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Contract System for Circulation of the Right to Rural Land Contractual Management

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Abstract From the perspective of civil subject theory, law of value, comparative law and history of laws, the thesis expounds that the contract on the transfer of the contractual right of rural lands is in nature a civil contract instead of an administrative one. Then it explores the defects in the contract from the viewpoint of legal value goal, contract law and legal sociology, that is, the relevant provisions in *Rural Land Contract Law* and *Explanations of Supreme People's Court about the Issues concerning the Laws Applicable to the Trial of Cases of Disputes over Rural Land Contracting* go against the principle of free contracting and run counter to the legal value goal of justice, so they do not achieve good implementing effect. Finally, the thesis demonstrates and makes some practical legislative proposals to perfect the contract system for circulation of the right to operate constructed rural lands, aiming at improving the circulation rate through perfecting the contract of the right to rural land contractual management, solving the disputes in rural lands circulation and safeguarding the legitimate rights of the farmers.

Key words Rural lands, Contractual management right, Circulation means, Contract system, China

A research team aiming at studying the circulation status and innovation of the right to rural land contractual management in Guizhou Province goes down to the 36 villages in 13 townships of seven counties in four cities, one canton and one region in Guizhou Province to conduct field survey, the investigation subjects cover the village cadres and rural household members at the age of 18 – 60, the survey questions only several main cadres in each village and one main member in each family, the sample data will be obtained by combining the importance sampling with stratified random sampling. As shown in the investigation, there is a quite low circulation rate of the right to rural land contractual management with 1. 1% exchange rate, 15. 9% subcontract rate, 1. 1% renting rate, 0. 06% share-buying rate, 0. 18% mortgage rate and 0. 51% transfer rate. According to the reaction of the superstructure on the economic base and systematic economics, one of the major reasons leading to the low circulation rate of the right to rural land contractual management is the defects in its circulation contract system, so a legitimate, standardized and effective circulation contract system is the necessary condition for improving the circulation rate of the right to rural land contractual management. Therefore, based on discussing the nature of the contract on the circulation of the right to rural land contractual management, I will analyze the defects of the contract system and then propose some countermeasures and suggestions to perfect the contract.

1 Nature of the contract for the circulation of the right to rural land contractual management

1.1 Problems propounding Viewed from the angle of formal logics, contract of the right to rural land contractual management and the contract of the circulation of the right to rural land contractual management are in a relation of category and predictability, which is to say that the former contract is the upperseat concept of the latter contract. Thus, the following conclusion could be deduced: if we want to expound the nature of the contract of the circulation of the right to rural land contractual management, we should only find out the nature of the contract of the right to rural land contractual management; and if we want to prove that the contract of the circulation of the right to rural land contractual management is a civil contract instead of an administrative one, we could only verify that the contract of the right to rural land contractual management is a civil contract rather than an administrative one.

So far as the nature of the contract of the right to rural land contractual management is concerned, there are two opinions of "administrative contract" and "civil contract" existing in the law field. The opinion of "civil contract" holds that, the agricultural management contract is the bilateral, paid and consensual contract signed between equal parties just like the enterprise operation contract. While the opinion of "administrative contract" deems that, through the establishment of the agricultural contract responsibility system, the farmers are entitled to their land use right by signing an administrative contract with the government; taking the place of the administrative order and mandatory plan under the planning system, administrative contract has become a dominant method adopted by the central government to manage the agriculture^[1]. The existing legal provisions also demonstrate the administrative legal thought of

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the rural lands management right contract, and expound the administrative nature of the right to rural land contractual management. For example, as prescribed in paragraph 6 of Article 6 about administrative reconsideration scope in *Administrative Reconsideration Law of the People's Republic of China*, "a citizen, legal person or any other organization may, in accordance with this law, file an application for administrative reconsideration under the cases where an administrative organ has altered and nullified their agricultural contract, and is considered to have infringed upon their rights and interests". As stated in Article 16 in the Supreme People's Court's *Interpretation on the Implementation of Administrative Procedure Law of the People's Republic of China*, any contractor of rural lands and land user, who consider the administrative organ's dealing with rural collective lands disaffected, may institute legal proceedings in their own name.

