

MARKET PROCESS REFORM OF CHINA'S LAND SYSTEM AND ITS LEGAL PROBLEMS¹

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I. Market process reform of China's land system

1. The land system prior to economic reform

The reforming of China's land system began with the founding of the People's Republic of China. After most of the land had been distributed, a new land system was implemented, based upon the idea that „every cultivator has the right to own his field”. According to the „Law of the Land Reform”, promulgated by the central government in 1950, two kinds of land were to be expropriated from the landowners: the land including kulak's leasing land exceeding that furrowed by the landowner, as well as the land cultured by employees. Expropriated land was given to the peasants, who owned little or no land. Meanwhile, the former landowner was allowed to keep some land to earn his own living. The village's land reform liberated the village's productivity. The „Law of the land reform” also stipulated that great forests, large water conservation projects, great brine pans, great wastelands, mines, lakes, luster, rivers, and ports were all to be confiscated by the government. Because state-owned land in the suburbs was used for agriculture, the farmers were obliged to pay an agriculture tax to the government instead of rent for the land. By late 1952 and the early 1953, with the exception of a few regions, the task of the land reform had been largely accomplished. On the mainland of China, the coexisting land tenure of state-owned land and private land was formally established. The „Law of the land reform” stipulated that the farmers have the right to manage, buy, sell and rent the land.

In February 1953, the Central Committee of the Communist Party of China promulgated „The Resolution on Mutual-Aiding Cooperatives of Agriculture”, leading farmers to carry out agricultural cooperation, which is the elementary agricultural production cooperatives organization, in which the simple agricultural labor mutual aiding developed to land convergent management, and the division of land became a simple question of melon cutting. The elementary

¹ China here refers to the People's Republic of China.

agricultural production cooperation reserved farmers' land ownership. Nevertheless, the land was no longer managed by individual farmers, but by the agricultural cooperative collectively. The exertion of land ownership was limited. „The notice of task on transferring of country land and deed tax” stipulated that the government should use administrative means to limit the buying, selling and hocking of farmers' private lands.

The third session of the First National People's Congress of June 1956 adopted „The Demonstrating Rules on the Senior Agricultural Production Cooperatives.” It was stipulated in Article two that the private means of production belonged to the cooperatives. Until that time, the primary means of production, like private land of farmers, was transferred into collective ownership. Collective ownership was ascertained formally.

Before 1990, state-owned land was handed over to land-usage units in the form of gratis transfer without any time limit, and the land-usage units did not need to take any economic responsibility towards the nation, except making use of and protecting the land reasonably and legally. To use newly expropriated state-owned land, originally used by other unit, the land-user only needed to pay certain amount of money to the original owner, or original user, and did not assume economic responsibility towards the state.

Since 1956, China has implemented the collectively unanimous managing land-usage system, and the collective became the basic unit of agricultural production and income.

2. Market-oriented change of the land system subsequent to economic reform

In 1979, China commenced its reform of the economic system, and gradually carried out a market-oriented reform of the land system. A „Land Related-Output Contract Management Responsibility System” was carried out. The original collective-owning and collective-using system was transformed into a collective-owning and individual-using system.

Beginning in 1982, China began to implement the repaying land-usage system for foreign businessmen. In 1986, the reform of the state-owned land-usage system began. In 1987, ShenZhen City led off the experimental unit of remitting state-owned land with repayment. On September 9, 1987 ShenZhen City leased a piece of land with an area of 5321.8 square meters to a company for a term of 50 years. This was the first case of remisng state-owned land with repayment since the PRC. was founded, which marked the beginning of the market-oriented reform. Nowadays, the system of state-owned land usage and remisng with repaying has already been implemented across all of China.

China has carried out the system of separation of ownership and of state-owned land. In case of the unchangeable land ownership, the Right of Use of a Land is allowed to be transferred, what enables state-owned land resources to realize reasonable collocation according to the rules of the market.

