1. The legal logic, policy interpretation and alternate system of “the division of three rights”

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1. BACKGROUND

Since the founding of new China, the rural land property rights system has undergone a series of major changes. Among them, in 1984, the household contract system was recognized by the central government, and has made great achievements in the development of rural productivity. The core of this reform is the so-called “separation of two rights”, namely land use rights separated from the collective land ownership, and the right to the contracted management of land enjoyed by the family contracting households as an independent civil right. In the process of industrialization, urbanization and agricultural modernization, and the promotion of the new context, the practical needs of the contracted land circulation have led to the so-called “separation of three rights”, namely the contract right and the right of management division, established ownership and contract rights, while the right to operate the three powers in parallel split the farmland rights system, which is known as the movement from the “separation of two rights” to the “separation of three rights”.

Professor Gao Shengping believes that in the evolution of China’s land system it is often first necessary to explore its spontaneous practice, the role of government departments and the roll-outs of the party’s pilot projects, and then initiate the law through the formulation and revision of leading economists and management scholars. In this process, the lawyers do not provide much wisdom or make a great contribution.¹ The

¹ See Gao Shengping, Under the New Agricultural Management System of the Legal Logic of the Farmland Property Right Structure, 4 *Chinese Journal of Law* (2014).

local practice and policy process of the “separation of three rights” seems to confirm this view again. In fact, as early as the late 1990s, “the theory of division” in local practice was put forward and was reflected in many local governments’ introduction of normative documents. In the early years of the 1990s, the problem entered into the theoretical field of scholars.² In the academic circle itself, economists’ and management scholars’ views are one-sided in terms of support and active advocacy. The discussion of this issue in the legal sphere stems only from the last two or three years, and there are two diametrically opposed views: one is approval, and the scholars Cai Lidong³ and Ding Wen⁴ serve as the representatives here; the other is opposed, represented by Professors Chen Xiaojun⁵ and Gao Shengping.⁶

The existence of differences indicates that the problem merits further discussion and review. This chapter is based on the differences in and reflection on the product. The basic conclusion of this analysis is that “the theory of division” is a lot of trouble, and the problem is discussed mainly in the light of three aspects. First of all, is it possible to analyze the system function of “the theory of division” from the perspective of legal logic, and if not, where do its roots lie? Secondly, the chapter seeks to clarify what is the starting point of the current policy of the theory of division, and whether and how much it achieves the desired policy objectives. In the end, if it is proved that the above two points are negative, is it possible to put forward instead a feasible system for the target? In other words, how can we achieve this important goal which both stabilizes the rural land contracting relations so they remain unchanged for a long time, and yet give farmers more property rights through the system design.

² See Feng Yuhua and Zhang Wenfang, On the Theory of “the Division of the Three Rights” of the Rural Land, 9 *Economic Review* (1992).

³ See Cai Lidong and Jiang Nan, The Legal Structure of the Consulting and Management of Separation, 3 *Chinese Journal of Law* (2015).

⁴ See Ding Wen, On the Separation of the Land Contract Right and the Right to the Contracted Management of Land, 3 *China Legal Science* (2015).

⁵ See Chen Xiaojun, China’s Legal System of Rural Land Reform Ideas and Framework, 4 *Chinese Journal of Law* (2014).

⁶ See note 1.

2. THE CONFUSION, DILEMMA AND ORIGIN OF THE LEGAL LOGIC OF "THE THEORY OF THE DIVISION"

In this part, I will analyze the views of the scholars who agree with "the theory of division", and discuss the key points of (but not limited to) Professors Cai Lidong and Ding Wen.

2.1 The Legal Logic of the Division of the Rights is Chaotic

The important question is: what is the premise of the separation of rights? From a logical point of view, since it is separation, the rights must have been previously combined. So, of the rights that are merged together, which one is right? Consistent with the mainstream view, Professor Cai Lidong considers that the right to contract and management rights are separated from the original land contract management rights.⁷ If so, this will lead to a series of problems.

First, when the right of management is broken away from the right to the contracted management of land and becomes an independent property right, what is left in the original with respect to the contracted management of land rights? According to Professor Cai Lidong's statement, there are two possible scenarios: one is only the right to contract; the other is to retain the right to the contracted management of land in addition to the contract right. The question is whether these two possible situations are one thing or not. If they are different things, what is the difference between them, and can they exist at the same time? If they cannot exist at the same time, what is the difference between the two? Professor Cai Lidong does not give a clear exposition. As can be seen from the text, Professor Cai Lidong believes that the two are not exactly the same. In fact, both of these are logically wrong. The first case is demonstrated now, and the second one later.

Second, if the right to the contracted management of land after the separation, the rest of the right, is just a contract right, how are we to understand the contract right? Professor Cai Lidong focuses on the nature of the right to operate from the beginning to the end, and the right to contract barely rates a mention. About the contract right, the rural land contracting law (article 5) regulations state: "the rural collective economic organization members have the right to contract by the collective economic organizations in accordance with the contract of

⁷ See note 3.

rural land. Any organization or individual shall not be deprived and illegally limit the rights of the rural collective economic organizations to members of the contracted land". Obviously, the "right" here does not refer to the right to land contractual management, because the "right" is in the land contract behavior from before, and is a kind of legal right; and the right to land contractual management is the agreement, and set up only in the contract when the contract comes into effect (article 22). Therefore, the phrase, "shall have the right to the contracted land", means the contract right.⁸ In addition, the article pointed out that the enjoyment of the legal rights of the condition is that of the rural collective economic organization members, the right to contract and identity attributes being closely related, which is consistent with Professor Cai Lidong's statement, "This contract right depends on the identity of the peasants' rights and farmers' collective sharing of the same fate, safeguarding peasants and land rights, and bearing the weight of the function of typical land ownership".