1.2 Contract of the right to rural land contractual management is a civil contract In the author's opinion, contract of the right to rural land contractual management is a civil contract. What fundamentally differs a civil contract from an administrative one is that both parties of the civil contract are equal while that of the administrative contract are not. From the angle of real right alternation, contract of the right to rural land contractual management could be divided into three kinds, namely the contract of obtaining the right to rural land contractual management, contract of modifying the right to rural land contractual management and contract of aborting the right to rural land contractual management, in all these three contracts, both parties are equal. One party in the contract of obtaining the right to rural land contractual management is peasant economic collectives while the other party is the members in the peasant economic collectives or the organizations and individuals outside of the peasant economic collectives. In contract of modifying the right to rural land contractual management, both parties are legal civil subjects, because they are all eligible for the qualifications of civil subjects prescribed in the *General Rules of Civil Law* and *Contract Law*. And as for the contract of aborting the right to rural land contractual management, one party is the contractor of rural lands while the other is the enterprise, school, hospital, government and other civil subjects. Whether both parties in the legal relation are equal or not, is determined by their emerged, modified and aborted legal relation on the one hand and by the objectives of law on the other. As known to all, the legal relation between the parties in the contract of the right to rural land contractual management emerges, modifies and disappears with the obtaining, modifying and abortion of the right to rural land contractual management, and during the obtaining, modifying and abortion of the right to rural land contractual management, both parties should abide by the principle of exchange at equal value, which requires that both parties should express their true meanings and enjoy equal status. However, the design of the contract system for the right to rural land contractual management aims at solving the problems concerning rural area, rural people and agriculture, especially the problems about peasants' agricultural income. It is obvious that

to define the contract of the right to rural land contractual management as a civil contract is beneficial to solving the problems concerning rural lands, rural people and agriculture as well as the problem about the peasant's agricultural income.

1.3 Reviewing the theory of "administrative contract" about the contract of the right to rural land contractual management The theory of "administrative contract" and some existing legal provisions provide theoretical and legal excuses for those agricultural administrative departments, local governments and grass-root governments to arbitrarily infringe upon the right to rural land contractual management and wantonly terminate the contract of the right to rural land contractual management, leading to the "enclosure movement", transforming the farmers without lands into the socially marginalized "3 without" personnel, and aggravating the relationship between the farmers and local government especially that between farmers and grass-root governments, which all will threaten the social stability in rural areas. For example, if the case that the contractual operation right of forest land of the contractor is infringed upon is dealt with according to the prescription in paragraph 6 of Article 6 about administrative reconsideration scope in *Administrative Reconsideration Law of the People's Republic of China* and Article 16 in the Supreme People's Court's *Interpretation on the Implementation of Administrative Procedure Law of the People's Republic of China*, then it will do harms to the protection of the contractor's contractual operation right of forest lands. In some places, the township government is also the contract issuing party of the rural lands. In commandeering and expropriating rural lands, local government and grass-root government may be one party of the contract of aborting the right to rural land contractual management, according to *Rural Lands Contract Law*, agricultural administrative departments and grass-root governments manage the contract of the right to rural land contractual management, once there is a dispute over the contractual operation right of rural lands, it will be obviously unfair for the contractor to settle down the dispute through administrative sanction and administrative review.

1.4 Conclusion From the comparative law point of view, the contract of the right to rural land contractual management is a civil contract instead of an administrative one. The countries with Anglo-American law system and that with Continental law system deem the contract of the right to rural land contractual management as a civil contract rather than an administrative one. From the angle of law history, permanent tenancy contract and superficies contract are not administrative contracts but civil contracts.

To sum up, since the contract of the right to rural land contractual management is civil contract rather than administrative contract, the contract of the circulation of the right to rural land contractual management is a civil contract instead of an administrative one.

