



The World's Largest Open Access Agricultural & Applied Economics Digital Library

This document is discoverable and free to researchers across the globe due to the work of AgEcon Search.

Help ensure our sustainability.

Give to AgEcon Search

AgEcon Search

<http://ageconsearch.umn.edu>

aesearch@umn.edu

*Papers downloaded from **AgEcon Search** may be used for non-commercial purposes and personal study only. No other use, including posting to another Internet site, is permitted without permission from the copyright owner (not AgEcon Search), or as allowed under the provisions of Fair Use, U.S. Copyright Act, Title 17 U.S.C.*

No endorsement of AgEcon Search or its fundraising activities by the author(s) of the following work or their employer(s) is intended or implied.

Analysis of Secondary Separation of China's Rural Land Rights from the Perspective of Analytical Jurisprudence

Jicheng SU¹, Hongjuan LI^{1*}

Civil, Commercial and Economic Law School, China University of Political Science and Law, Beijing 100088, China

Abstract China's rural land rights are incomplete in structure of land rights and functions due to status restriction. Settling dispute and problem of status in rural land right and function structure is of great significance for determining and guaranteeing subjects of rural land rights. The point connecting and solving rural land circulation issue is demonstration and settlement of status. Separating the status right from rural land property right, namely the secondary separation of right, is to realize such purpose. Currently, China's rural land right is a bundle of rights, not the right described in property pedigree in strict sense. Using theory of rights of Hohfeld, this paper discussed and analyzed legal relationship of secondary separation of China's rural land rights, in the hope of realizing real return from practice to theory and to practice again.

Key words Rural land rights, Secondary separation, Hohfeld analytical jurisprudence, Rural land circulation

1 Introduction

In *Several Opinions on Deepening Rural Reform and Accelerating Modern Agricultural Development* issued by the Central Committee of the Communist Party and the State Council of the People's Republic of China on January 19, 2014, it grants farmers with possession, use, usufruct, circulation, contractual management right mortgage and guarantee rights over contracted land. According to this, separation of three rights, namely, "ownership", "contractual right" and "management right" of contracted land, is formally put to the level of rural land institutional innovation and legal construction. The first time separation of rural land rights is separation of ownership and use right. After the land use right is derived, there is status right in the practice and research of rural land use right. If taking contractual right as status right and management right as property right, to realize breakthrough in bottleneck of "expanding rights and endowing functions" in rural land rights, we should firstly study separation of status right and property right, namely, the secondary separation of rural land rights. At present, researches of secondary separation of rural land rights are mainly remain at the assumption and suggestion level, and few researches make analysis and inference from jurisprudence. In this study, we try to analyze secondary separation of China's rural land rights from the perspective of analytical jurisprudence.

2 The theory of secondary separation comes from status plight of rural land right and function structure

From the historical perspective, rural land (including urban land) remains the status of coexistence of several ownership systems before the promulgation of Constitution in 1982. Apart from collec-

tive ownership, private ownership of land is recognized in Constitution and other laws in varying degrees. For the state of rural collective land ownership system, different scholars give different definitions. In general, there are three theories, public ownership, private ownership, and quasi-ownership. These three theories are concept at institutional level. They belong to ideological sphere, rather than scope of jurisprudence. Yan Yimei discussed the relationship between ownership system and ownership and stated that it is inadvisable to divide ownership in accordance with types of ownership system. The concept of private ownership is relative to non-private ownership. According to legal logic, ownership is the direct exclusive right of owner over his immovable or movable property. It is absolute, exclusive and perpetual. The concept of rights and functions in laws and jurisprudence refers to specific functions and realization method, and is specific content of rights. For example, the ownership takes possession, use, usufruct and disposal rights as content, while creditor's right includes request for repayment, reserve and execution for repayment, etc. Article 544 of *Code Napoleon* defined property as the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes. Section 903 of Civil Code of Germany specifies that the owner of a thing may, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and exclude others from every influence. The owner of an animal must, when exercising his powers, take into account the special provisions for the protection of animals. "According to existing laws in China, the disposal right is mainly restricted. Article 117 of *Property Law of the People's Republic of China* specifies that a usufructuary right holder shall enjoy the right to possess, use and seek proceeds from the real property or movable property owned by someone else according to legal provisions. Article 118 specifies that an entity or individual may possess, use and seek proceeds from the natural resources that are owned by the state or that are owned by the state but used by the collective as well as those that are owned by the

Received: March 12, 2015 Accepted: April 23, 2015

Supported by Doctoral Dissertation Grant Program of China University of Political Science and Law in 2015 (2015BSLW07).

