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Laws, Defects and Countermeasures on the Circulation of Rural Housing Land

—From the Perspective of Farmer Rights Protection

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Abstract The thesis combs the existing legal provisions about rural housing land from the perspectives of use restriction, means restriction, subject restriction and mortgage prohibition, and finds out their defects, namely, weakening real right, confused knowledge about the integration of house property and land property, the loophole in *Land Administration Law*, the bans on the rural residents' purchase of housing land and so on. Then the thesis expounds the harms of restricting the circulation of housing land, for example, it will result in underground transaction of housing lands; lead to untenanted lands and waste of resources; bring about financing difficulty for peasants; do harm to the interest of land owners (rural collective economic organizations) and so on. The thesis further proposes to establish the legal lease model to solve the problems in the circulation of housing lands, specifically explains the definition of the legal lease model of housing lands, illustrates its detailed information from the aspects of object, subject and content and elaborates a series of problems involving, how to distribute the rent of housing lands, as well as how to perfect relevant procedures and formalities in the credit circulation of housing lands so as to realize the legitimate and effective circulation of rural housing lands and protect the peasants' interests.

Key words Circulation of housing lands, Legal lease, Protection of the peasant's interests, China

Having been influenced by Germanic system of law for a long time, legal research is accustomed to self-proof within the legal system. But what we do not recognize is that the real source and vitality of law come from the practical social life rather than legal provisions. As Ehrlich said long ago, "the focus of legal development is not on legislation, law science or judicial judgment but on society instead." The circulation of rural housing lands is a vital matter involving the immediate interests of more than 900 million Chinese farmers as well as a major unavoidable problem in legal theoretical studies. In recent years, both theorists and practitioners conduct the explorations in this area and put forward various solutions, hoping to solve the problem. It should be said that these explorations are all useful. But they face one same drawback that nearly all of them are limited to the area of real right. Limitations of thoughts and perspectives lead to the feebleness of theoretical study. To search the solution only within the scope of real right may result in "failure looms". Here I try to abandon traditional research approach, broaden the research thought and attempt to find the solution from the field of credit, looking forward to bringing on new ways to solve this problem, I will also try to find out the beneficial model of circulating housing lands so as to protect the farmers' interests and realize the harmonious urban-rural development.

1 Legal status of circulating rural housing lands

1.1 Combing the existing legal provisions

Our laws ex-

pose restrictions on the circulation of rural housing lands, which can be clearly seen from four aspects involving use restriction, means restriction, subject restriction and mortgage prohibition.

Firstly, as far as the use of circulating housing lands is concerned, Article 63 in *Land Administration Law* prescribes that "the land use right of farmer collectives shall not be leased, transferred or rented for non-agricultural construction", which shows that the housing lands can only be circulated for agricultural production instead of for investment and other non-agricultural construction.

Secondly, as for the means of circulating housing lands, apart from being transferred together with the houses, the housing land is forbidden by the laws to be purchased, mortgaged, share bought and given independently. As prescribes in Article 62 in *Land Administration Law*, "one rural household can own one piece of land for building house, with the area not exceeding the standards provided for by provinces, autonomous regions and municipalities". "The application for housing land after selling or leasing house shall not be approved".

Thirdly, so far as the subjects of circulating housing lands in concerned, the housing lands can only be circulated to the members within the collective economic organizations, the circulation to urban residents is forbidden, in *Circular of the General Office of the State Council on Strengthening Management of Transfer of Land and Strictly Banning Speculative Land Dealing* released in May 6, 1999, "rural housing lands cannot be sold to urban residents." *Decisions on Deepening the Reform and Intensifying Land Management* issued by the state council in December, 2004 also highlights that: "the rural housing land management should be intensified and urban residents are forbidden to purchase housing lands in rural area." Thereafter, in order to curb the purchase of small property room, the *Circular*

of the General Office of the State Council on Strictly Implementing the Laws and Policies about Rural Collective Construction Lands in December, 2007 stresses that "rural housing lands can only be assigned to the villagers in the village, urban residents should not buy the housing land, the peasants' houses and small property room in rural areas". "Any unit or individual cannot illegally rent and occupy the land collectively owned by farmers for developing real estate." While in January 15, 2008, the Circular of the General Office of the State Council on Strictly Implementing the Laws and Policies about Rural Collective Construction Lands issued by Ministry of Land and Resources reclaims that "rural housing lands can only be assigned to the villagers in the village, urban residents should not buy the housing land, the peasants' houses and small property room in rural areas".