2 Defects in Contract System for Circulation of the Right to rural land contractual management

Due to the mistaken knowledge about the nature of the cir-

culation contract of the right to rural land contractual management as well as other various factors, the existing contract system for circulation of the right to operate contracted rural lands faces some defects, say, some provisions in the existing contract system are unreasonable, and the existing laws do not present detailed prescriptions about the parties in the circulation contract, and on the share-buying contract, mortgage contract and transfer contract of the contractual operation right of rural lands. For example, as prescribed in Article 37 of *Rural Land Contract Law*, "where the right to land contractual management is circulated by means of subcontract, lease, exchange, transfer or by other means, the two parties shall conclude a written contract". As stated in Article 13 in *Interpretations of the Supreme People's Court about the Issues Concerning the Laws Applicable to the Trial of Cases of Disputes over Rural Land Contracting*, "without approval of the contract issuing party, the contract through which the contractor circulate the right to land contractual management by means of transfer is invalid". Both provisions above are unreasonable.

2.1 Angle of contract The provisions in Article 37 in *Rural Land Contract Law* and Article 13 in *Interpretations of the Supreme People's Court about the Issues Concerning the Laws Applicable to the Trial of Cases of Disputes over Rural Land Contracting* violate the principle of free contract. According to the theory of British famous jurist Atiyah, the thought of free contract has two meanings: firstly, the contract has obtained the consent of both parties; secondly, the contract is the result of free choice^[2]. In Li Yongjun's opinion, apart from these two meanings, the freedom of contract also covers the other two meanings—the sacredness of contract and the relativity of contract. The sacredness of contract should be one aspect of free contract, which means that, if the contract is signed based on the free will of both parties, thus the rights and obligations arising therefrom should be sacred, should be performed by the court and should not be violated by both parties. The relativity of contract is also a byproduct of free contract, which refers to the relativity of the contract validity. Since the rights and obligations specified in the contract arise only based on the free will of both parties, the parties will be bound by the contract only when they want to, the validity of the contract should not be exerted on the third party who is not involved in the contract. Whether the written contracts about the subcontract, lease, exchange and transfer of the right to land contractual management will be signed or not as well as signed in which forms, is the freedom of both parties, as long as their contract do not invade the interests of others, society and the state and express the free will of both parties, the contract about the circulation of the right to land contractual management will be valid. The transfer of the right to land contractual management do rather good than bad to the interests of others, society and the state. The object in the contract about the subcontract, lease, exchange and transfer of the right to land contractual management is the right to land contractual management, which is the intangible property of the peasants, whether to transfer it or not, is the right of the

contractor, therefore, we can say that the contract about the subcontract, lease, exchange and transfer of the right to land contractual management is as common as other contracts, thus as long as the qualifications of its parties are eligible and it is in accordance with the principle of free contract, then it is valid.

2.2 Angle of legal value goal The provisions in Article 37 in *Rural Land Contract Law* and Article 13 in *Interpretations of the Supreme People's Court about the Issues Concerning the Laws Applicable to the Trial of Cases of Disputes over Rural Land Contracting* go against the legal value goal of "justice". In these two laws, there is no such prescriptions like this, "if the right to land contractual management is circulated by other means, it should be approved by the contract issuing party, otherwise the contract for the circulation of the right to contractual management would be invalid". No matter which kind of the right to land contractual management are essentially the same, they are all real right as well as usufructuary right, which all have the right of disposition, the law should prescribe the same to both of them, otherwise it is injustice. However, some people consider that the two kinds of the right to land contractual management will benefit and protect the members of the collective economic organization to different degrees, this view shows some rationality, but it does not take into account the important factor of "the contradiction and particularity of things". Undeniably, the household-contract-based right to rural land contractual management guarantees the basic livelihood of most farmers, but the right contracted in other means could not achieve such effective results in ensuring their basic life. However, no matter which kinds of the right to rural land contractual management, they are all of little economic benefits to the farmers, let alone to protect their basic life. In fact, the right to rural land contractual management does not provide them with economic benefits and guarantee their life, but play a negative role in their way to getting rich instead. In addition, the inheritance of the right to rural lands contractual management is essentially the same as a certain type of share-buying and transfer of the right to rural lands contractual management, which all belong to the subject alternation of the right to rural land contractual management. In the existing legal system, there is neither such prescription that the inheritance of right to rural forest land contractual management contracted by household or by other means should be approved by the contract issuing party, nor the provision that the share-buying of other types of right to rural land contractual management should receive the approval of contract issuing party.

