to law."* Here, the "usage right of land" can be the usage right of state-owned land or the usage right of collectively-owned land. However, Article 63 of the Land Management Law prescribes: *"the usage right of rural collectively-owned land shall not be remised, transferred or leased under the purpose of non-agricultural construction; except for the usage right transfer due to bankruptcy and mergence, etc., according to law by enterprises that conforms to the general planning of land utilization and acquired land used for construction."* This regulation totally prohibits transfer of collectively-owned land used for non-agriculture construction, it says that "land used for non-agriculture construction shall not be remised, transferred or leased", and then gave a restrict exception, i.e., only the "forced" transfer due to bankruptcy or mergence is allowed. [9] Therefore, the ownership of rural land itself cannot be circulated directly in the market, but after it is expropriated by the State, and transformed into state-owned land, it can be circulated. There are some obvious faults in this system. The imperfection of the expropriation system harms farmers' interest. Now, the compensation for expropriating collective land is about 3,000 to 30,000 RMB per *mu*. But after expropriation, the land price is 100,000 to several millions of RMB per

[8] Gao Fuping: *Land Usage Right and Usufructuary Right—Research on Chinese Estate Property System*. China Law Press, 2001. p.393.

[9] Zhou Jianchun: Legality Building of the Collectively-owned Land Used for Non-Agricultural Building. *China Land*, 2003(6).

mu.[10] Some officials of local governments expropriate land in the name of public interest, but do not adopt public bidding or auction, thus seeking personal interest. In many areas, the large-scale expropriation of land has provoked some disputes and conflicts.

III Solutions

The rural collective land ownership is an important issue that should be solved in the new Property Law. Under current situations, we can neither privatize nor simply nationalize the collectively owned land. The existing problems can only be solved by perfecting the existing system of collective land ownership. I have suggestions for the new Property Law as the follows:

1 Clarification of the subjects of collective land ownership

(1) Keeping the subjects' scale continuously. As a principle, the subjects should be the villagers' groups or villagers' committees. The subject status of the villagers' group should be specially enhanced. The township or town authority, as the government agency at the bottom level, should not be the subject of ownership. Downsizing the scale of owners can stimulate farmers' enthusiasm, make closer the interest relation between land and farmers, decrease agency costs, and increase land efficiency. Especially the land whose ownership is not clear should be determined to be owned by the villagers' groups. As a kind of collective organization, the villagers' group is smaller than the township, town and village. Taking the villagers' group as the owner can draw closer the relation between farmers and the land, eliminate the administrative influence on the land occupation relation, and promote farmers to utilize land reasonably and efficiently. The Property Law will not just simply affirm the status quo of current land occupied. According to a survey, in many rural areas in southern China, 80% of land actually belongs to the villagers' groups. The villagers' group, as the subject of ownership, in most circumstances, will administrate and utilize land more efficiently than the villagers' committee and township (town). Therefore, the land whose ownership is not clear should be determined to be owned by the villagers' group.

(2) The villagers' committee, as the representative of all the villagers, exercises the land ownership right. The committee itself is not the owner of the

[10]Regarding to this problem, scholars have conducted researches in some provinces and cities in China. For detailed information, please see *Research on the Legal System of Rural Land—Explanation of the Field Survey*, by Chen Xiaojun et al., China University of Political Science and Law Press, 2004. 40–42, p. 256–261.

collective land. According to the Constitutive Law of the Villagers' Committee, the villagers' committee is a basic-level mass autonomous organization set up under the purpose of the villagers' self-management, self-education and self-service, it is not an independent juridical person, and do not possess legal capacity for civil rights or capacity for civil disposition, hence, it cannot be the owner of collectively-owned land.