„The General Rules on Civil Law” adopted in 1986 contained concrete rules about the relationship between ownership and the Land Use Right. The land, as a huge social fortune, was brought into the system of civil and commercial law. The land ownership and the transfer relation became an object regulated by civil law. The „Land Administration Law of PRC.” adopted by the 6th People's National Congress in 1986 regulated possession of the land, its use, management, protection and all kinds of social relationship, which symbolize the new era of the land legal system.

In order to meet the needs of China's Reform and Opening policy, China needs to further develop its land-using system, and to attract foreign investment in this area. On 19th May 1990, the state council promulgated „The Provisional Rules on Remising and Transfer of the Right of Use of State-owned Land in China City And Country” and „The Provisional Management Rules on Foreign Capital in Developing and Managing Large Area Land”, which symbolized that China's land-usage system had entered a new era.

The revision of the Constitution in 1998 modified the provision from „Any organization or individual should not occupy, buy and sell, rent or transfer land illegally in other forms” into „The Land Use Right can be transferred in accordance with the law”. The revision of the Constitution provided the basis for the reform of the land-usage system. Accordingly, the standing committee of the National People's Congress also amended the „Land Administration Law”. Certain provinces and cities also issued numerous local regulations on the transfer of the Land Use Right with repaying, stipulating the method, the conditions, the procedure of the transfer, and the rights and obligations of the parties.

Besides the land-use system connected with repaying, the traditional system of transfer still prevails in areas, where the land was bought and used without repaying.

II. Issues relating to urban state-owned use of land

Section 9 of „The Constitution of the People's Republic of China” stipulated: „Mines, rivers, forests, mountains, grasslands, wastelands, shoals and other natural resources, all belong to the state, they constitute the whole nation's ownership, except forests, mountains, grasslands, wastelands, shoals belonging to the collectives stipulated by the laws.” Section 10 stipulates that: „the city's land belongs to the nation.” On grounds of public policy the state can expropriate the collective's land in accordance with the laws”. „The implementing law

of the land management law” (98. 12. 27.) stipulated in its 2nd Article: The following land belongs to the whole nation, it is owned by the state: the land in the city, confiscated, expropriated land, or acquired by purchase. Land, such as forests, grassland, shoals, which do not belong to the collective, the land originally belonging to the members of the collective, who later transferred the land to city and county citizens, the land originally belonging to moving farmers, who did not use it after moving away, because of the transmigration organized by the nation or because of natural disasters.

Though state-owned land belongs to the nation, under general circumstances it is not used and managed directly by the nation, but by the government, and used by the unit and the individual. The 9th Article of the „Land Administration Law” stipulates: „The state-owned land and the farmer collective land can be given to the unit and to the individual according to the law...” The 15th Article stipulates: „The state-owned land can be managed by the unit and the individual engaging in planting, forest, stockbreeding and fishery production.”

The system of use and transfer of city and county land with repaying constitutes a part of the economic reform in China. The system of use carried out prior to the Reform had many disadvantages. The land user did not need to calculate the cost of using the land, which led to serious wastage of land. On the one hand, the nation loses the great income of land resources, on the other hand, building the city's basic infrastructure requires more money. Certain land-users transfer the land bought without repay-obligation privately and with repaying. This leads to land speculation. This kind of land use system is unreasonable. The system of use and transfer of city and county land with repay can avoid the disadvantage of the system of land use without repayment, retrench land-using and put an end to the concealed land bargaining and add to the fiscal income. The market economy system has to have a consummate land market to realize the reasonable collocation of land resource. Under Chinese law, buying and selling land ownership is forbidden. According to „The Temporary Rules on the Remising and Transferring of the State-Owned Land Use Right”, the Land Use Right can be exchanged. The dealing object in the land market is the Land Use Right. State-owned land acquired by the buyer, belongs to *iura in re aliena*. During the contracting period, the land user has the right to use the land.