Fourthly, on the problem of whether the housing lands could be mortgaged or not, Article 37 in *Guaranty Law* prescribes that "the land-use right to the land owned by the collectives such as cultivated land, house sites, private plots and private hills may not be mortgaged."

From the above legal provisions, it can be concluded that the laws carry out prohibitions and set up obstacles on the circulation of housing lands. The circulation of housing lands is restricted by legal provisions, administrative regulations and department rules on its use, means as well as even subjects. The law spreads a dragnet, turning the circulation of housing land into the most stringent system.

1.2 Drawbacks of the existing legal provisions The legal restriction on the circulation of housing lands is essentially the restriction on the circulation of the farmers' houses, which damages their right of property and is extremely unfair for those farmers.

1.2.1 Weakening real right. As a basic law protecting the property rights of the citizens, *Property Law* has only four provisions related to the issue of housing lands. The provision of Article 153 shows that *Property Law* flees towards *Land Administrative Law*. Most of the legal relationship involved in the circulation of housing lands is dealt with by *Land Administrative Law*, public law is mixed up with private law, while public right is confused with private right, the property rights are weakened, and its privacy is not highlighted.

1.2.2 Confused knowledge about the integration of house property and land property. In the house-land property structure, China pursues a strict integration of house property and land property. When transferring the house property, the use right of the land occupied by the house should also be transferred together. Chinese law does not prohibit the farmers' sale of their houses, because the farmers own the full ownership of their own houses and they could freely dispose their houses. But the sale of houses will inevitably lead to the incidental transfer of the housing land use right. This has resulted in a mess in legislative theory: on the one hand, the circulation of housing lands are forbidden; while on the other hand, the housing lands are circulated in disguise, so whether the circulation of housing lands are forbidden or not is hard to interpretate, the plausible

tight legal system is actually self-contradictory, the bans on the circulation of housing land haven't achieved the legislators' expected results and are even counter to the primary legislative purpose.

1.2.3 The loophole in *Land Administration Law*. In order to prohibit the transaction of housing lands in disguise, Article 62 in *Land Administration Law* prescribes "the application for housing land after selling or leasing houses shall not be approved." There is no point to restrict the circulation of housing lands through the bans on their reallocation. But in practical life, the farmers sell their houses and lands often out of desperate, or because their life has got into a helpless impasse, say, debt, disease or marriage, *etc.*, which could not be solved in a short term^[1]. Moreover, since Chinese have strong consciousness of "root", they usually do not sell their old residence without serious consideration, so many people still retain their old houses in rural areas since they moved to the city many decades ago^[2]. If the housing lands are not allowed to be allocated to those farmers who have sold their houses, given the current situation that the low-rent housing program hasn't been established in rural areas, those homeless farmers would either lead a vagrant life in the city or be reallocated with new housing lands by the village cadres through establishing a new household, the former result will disrupt the social order in the city while the latter will result in the boundless expansion of the village, neither of these two consequences are acceptable by the state. Moreover, the *Land Administrative Law* prescribes that the farmers' houses could only be sold to the qualified members within the collective, which leaves this provision only an empty shell, because the qualified farmers would rather apply for a new housing land than buy an old one.

1.2.4 The bans on the rural residents' purchase of housing land. The government severely prohibits the rural residents' purchase of housing lands in case that the rich people buy the farmers' houses and make them homeless as well as there is the intention of real estate speculation. The bans on the rural residents' purchase of housing lands mean that the transaction of the farmers' houses loses its potential market and consumers. The circulation within the collective economic organization inevitably leads to the transaction at low price. What's more, since people have the choice of their own living environment, they could choose to live in rural or urban areas, this is one of their basic rights. Since the farmers could buy commercial housings in the urban areas, there is no reason to forbid the rural residents to purchase a house in rural area. Nowadays, both the economy and society develop, and the state government is carrying out the urban-rural integral construction, aiming at the interaction between the rural and urban areas, so the urban people should not only be confined to the urban areas.