(3) Clarification of the collective land in the cities.—Article 8(1) of the Land Administration Law prescribes that: *"Land in city urban areas is owned by the state."* This clause is the concretization of Article 10 of the Constitution. However, under current city system in China, city is a very broad concept. According to Article 3 of the City Planning Law, cities include municipalities directly under the Central Government, cities, and towns. Therefore, land in the cities covers all the land in different types of cities. But in fact, in the area of cities, many portions of land are owned by villages or city economic collectives. Especially in the process of urbanization, the urban areas of old cities expand constantly. But, in the meantime, not all the portions of former collectively owned land have been nationalized. Thus, there is still collectively-owned land in cities. Especially the cities in China also include towns, land that usually belongs to collectives. Therefore land in city urban areas cannot be simply declared to be owned by the state. Given the coexistence of state-owned and collectively-owned land in the cities, we should, on the one hand, enhance the land registration to clarify the entitlement of land ownership, and, on the other hand, affirm in the Property Law that the collectively-owned land in the cities still belongs to economic collectives. They should not be simply declared to be nationalized.

2 Making the land contractual management right to be a property right

Land contractual management right is the right enjoyed by citizens and organizations of collective economy towards collectively-owned land or state-owned land that can be used collectively. [11] Land contractual management right has been listed as a property right related to property ownership by the general principles of civil law. In the document titled *Suggestions on Judgment of Rural Contract Dispute Cases* promulgated in 1986 by the Supreme People's Court, it made corresponding prescriptions regarding the confirmation of invalid rural contract and property disposal, contract transfer, subcontract, alteration and termination of contract. The Rural Land

[11] Wang Liming: Discussion on the Issues of Rural Land Contractual Management Right. *Journal of the Renmin University of China*, 2001(6).

Contract Law of China was enacted in 2002 by NPC. It further clarifies the principles, procedures, and terms of the land contract, as well as the protection of contractual management right. Article 20 prescribes: *"The term of cultivated land contract shall be thirty years. The term of grassland contract shall be thirty to fifty years. The term of forestland contract shall be thirty to seventy years; the forestland contract for special types of trees may be extended with the permission of the forest administration of the State Council."* But this law did not affirm that the land contracted right is a real right. This adversely affects the stability and transferability of contractual management right, and hinders the circulation of land as property. It is necessary to prescribe the land contractual management right as a property right in the new Property Law. A perfect rural land system is the key for protecting farmers' rights and interests; the core of rural basic management system is household land contract management. Therefore, China should protect farmers' land contractual management right, prescribe the right as a real right, and ensure that farmers can transfer the land contractual management right lawfully, voluntarily, and profitably. If the contractual management right cannot be a real right, but only as a right in contract, it can hardly become a long-term stable property right, and the contractors can hardly defend themselves against the unlawful interference and damage. Making this right a real right can stimulate the contractors to produce actively, make long-term investment on land, and utilize land more efficiently.

The contractual management right should be transferable in the market, or farmers' interest will be harmed and scale management will not be realized. The greatest disadvantage of the contractual management right model lies in its decentralized management by household. Under this model, a scale effect cannot be formed. The household contract responsibility system adopts the "one *mu* and three *fen* per person" model, which is not an appropriate operation model for modern agriculture. Without scale effect, and especially due to technical backwardness, this model is negative for introducing into agriculture the modern factors of production, e.g., capital, technique, knowledge, and management, to allocate optimally with other traditional factors of production such as land and labor. It is also not good for saving cost and expenses. In fact, mutual transfer and subcontract, whether profitable or non-profitable, are happening everywhere.[12] There are also subcontract by the lessees and leaseback subcontract in cooperative shares enterprises and share-holding farms. Furthermore, the transfer of land contractual

[12] For the form of transfer of rural land contractual management right in practice, please see *Research on the Legal System of Rural Land-Explanation on the Field Survey*, by Chen Xiaojun, et al. China University of Political Science and Law Press, 2004. 24–31, p. 164–180.

management right has been accepted in reality.[13] The transferability of land contractual management right can promote the realization of land value, the development of rural economy, and the marketization process in Chinese rural areas, and increase the efficiency and utilization rate of land.