Thirdly, if Professor Cai Lidong believes the contract right is the contracted land right in accordance with the law, then the entire legal logic foundation of the theory of division will be subverted. In logical order, in the right since it is a right to separation, then the merger is the premise, otherwise, how can there be separation of the latter? If the right to contract is included in the right to land contractual management, then the establishment of the right to contracted management of land should be in advance or at the same time, but not after the establishment of the right to contract. This can be seen from Professor Cai Lidong's statement, which clearly approves of the concept that the contract right is separated from the right to the contracted management of land; from the point of view of time, the right that is set up in the contracted management of land came after, and this is contradictory regarding the law. In contrast, because Professor Ding Wen will be the focus of the argument on the nature of the right to contract and carry out the details of it, he draws a different conclusion from Professor Cai Lidong. Professor Ding Wen believes that the contract right in form is a kind of expectant interest, and is a prerequisite to obtaining the right to land contractual management; obtaining the right to land contractual management is the basic way to realize the right of a land contract, the two kinds of rights

⁸ Some scholars call it "contract claim". See Zhou Yingjiang, *Household Contracted Management: The Status Quo, Dilemma and Outlet*, Beijing: Law Press, 2010, p. 48.

are not synchronic, which means the right to land contractual management and the right of land contract are viewed as contrary to the basic law and lacking theoretical support.⁹ Therefore, from the point of view of the law, the contract should be the right to contract, the right to land contractual management and the entire legal logic of "the theory of division" is the opposite of this.

2.2 Can the Management Right Be Set Up as the Usufructuary Right?

Another problem is that when separated from the contracted management of land, management has become a separate right, and what then is the nature of the right or management? Professor Cai Lidong believes that the management right is a usufructuary right, but that it is different from the traditional usufructuary right. The strategy is to expand the traditional usufructuary right object scope, thinking that the object should not be limited to, but should also include, rights called usufructuary rights. The right of management after separation is the right of usufructuary right, which regards the right to the contracted management of land as the object of the right. But the viewpoint which regards the right of management as the right to the contracted management cannot be established.

Professor Cai Lidong puts forward three defenses. The first is Karl Larenz's proposed civil object sequence. According to this, if only the object of right which can be the object of the law is the right object of the second order, the object of the object is the object that can only be the object in fact. Karl Larenz has put forward the main concept in order to prove that legal behavior is not only the object of property rights, the provisions of the object cannot be separated from the legal system, because it is inconceivable that the objects of the behavior, merely as legal objects, could exist beyond the system of laws.¹⁰ Professor Cai Lidong's purpose is to prove that the object of right is not only the object but also the right. But even so, it cannot be proved that direct management can become a kind of usufructuary right. Professor Cai Lidong's second defense is to expand the object scope of usufructuary rights in accordance with the law of evolution theory and historical logic. The theoretical and historical logic reference to the usufructuary right as the object of the aforesaid usufructuary right holder, to set the secondary

⁹ See note 4.

¹⁰ [Germany] see Karl Larenz, *The General Theory of German Civil Law*, translated by Wang Xiaoye, Beijing: Law Press, 2003, p. 403.

usufructuary right for others, is thus proved through the evolution of the usufructuary right in the ancient Roman law object. However, the example cited relates to a body of claims, so its probative force can only be limited to this; if there is expansion of its probative value, appropriate evidence should be given. Thirdly, the German and Swiss civil law (or cases) have recognized the rights and even that the usufructuary right can become the object of usufruct.¹¹ But the problem is, can a right on the ground be set for the usufructuary right that is also the right to land contractual management?

Therefore, the key question is whether the right to business can become a usufructuary right. Professor Cai Lidong believes that people have a right to the contracted management of land management right in the proper setting; they still have the right to land contractual management, management rights just set the exercise and the realization of the right to land contractual management mode. Furthermore, after the establishment of the contractual operation right of the land, the derivative rights, such as rights of possession, use, income and power, should be confined by the contractual operation right. In addition, a right is also set after the reservation of the right to land contractual management in nature as a usufructuary right.

It is here that we see the conflict between rights: the contractual management right is certainly not in the earlier contract, that contract right is the only one that can expect interest and is the premise of obtaining the right to the contracted management of land; the land contract management right is a real right. Then, the right to the contracted management of land as a usufructuary right includes what right? Look at the statement from Professor Cai Lidong, which includes possession, use and income rights, but only by the new management rights restrictions, while retention of the right to transfer can continue, but only regarding closed circulation. The franchise has become a pure usufructuary right of property rights, it should have complete power including possession, use, income and disposition. But this way, it also has two usufructuary rights, with the two rights having possession and use of power, and how might this occur in fact? If the possession of the former is restricted by the latter, how does this restriction manifest itself? Professor Cai Lidong does not say anything about this. Some scholars have pointed out that the usufructuary right holder can be set in the burden of usufructuary right. But in these cases, the usufructuary right

¹¹ See Fang Shaokun, *Basic Studies of the Usufructuary Right*, Beijing: Peking University Press, 2006, p. 7.

holder's set of usufructuary right objects are not the original usufructuary rights enjoyed by the people of the usufructuary right, the object and the object of its original usufructuary right are the same, and are the original real estate.¹² Due to the fact that the same object is not allowed to have an incompatible coexistence of real rights, the view of the management rights as a usufructuary right cannot be applied, unless it is thought to be the contracted management of land division after only the right to contract a right, namely that of the contractor to the management of land circulation of the land to others, while still reserving the right to contract land. But this is again inconsistent with the above discussion.

2.3 The Illusion that the Same System Carries a Variety of Functions

If the above argument is justified, then how is the logic of separation theory formed? Some scholars believe that the main reason for the existence of defects in the system of land contract and management rights is that it carries too many institutional functions. It is obvious that the land contract and management right system carries too many functions, including the political, social and economic functions of the system, and there are serious structural conflicts between these different functions.¹³ Therefore, it is necessary to reform the land contract management right system. The separation of rights, on the one hand, is "easing the burden" for the contracted management of land, and "enhancing the ability", on the other hand, to make the right to the contracted management of land become a pure usufructuary right. The method is to remove the unnecessary system function and the right attributes, and separate the management right and the contract right. But this is only the appearance of the operation of the system, rather than the substance, and gives us the illusion that it should be divided.