2 The harms of restricting the circulation of housing land

2.1 Resulting in underground transaction of housing lands Land is an important resource, the state-owned lands and rural residents-owned commercial housings could be trans-

ferred freely. The vigorous real estate market in recent years reveal the farmers great economic value in their own housing lands and houses and leave them a strong desire for the circulation of housing lands. But the existing laws strictly restrict the circulation of housing lands. Therefore, under the contradiction between the legal bans on the circulation of housing lands and the strong desire for circulation of housing lands, the hidden markets dealing with the underground transaction of housing lands emerge. Most of those hidden markets and underground transactions are illegal, which makes a lot of property dissociate besides the legal protection and breaks the integrity and unity of legal order. What's worse, since these hidden transactions are conducted in private, most of them lack standards and management, usually leading to continual disputes and lawsuits, which affects the social stability and harmony. For example, the national-known case of artist village fuels the dishonest customs, which tolls the alarm bell for our legislators in making laws thereafter.

2.2 Leading to untenanted lands and waste of resources

As prescribes in the *Land Administrative Law*, one rural household can own one piece of land for building house, which refers to the original obtaining of housing lands. In practice, the farmers may have more than two housing lands through the inheritance and purchase of houses, and when they live with their children, work and do business outside, purchase a commercial house in the city and are no longer live in the rural areas, they all call for the transfer of housing land. But the existing laws prescribe: the housing land could only be transferred to the qualified farmers within the collective economic organization and the transfer to urban residents is forbidden. Therefore, the housing lands could only be transferred in a narrow scope, or we could say, at a low price. Thus, the farmers would rather let it idle than sell at a low price in case that they could have a place to live when they are unable to handle a life in the city.

2.3 Bringing about financing difficulty for peasants

Agricultural modernization should be driven by funds, due to the low quality of the farmers, asymmetrical information and the farmers' low capacity to search for funds, farmers could raise funds only through loans. But now most farmers feel it difficult to apply for bank loans mainly because they have no collateral. As known to all, the farmers' most valuable property is their houses, while the legal bans on the circulation of rural housing lands actually restrict the circulation of rural houses, the farmers could not pledge their house as collateral to apply for bank loans. The legal prescriptions turn those valuable assets into "dead asset" and "sleeping asset". Without funds, both the farmers and agriculture could not develop. Lots of people spend their whole life making money for the houses, every piece of brick and tile are paid in their efforts. But when the farmers come across difficulties and urgently need the money by selling their houses, the laws forbid, which, as the law calls, is to protect the farmers' living right but actually deprive of their rights to live. Even when there is a difficulty in the farmers' subsistence, it is totally pointless to bother where to live. Moreover, since the farmers are weak but not mentally handi-

capped, they are able to judge what is better for them to do.

2.4 Doing harm to the interest of land owners

As the owners of rural house lands, the collective economic organization should share the benefits in circulating rural housing lands. But the practical situation is quite on the contrary, the interests of the collective owners usually do not get protected. According to a study launched by the State Council Development Research Center, currently in the process of legitimate real estate development, 40% –50% of the profits gained from the added value of the original collective-owned lands will be taken away by the developer, local government take 20% –30%, the farmers take 5% –10% and the rest belongs to the collective^[3]. While in the illegal transaction of housing lands, most of them are circulated in private, and the proceeds go directly into the buyers and sellers, while the collective economic organization, as the land owner, gets nothing.