3 Perfecting the system of the expropriating of collectively owned land

(1) The transferability of collective land ownership should be gradually established. Although the current law prohibits the transfer of collective land ownership, due to differences in land incomes, the income of farmers' cultivated land is far less than the income of land used for non-agricultural purposes, thereby farmers are willing to transform their agricultural land into non-agricultural land. Meanwhile, when lands are expropriated by the state, the compensation standard of rural collectively-owned land is relatively low. After becoming aware of the huge benefit of land transfer, farmers do not want their lands to be expropriated by the state. In this way, the unequal distribution system of land utilization incomes resulted in that villages, towns and farmers hope to get high returns through the transfer of collectively-owned land.[14] In practice, the phenomena of illegal transfer of collectively owned land are very severe — e.g., using land for investment, cooperation, and joint-venture, renting, mortgaging, and transferring land, unlawfully auctioning the unclaimed mountains, valleys, hills, and bottomland,

[13]In fact, many provinces and cities in China have made clear descriptions on the land of contracted management. For example, in the *Notice on Energetically and Orderly Promoting the Transfer of Rural Land Contractual Management Right by the General Office of Zhejiang Provincial Committee of CPC and the General Office of Zhejiang Provincial People's Government*, it prescribed that, "governments at local level should energetically encourage and guide farmers and small-scale part-time farmers who had engaged in industry or trade to transfer their land contractual management rights. The irrigated land contracted by farmers can be transferred, dry land and water land can also be transferred. After the land contract has been transferred, the original contracting right of the farmer remains unchanged, the policy of village income distribution remains unchanged, and the public welfare treatment enjoyed by towns and villages remains unchanged. As for farmers and enterprises which acquired the land contractual management right through transfer, within the scope of regulations and policies, their independent operation right, product disposal right, income distribution right and other legal rights are protected by the law, and their production, operation and marketing activities shall not be intervened by any organizations or individuals." In the 4th article of Rural Land Contract Regulation of Qinghai Province, it says, "the people's government encourages and protects voluntary and compensated transfer of land contractual management rights." Article 20 of the *Notice on Promulgation of the Land Contract Management Regulation by Fuzhou People's Government* says that "transfer of land contractual management rights shall stick to the following principles: (1) compensated transfer. Transfer of land must be voluntary, and shall not be against the farmers' will. It is forbidden to force farmers to transfer their lands or take back the contracted land through political means; the time limit, amount, conditions and compensation of land transfer shall be determined through equal negotiation between the two parties, and approved by the contract-issuing party, and a written agreement shall be signed. (2) Land collective ownership shall remain unchanged, and the agricultural purpose of land shall remain unchanged.

[14]Zhang Fang. Discussion on the Legal Problems of the Usage Right Transfer of Collectively-owned Land. *China Land*, 2003(12).

and even unlawfully selling land in the open.[15] The illegal trade of land includes illegal transfer of land usage right, ownership right, and house-site usage right. In my opinion, the Chinese Property Law should clearly distinguish between the agricultural land ownership and non-agricultural land ownership, and should endow different rights to different owners. The illegal transfer of agricultural land ownership must be strictly prohibited. The non-agricultural land also should not be transferred by organizations of collective economy, and can only be transferred after it has been nationalized according to the active law. Of course, the price for expropriation must be reasonable. There must be strict procedure for examination and approval when agricultural land is transformed into non-agricultural land. To strengthen the management of land, both agricultural and non-agricultural land should be registered. Currently this method has been tried in Anhui, Wuhu,[16] and other provinces. We should learn lessons from the experiments and normalize them.

(2) The process of expropriation should be further normalized. For example, there must be a plan, and the expropriation must be strictly carried out in accordance with the plan. In some coastal areas, the quota of land should not be broken through freely. The land administration by law should be strengthened to prevent the activities of avoiding land regulations. Especially the concept of "social public interest" should be defined precisely. There is controversy over this issue in the process of drafting the Property Law. Some scholars argue that the "social public interest" should be defined negatively, and the "commercial interest" should be excluded. Some others argue that it is necessary to enumerate specific types of "social public interest". A third argument is that it is unnecessary and incapable to enumerate specifically the "social public interest" by law, and the interpretation of individual cases should be given by the court.[17] I agree with the last argument.