* Corresponding author. E-mail: snjuanjuan@163.com

collective. Article 120 specifies that a usufructuary right holder shall, when exercising its or his right, abide by the provisions on protection, reasonable exploration and utilization of resources as prescribed in the laws. An owner shall not intervene in the exercise of rights by the usufructuary right holder. In *Law of the People's Republic of China on the Contracting of Rural Land*, Article 9 specifies that the state protects the legitimate rights and interests of the owners of the collectively-owned land, protects the contract-undertaking party's right to the operation of contracted land. No unit or individual may infringe upon these rights and interests. Article 10 stipulates that the state protects the contract-undertaking party's right to transfer the operation of the contracted land lawfully, voluntarily, and for compensation. Besides, according to existing laws of China, state-owned land can be set with construction land use right, easement and hypothec. These *jus in re aliena* basically realized complete rights and functions of state-owned land in market use. In comparison, rural land rights are incomplete in rights and functions due to limitation of status. Taking hypothec as an example, the mortgage and guarantee system of rural land use right is not established in real sense, and rural land that can be mortgaged is limited to use right of township enterprise land, four types of waste land, and forest land. See Paragraphs 5 and 6 of Article 34 and Article 36 in *Guarantee Law*, Articles 133 and 138 of *Property Law*, Article 49 of *Law of the Peoples Republic of China on Land Contract in Rural Areas*, and *Measures Concerning Assets Mortgage Registration of Forest Resources (for Trial Implementation)*. According to Paragraph 2 of Article 180 in *Property Law of the People's Republic of China*, the following properties to which the obligor or the third party has the right to dispose of may be used for mortgage: (2) the right to use land for construction. Article 30 of the *Guarantee Law of the People's Republic of China* specifies that if legally-acquired buildings on State-owned lands are mortgaged, the land use rights of the land occupied by the buildings shall also be mortgaged at the same time. The land use rights of State-owned lands acquired through means of transfer, when being mortgaged, the buildings on the land shall also be mortgaged at the same time. The land use rights *per se* of the township and village enterprises cannot be mortgaged. When the buildings of the township and village enterprises are mortgaged, the associated land use rights shall also be mortgaged at the same time. Paragraph 2 of Article 184 in *Property Law of the People's Republic of China* stipulates that none of the following properties may be mortgaged: (2) the right to use cultivated land, house sites, land set aside for farmers to cultivate for their private use, hilly land allotted for private use and other collectively-owned land, unless it is otherwise prescribed by any law. These limitations of status make it difficult for capitalization of rural land rights.

If adjusting and explaining rural collective land ownership in the context of private law, the ownership should be taken an ownership with complete rights and functions. In other words, it has complete possession, use, usufruct, and disposal rights. Owners

of collective land can independently dispose land they own. In this sense, the state can not intervene against setting and change of usufructuary right with its status of land owner. For example, state establishes rural land contractual management right as real right in legal form. This means that there is no dominance relation between holder and owner of rural land contractual management right. Two parties are equal in status and their relation can be adjusted. In China, rural land right is a bundle of rights. Because there is structural problem within the bundle, such structure will inevitably bring about conflict in effect. The settlement and mediation of this conflict is a limitation and coordination of rights and functions to a certain extent. Existing laws and regulations of China have various limitations to establishment and circulation of rural collective land rights. As a result, rural collective land and state-owned land are circulated in urban areas and rural areas separately, and internal circulation of rural collective land is also limited by various conditions. These limitations are not proper in legal sense. Only after getting rid of restrictions of such status, may the right and function structure head for unification with state-owned land right and function structure.

3 Hohfeld analytical jurisprudence

It is generally accepted that rural land right is a bundle of rights. The bundle of rights is a common way to explain the complexities of property ownership. The origin of this concept can be traced back to Hohfeld theory. The bundle of rights and narrow issue thinking of Llewellyn are typical cases influenced by Hohfeld theory^[1]. The core part of Hohfeld theory is rights system. Hohfeld theory takes up important position in the entire school of analytical jurisprudence. In the theory, the most important articles of Hohfeld are two papers with the same name *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* published in 1913 and 1917 respectively. In the paper, Hohfeld firstly made discussion of trust and equitable benefit. In his opinion, the analysis of trust and equitable benefit of jurists and judges at that time is not adequate, because it is not based on analysis of basic legal relation and concepts^[2]. Hohfeld made a systematic analysis on basic legal concepts. Hohfeld integrated fictional terms of Bentham, such as right, power, privilege, duties and obligations into logical framework of fundamental legal concept relation, which brings logical relation of these basic concepts to a harmonious level in legal field, at least in the field of private law^[3]. In the opinion of Hohfeld, the fundamental legal concepts and relation in strict sense should be *sui generis* (of its own kind/genus). In an expression consisted of inverse relation and correlation, Hohfeld showed the basic legal concepts and relation. He believed that basic legal concepts and relation are the lowest common denominators of other legal concepts and relation, and the complex legal concepts and relation are just different combinations^[4]. Analysis of Hohfeld about property includes right, absence of right, privilege, duty, power, disability, immunity, liability.