By way of the transfer of the state-owned Land Use Right, the government implements the system of the nation's land monopolization (the nation monopolized the first market level of the land), and remises the state-owned Land Use Right via the city or county government. The accepting party pays the money and acquires the Land Use Right. The two parties sign the Land Use Right remising contract and stipulate their rights and obligations. The accepting party uses the state-owned land according to the contract during the period stipulated therein. This is the remising of Land Use. The remising contract is

signed by the land administration of the city or country government. The remising period of the Land Use Right was confirmed according to the following purpose:(1) Dwelling land: 70years; (2) Industrial land: 50 years; (3) Educational, science and technology, culture, sanitation land: 50 years; (4) Commerce, junketing and entertainment land: 40 years; (5) Colligation or other land: 50 years.

The remising of the Land Use has great significance. The remising of the Land Use Right can secure effective use of the state-owned land, prevent the loss of national assets, enable the land-user to use the land according to the land-layout and prevent land speculation. China has also established the land storing system, in order to ensure the profit of the nation as the owner of state-owned land, to regulate the land market and to control the market price of the land.

The ways state-owned land can be sold are the following: by agreement, by inviting bids, by auction and by listing for granting. Selling the land by agreement means that the buyer, who wants to acquire the ownership of the land, directly expresses his wish to the local governments of the county or the city that represents the nation. Provided that no third party takes part in the „competition” to acquire the land, the government as the seller has the tendency to let the buyer reach the agreement by consultation. This is the way the state sells land to individuals. As it can be seen, the state does not make use of the possibility of requiring the offerors to compete with each other, which causes the price of the land to be very low. This means that this method is just perfect for governmental projects, public welfare, non- profit units or projects, and some other cases, where the government considers it necessary to give certain support. Selling land by inviting bids refers to the case, when in a required period of time the bargainer issues a bid invitation bulletin to invite citizens, legal persons and other organizations to make bids to the seller in order to acquire the land. In these cases the seller has the right to choose the best offer. Selling by auction roughly means that the land keeper issues an auction bulletin, and the competitors make the offer openly in the required time and at the required place. The buyer will be determined according to the „winner with the highest price” principle. Selling by listing for granting refers to the cases, when the owner of the land hangs out his shingle and the exchanging conditions in the exchange center of the land, and announces basic information about the land and its terms of use. Possible buyers in this case as well make their offers during the established time limit, and the buyer will also be determined according to the „winner with the highest price” principle. As it can be seen, the last three methods mentioned above have all introduced the notion of competition.

The buyer of the land can transfer, rent, and mortgage the land. The transfer of the Land Use Right belongs to the second market of land transfer. Only by allowing the transfer of the Land Use Right, can the land market be established. The transfer of the Land Use Right refers to the land user's right of re-transfer of the land, including selling, exchange and conferring. The Land Use Right cannot be transferred, if the land has not been exploited according to the period and conditions stipulated in the Land Use Right transfer agreement. The practice of buying and afterwards re-selling the land with profit should be stopped. When the Land Use Right is transferred, buildings and other adhering objects should also be transferred. Renting the Land Use Right means that the land user as the lessor leases out the Land Use Right, together with the buildings and other adhering objects. The leaseholder pays the rent. After leasing the Land Use Right, the lessor has to continue to fulfill the Land Use Right remising agreement. When the Land Use Right is mortgaged, the buildings and other adhering objects are also mortgaged.

The Land Use Right means the right of occupying, using the land. Regarding its legal nature, it is a substance right. First, the Land Use Right is the right to occupy, to use the land. Secondly, the land user has the right to dispose of the land, within certain limits, namely, he has the right to transfer, lease or mortgage the Land Use Right. Thirdly, the Land Use Right only implies the active behavior of the obligee, but it does not depend on other people's active behavior. The obligee has the obligation to use the land. The Land Use Right is a Jus in re. It is the right of the land user to invest in the land, to get profit from it, and to transfer, rent, and mortgage the land. The Land Use Right differs from the single leasing and mortgageing right connected to the ownership, and it is an independent property right. The Land Use Right is a usufruct similar to the superficies, and it implies the right of the acquiring party to construct buildings and other infrastructure on the state-owned land.