(3) The farmers must receive sufficient compensation. The Amendment of the Constitution distinguishes between expropriation of land ownership and

[15]Chen Xiaojun et al. *Research on the Legal System of Rural Land—Explanation on the Field Survey*. China University of Political Science and Law Press, 2004. 256–261.

[16]In fact, early in the 1990s, the Ministry of Land and Resources has been aware that the transfer of collectively-owned non-agricultural land used for building has already existed. After it made researches on its status quo, problems and roles, the ministry began to explore the way of management via pilot projects. In 1995, the Ministry of Land and Resources instructed Suzhou to conduct tentative management on existing collectively-owned non-agricultural lands. In November 1999, Wuhu, the city in which collectively-owned land transfer was relatively disordered, was formally approved to be the pilot city of rural collectively-own land transfer. In 2000, two management conferences on collectively-owned non-agricultural land transfer were held in Suzhou and Anyang, some instructive policies were formed during the conferences and the pilot projects were expanded. In the pilot cities, some valuable explorations on transfer procedures, property right management and income distribution has been done. See Zhou Jianchun, Legal Construction of Collectively-owned Non-Agricultural Land Transfer, *China Land*, 2003(6).

[17]Wang Liming: Perfection of the Collection and Expropriation System in the Draft of Law of Property, *China Jurisprudence*, 2005(6).

expropriation of land usage right, and prescribes that compensation must be given for expropriation of land ownership. With the development of urbanization in China, too many development zones have been established in cities, and too many agricultural lands have been expropriated. In the process of expropriation, the farmers' interest has been severely ignored. In the end of December 2003, the National Land Resource Ministry, after investigating more than 6,000 development zones, found that there were 35,4000 squares kilometers of development zones, which was even larger than the whole amount of construction land in all the cities. Lots of the land is left unused. For example, Jiangsu Tieben Iron Company occupies 6,541 *mu* of land. The occupied cultivated land cannot be recovered. More than 4,000 farmers lost their jobs.[18] From 1996 to 2003, China lost 100 million *mu* of cultivated land.[19] It is reported that 1.4 farmers will lose their jobs for every *mu* of land expropriated. These farmers become "4- Nos Wanderers": no land to cultivate, no opportunity to work, no money to start their own business, and no social security to live with. As estimated roughly, under the current development speed, the number of Chinese farmers without land will have increased from 35 million to 110 million by 2003,. We can consider defining strictly the land for public interest and the land for profitable construction and perfecting the land expropriation process. For the land used for profitable construction, the developers should negotiate a compensation deal directly with the farmers, and the government should not interfere and seek profits. For the land used for public benefits, the government should consider the market price and give the farmers sufficient, reasonable, and timely compensation.[20]

4 The necessity to affirm the rights of the members of collective organization

In determining the subject of collective ownership right, the collective property shall not be individualized to private persons. In the meantime, it should also not be co-ownership by shares. Both of the methods will result in privatization of collective property, which is inconsistent with China's basic social and economic system.[21] In order to solve the problem of the subjects

[18] The "Iron Capital" Makes Either Parties Run at a Lose. *Shenzhen Commercial Daily*, 2004-5-7.

[19] Xia Jun: China has Lost 100 million mu of cultivated land within 7 years, Restriction on Land Planning Must be Strengthened. People's Daily, 2004-3-18.

[20] Wang Liming: Perfection of the Expropriation System in the Draft of the Property Law, *Chinese Jurisprudence*, 2005(6). See Zhao Hongmei: Land Ownership, published in Legal Construction of Chinese Land Rights, compiled by Wang Weiguo and Wang Guanghua, China University of Political Science and Law Press, 2002. 49.