The provisions in Article 37 in *Rural Land Contract Law* and Article 13 in *Interpretations of the Supreme People's Court about the Issues Concerning the Laws Applicable to the Trial of Cases of Disputes over Rural Land Contracting* clash with the legal value goal of "efficiency". To establish the legal system about the circulation contract of the right to rural land contractual management aims at solving the problems concerning rural area, farmers and agriculture, taking full use of rural lands and

improving the value of rural land. " The statistical reclaimed lands in Anhui Province account for 1.2%, the percentage in certain regions between Yangtze and Huai River reaches as high as 5% –10% , the seasonally abandoned lands of Beishou County in Hubei Province in 2000 are 333 300 hm², accounting for 8% of the total cultivated area" ^[3]. The same conclusion is obtained in the field investigation of Chen Xiaojun study team: 62.5% of the cultivated lands are deserted in Rixi Village^[4]. Various reasons lead to the desertion of rural lands, on the one hand, the existing legal system makes severe restriction on the circulation contract of the right to rural land contractual management contracted by household, which means, it should get approved by the contract issuing party, but actually the contract issuing party exists only in name but not in reality, the contractor's right to dispose the right to rural land contractual management by the means of transfer is deprived of; on the other hand, their household income comes mainly from the second and tertiary industry instead of agricultural production and operation, they only want to take the means of transfer to dispose their right to rural land contractual management, because compared to other circulation means, the means of "transfer" will turn their right to rural land contractual management into the maximum economic benefits. Meanwhile, some farmers want to expand the agricultural scale and grow those agricultural plants with longer production cycle, so they have strong will to obtain the right to rural land contractual management of other farmers. Since rural lands are of no value to them and the right to rural land contractual management means them nothing practical, not knowing what else to do, they dispose their right to rural land contractual management only through the means of "desertion".

2.3 Angle of law enforcement The provisions in Article 37 in *Rural Land Contract Law* and Article 13 in *Interpretations of the Supreme People's Court about the Issues Concerning the Laws Applicable to the Trial of Cases of Disputes over Rural Land Contracting* do not achieve good results. Through interviewing some farmers in Yongxing County, Guiyang County, Suxian County and other counties in Hunan Province, the author notices that few of the farmers signed a contract when they circulate the right to rural land contractual management, in their mind, since they all live in the same village and are familiar with each other, a written contract is quite unnecessary. After interviewing some farmers in Huaxi District, Taijiang County, Dafang County, Zhenning County, Meitan County, Jinsha County, Pan County as well as other counties and districts, the author gets to know that there are also few farmers signing written contracts when they circulate the right to rural land contractual management by the means of subcontract, lease, exchange or by other means. Although there are provisions about the contract issuing party, it is a comparatively prevalent phenomenon in real life that the contract issuing party of rural lands tends to be empty and absent, especially in those underdeveloped areas with labor output, so the provision that the circulation of rural lands should be approved by the contract issuing party in *Rural Land Contract Law* is out of implementation.

3 Measures and suggestions in perfecting the contract system for the circulation of the right to rural land contractual management

3.1 Perfecting the contract system for the circulation of the right to rural land contractual management

In formulating and revising the substantive laws and regulations about the circulation contract of the right to rural land contractual management, the following major problems should be paid attention to.

(1) Some legal principles in circulating the right to rural land contractual management may be refined so that they could play a coordinating role, which not only act as the guiding principles in regulating the changes of the right to rural land contractual management, but also provide a theoretical basis for the judicial department and arbitration commission to solve the disputes over the contract of the circulation of the right to rural land contractual management, moreover, they could also eliminate the contradiction between the lagged legal provisions and real social life.

(2) Since the contract of the circulation of the right to rural land contractual management is characterized by particularity, so the legal provisions about the contract of the circulation of the right to rural land contractual management should be specially added into the *Law of Contract* and *Rural Land Contract Law*. And there should be different legal provisions for different types of circulation contracts, because different types of contract of circulation of the right to rural land contractual management show different characteristics and legal value goals. For example, contracts of the obtaining and abortion of the right to rural land contractual management both have complicated procedures to conclude, and their legal value goal is "Equity Priority and Efficiency Consideration". However, the contract of change of the right to rural land contractual management is much easier to bind, so its legal value goal is "Efficiency Priority and Equity Consideration".