The mainstream view is that the right to the contracted management of land has the basic function of social security, and has an important function in relation to peasants' property. On the one hand, "The Real Right Law" (article 125) will be specified as a usufructuary right to the contracted management of land and is therefore free to be transferred. On the other hand, it is subject to many restrictions. For example, the person

¹² See note 11, p. 193.

¹³ See Zhao Wangyi. Wang Qingsong, The Function Transformation and Right to Implement of the Right to the Contracted Management of Land and Power, 1 *Chinese Journal of Law* (2014).

having the right to contract for management of land who transfers some or all of the right to others shall be subject to consent by the developer. The right to the contracted management of land contracted by the household shall not be used for the purposes of mortgaging. In this regard, the legislative intent is deeply rooted in a dilemma, because the two systems are mutually exclusive to some extent. In addition, the right to a land contractual management system connects to two different kinds of value concepts – fairness and efficiency – simultaneously: on the one hand, so that the members of the collective economic organizations have contracted collective land rights, to ensure a fair starting point; on the other hand, the right to land contractual management shall maintain long-term stability so as to facilitate the transfer to achieve efficiency goals. But the two are conflicting.¹⁴

In other words, these conflicts subject the right to the contracted management of land to criticism as well as reform. But this is just a representation. The scholars do not pay attention to the stage and cooperation of the system in the process of operation. In different stages, it seems that the same system is in continuous operation, but in fact there may be different systems that have inadvertently completed the conversion. This is the crucial time to establish the right to land contractual management; that is, the right to the contracted management of land is set when the contract comes into effect. In accordance with the interpretation, prior to this, the right to the contracted management of land has not been established, but this does not mean that farmers do not enjoy any other rights; there still exists the right to contract by the collective economic organization of rural land, which is the previously mentioned so-called “contract right”. The contracted land is not the right to the contracted management of land, but the right to contract. As some scholars have argued, there should be in the land contracting right an “initial allocation” phase to achieve security objectives and a “free transfer” stage to achieve economic goals; the two goals will be completed in stages, rather than as two distinct values at the same time in a mixed system of farmland.¹⁵

Further, there is the question of whether the premise of the realization of the concept of protection or fairness is to have the specific identity of

¹⁴ See Lin Wei, *The Study of the System of the Rural Contracted Land Adjustment*, Beijing: China Procuratorial Press, 2010, p. 88.

¹⁵ See Wang Yang, *The Right to the Contracted Management of Land Succession Studies*, 4 *Tsinghua Law Journal* (2014).

the property, that is, the membership of the collective economic organizations.¹⁶ "The Real Right Law" stipulates that "when the contractor's family moves into a community of the city, which is converted into a non-agricultural population, there shall be returned to the party would-be contracted farmland and grassland. If the contractor fails to return the contract, the employer may recover the contracted farmland and grassland". Here, the non-agricultural household account means that it has lost the membership of the collective and the original land contract relationship has been destroyed by the return of the contracted land.¹⁷ In contrast, even in the contract period of voluntary surrender of the contract, this does not affect the fact that the contractor still has the right to enjoy the contracted land.¹⁸

Unlike the opinions mentioned above, some scholars hold that¹⁹ although there is a relationship between identity and the right to the contracted management of land, this relationship is mainly reflected in the establishment of the right to land contractual management. It is important that the original identity of the right to the contracted management of land is neither equal to the identity of the right itself, nor capable of having the right to obtain the identity. Regarding the right to the contracted management of land, for the first time with identity, once this right has been obtained, the contractor of contracted land possession has the right to use and harvest the land independently of ownership, and these are all property rights, not completely equal to affordable rights.²⁰ From the process of the generation and development of property rights, even if the establishment of a property right is based on a specific identity, its subsequent existence and change may not necessarily need to be restricted by its status.²¹ Therefore, the root of the problem lies in defining what has the right of an identity attribute, referred to above,

¹⁶ See Zhang Fan and Sun Shuyun, Farmland Property Right Structure Under the Perspective of Members of the Collective Rights, 11 *Rural Economics* (2012).

¹⁷ See Hu Kangsheng, *The Rural Land Contracting Law Meaning of the People's Republic of China*, Beijing: Law Press, 2002, p. 75.

¹⁸ See He Baoyu, *The Concept and Practical Guide of the Rural Land Contract Law of the People's Republic of China*, Beijing: China Democracy and Legality Press, 2012, p. 61.

¹⁹ See Zhou Yingjiang, The Identity of the Right to the Contracted Management of Land, 7 *Legal Forum* (2010).

²⁰ See Cui Jianyuan, *Real Right Law*, Beijing: The Chinese People's University Press, 2011, p. 270.

²¹ See note 13.

along with the right to the contracted management of land, and what is the relationship between these contract rights?

2.4 Ignoring the Collective Land Ownership in the Farmland Rights System

In my opinion, in this series of problems, the most important thing is that people ignore the collective land ownership system function, but only when limited to the land contract management system. The former has been stressed, with the specific status of the original land's contracted management right; it is this identity that determines who can obtain the initial land contract and management rights, but what type of right is the right of identity? In other words, where the provisions of "The Contract Law" (article 5) outline that one shall have the right in accordance with the contract, the "right" refers to what kind of rights?

"The Contract Law" (article 5) stipulates the relation of collective economy organization members to the contracted land in accordance with the law. But "The Real Right Law" (article 5) stipulates that real property and personal property are collectively owned by peasants, belonging to the members of collectives. So, given the premise of obtaining the land contract right is being a member of the collective, the so-called keeping contract right, its essence is a kind of collective land contracting qualification, with membership right, and this right is to be granted to members of the collective.²² Professor Wang Liming believes, first, that the nature of the membership right is based on the status of rights; second, it is a dialectical unity and form of collective ownership; and, third, that the collective members enjoy exclusive rights.²³ Other scholars believe that the membership right is mainly realized by members of the collective who benefit from the power: the beneficiary can be both collective and individual; in the case of a member, a specific contract to particular plots of land has given the right to the contracted management and is to realize the beneficial right of the individual – the right to the contracted management of land belongs to the individual.²⁴

We can know that: (1) the membership right is different from the right to the contracted management of land. The membership right is the premise for obtaining the right to land contractual management. Only

²² See note 5.