3 Solution to solve the problems in the circulation of housing lands – establishing the legal lease model

3.1 Definition of the legal lease model of housing lands

As one of the creditor relationship, leasing is based on the free will of the parties or the direct legal provision. The former is called will-based lease while the latter legal lease. In the circulation of rural housing lands, we could solve the existing theoretical confusion with the help of legal lease right. That is: when the buyer of rural house obtains the house ownership, he at the same time got the credit "leasehold of housing land" rather than the real right of "housing land use right", because the house buyer could occupy and use the housing land. This result is not out of the free will of both the buyer and seller of rural house, but an inevitable consequence caused by legal provisions. This is the so-called the legal lease right of housing land^[4].

Based on his own study, Liu Kaixiang proposes the concept of legal lease right of housing land. "the legal lease right basically means: as the house ownership of the farmers is transferred to the non-collective member, there is a use relation between the non-collective member and rural collective, in this case, the non-collective member will be granted by the legal provisions with the legal lease right of the land occupied by the house he bought during the normal service life^[5]." Here this study is taken for reference.

3.2 The specific content of the legal lease model

3.2.1 Subject.

The subject in the legal lease of housing land is the person who enjoys the right and assumes the obligations in legally leasing the housing lands. That is, the lessor and lessee.

As the ownership owner of housing land, rural collective economic organization has the right to dispose the housing land, so the lessor is the rural collective economic organization rather than the farmer who sells his house. While the person who buys the farmers' houses and has to use the land occupied by the house is the lessee, which could be the natural person, legal person or any other economic organization. And of course

the non-collective member who obtains the house ownership through inheritance, acceptance of bequest or donation will also have the legal right to lease the housing land.

With the use right of housing land, the farmers themselves are not the subjects in the legal lease right of housing land, but since the house is exclusive, the farmers who have sold the house will also lose their deserved benefits from the housing land, so they could ask for rent from the collective organization or directly from the tenant, this is their legal right to draw benefits. The farmers act as the third party in the legal right of leasing housing land.

3.2.2 Object. The object of the legal lease right of housing lands is an important component element of the lease contract as well as the subject matter which should be given to the tenant when the lease contract comes into effect. The object of the legal lease right of housing lands is the "housing land" instead of the "use right of housing land". Since our rural housing lands are with special features, the laws strictly restrict the function and purpose of housing lands. The legal lease of housing land must be subject to these restrictions, which means that the housing land can only be transferred for residential building or affiliated facilities instead of for non-agricultural purpose or even for developing. And the term of the lease is not confined to 20 years, but instead, as presumed by the "Civil Law" in Taiwan, the lease relation will last during the term of house tenure.

Rural housing land is an important real property. "Contract Law" has special prescriptions on the lease of real property, such as registration. In the future when the system of our collective land use rights gradually gets improved, we could consider registering those leased housing lands, otherwise it should not be against those innocent third party.

3.2.3 Content. At first, the rights and obligations of the lessee:

Firstly, the tenants of the housing land should use the leased property in the agreed ways, they should not reconstruct the house and change the use of the housing land.

Secondly, make a proper use of the housing land, avoid the excessively use and the pollution of environment, as well as maintain the reasonable ecological structure of housing lands.

Thirdly, without the approval of the lessor, the housing land shall not be subleased.

Fourthly, during the exercise of the legal lease right of housing land, the tenant should not injure the legitimate interests of the neighbors, the dealing with the drainage, lighting, eaves drop and house repair concerning the neighborhood should be in accordance with the principle of harmonious consultation, fair and friendliness.

Fifthly, pay for the rent on time and return the housing land when the lease contract is terminated.

Sixthly, subordinate to the national construction and the overall planning of the village. If the national construction needs to expropriate housing lands, or the village planning needs to change the use of housing lands, the tenant shall be subject to, and get the compensation through legal channels or be re-

arranged within the collective.

As for the rights and obligations of the lessor: to deliver the housing land on time, to maintain the agreed use of the housing lands during the term of the lease; not interfere the tenant's obligation to reasonably use the housing lands; to bear the obligations on rights defects and land function defects.