4 Rural land right subjects with status and property right separated

The legal relation is a regulatory relation between legal subjects specified by laws^[5]. In rural land right system of China, since many subjects are involved, the rural land relation is very complex, mainly including land relation between the state and collective, between the collective and individual (collective member), between the state and individual (collective member), and between individuals (collective members). According to Hohfeld analytical jurisprudence, the rural land right relation can be described as follows; in the legal relation of right subject X and Y, Y is free to use land, namely, Y is not obliged to use the land, so X is not entitled to force Y to use the land. Combining existing laws, there is no derived or subordination relation between state and rural collective land ownership, and there is no difference in level of rights between them, so the state and collective ownership do not have complete rights and functions of ownership in the sense of private laws. Similarly, the subject of collective ownership is a group subject of collective members and is a subject only in name, so the relation between rural collective and collective member is the same as the above. An ownership without freedom is obviously disabled in obtaining return of property rights and interests. However, after contractual right is separated from management right (or the status right is separated from property right), original circulation and transfer rights of land break (status) institutional barrier and enter the market without changing the nature of ownership and realize the equality in substance. Besides, in private right field, it expands range of the relation between an individual (collective member) and another individual (collective member), namely, right relation within the collective is split into legal relation between individuals of collective members, between collective member and external individual, and between collective member and external legal entities. In this case, subjects of contractual right and management right come from contract (contractual management agreement). When contractors circulate their management right, the management right subject X will have right to ask contractual right subject Y to leave from their land. Then, rural land right subject will have the right in strict sense and become claim of rural land right. From the relation of rights, it is a legal relation conforming to logic, not limited to status institution and can be freely switched, and the relation adjusted and restricted by private laws. It can be deemed that land property right relation without status limitation is a legal relation with more right of speech in the sense of private law to a certain extent.

5 Types of rural right relations with status and property right separated

Professor Wang Yong called four groups of related concept relation of Hohfeld rights as element form of legal relation. In his opinion, for complex legal relation, the best analytical method is to simplify it to the most fundamental legal relation. Like the mathematical principle "any number can be changed to the sum of prime num-

ber", the difference is the prime number is infinite, while there are only four types of legal elements. According to Hohfeld analytical system, the right relation includes right - duty relation, freedom - no-right relation, right - liability relation, and liability - no-liability relation. The relation between rural land right subjects after the status right and property right (contractual right and management right) are separated can be described as follows:

Table 1 Legal relation between subjects of rural land rights after secondary separation

Subjects	Owner of contractual management right	Owner of management right
Owner of collective land	(1) Duty - right	(1) Duty - right
	(2) No right - freedom	(2) No right - freedom
	(3) Right - liability	(3) Right - liability
	(4) No-right - no-liability	(4) No-right - no-liability

According to the above table, the structural analysis of legal relation between subjects of rural land rights after secondary separation is as follows:

(1) Duty - right.

In the legal relation between owner of contractual management right and the collective, the owner of contractual management right has the right to use land, obtain land appreciation income, protect land right, and renew contract. For the collective, these rights are duties of the collective and the collective should not infringe upon rights of owner of the contractual management.

(2) No right - freedom.

After the owner of contractual management right obtains the collective contractual management right, the owner of contractual management right is free to possess, use, and obtain profit of the land, while the collective has no right to order the owner of contractual management right to take (or not take) these actions.

(3) Right - liability.

The owner of collective land still has the right to dispose the land he owns (take back the land, for instance), while the final disposal is restricted by new legal relation.

(4) No-right - no-liability.

The owner of contractual management right does not have right to dispose land. If he changes the land use and abandon the contracted land without authorization, it will not change the state of the collective's original right to use the land. In other words, the collective is not liable for illegal disposal of such owner of contractual management right.

(5) The relation between the owner of collective land and the owner of contractual management right.

When owner of collective contractual management right transfers the contractual land to others through agreement, based on the reciprocity principle, he will obtain the equal rights and legal status in land use, possession, and usufruct as the owner of contractor management right. Through market transaction, the owner of contractor management right obtains equal subject status and final-

nese, and also meet the actual demands of those students wanting to study in Japan. In this way, it repeats itself in endless cycles and enters the next "integration - separation - integration asynchronous teaching" process, and finally completes asynchronous MES process of College Japanese.