²³ See Wang Liming and Zhou Youjun, On the Improvement of the System of Rural Land Rights, 1 *China Legal Science* (2012).

²⁴ See Han Song, On the Collective Members' Benefit Right of the Peasant Collective Ownership of Land, 1 *Contemporary Law Review* (2014).

with the membership of the collective economic organization can there be the original contract for the right to land contractual management. (2) The membership right is also different from the "contract right". The right to contract in "the theory of the division" refers to the specific rights of the collective members to contract the rural land contracted by the collective economic organization of the contract law. However, as a kind of general right, the membership right should be more abundant, and the right to contract is only the concrete embodiment of the right of members to obtain the right of land contract and management.²⁵ (3) The membership right is not equivalent to the collective ownership of land, although there is overlap, but there are at least two differences, namely the subject and content: the main member of the right is a single member, and the collective land ownership is that of the collective members. The right of the member embodies the interests enjoyed by the member of the collective independently, while the collective right of the land refers to the interests of the collective.²⁶ (4) Although the membership right and the collective ownership of land are not identical, the system function framework of the system of collective land ownership can be realized, which is not only the basis for legislation, but is also the subject of a basic consensus among scholars.²⁷

So, the legal logic of "the theory of division" is clear. The purpose of "the theory of division" is to separate the security function and the function of property, the concept of fairness and the concept of efficiency, which can be carried out separately. As a result, this can not only ensure that the contract relationship remains unchanged, but also gives farmers more property rights. However, the right basis of the "division" is the contract right of land contract. Indeed, the legal logic of the right division is reversed, that is, the situation and the goal after the separation in fact exist before the separation. On the face of it, "the three rights" are separated from and paralleled with each other; in fact, the so-called "contract right" is implicit in the collective land ownership, without which it may not be separated from the right to the contracted management of land. In other words, the entire theory of the division is not based on the right to land contractual management but the collective land

²⁵ At one point in this chapter, we discuss that contract right and right to the contracted management of land have been successively set up over time. Professor Ding Wen has recognized this opinion. I basically agree with his argument. See note 3.

²⁶ See Dai Wei and Chen Xiaojun, On the Realization of the Membership Right of the Rural Collective Economic Organization, 1 *People's Tribune* (2012).

²⁷ See note 1.

ownership and the land contracting right of the two, and the former can carry the security function and the fairness principle, which can carry the function and efficiency of the concept of property.

It can be said that the theory is the source of scholars' ignoring the collective ownership of the soil in different degrees. Some scholars believe that the right to contracted management of land has become an independent right and a basic right of farmers. Comparatively speaking, the status of the collective rights of farmers is not so prominent. This is because the basic rural operation system is based on the household contract responsibility system, rather than on collective management. We know that throughout academia, collective land ownership because of its subject – unclear property rights – is repeatedly criticized, as is the right to land contractual management and virtual collective land ownership.²⁸ But the problem that collective land ownership is not perfect should not be completely denied. On the contrary, perhaps this is a new opportunity to reflect on it, and modify and perfect it.

3. THE EXPLANATION AND THE PROBLEMS IN PRACTICE OF “THE THEORY OF THE DIVISION”

In this part, I will expand the scope of the law to the outside world. Firstly I look at the economics and management science interpretation of “the theory of division”, considering whether there is a problem, and if so what is the cause. Then, I will resurvey “the theory of division” as regards related problems in practice, so as to prepare for the next step – possible measures.

3.1 The Interpretation and Query of Policy Formulation

Representatives from economics and management circles, as a result of their direct participation in various types of economic reforms, and by virtue of their “think tank” role, will transform this theory into a policy. Over time, this theory has become a necessity without proof.²⁹ Therefore, the way it is analyzed by economics and management scientists is very important to the understanding of the “theory of division”.

²⁸ See Wu Yue et al., *The System Bottleneck and System Innovation of the Right to the Contracted Management of Land Circulation*, Beijing: Law Press, 2014, p. 121.

²⁹ See note 4.

As early as 2002, Zhang Hongyu put forward "the theory of the division", although it was not explicitly expressed, and its meaning then was different from its meaning today. He believed that, under the conditions of the market economy, the contract right is derived from the right to the contracted management of land in the home. Because there is no disposal right to the contracted management of land, after the separation there exists the right to contract for disposition, but also as an independent exchange value and as free circulation.³⁰ From the point of view of the functioning of the system, the right of the contract here refers to the right of management in the current theory of division. Since the separation theory was expressed explicitly, Zhang Hongyu's argument has since changed. He believes that after consulting and management have separated, there are contract rights for possession, the right of disposal, and, derived from the right of inheritance, exit rights; management rights for farming, business, income and derivatives into equity, mortgage, etc. The right to contract is to bring the property income to the farmers, to realize the property value of the right to the contracted management of land, and the right of management by flow in a larger scope, improving the configuration efficiency of limited resources. The significance of the right to contract is reflected in the acquisition and realization of the right to contract. The significance of the right of management is more reflected in the scope of the exercise of its main body as far greater than the main contractor. In short, the protection of the right to contract in order to be fair, with the right to live in order to operate efficiently, is to achieve the organic unity of fairness and efficiency.³¹

In Zhang Hongyu's view, in an earlier time when most farmers did not have any non-agricultural employment, or work for agricultural contractors and operators, and did not have a high degree of unity, there was no need for, or value in, separation. Against the background of industrialization and urbanization, it is necessary and possible to separate the two powers: it is necessary for the professional management to be more effective. Although Zhang Hongyu's judgment on the background and the facts is correct, there is a problem with the right. If the contract right reflect the rights of possession and disposition after the separation, then how could the operators farm and operate the lands while the contractors still occupy the land? This is also because if the right to contract includes

³⁰ See Zhang Hongyu, China's Farmland Adjustment and Transfer of Use Rights: A Few Comments, 5 *Management World* (2002).