III. Issues upon the country's collective land contracting management right

China started to reform the country collective land use system in the 1970s, and gradually carried out the land contracting management responsibility system, which means that the public has the ownership of the land, while the farmers have the right of management. This reform changed the Chinese rural collective management system and enables the farmers to be the basic unit in agriculture. The reform rearranged the allotment of rights between the country, the rural public and the farmers. Thus, the principle of right allotment is: „to reach enough output to transfer to the country and the public, and the rest belongs to the farmers themselves.” This principle implies an encouragement, and farmers are going to work hard. As a result of this, agriculture developed at an extraordinary speed.

These land contracting management rights should be realized in the rural community (country or other agricultural economic enterprises). All members of the country are entitled to acquire the land contracting right.

Since the 1990s, the farmers' enthusiasm has vanished, because of low prices and high costs in farming, as well as low or even non-existent income. Therefore, the agricultural output has decreased, and the country's land system (land contracting responsibility system), which was considered to be the solution, turned out a failure. As a result, Chinese products on the international market are not marketable enough, Chinese agriculture will have to deal with terrible pressure after the opening of the domestic agricultural market, should ownership of public land remain unchanged, and intensive farming still remain impossible, due to high costs.

The present land contracting management responsibility system would have to meet the requirements of public interest. Farmers would need more help, the subsidies paid to them are too low. Land is the basic means of production for them, it is their guarantee for life, and only by protecting their land related rights can one stop their migration to the cities. The problem brought about by the country's land system is not just the problem of scale, or a problem of family management. It can be foreseen that farmers moving to the suburban areas of the cities will create a major problem. If the number of the suburban population increases while the industry's absorbing ability decreases, the cost of human migration will increase. This means, the migration of surplus labor to suburban areas is the key problem of promoting the efficiency of land management.

The implementation of the land usage right is different across the country. Because of this, China is trying to introduce reforms in some areas.

Meitan region (comparatively developed region) implements the means of land contracting for a long period. During the contracting period, the acreage of the land contracted is not enlarged or reduced because of a newborn baby or a dead person.

Pingdu region (comparatively developed region) implements the „double-farmland system”, which stipulates that every farmer can have his own land covering his and his families needs, and the land left, is delivered to the farmer by way of a bid invitation.

Sunan region (developed region): the collective managed the land, and the farmer was usually engaged only in machining or servicing work.

Nanhai region (developed region) implemented the land-sharing cooperation system. The farmer has become a shareholder with land, and the collective gave him the land. The farmer draws extra dividends at the end of the year.

Huaihua region (less developed region) implemented forest renting for a 6 years period. The farmer and the collective collocate at a ratio of 9:1.

Yan'an region (less developed region) implemented brine-pan auction. The contracting period is 20 to 50 years. The farmers adopted it with great enthusiasm.

The levels of development in various countries in China are very different, these regions should adopt the best land system for themselves, according to their own conditions. The farmers in most regions still depend on land, this is why the Land Contracting Management System still suits most country regions in China.

The Land Contracting Management right in the different countries is a right of membership of a collective. Section 5 of the „Law on Country Land Contracting” stipulated: The member of the country’s collective economic organization is entitled to contract any country land granted by the collective economic organization. No organization or individual can deprive the country’s collective economic organization’s member of his right, or limit his right of contracting land.” Section 26 stipulated: if, within the contracting period, the whole family of the contractor moves to the city, and modifies its residence into a registered non-agricultural permanent residence, they shall return the plough contracted and the grassland to the delivering party. In case the contracting party does not return it, the delivering party has the right of taking back the contracted plough and grassland.