[21] For Discussion on the definition of the qualification of the member of collective organizations, please see *Study on the Qualification and Right of the Member of Collective Organization*, by Wu Xingguo, *Law Science*, 2006(2).

of collective ownership, the key is to clarify the interest relation between the collectives and its individual members, and to affirm the rights of the members according to law

Collective ownership is a special type of common ownership, which means that it is totally separated from the right of the members. In other words, the commonly owned property has close and substantial relation with the interest of every individual member. The damage to collective property will directly harm collective members' individual interest; the destruction of collective property means the destruction of members' interest. In this perspective, it is different from state ownership, but similar to joint ownership to some extent. In sum, defining the nature of collective ownership as a special type of joint ownership, essentially speaking, means acknowledging that members of collectives have certain rights to the property, i.e., affirming in law the rights of members of collectives. The necessity is reflected in the following specific aspects:

First, it will make clear the nature of collective property from the perspective of law. If the member's right over collective property is prescribed clearly, it can clarify that the nature of collective property is the common ownership by the members of collectives.

Second, it can strengthen the protection for collective property. Because the subjects of collective property are not clearly defined yet, the collective property is vulnerable. For example, under current law, collective land can also be owned by the villagers' groups. But in some areas, a small group of people in the villagers' committees dispose the land without authorization, and distribute the profit among the minority, or use the profits for their personal consumption. When villagers bring suits to the courts and claim for the protection of their rights, the courts reject to handle the cases on the ground that the villagers have no standing. An important cause for this phenomenon is that the land ownership is not associated with the member's right.

Third, it will promote the democratic management of collective property. For a long time, the collective ownership is disconnected with the collective members' interest. To perfect the collective ownership system, this situation must be changed, and the principle of democracy must be realized when exercising the collective ownership right. The democratic management of collective property by the members of collectives must be emphasized in order to reflect the nature of collective ownership—owning collectively by the members. The democratic management is not just abstract and nominal. It must be realized through specific measures and strengthened through the fulfillment of all kinds of rights of the members. At the bottom, the collective ownership should be a property arrangement by which the working people commonly possess the means of production, manages the property

democratically, and achieve common wealth. Only by carrying out democratic management within the collectives can the working people identify themselves with the collectives and have incentives to work actively and creatively, which will promote stable development of the collective economy.

Fourth, it will help solve many existing property right disputes. The development of the rural economy will increase the mobility of the rural population. Many farmers who already changed their status to urban residents have changed their status back again, and want to return to their villages and take up farming, or require sharing the profits of rural collectives. Because many people have left the collectives for a long time, it is very hard to determine their interest relations. Accordingly, whether their claims can be acknowledged is problematic and has caused many disputes. The government met substantial difficulties in solving these disputes. And there will be more and more such phenomena with the development of the rural economy. It will affect the development of the rural economy if not being solved well.

In my opinion, the rights of the members of collectives should include the related aspects as below:

(1) The right to supervise and participate in the democratic management of the collective property. The right of collective member's democratic management is the core of collective member's property right. Because collective property belongs to all collective members, they have the right to conduct democratic management on the collective property. When the members of the collective organization are participating in the management, they do not exercise their rights according to their shares, instead, they have equal decision-making right.

(2) The right to elect the administration agency and person in charge for the collective property in accordance with the regulations and against interference of any group or individual. The principles of villagers' self-governance and deliberative democracy should be fulfilled in the process of election. The administrative agency and its leading officials should be selected on the basis of extensive deliberation. The government should not arbitrarily appoint or dismiss the leading officials of property management agencies of collectives. The members of collectives should have the right against such decisions.

(3) The right to have house site and build house in accordance with law. In rural areas, the members of collective organizations have the right by law to gain house0site usage right based on the common ownership. This is a right of usufruct. Once qualified to have the member's right, a person can expect to gain this usufructuary right. In the collective property relation, although the member's right is based on individual, the right to house site, in principle, should be based on the household. In other words, every household can have

only one portion of house site. The members of the household commonly share the house site usage right.

(4) The right to claim profit. The members of collective organizations have right to claim, in accordance with the laws or regulations, for the profits generated from the collective property. This right to residual claim can be inherited, but in principle cannot be transferred. The members of the collectives have priority on the property transferred or rent by collectives under the same conditions.

(5) The land contract should not be changed without the approval of the villagers' assembly.