³¹ See Zhang Hongyu, Agricultural Scale Operation and Rural land System Innovation, 2 *Found in Rural China* (2013).

the right of inheritance and the right to withdraw, and this is obviously the collective ownership of land under the framework of the system of ownership, these rights are closely related to the membership of the collective organization. Zhang Hongyu's statement also confirms this point.³² The right of management, including not just management but investment, mortgage and other rights, is to realize the purpose of the two: on the one hand, to make it possible to have various types of professional operators' land operation; on the other hand, making it a more complete and not incomplete set of rights, which will contribute to the efficient circulation of land. But this can be restored by the existing land contract management right, making it a pure property right. In short, as previously mentioned, Zhang Hongyu confuses the legal logic of the separation of rights, not the two systems of collective land ownership and land contracting rights taken together, and tensions and conflicts between equity and efficiency can be better employed to solve this.

Next, let us take a look at Liu Shouying's interpretation. On several occasions, he expressed his views about separation theory, but centralism manifests itself in the views expressed in his paper entitled 'The Rural Collective Ownership and the Innovation of the Division of Three Rights'. In this article, he puts forward five criticisms of the logic of the reform of the separation of the two powers. The first four points focus on the collective land ownership, and the first one is about the right to the contracted management of land. Liu Shouying believes that the combined protection of the right to contract and the right to operate results in the failure of protecting either of the two rights, and what is worse is that they are actually divided. These characteristics are shown: against the background of accelerating rural labor migration, many migrants have a contract right, but no longer work the land, leading to troubles in reality. On the one hand, the protection will weaken the right to contract management and land circulation; on the other hand, this can result in emphasizing the management side, and easily lead to members' loss of the right to contract. Liu Shouying's advice is given as members with the right credentials take steps to deepen the collective ownership of property rights reform, strengthen the land contractual management rights, and clear the connotation of the management right from the land use right derivative. Furthermore, the original land users, having transferred to the

³² See Zhang Hongyu, From "Separation of Two Rights" to "The Division of Three Rights": The New Trend of the Change of Agricultural Production Relations in Our Country, *People's Daily* (Beijing, 14 January 2014).

land contract relationship, protect the operator safety investment and benefit right.³³

Liu Shouying believes that the contract right and the management of mergers have led to the current legal problems, and a combination of the two is a sign that the contractor and operator are the same person. If the contract right refers to the right of farmers to contract land, for both protections – the protection on contractors and the protection on operators – it does not belong to one system, that is, the system of right for land contract and operation. Therefore, we cannot find the integration of the above-mentioned two protections. It is questionable to mark the division of the right to contract and the right to operate with the fact that the contractor and the operator are not the same person. Arising from this, Liu Shouying asks: if the homesteader is also the land operator, why should not he use his right to operate a mortgage or pledge?³⁴

Obviously, since the program is to create mortgages on their own land, if one allows the mortgaging of land contract management right, it is not only the original operators that can be mortgaged. And this will not lead to this situation: for the protection of the right of two is bound to weaken the other rights for the price, because these two rights belong to two sets of parallel operations of the system and can live in peace together. In the proposed part, it is necessary to strengthen the real right of the right to contract, including the right to use, the right to income, the right to transfer, the right to mortgage and the right of inheritance. In this case, how can we understand the right to operate for a mortgage?³⁵ In addition, Liu Shouying thinks that there is a right through signing a contract. This may mean the method of land use right, rather than the usual so-called set usufructuary right; but this has the "split theory" intention in a completely opposite position, given only the usufructuary right to mortgage.³⁶

3.2 The Source of the Error of the Interpretation

Not only are these mistakes widespread in economics and management science; in addition to the above-mentioned ignorance of the fundamental reason for collective land ownership, there are at least two other reasons.

³³ See Liu Shouying, *The Rural Collective Ownership and the Innovation of the Division of Three Rights*, 5 *Found in Rural China* (2014).

³⁴ See note 33.

³⁵ See Liu Shouying, *Land System – What to Do*, 11 *China Investment* (2013).

³⁶ See note 5.

On the one hand, the economics and management scholars are not familiar with the two ways of land use. Land use, in addition to setting a usufructuary right this way, can also be established using creditor's rights – this is known as the dual system of land use.³⁷ The creditor's rights and the nature of the right to use are mainly achieved by means of contract creditor's rights, and, based on the contract, entitle the creditor to possession, use and income rights of the things of others, such as acquiring those things through lease and loan, etc.³⁸ Corresponding to the two systems of land use, the mainstream view is that the transfer of the right to land contractual management can be divided into the following two categories: property rights and creditor's rights. The former is the consequence of the alteration of circulation, such as through mortgage, transfer, exchange or shares, and the latter is the occurrence of credit consequences such as transfer, leasing and subcontracting.³⁹

With a corresponding land use binary system, the mainstream view is that the right to the contracted management of land circulation is divided into two kinds, one kind is the real right nature, and the other is the nature of the creditor's rights. The former is the result of the change of the real rights, such as alienating, exchanging, mortgaging or becoming a shareholder; the latter is the transfer of certain rights as the result of the change of the creditor's rights, such as the lease or sublease. The two methods of land use have different legal consequences. If the obligee makes use of the land in the form of creditor's rights, such as rental, although he has the right to possess, use and benefit, etc., they could not be set for the purpose of mortgage financing. In practice, use of land by way of lease is the dominant form of land circulation. Those not familiar with these two kinds of land use tend to believe that as long as there is management separation, it can be used for taking out a mortgage. For example, Professor Wu Xingguo believes that after the separation of the right to operate establishes the creditor's rights, the transfer of land claims can be secured. If the person who has the right to operate cannot repay the due mortgage debt, financial institutions or other creditors cannot obtain the people's right to contract status, and thus payment can

³⁷ See Wang Zejian, *Real Right of Civil Law*, Beijing: Peking University Press, 2010, p. 277.

