

Study on Problems in Implementation and Institutional Innovation of the Rural Land Policy of "Three-Right Separation" in China

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Abstract: The rural land new policy of “separation of three rights” ,namely, rural land collective ownership, land contracting right and land management right, has outlined the future ideals for the reform of rural land rights system in China, but it still faces legal obstacles and problems in practice. Theoretical breakthroughs and institutional compatibility should be actively sought, which includes exploration of theoretical breakthroughs in the connection between the "three-right separation" and traditional concepts of civil law, compatibility of the separation with other agriculture-related legal systems and reforms of political and economic system as well as balance of interests among various entities. The institutional innovation to realize the "separation of three rights" includes upgrading of the legal rights structure of rural land contracted management rights, cultivation of new agricultural business organizations with their own core assets, promotion of the construction of financialized systems of rural land and pilot trials and building of mechanisms for supervising rural land transfer and preventing legal risks.

In 2016, the State Council of China promulgated the Opinions on the Separation of Rural Land Ownership and Contracting Rights, and proposed the new concept of separating “collective ownership of rural land, land contracting rights and land management rights” to reshape the rural land system in China. This has opened an important chapter in deepening reform of such system in China. In the report of the 19th National Congress of the Communist Party of China, the importance to improve the system of “three-right” separation for contracted land has been made clear. And in the Opinions on Implementing the Rural Revitalization Strategy, such improvement is stressed again. Land management rights should be given the same guarantee under the premise of law-based guarantee collective land ownership and farmers' contractual rights. However, the separation still faces major challenges under in terms of the concept of "law-based advancement", due to unclearness in connotations and extensions of the "three-right separation" and the idea of how to achieve its legalization. This paper will analyze problems in implementing the "three-right separation" as a new rural land policy, seek theoretical breakthroughs and institutional compatibility and will put forward countermeasures and suggestions for institutional innovation.

1. Problems in Implementing the New Rural land Policy of "Three-Power Separation"

1.1 Legal Obstacles Faced by the New Rural land Policy--"Three-Right Separation"

Firstly, the "separation of three rights" contradicts with the Numerus Clausus Principle. China upholds the strict principle of "legal right of property" by requiring the type and content of property rights to be limited by legal provisions, and allowing no parties to create them arbitrarily. The "separation of three rights" is still a policy term. Before the land management right is transformed into part of a legal system, it is not a property right, but a debt that is restricted in terms of circulation, scope and force.

Secondly, the "separation of three rights" contradicts the principle of one property one right. In land management rights and rural land contracted management rights, there are overlapping

intersections in terms of power, including possession, farming, and earning power of contracted land. But distinctions only exist in terms of subjects of right, right acquisition, and exercise manners. Excessive rights set on the same land will cause chaos between systems and inconformity between rights and their contents. This both defies the principle of “one property one right” in the property law and may lead to dilemmas in the theoretical and institutional construction of how to deal with the system relationship of two types of rights.

1.2 Legislative Obstacles Faced by the New Rural land Policy of “Three-Right Separation”

The concept of rural land contracted management rights has been in use for more than 30 years. It has not only formed specific connotations and extensions, but has laid an important foundation for China's rural land system. The transformation of “three-right separation” into part of the legal system entails complete reinterpretation or revision of the current farm land rights system and its related legal systems, including but not limited to a series of basic laws and regulations and normative documents, such as the Property Law of the People's Republic of China, Law of the People's Republic of China on Land Contract in Rural Areas, Land Administration Law of the People's Republic of China and the Guaranty Law of the People's Republic of China. This will pay high costs in legislation and legal amendments, and the legislative progress with different schedules probably undermine the stability of the existing system of rural land contracted management rights and cause farmers' panic, which may easily lead to confusion in applying policies and laws[1]. All these constitute a legal premise that cannot be ignored in China's “three-right separation” trial.

1.3 The “Three-Right Separation” Policy Norms are Limited in Practical Guidance

The current policy norms issued at the national level are highly abstract. There are very few provisions on how to achieve the convergence of the separation and the current legal system on the macro level, and how to implement the specific legal provisions on rights of rural land on the micro level. What's more, local governments are also slow and wait-and-see in implementing their policy norms and practices due to theoretical controversies of the separation and its conflicts with the current legal system of property rights. Therefore, the abstract policy norms have limited effects on the practice of “three-right separation”.