The land contracting management right is a property right, but it is not the property right in a traditional sense. It can be deduced from the „Law on Country Contracting Management” that the aim of the law is the stabile linking of farmers to the country land. For example, the 23rd Article of the law stipulates: the government should issue the Land Contracting Management Right Certificate to the contracting party and register it to affirm the land contracting management right. The 54th Article of the law stipulates: If the delivering party causes damage to the land-contracting party, he should be liable in tort (such as stopping trespass, returning protoplast, restoring property to original state, eliminating harm, removing danger, repaying damage). Without the approval of the country collective, the farmer cannot transfer the land contracting right privately. He has only the right to interchange, rent and subcontract. The farmer cannot transfer the obligations arising from the agreement to the collective. He does not have the right of disposal. The contracting management right is not a real right.

The country land contracting management responsibility system does not fall into the traditional theories of real rights or creditor's rights in civil law, therefore civil law has to create a new right. The Land Use Right has to be integrated into the legal system. The land-transferring system has to be established for the purpose of accelerating the reasonable collocation of country land and the transfer of country labor force. For example, the farmer has to be allowed to dispose of his land. The Country Land Contracting Management Responsibility System means that the collective, as the representative of all the landowners, delivers the land to the farmer of the same organization. The two parties sign a contract, where more articles are prescribed, and cannot be negotiated, than articles that can be objects of negotiation. The collective land ownership is limited, and the transfer of the Land Use Right is also strictly limited. The „Law on Contracting of Land” emphasizes the stability of the land use right, therefore the transfer of the Land Use Right is strictly limited. For example, though section 10 of the „Law on Country Land Contracting Management” stipulates that the contracting right can be transferred, it only allows the contractor to rent or to subcontract. If the contracting right is transferred, in the true sense of the word, the approval of the delivering party – namely the collective organization – is needed.

The provisions of the „Law on Country Land Contracting” reflect that the government interference is serious. For example, if the land contracting management right needs specific adjustment, or the country land was contracted to a person, who is not a member of the collective, the approval of more than 2/3 members of the organization and the country (grass roots-government) government is needed.

The law strictly protects the farmer's land contracting right. The farmer has the right to give up the contracting right. He has the right to give it up at the beginning or in the course of contracting. The collective can reverse-contract in order to prevent the land from being barren. During the contracted period, the delivering party should not take the land back. If the whole family of the contracting party settles down in a city, the land contracting right can be reserved according to the willingness of the contracting party. During the contracted period, the land of the farmers should not be adjusted. If the land contracted has to be adjusted, for example because of serious damage, the procedure is strictly regulated. If the agreement stipulates that the land should not be adjusted, the agreement should be followed. The income of the contractor can be inherited in accordance with the „Law of Inheritance”. If the contractor dies, his successor has the right to continue to perform the contract during the contracted period.

IV. The conflict between economic development, land protection, and legal adjustment

The contradiction between economic development and land protection is very serious in China. The main problem is that the developing areas run by the government enclose land blindly. According to statistics released in 1999, China has 2 million mu Chinese expropriated land un-used at present. Many areas do not possess means for development, thus a lot of expropriated land is unused and wasted. In some areas low-level repeated building is followed on the engrossed land. Some areas, making use of the time needed for transfer from the country to the city, or from the country to the town, reclassify agricultural land into land for construction.

China's economy has been developing quickly, and needs a great deal of land for construction. In order to accelerate the local economic development and acquire investment, some local governments by way of exceeding their authority authorize this kind of reclassification of agricultural land, or establish developing areas without the approval of government. This phenomenon is widespread. The phenomenon of „rush development of the area” in the course of economic construction leads to serious destruction of vegetation. Therefore, since 1997, the policy of freezing occupied arable land has been enforced. If arable land is used for non-agricultural construction projects a serious approval system has been introduced. The „Land Administration Law” amended in 1998, intercalated the examination and the approval system connected to the reclassification of agricultural-used land to non-agricultural-used land. Though the situation is much better nowadays, the problem has not been solved yet. In 2003, the Ministry of Land and Resources organized a survey of the national land market order. According to statistics from 10 provinces and cities, using land without approval, occupying and transferring land illegally is still widespread. The causes of this are: (1) the conflict between economic development and land protection; (2) the local government does not fulfill its administrative obligations in compliance with the law, authorizes land for construction unlawfully; (3) the local government increases its income only by selling the land; (4) local people's hope for developing the local economy and governmental officials' aim of developing the local economy to reflect their political achievements; (5) the land management department of the local government is subordinated to the local government and cannot supervise the local government effectively.