³⁸ See Wang Liming, *The Theory of Property Law*, Beijing: China University of Political Science and Law Press, 2008, p. 221.

³⁹ See Fang Shaokun, *Real Right Law Usufructuary Right Encoding*, Beijing: China Renmin University Press, 2007, p. 104.

only be obtained through land management agricultural income or rent income, seeking preferred payments.⁴⁰

On the other hand, the economics and management scholars misuse economics theory and terminology. In fact, the right is neither divided nor separated, but partitioned, which refers to the same rights belonging to a person of different objects that can be separated simultaneously by different groups to enjoy and use. The theory was originally proposed by Alchian, who said:

What are the effects of various partitionings of use rights? By this I refer to the fact that at the same time several people may each possess some portion of the rights to use the land. "A" may possess the right to grow wheat on it. "B" may possess the right to walk across it. "C" may possess the right to dump ashes and smoke on it. "D" may possess the right to fly an airplane over it. "E" may have the right to subject it to vibrations consequent to the use of some neighboring equipment.

He stressed that the right can be on a temporary or even a permanent basis in terms of allocation, division and redistribution.⁴¹ What is implied here is that if the cost of defining a new right is less than the benefits it brings the best use of the right will be to divide it into the subjects that are the most prized.

But the core of the problem is not whether the right should not be split, but how to split it. As a right can be regarded as a bundle of rights, it can be divided into vertical and horizontal rights, which can be achieved through space and time. On the surface, the right of space can be seen as an example of breaking up a space. The civil code of the civil law of the Taiwan area has added the right above ground, which is designed to create the right to set up building or other work objects in a certain space.⁴² The lease of land property rights can be seen as an example of breaking up through time. The lessors break the right of lease into different periods, and lease them to different lessees who will only have lease rights in one or some periods.⁴³ It is important that no matter what the right segmentation in different subjects may be, the basic premise is

⁴⁰ See Wu Xingguo, Study on Rights and Interests Protection of Credit Flow Management of People Under the Framework of Consulting and Management of Separation, 4 *Jianghuai Tribune* (2015).

⁴¹ See Armen Alchian, Some Economics of Property Rights, 30 *Il Politico* (1965) at 819.

⁴² See note 38, p. 279.

⁴³ See Judith-Anne Mackenzie and Mary Phillips, *Textbook on Land Law*, 11th edn, Oxford University Press, 2006, p. 164.

the same, which can mean simultaneously exercised rights are clearly defined and mutually represented in the content without conflict, especially since not many people enjoy the same physical possession at the same time.

3.3 The Problems in Practice of “The Theory of Division”

If separation theory mainly deals with how the law does not allow the contracted management of land to be used for mortgages, in practice there is a realistic demand for mortgage financing, and the predicament in wording land contracting rights then becomes what is the actual practice and what is its future?

First of all, if we strictly follow the separation theory, the separation of the operation right is a real right which has independent and absolute power to dispose of the rights. However, in practice, the case of the right to operate as a form of collateral itself is very rare; throughout the mortgage financing form, there are all kinds of flexible or disguised mortgages. A typical example is that of Tongxin County in Ningxia Autonomous Region, where the method for management of the land used for mortgage is that farmers can obtain loans from the banks with a guarantee from the land association, which is counter-guaranteed by farmers pledging their right to operate the land to the land association. For the mortgagor and the farmers as the mortgagee, the land management right is not the subject of the mortgage loan, but the land association and other farmers are the guarantors of the loan guarantee.⁴⁴

Secondly, in accordance with “the theory of division”, as long as they have the right to operate and can become a mortgagor, the mortgagors should not have additional restrictions. But, in practice, mortgage lenders are mainly agricultural enterprises, cooperatives and large operators. In other words, the majority of ordinary farmers do not receive a mortgage; even in some places, such as Wuhan City, mortgage loans are targeted directly at the land management right for land management rights transfer at the scale of business entities, rather than small ordinary farmers, and small farmers still rely more on private loans.⁴⁵

⁴⁴ See Li Weiwei and Zhang Yunhua, *Mortgage Mark and Lending Practices of the Right to the Contracted Management of Land: Cases of 11 Provinces (District, City)*, 12 *Reform* (2011).

⁴⁵ See Zhang Longyao et al., *Reform of the Analysis of Mortgage Financing of Farmers’ Right to the Contracted Management of Land*, 2 *Issues in Agricultural Economy* (2015).

Thirdly, in accordance with the legal principle, if we use rights as a mortgage mark, the effectiveness of the mortgage right should not be applied to crops on the ground.⁴⁶ But this is not the case in practice. For example, the legal provisions of Chengdu City stipulate that if the rural land management rights are mortgaged, the ground attachments at the same time are mortgaged and during the period of the mortgage the nature of the ownership of land and agricultural use shall not change.

Fourthly, in accordance with the law, as long as the collateral is specific and independent of exchange value and the transfer is able to become a legal mortgage property, other restrictions should not exist. However, the property can be mortgaged but a lot of obstacles and barriers set. For example, some places require that a contract for the mortgage must reach a certain operating area, for example an area of at least 50 acres of arable.⁴⁷

Finally, a widespread practice which obviously misuses the separation theory is where the contract right and the right of management can be mortgaged after separation, but the reality is different: with a mortgaged right to contract, when a loan cannot be repaid, the original contract relationship is terminated, with the mortgaged right to contract leading to a permanent loss for farmers. Its effect is equivalent to a contract right being transferred. In the management of a mortgage, when loans are repaid, the mortgagee shall have the right to dispose of the right, the original contract relation is unchanged, and the effect is equal to the management of subcontracting. The former is a real property mortgage, the latter is a secured mortgage.⁴⁸ In order to avoid the permanent loss of contractual rights, farmers use the management rights as collateral, and the reasonable basis for this is that the management rights belong to the creditor's rights rather than being real rights; creditors can be secured on both sides abiding by the premise of land transfer contract. If the right of management is regarded as the creditor's rights of the contracted land, the creditor's rights can be the subject matter of the pledge, and the creditor's right can be the object of the mortgage.⁴⁹ This once again confirms the previous view, that is, in economics and management

⁴⁶ See Fang Shaokun, On the Mortgage System Construction of Right to the Contracted Management of Land, 2 *The Jurist* (2014).