(6) When the collective property is damaged, the members of collectives have the right to select representatives to bring suits to the courts, and claim for protecting the collective property, returning the property and receiving compensation.

Once the members' interest is closely associated with the interest of the collectives, especially after the member's right is affirmed, there will appear a realistic question—how to determine the members of collectives and their qualifications? Suppose a family has lived in a village for many generations and a member of this family went to the city to be a worker. Is this person still a member of the collective? Suppose an outsider comes to a village and contracts a portion of land, can this person become a member of this collective? We think that it is unnecessary and difficult to prescribe specifically the qualification of the members of collectives. But the Property Law can provide a certain time limit to define the qualification for the members.

Is it necessary to prescribe the procedure of exercising the member's rights in the Property Law? Many scholars argue that the Property Law, as a substantive law, should not prescribe the procedural issues. I do not totally agree. To be sure, the litigation procedure obviously should not be prescribed by the Property Law. However, the procedure of the members of collectives to manage the collective property is in fact the process of exercising the collective ownership right, and should be prescribed by the Property Law. For a long time, the procedure of exercising rights is ignored in the substantive civil law. Although some rights seem to be prescribed in much detail by the law, actually they cannot be realized in practice because the law did not prescribe the procedure of exercise of rights. The collective ownership right is a typical example. Accordingly, it is necessary to prescribe the procedure of the members of collectives to exercise their rights. The process of democratic management by the collective members should include three aspects:

(1) The members have the right to elect the collective property management agency. The agency should be responsible to all the members of the collective, and handle the affairs related to the collective property in accordance

with the regulation, and hold the members' assembly timely, or hold interim assembly upon the request of more than one half of all the members.

(2) The assembly of the members of collectives. The collective property management agency must hold an assembly at least twice a year, deliver notice ten days before the assembly, and publish in paper the content of the assembly. The content of an interim assembly should be noticed in written five days before.

(3) The decisions of the assembly of the members of collectives. A decision on important issues about collective property made by the collective members' assembly shall not be valid unless 2/3 of the members attend the assembly and 3/4 of the attendants support the decision. The collective property management agency should implement the valid decisions made by the assembly.

5 The transferability of house site usage right

The house site usage right is a special form of right of usufruct.[22] It is the right of rural residents and a few city residents to occupy and utilize collective land in order to build their own houses. The house site usage right can be classified into two types: rural house site usage right and urban house site usage right.

The house site usage right is based upon the membership of economic collectives. It to some extent functions as welfare and social security. Accordingly, a member of an economic collective can only apply for one portion of house site, and should not transfer it.[23] Only the house ownership right is transferable. And the house site usage right can be transferred only when the corresponding house ownership is transferred. I think this restriction is unreasonable. Since the house can be transferred, then the house site should also be transferable. The restriction on the transfer and mortgage of the house site usage right will make it difficult for the rural real estate to enter the market, restrict farmers' means of financing to some extent, and even hamper the development of the rural economy. Especially nowadays lots of farmers have gone to work in cities and bought houses there. Their houses in their hometowns are left unused. If the farmers are not allowed to transfer their houses, it will make the rural houses vacant for a long time. This violates the principle that property should be made best use of. Certainly, only

[22]Gao Fuping: Land Usage right and the Right of Usufruct—Research on China's Real Estate Property Right System. China Law Press, 2001. 442.

[23]Gao Fuping: Land Usage right and the Right of Usufruct—Research on China's Real Estate Property Right System. China Law Press, 2001. 90.

after the house site is transferred, the collective may receive the appropriate land price.

6 About the transfer of rural houses

Under the prescription of the existing law, because the collective land ownership cannot be transferred, the house ownership cannot be transferred either, but it can and only can be transferred among the members of the same collective. If a farmer's house has been transferred to city residents, how to protect the transferee's property right is a question, which needs to be solved urgently. Some scholars suggest solving this problem by setting the time limit system. This argument is reasonable to some extent. If the future legislation allows the transfer of house site usage right, according to the principle of "the house attached to the land", we can expect that the ownership of rural houses can be transferred.