



Università degli Studi di Ferrara

DOTTORATO DI RICERCA IN
COMPARAZIONE GIURIDICA E STORICO-GIURIDICA

CICLO XXVI

COORDINATORE Prof. Daniele Negri

**The Reform of Rural Land Law System and the Establishment
of Integrated Construction Land Market in China**

Settore Scientifico Disciplinare IUS/02

Dottorando

Dott. ZHANG ZEYI

Tutore

Prof. AMODIO CLAUDIA

Anni 2011/2013



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The Reform of Rural Land Law System and the Establishment of Integrated Construction Land Market in China

Abstract

In China, dualistic land ownership system, which is divided into urban state-owned land and rural collectively-owned land, has been formed since the movement of Advanced Agricultural Producers' Cooperative in 1956. As a result of socialism ideology and the strategy of economic development, the rural area and agriculture was subordinated to the need of economic development in the urban area, particularly the development of heavy industry in the first 30 years since the foundation of People's Republic of China, and the factors of production in the rural area were exported to the urban area contributing to its development. So the farmers were prisoned on rural land to produce the materials for industrial production before the Reform and Opening-up of 1978. As the most important factor of production, rural lands were only restricted for the agricultural use subordinated to the need of the urban area. So in the context of central-planned economy, the property rights on rural lands were discriminated.

In the past 3 decades, most of the dimensions of the Chinese society have experienced important social changes, and the reform has granted liberty and equality to citizens in the urban area and farmers in the rural area. However, the property rights on rural lands are left to be the last exception, because the dualistic land administration system is inherited and strictly followed by the existing land law system, under which the rural lands are subject to a set of restrictions for its capitalization, compared with the urban lands. The most serious is that this dualistic system of land rights is strictly provided by the current land law system, without any essential alteration in the past 30 years, and even after the enactment of the highly appreciated "Property Law" (2007), the situation does not change.

In the first place, the ownership of land is not tradable in the market, and only the use right of the land could be transferred. However, from the point of view of land supply, the rural land cannot be freely circulated in land market, only should the rural land be converted into state-owned land through expropriation by government, can it then be used for civil and commercial purposes, for example commercial residential building. In this way the State monopolizes primary market for land supply, and thus it deprives the farmers' economic benefits from the transfer of their own land. At the same time, the government has accumulated abundant capital through expropriation of rural land with a comparatively lower price than the market price to support the local economic and social development, and this is vividly described as "Land Finance". For this reason, the conflict between expropriation of rural land and farmers lost their lands is always a hot and sensitive topic for the public debate.

Except restrictions on the supply of construction land, other private property rights on rural land are also prohibited to be created or transferred. For example, the land-use right on the rural farmland and homestead cannot be transferred to the subjects who are not the member of the village collectivity, or mortgaged for loan from banks. This is why the market value of rural land is lower than that of the urban lands. One political consideration for the restriction on the free circulation of rural land and the property rights on them is to prohibit the land annexation in the rural area so as to secure the fundamental production factors of farmers. Its economic essence is a kind of social security for the farmers who will not be subject to unemployment even if the economic turmoil, and in this way the government purports to keep the social stability in the rural area. The existing legislation also imposes limits on the specific use of rural lands for other policy considerations. For example, in order to secure the food supply, the farmland is strictly forbidden to be converted into land for construction. However, the economic consequence of this dualistic land system is that the farmers in China are

prohibited from participating in urbanization with their own land as the most important kind of capital; on the other hand, without free circulation of rural land in land market, the problem of structural shortage of land used for construction between urban and rural area is serious, i.e. the urban state-owned land cannot meet the demand of urban development while large amount of rural collectively-owned construction land is used inefficiently or even left unused.

With the above-mentioned restrictions on the rural land, we are wondering whether the rights on rural lands enjoyed by the farmers are pure and complete property rights, and whether the above-mentioned policy considerations could justify the restrictions on the property rights on rural lands and its free transfer in land market. The answer seems no. So it calls for radical reform of the current land law system, in which the legislature shall wipe off all the unreasonable restrictions on the property rights on rural land and establish an integrated land market, through which the rural land will be granted the same and equitable legal status enjoyed by the urban state-owned land.