⁴⁷ See Ding Guanliang, The Chaos Analysis of Mortgage of Right to the Contracted Management of Land of Household Contract and the Rule of Law Research, 6 *Chinese Cadres Tribune* (2014).

⁴⁸ See note 44.

⁴⁹ See note 5.

circles, the understanding of the nature of the right to operate means treating it as a kind of creditor's right.⁵⁰

4. DEFICIENCIES IN, REFLECTIONS ON AND INSTITUTIONAL ALTERNATIVES TO THE CURRENT LAW

The emergence of the separation theory rooted in the current legislation and actual practice has caused a separation of the demand for new theory. Its aim is to change the current legislation and make theoretical preparations for this. But there are difficulties and problems in many respects, so a new way is needed of constructing a new system to replace the current "theory of division".

4.1 Review of the Current Legislation

4.1.1 Deficiencies in the legislation

First, the contracted management of land system has some problems which are mainly seen in three aspects. (1) As a usufructuary right, the disposal of the ability of the right to the contracted management of land may partially be used for the purposes of mortgaging, inheritance and claiming a stake in the company legal person system.⁵¹ (2) Because of identity restrictions, the right to the contracted management of land circulation has many limitations. For example, if the transfer of the right to the contracted management of land is the transfer of the method, it shall be subject to consent by the affected party. (3) The right to the contracted management of land circulation market mechanism is not perfect. For example, the land registration system is not standardized, and the intermediary institutions for property rights transaction and evaluation are not ideal.⁵²

Secondly, the collective land ownership system has some problems. (1) The subject of the right is unknown. (2) The legal provisions stipulate that the contractee has three forms: the collective economic organizations, the village committee, or villagers' groups. Therefore the three types of contractees have the right to exercise the collective land

⁵⁰ See note 31.

⁵¹ See Song Zhihong, Legal Nature of Discrimination of Shares of Right to the Contracted Management of Land, 5 *Law Science Magazine* (2010).

⁵² See note 28, p. 187.

ownership, and the employer has administrative, economic and community management functions, so it is easy to infringe objectively the legitimate rights and interests of the contractor. (3) There are problems concerning the ability of the collective ownership of land to generate earnings. Although the law is determined by the collective members of some of the items, on the distribution of the use of the land compensation fees and regulations, the ownership of the property income function in terms of collective land ownership is still not clear. So the security capability is very limited.⁵³

Thirdly, the related supporting system has a lot of problems, which mainly relate to performance regarding the social security and employment of landless peasants.⁵⁴

4.1.2 Reflections on the legislation

(1) The legislation demonstrates a lack of holistic thinking, which fails to consider the collaboration of the system. On the one hand, the theory of division will set out the franchise as pure property rights, so as to cut off its connection with the identity of the right owner to operate, and realize the efficiency introduced by free circulation. On the other hand, it keeps the right of contracting, not only to ensure that the collective members of the household contract according to the principle of fairness to people, but at the same time, in terms of lost business rights, there are still reliable safeguard measures and the long-term stability of the contractual relationship remains the same. However, it is difficult to achieve different goals in the system of land contract management rights. The usufructuary right faces the right to land contractual management to realize its function outside the security goal and is not feasible. But the other has been the target of the corresponding system carrier, namely the system of collective land ownership, and the burden of responsibility to protect members' collective survival and welfare.⁵⁵

(2) The lack of awareness of system comparison, resulting in the lack of a comparative study on the pros and cons of the methods to achieve the same goal. First of all, although there is the land security function,

⁵³ See Chen Xiaojun et al., Post-Agricultural Tax Era on the Outline of Right System and Operation Mechanism of Rural Land, 1 *Legal Science* (2010).

⁵⁴ See Yu Guizhi, Some Countermeasures and Measures to Promote the Right to the Contracted Management of Land Circulation, 2 *Academic Journal of Zhongzhou* (2008).

⁵⁵ See Han Song, The Right Bundle of the Farmer's Collective Land Ownership Rights, 6 *Chinese Journal of Law* (2014).

realizing the specific objective function, the land or land system itself is not the most effective means of gradually perfecting the social security system and ensuring more effective measures.⁵⁶ Secondly, the land has a security function in order to bring benefits to farmers, but the price paid should also be considered. We should also bear in mind the opportunity cost of obtaining security functions, that is, the normal functioning of the land property will be lost. Again, people who value the security function are worried that farmers losing land will cause social instability. But the landless peasants constitute part of the entirety of the peasants, and for the majority of the peasants, what they lose is the right to use the land rather than the income brought by the transfer of the right to contract and operate the land at will.

4.2 The General Idea of the Legislative Reform

Firstly, we should clearly delineate the legislative goal that will stabilize the rural land contract relations and remain unchanged for a long time, giving farmers more property rights. Since the implementation of the household contract system, the direction of evolution is toward continuous expansion, strengthening and stabilizing the rights of farmers to contract land. The cornerstone of this one party rural policy must be maintained. Some scholars believe that the policy emphasizing the effective use of collective and farmers' own property to achieve the sustainable growth of farmers' income is the highlight of the new round of rural land reform.⁵⁷ These two policy objectives should be run parallel to achieve balance. Their basic premise is to stabilize the land contract relationship. The former objective is the starting point of the reform of the rural land system, the latter is the end point of the reform; the former aims to achieve a system of security functions and the concept of fairness, the goal of which is to achieve a system of property and efficiency.

Secondly, we should straighten out and purify the function of the system design, clarifying and strengthening the system of the division of labor and collaboration. We should use holistic thinking, reviewing the system of farmland in the rights system of different functions and attributes in order to better achieve the expected goal. The right to the contracted management of land is a kind of usufructuary right, and the key is to improve the disposition power system function of the civil

⁵⁶ See Gao Shengping, *The Legal Dilemma and Outlet of Rural Land Financialization*, 8 *Social Sciences in China* (2014).