Sichuan Province in China can be taken as an example. Firstly, in May 2016, the People's Government of Sichuan Province issued the Plan for Implementing the Pilot Programs of Loans with Mortgage of the Right to Contractual Operation of Rural Land and Farmers' Housing Property Rights in Sichuan Province, which has served both as an important policy basis for implementing “two rights” loans with mortgage in the province and as institutional rules for carrying out the “three-right separation” and promoting the transfer of land management rights within a few provinces. According to the Plan, the pilot areas for loans with mortgage for land management rights include ten districts (cities) in the province, like Wenjiang District, Chongzhou District of Chengdu City, Pengshan District of Meishan City, and Shizhong District of Neijiang City. The reform pilots in various regions have adopted the approach of “trials in parallel with reforms” or “trials prior to reforms”. Secondly, how to realize the transition between old and new policies as well as their practices emerges as another problem in the practice of the new policy due to the long-term practice of reforming the property rights and its circulation system of rural land in Sichuan Province and the new policy of “three-right separation” as a form of “fracture-like” innovation in current legal system for rural land and local policies and regulations. Finally, the reform of “three-right separation” aims to make land management rights real rights and property rights and realize their market-based transfer. With the absoluteness and exclusive effects of real rights, nevertheless, this reform will bring about inevitable disputes and will certainly have a significant influence on the relationship between rights and obligations on rural lands. However, in current policy norms, the judicial responses to disputes out of “three-right separation” reform have not been supposed and defined. Institutional blanks on how to make judicial policies play their role of actively responding to legal disputes in reform pilots will hinder the smooth advancement of such reform practice.

2. Theoretical Breakthroughs and Institutional Compatibility in the New Farmland Policy of "Three-Right Separation"

As an important part of the future reform of agriculture and rural areas, reshaping the rural land rights system with the concept of "three-right separation" and promoting the orderly and law-based transfer of land management rights has outlined the future ideals for the reform of the system in China. Despite this, the new policy still faces legal obstacles and difficulties in practice. Therefore, seeking theoretical breakthroughs and institutional compatibility is a top priority.

2.1 Theoretical Breakthroughs in the Connection between the "Three-Right Separation" and Traditional Concepts of Civil Law

Obstacles in the legislative expression of the "three-right separation" will be removed through theoretical breakthroughs. The separation should be shaped as real rights by legislative approaches to achieve the logical self-consistency of the legal system of property rights. The first is to learn "shaping the leases right as the real right" from civil law theories. Experiences in the local pilot practice should be constantly summarized so that the revision or interpretation of the law can be conducted at an appropriate time, which will make a reality the legal expression of the "three-right separation" and will have the transformation of the land management right from the creditor's right to the property right completed. The second is to define the rural land management right as a new usufructuary right based on the willing of rural land contracted management right holders with the rural land contracted management rights as the object[2]; thereby the right can be distinguished from its object of rural land contracted management rights and realizing its compatibility with the concept of "one property one right". German jurist Larenz pointed out that the object of rights can be used in two senses: one refers to the subject of dominance or use rights, a physical object or a non-physical object; the other means the rights and legal relations, the subject can be disposed by right holders through legal acts[3]. Therefore, it is theoretically feasible to add land management rights that differ from rural land contracted management rights.

2.2 Compatibility of "Three-Right Separation" with Other Agriculture-Related Legal Systems

The rural land new policy "three-right separation" must be compatible with other agriculture-related systems for the promotion of its legal transformation. At present, problems faced by rural land transfer in China lie in not only the lack of legal system basis in "three-right separation" concept, but also the too conservative and backward legal right system of rural land as a more urgent and realistic problem, which has already terribly contracted with real right properties of rural land contracted management rights and their related systems, having long fallen behind the pace of practice and requiring immediate revision and optimal. The new rural land policy under the concept of "separation of three rights" is an innovative way to reform the legal rights system of rural land in China. It is necessary to realize the connection and compatibility between China's system of rural land transfer and relevant legal systems for the transformation of "three-right separation" into legal systems to be realized and the smooth progress of the capitalization of rural land and its transfer as property rights promoted. Therefore, as the current coincides with the timing of the revision of the law, the separation should be transformed as policy guidance into the legal system based on full investigation and discussion to achieve the compatibility and coordination of the agricultural land legal system at minimal legislative cost.

2.3 Compatibility between the "Three-Right Separation" and the Reform of the Political and Economic System and the Balance of Interests among the Various Subjects

The compatibility of political and economic system reform and the balance of interests of various entities will provide risk warnings and key tips for the reform of the "three-right separation". Firstly, the reform of "three-right separation" and the rural land transfer are compatible with China's political and economic systems. The compatibility is demonstrated in the "strict observance of the red line of cultivated land protection, strict land use control" as the basic premise of "three-right separation" to prevent the "non-agriculturization" of rural land for ensurance of China's food security and to prevent

the uncontrollable risks brought by rural land transfer to the existing politics economic and social stability. At the same time, the concept of “three-right separation” particularly focuses on “stabilizing contracting rights of farmers” based on the social security demands from farmers and for the sake of the prevention of social instability factors formed by farmers who have “lost land”[4]. The stability of China's political and economic system reform will be guaranteed to the utmost extent. The second is that the "three-right separation" reform is conducive to reasonable balance between the interests of farmers and foreign investors. This will help to realize the separation of the identity attribute and property attribute of rural land contracted management rights so that objects in negotiations between farmers and foreign investors is the land management right purified into a complete property right[5], thereby the decisiveness of the market in resource allocation can be realized and rural land is really "rid of idleness".