3 Points for attention in implementation of asynchronous MES for College Japanese

Implementation of asynchronous MES for College Japanese lifts College Japanese from general language learning to asynchronous advance by modules. Combining demands of students, taking interests of students and future employment opportunity as basis, asynchronous MES makes knowledge more systematic, effectively utilizes teaching time, and raises teaching efficiency. Students can analyze and solve problems related to business and political affairs in Japanese. This can greatly raise interest of students in learning College Japanese and improve their ability of using Japanese. Students can select familiar industries according to their employment direction or interest. It is recommended to simulate language use and communication in Japanese, and pertinently analyze knowledge of College Japanese in language use, phonetics, grammar, and syntax, etc.

From the 10 years of continuous practice of asynchronous MES approach for College Japanese, it proves that such approach calls for higher requirement for both teachers and students. Teachers need make more efforts and have indiscriminate love for every student, have strong democratic idea, carry out democratic classroom teaching according to differences, accumulate solid and broad theoretical knowledge and adequate operation skills, have high ability of regulation, and are good at innovation and implement diversified examination of students. Students should pay attention to improving their awareness of independence and regulation, respecting teachers, and conduct active learning. Other-

(From page 60)

ly realizes fair exercise of rights. In other words, on the condition of conforming to fundamental requirements of rural land ownership property and excluding disturbance of status, it increases property income of farmers and realizes the objective of reform of farmers' land right protection system.

6 Conclusions

(i) The circulation of rural land rights with social contract as source of rights gets rid of status limitation in logic and substance. In the limitation of existing laws, it provides equal transaction status for subjects of land rights and increases land utilization rate and opportunities and approaches for farmers obtaining land property appreciation. (ii) Secondary separation of rural land rights realizes rational return of collective land property right. The property right without status not only conforms to provisions of current institutions and laws, but also conforms to demands for land right protection and property pedigree theory.

wise, it is difficult to realize the expected effect of asynchronous MES approach for College Japanese.

4 Conclusions

Southwest University Rongchang Campus is positioned as a multi-disciplinary characteristic campus. Every semester, more than 300 students choose learning College Japanese. The exploration in asynchronous MES for discipline of College Japanese in characteristic campus of agriculture-related universities conforms to laws of education and teaching development. We made modular design for discipline of College Japanese in emotional concept, language skill, language knowledge, learning strategy, and cultural quality combining students' demands and education and teaching rules. Relying on Internet and Mobile Internet aided teaching platform, it came up with "Integration - Separation - Integration" asynchronous teaching approach. The practice indicates that teaching effect of such approach is remarkable. With interaction of teachers and students and support of corresponding resources, the asynchronous MES for discipline of College Japanese will exert certain influence on promoting teaching effect of College Japanese in colleges and universities of China.

References

- [1] ZHANG SM. China Education Daily [N]. 2008-02-28. (in Chinese).
- [2] LI SF. Reform thinking of different-step teaching in institutions of higher education in the new period [J]. Journal of Hubei University (Philosophy and Social Sciences), 1999(4): 69 - 75. (in Chinese).
- [3] LI SF. Different-step pedagogy [M]. Beijing: Contemporary China Publishing House, 1994. (in Chinese).
- [4] LI SF. Each different-step teaching class is a research lesson [J]. Different-Step Teaching Research, 2001(5): 45. (in Chinese).
- [5] SHEN ZM. Exploration on asynchronous modular teaching methodology of marketing course [J]. Higher Agricultural Education, 2010(1): 52 - 54. (in Chinese).

References

- [1] Morton J. Hurwitz. The Transformation of American Law 1870 - 1960: The Crisis of Legal Orthodoxy [M]. Oxford University Press, USA, 1992: 154 - 156.
- [2] WANG Y. Seeking the "least common denominator" of legal concept—Study on legal concept of Wesley Newcomb Hohfeld [M]. Journal of Comparative Law, 1998(2): 13. (in Chinese).
- [3] Hohfeld, Wesley Newcomb. Some fundamental legal conceptions as applied in judicial reasoning [M]. The Yale Law Journal, 1913, 23(1): 16 - 59.
- [4] WANG Y. Seeking the "least common denominator" of —Study on legal concept of Wesley Newcomb Hohfeld [M]. Journal of Comparative Law, 1998(2): 2. (in Chinese).
- [5] WANG Y. The original form of legal relation [J]. Peking University Law Review, 1998, 1(2): 576 - 602. (in Chinese).
- [6] WANG Y. Analysis and construction of private right [D]. Beijing: China University of Political Science and Law. (in Chinese).
- [7] WANG WG. Study on Chinese land right [M]. Beijing: China University of Political Science and Law Press, 1997. (in Chinese).
- [8] LI YJ. Study on civil right system [M]. Beijing: China University of Political Science and Law Press, 2008. (in Chinese).