⁵⁷ See note 5.

property rights. Collective land ownership is not only a right of private law, but also a right of public law. As the supporting system of social security, we should give full play to the advantages of its exclusive system function.⁵⁸ In contrast to the collective ownership of land's safeguarding function, the social security system is intended to protect the exclusive right of land in the landless farmers. They have quit the land contract relations and focus on the collective land ownership without farmland transferring to the members of the collective security, while they still retain the collective organization in the land contract relationship.

Thirdly, we should improve the system of rights to the contracted management of land. (1) We should give it a more complete disposition power so that it becomes a truly independent usufructuary right, including mortgaging, inheritance and types of corporate shares in the company. (2) We should sever the link and identity constraints, to guide the free transfer of the principle of efficiency and the removal of various related restrictions. In this regard, scholars have given detailed and comprehensive legislative amendments, and it is worth considering.⁵⁹ (3) We should amend the existing legislation mode of the doctrine of intention registration. The legal provisions stipulate that the contractor obtains the right to operate the land when the land operations contract comes into effect. This is in line with the actual situation of China's rural community rights' transactions, which are mostly between acquaintances and therefore need not be registered.⁶⁰ However, the policy highlighted that the contract encourages the right to operate in the open market for professional large farms, family farms, farmers' cooperatives, and agricultural enterprises, as well as encouraging the development of various forms of scale management. We can foresee, with the scale of business entities that are continuing to emerge, that the right to the contracted management of land will be gradually increased to encompass strangers, while the meaning of the registration mode is not conducive to the safety of transactions, so the contracted land should be based on public methods for registration.⁶¹ (4) We should design the contracted management of land's exit mechanism. With the gradual establishment of the new urbanization process, and people's transition from peasants to urban

⁵⁸ See note 55.

⁵⁹ See note 4.

⁶⁰ See Wang Liming, *The Real Right Law Research* (Book Two), Beijing: China Renmin University Press, 2007, p. 61.

⁶¹ See Gao Shengping, *The Land Legal System Modernization in China*, Beijing: Law Press, 2014, p. 145.

residents at the core of the acceleration of the new agricultural management system, the land contract management right transfer market is perfect, and there will be more farmers voluntarily giving up the rights to land contract law. The exit mechanism includes two aspects: one is the establishment of an exit compensation system, not only to have the appropriate incentives oriented to ensure fairness, and the other is to build the linkage mechanism for exit, including household registration, employment, security, etc.⁶²

Fourthly, we should enrich the system of collective land ownership, which mainly includes three aspects. (1) We should introduce members' rights to clear the collective subject of land ownership. Although the legal provisions have put forward the concept of the right of membership, the nature, content, exercise and relief procedures, as well as the identification of membership, there still are no specific provisions. Some scholars have conducted detailed discussions about this.⁶³ Out of concern over members' rights, this chapter proposes, on the one hand, that we can regard "the contract right" as a specific exercise of members' rights and clarify the nature of belonging in logic, while, on the other hand, as long as it is clear that the collective organization members enjoy the contracted land rights, thus resolving a problem, it is ensured that any members of the existing land contract relationships remain unchanged for a long time, and also that the new population enjoys the rights of the contracted land. The solution is that we should give farmers the collective assets of the shares, income, paid off and mortgaged, security, and inheritance rights, as indicated in the policy. (2) The law shall specify the peasant household member rights obtained based on the contracted management of land and that the household shall pay rentals to the land owners.⁶⁴ Collective economic organizations have a reliable source of economy. On the one hand, it will be more effective to transform the protection on the members from protection through physical assets to protection with financial instruments; on the other hand, the power benefit of collective ownership may be exercised over the collective assets in the form of shares, which can effectively adjust the balance of interests between the existing and future members. This makes a connection with the existing contract and ensures that the new population has collective security; at the same time, this also provides an effective way

⁶² See Wang Jianyou, *Perfecting the Exit Mechanism for the Contracted Management of Rural Land of Peasant Households*, 3 *Agricultural Economics and Management* (2011).

⁶³ See note 23.

⁶⁴ See note 53.

for members to leave the collectives and for non-members to enter the collectives.⁶⁵ Not only that, but the abolition of agricultural tax also provides the conditions for the provision of rural public goods. (3) The legal provisions shall reasonably define and distinguish between different functions of collective economic organizations and villagers' committees. The former's basic functions concern economic affairs and their management – its main task is to improve production and management, and strengthen the collective economy for the benefit of the members. The latter's main task is to improve administrative management, to provide public services for farmers. The difference between the two is that we can guarantee the effective realization of the two goals in the system. In addition, this problem is more closely related to rural governance and thus is particularly important.

And lastly, we should actively follow up the formation of a comprehensive social security system. Policy has indicated that we should integrate the urban and rural residents' basic old-age insurance system and the basic medical insurance system while promoting the development of urban and rural minimum living security systems as a whole. The security system aims at peasants who, for various reasons, lost their contracted lands in the transfer of the real rights of the land in the process of land contracted management. On the one hand, farmers may not be able to turn to the public to enjoy the social security rights that urban residents have. On the other hand, while they do not lose the final collective member qualification, however, due to the loss of the contract, without paying the cost of collective land use, they will not be able to enjoy the economic benefits from collective economic organizations. Therefore, it is necessary for these farmers to obtain the guarantee of the public law in the period of losing the contract.⁶⁶ Two main considerations follow: firstly that this should be targeted and differentiated from other social security measures, mainly through the application of different objects to be judged. The second concerns local conditions, whereby the actual situation on the ground should be taken account of, thus precluding engagement across the board. Considering various factors, the formulation of standards should be moderate, not only to meet the basic needs of security, but also as falling within the scope of the capabilities of fiscal expenditure.

⁶⁵ See note 13.

⁶⁶ See note 61.