(3) In Article 13 in *Interpretations of the Supreme People's Court about the Issues Concerning the Laws Applicable to the Trial of Cases of Disputes over Rural Land Contracting*, the provision that "without approval of the contract issuing party, the contract through which the contractor circulates the right to land contractual management by means of transfer is invalid" should be revised into "unless specially prescribed in the law, without approval of the contract issuing party, the contract through which the contractor circulate the right to land contractual management by means of transfer is valid". As for Article 133 in *Interpretations of the Supreme People's Court about the Issues Concerning the Laws Applicable to the Trial of Cases of Disputes over Rural Land Contracting*, we should revise the provision that "where the deserted lands and rural lands are contracted through the means of bidding, auction and open negotiation, should be in accordance with the provisions in *Rural Land Contract Law* and by State Council, and the right to land contractual management may be circulated by means of transfer, share-buying, mortgage and other means" into that "

where the deserted lands and rural lands are contracted through the means of bidding, auction and open negotiation, should be in accordance with the provisions in *Rural Land Contract Law* and by State Council, and the right to land contractual management may be circulated by means of transfer, share-buying, mortgage and other means. When in accord with the laws, the right to rural land contractual management contracted by household may be circulated by means of transfer, share-buying, mortgage and other means".

(4) The law should give detailed prescriptions about the parties in the contract of circulation of the right to rural land contractual management as well as the contract of share-buying, mortgage, transfer and other circulation of the right to rural land contractual management. To be specific, the law should specifically prescribe the qualification, rights and obligations of both parties in the contract of the circulation of the right to rural land contractual management, some major items like share discount, share-buying procedure, share-buying registration and various others should also be made clear, the objective conditions, subject qualification, registration, realization of the mortgage of the right to rural land contractual management should be clarified, and the law should clearly define the qualifications of the transfer and transferee of the right to rural land contractual management and the upper limit of the amount of rural lands could be transferred.

3.2 How to perfect the system of settling the disputes in the contract of circulation of the right to rural land contractual management Space forbids, so here I will not make a systematic and deep research into how to better settle the disputes in the contract of circulation of the right to rural lands contractual management, instead, I will only propose some suggestions from the macro aspect. In perfecting the system of settling the disputes in the contract of circulation of the right to rural land contractual management, the following problems should be paid attention to.

(1) *Administrative Procedure Law* and local administrative regulations should not prescribe how to settle the disputes in the contract of circulation of the right to rural land contractual management. Because the contract of circulation of the right to rural land contractual management is a civil contract rather than an administrative one, so the disputes in this contract belong to civil disputes instead of administrative disputes, according to the theory of "law regulate life", the goal of law is to regulate life and life needs corresponding legal norms, therefore, *Administrative Procedure Law* and local administrative regulations should not prescribe how to settle the disputes in the contract of circulation of the right to rural land contractual management.

(2) The system of settling disputes in the contract of circu-

lation of the right to rural land contractual management should embody the legal value goal of "efficiency". The contract of circulation of the right to rural land contractual management is a form of right transfer as well as an act of property transaction, the act of transaction is an economic problem, while "efficiency" is the core concept of economic problem, which measures the normal development of certain economic activity, law serves economy, and economic development measures the justice of law, so "efficiency" mirrors as well as drives the economic development, so the settlement system of the disputes in the contract of circulation of the right to rural land contractual management should embody the legal value goal of "efficiency".

(3) The system of settling the disputes in the contract of circulation of the right to rural land contractual management should represent the common people's interest and should be handled by the common people autonomously. In rural areas, there is a scarcity of legal resources and asymmetrical information, the executive color is too thick, the executive branch controls the national legal resources and the judicial department highly depends on these legal provisions, what's else, since the grass-rooted government is involved in the disputes in the contract of circulation of the right to rural land contractual management, so the settlement of these disputes could not achieve good results, as a result, more and more petitioners come to seek help from the central authorities, which not only makes it necessary to establish a democratic and autonomous disputes settlement system, but also makes it justice to settle the disputes in the contract of circulation of the right to rural land contractual management.

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