3.3 Several problems needing to be classified

3.3.1 How to rehouse those farmers who have sold their original houses. As prescribed in Article 62 in *Land Administrative Law*, one rural household can own one piece of land for building house, the application for housing land after the use right of housing land is transferred with the house. In practical life, as for how to rehouse those farmers who have sold their original houses due to various reasons, the author propose to establish the system of compensated use of housing land, so far as those homeless farmers who have sold their houses and had to go back to their hometown are concerned, they could be rehoused at the leased vacant housing lands by paying for certain rent to the collective. What's more, when conditions permit, the low cost housing-type minimum residential standard security system could be implemented in rural areas so as to effectively guarantee the farmers' housing as well as establish a unified housing management system in both the rural and urban areas.

3.3.2 How to deal with the over-standard occupied housing lands. The rural housing lands are gratis distributed by the collective, one rural household can own one piece of land for building house, with the area not exceeding the standards provided for by the state. But in practice, since the housing land can be inherited and the qualified members in the collective economic organization could transfer the housing land through trading the houses, there objectively exists that one household owns more than one housing land. And as the housing lands these people get are legitimate, the collective economic organization usually may not recover the lands back. However, the phenomenon that one household holds more than one housing land goes against the housing lands' basic function of protecting and benefiting the farmers' life, although the collective could not take the housing lands back, it could collect the rent or usage fees of the housing lands from the farmers, which is lawful, reasonable and fair. Moreover, the laws should eliminate restriction on the transfer of housing lands to the farmers outside of local collective and then charge them for the use of housing lands so that the utility of housing lands could be fully exploited.

3.3.3 How to distribute the rent of housing lands. The distribution of the rent should take into consideration the interests of both the collective and farmers. The collective owns the housing lands while the farmers use the housing land, we should protect the interests of the former as the land owner while notice the right of the latter to gratis use the housing lands. Therefore, the rent of housing lands should be distributed rationally between the farmers and the collective. Of course, a larger proportion of the rent should be titled towards the farmers and the rest belongs to the collective. The concrete distribution

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(2) Improving the reform of education and health care. Among the eight parts of living consumption expenditure, education and medical care are most greatly affected by the national policy. "All people are well educated and patients are well treated" can eliminate the rural residents' worry about consumption, which improves the disparities in living consumption expenditure, enlarge the consumption of rural household, expand the rural consumption market, and further stimulate domestic demand. Moreover, China should strengthen financial support for technical education, secondary education and higher education, reduce the burden of rural residents in education, and minimize the gap of education and entertainment consumption expenditure among rural residents.

(3) Strengthening the construction of rural road. It is necessary to strengthen the construction of traffic infrastructure in rural areas, because there is gap in transportation and communication consumption between rural and urban residents in Anhui Province. A convenient traffic not only is beneficial to the travel of rural residents, but also promotes the economic development of rural areas.

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form and means may be mediated by both parties previously, and then be referred to the court for adjudication if the mediation fails.

3.3.4 How to perfect relevant procedures and formalities in the credit circulation of housing lands. The credit circulation of housing land calls for the perfecting of relevant procedures and formalities. At first, to clearly define the ownership of the property is a prerequisite for its transfer, so is the registration of the ownership of housing lands a prerequisite for the transfer of housing lands. Only when the housing lands are legally registered and have legitimate land ownership certificate could the security of the circulation of housing lands be guaranteed. Secondly, as for the specific circulation procedure, it should get approved by the farmers' collective and then be reported to the land administrative department of the people's government at or above the county level to get approved and recorded, moreover, in order to prevent both parties in the transaction of lands from padding the price, the price should be determined by the asset appraisal institution based on the natural, locational and other practical conditions of the transferred housing hand.

4 Conclusion

The circulation of rural housing lands is a vital matter involving the immediate interests of more than 900 million Chinese farmers, the relevant theoretical studies should focus on protecting the farmers' interests, and we should also bravely conduct institutional innovation so as to explore an effective means for the circulation of housing lands. This thesis is only a preliminary research on the legal status, defects and countermeasures of circulating housing lands, it is hoped that more scholars would engage themselves in the legal problems in the circulation of rural housing lands so as to achieve the legitimate and effective circulation and protect the farmers' legal interests.

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