The situation of plow land in China is also rather serious. According to some 1999 statistics, China has 1.95 billions mu plow land, per capita 1.59 mu, less than half of the world per capita plow land, 3.75mu. China feeds 22% of the world population with 7% of the plow land. Besides this, 64% of the plow land

lies in the area, where water resources are scarce; 40% of the plow land in dry and sub-dry areas deteriorates to different degrees; 30% of plow land is damaged by the washing away of water and soil; 91 million mu plow land's gradient is above 25 degrees, and needs to be returned to forest and grassland. Currently, China has 0.19 billion-mu plow land that can be exploited, but is difficult to rearrange, re-cultivate, and develop due to environmental limitations.

Facing the severe conditions of the land resource and the illegal activities in the real estate market, in order to protect the land, the State Council introduced reforms in the various developing areas, banned the local governments from allowing the illegal establishment of developing areas. The first market of state land remising is especially regulated. Rules stipulate that the collective land should not be illegally remised, that the governments should only provide land according to the law, and according to the whole land use program. The government tries to perfectuate the system of regulating land usage. With regard to the second market of land conveying, it is emphasized that the right to use state land, which can be transferred without payment, cannot be used for the development of the real estate, resulting in the land entering the market covertly.

With regard to legislative protection of the land, the Land Administration Law enacted in 1998 has already formulated mature regulations for land protection. The state is in charge of the overall planning of the use of the land, regulates it, restricts the reclassification of agricultural land into land for construction, denominates the total amount of the land for construction and offers special protection for cultivated land. The reclassification of agricultural land into land for construction has to be strictly examined and approved in accordance with the law. Besides the Land Administration Law, the State Council and the National Territory Resource Department implement some rules and regulations for land protection. In 1998, the State Council enacted the „Regulations Concerning the Re-cultivating of Farmland”, establishing the principle: those, who damage the land, are responsible for re-cultivating it. In 2003, the State Council revised the „Regulations on Basic Farmland Protection”, which now stipulates that basic farmland is land affirmed according to the prediction of the agricultural production to meet the needs of population increase as well as those of the national economy in a certain period. Besides, „Measures on Tackling the Unused Land”, „The Administrative Measures on the Annual Plan of Land Use” and so on were enacted in 1999. Thus, a sound legal system for land protection has been formed in China.

To tackle the contradiction between the economic development and land protection, China must strictly implement the land rules and regulations. But the key point of this problem is enhancing the legal concept of the district governments to exercise their authority according to the law, improving the supervision mechanism of the land, strengthening the legal responsibility of the leaders in the district governments, who have the power to approve the land.

V. Conclusion

The reform of the land system constitutes a part of the Market Economy System established in China, and is naturally the result of the Open Policy. It has changed the unreasonable land use system, accomplished the reasonable allocation of land resource and improved the efficiency of the use of the land. The paid use and transfer system of state-owned land, established a land system suitable for China, which is equivalent to the economic value of the land. The popularization of the land contracting management system in the country has solved the daily problems of nearly 1.3 billion people, and significantly improved the lives of the farmers. All this demonstrates that a reasonable system can generate people's enthusiasm for production and create great economic value. Inevitably, many economic and legal problems still have to be solved, for example the contradiction between economic development and land protection, the supervisory system of the administrative approval, the protection of farmers' rights during the expropriation of the land, the transfer of the agricultural right of use of the farmers. In addition, the already established legal system still remains to be strengthened, the system of land protection still remains to be perfected. Regulations like the „Law on Planning of State-owned Land”, the „Measures on Land Rearrangement”, the „Measures on the Development of Agricultural Land” should be promulgated. Generally speaking, many problems related to China's land system are still unsolved and further research is urgently needed. This paper is just an introduction, but the author hopes to attract some attention to China's land legal system.