3. Institutional Innovation in the New Rural land Policy of “Three-Right Separation”

Undoubtedly, it is an important part of the future reform in agriculture and rural areas to reshape China's right system of rural land and promote the orderly and law-based transfer of land management rights with the concept of "three-right separation". Hence the institutional compatibility and institutional innovation in the new policy of “three-right separation” should be achieved in terms of theoretical and practical respects.

3.1 Upgrading the Legal Structure of Management Rights of Contracted Land

Firstly, reshaping the right to contracted management of rural land with the idea of capitalized rural land reform underpinning the concept of “three-right separation”. Based on the existing management rights of contracted land, the land management right is added. The right is defined as the object of the right to contracted management of rural land based on the will of the right holders. The purpose is to establish a new usufructuary right for direct possession of cultivated land for other civil entities. The "three-in-one" legal right structure and system of rural land finally come into being, which includes "land ownership of the collective economic organizations--the right of the operation of the contracted land of members in the collective economic organizations--land management rights of land managers".

Secondly, systematically unscrambling and modifying the legal norms that frustrate the capitalized transfer of land management rights. The laws and regulations that directly or indirectly impede the transfer of the right to operate contracted land in the current legal system shall be abolished or modified separately. Other laws related to the right shall be further examined or revised, such as Law of the People's Republic of China on Farmers' Professional Cooperatives, Company Law of the People's Republic of China and other laws and regulations on industries related to agriculture.

3.2 Cultivating New Agricultural Management Organizations with Their Own Core Assets

In the process of cultivating new agricultural business entities, it is important to realize the capitalization of the right to operate contracted land through institutional innovation, to ensure farmers and other agricultural business entities enjoy property rights and disposition on rural land, and to expand the scale and scope of the transfer of real rights in the right to operate contracted land. This will not only help guide farmers to make land transfer, improve land fragmentation, land abandonment and idleness, but enhance the capability of new agricultural business entities to survive and develop and sustain the momentum and confidence of sustainable agricultural development featuring moderate scale, industrialization and modernization. And in so doing, the marriage-like conversion of land and capital will be truly realized.

3.3 Promoting the Construction of Rural Land Financialized Systems and Pilot Trials

Firstly, establishing and improving mechanisms of secured and credit loans in rural financial institutions by encouraging the government to establish financing guarantee institutions that specialize in serving agriculture, to provide government subsidies for security costs of both parties, to accelerate the establishment of a rural credit system, and to improve the system integrating urban and rural credit information.

Secondly, promoting the construction of a provincial-level and even national comprehensive trading platforms for rural property rights. The "transaction + attestation + mortgage" integration model should be vigorously popularized, the coordination between trading platforms of property rights and the financial institutions such as banks, insurance companies enhanced, and integration between transactions and financing built up through the convergence of transactions and financing and transactions boosting financing.

Thirdly, setting up a system characteristic of government dominance, policy support, financial subsidies, commercial operation through innovation in rural land financing model involving credit security and insurance and establishment of a four-party cooperation model "government + lending institutions + insurance companies + trading platform".

3.4 Refining the Mechanism for Supervising and Preventing Legal Risk from Rural land Transfer

Firstly, the governance mechanism of rural grassroots should be improved and the main role of farmers given play to. And the basic precondition of "upholding collective ownership of land" should come into reality. Virtual collective economic organizations and the miscellaneous governance structures of grassroots villages should be separated into functional organizations that provide public services and corporate bodies that promotes rural land transfer and builds new agricultural business systems. Such organizations and bodies will play a supervisory role in the rural land transfer, confirm the qualifications of farmers' qualifications of independent legal subjects and improve the mechanism for peasants' rights expressions and rights and interests maintenance[6].

Secondly, implementing and bettering rural land monitoring systems. The systems should include strict system for controlling land use, basic system for protecting rural land, mechanism for moderate restrictions on the scale of rural land operation and accountability for land-related law violations.

Thirdly, transforming government functions. For their role of oversight, guidance and coordination to be well exerted, local governments should prudently conduct micro-interventions, look at realizing agricultural public goals, and focus on providing markets of transferring land management rights with standardized services such as system improvement, complete sets of rules and platform building.

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