In fact, lots of local provincial governments, such as Chongqing, Guangdong, and Sichuan, have implemented several plot initiatives to reform the existing land law system, attempting to grant more property rights to the farmers and allowing the free trade of rural lands so as to permit the farmers to share the economic benefits of urbanization with the contribution of rural lands. However, these pilot reform initiatives have violated the existing land-related legislations, particularly the “Property Law” (2007) and the “Land Administration Law” (2004). The lack of legal justification from the positive law means high legal risk for these reform initiatives. For this purpose, it needs a systemic and comprehensive reform of the current land law system, and needs to establish an integrated construction land market in urban and rural areas. This is what the current research will focus on.

The dissertation consists of six chapters as explained in the following:

Chapter One: Introduction.

Chapter Two: It focuses on the legal framework for the land rights, both ownership and land-use right. The most important characteristic for the Chinese land law system is that it is a dualistic ownership system composed by the state-owned and collectively-owned lands, through which the state-owned and collectively-owned lands are in differentiated legal statuses. At the same time, as a result of bias over rural collectively-owned lands, the existing land law system imposed series of restrictions and even deprived it of the possibility for its circulation in land market. The discriminated legal status and restrictions on property rights on rural land result in the fact that farmers cannot share the benefits from the economic development with capitalization of rural lands in the process of urbanization and industrialization. In this part, I will undertake a general review of all the policy considerations for this dualistic system for land ownership and the property rights on lands, and try to explore whether the restrictions on property rights on rural lands are still justified by the social and economic development in China. In fact, the swift social change in the past 3 decades in China has imposed great challenges to the existing dualistic land law system which now cannot meet the requirement of the changed social circumstance.

Chapter Three: This chapter will focus on the expropriation of rural collective land, which is the most unique mechanism by which the property rights on rural lands can be circulated and at the same time the Chinese government gets sufficient construction land to support the fast urbanization and industrialization at the expense of the farmers' economic interests. This part will analyze the existing problems of collective land expropriation in China and its harm to the circulation of rural construction land. One of the most debated problems is the scope of public interest which is not clearly defined by the existing legislation and thus does not specify exactly the boundary between the private property liberty and government

restriction on rural collective land. And this is also one of the possible causes for the violent expropriation in the past decade. So in this part, I will explore how to reform the expropriation mechanism, through the strict definition, procedure of expropriation and the reasonable compensation to expropriated farmers, so as to protect the legitimate rights of the farmers who will lose their land for ever. And the more important or ambitious purpose is to restrict the expropriation of collective land only for the purpose of public interest, so as to eliminate radically the institutional backdoor and economic incentives of the local governments for expropriation.

Chapter Four: This chapter will explore the feasible market-oriented reform of the circulation of rural collectively-owned land for construction. The fundamental cause of the violent expropriation of rural land lies in the fact that there is no institutional channel for the free circulation of rural land in the primary land market, except the state expropriation. Besides, the circulation of rural lands in the secondary land market is also imposed with series of restrictions. So the problem is how to re-construct the land law system so as to lay down the legal foundation for the free circulation of property rights on rural lands, particularly for those on the land for construction. In this case, an integrated market-oriented construction land market shall be established both in the urban and rural areas. At the same time, this part will also analyze pilot reforms in local province of China, such as Guangdong, so as to explore the possible means for the collective land circulation in China. It is anticipated that rural land could be circulated in the following ways: to lease, to transfer, to offer as equity contributions, to donate and to mortgage for bank loans. Because of the complexity of the property rights on rural land, we have to carefully analyze subjects, objects and purpose in the circulation of the use-right on collective construction land, and explore the possible and equitable way to distribute the economic revenue deriving from the circulation of the right to use collective land for construction so as to let the farmers share the benefits from urbanization.

Chapter Five: This chapter will discuss the creation of development rights on rural land in China. This part explores the possibility to introduce into China the land development rights system prevalent in the United Kingdom and United States of America. Under the circumstance of land-use planning and land control, land development rights shall be a new type of property rights. Through the grant of development rights on rural lands, the conflict between the severe restriction of land-use control by the State and the free development of collectively-owned land by farmers will be mitigated, and the balance of economic interests among the rights holders of farmland and those of construction land could be achieved, which may reduce the disordered and even illegal conversion of agricultural land into non-agricultural land and may promote the reasonable circulation of urban and rural construction land.

Chapter Six: Conclusion. Based on the above analysis, it is suggested to undertake a radical reform of the existing land law system to eliminate the discrimination on the rural land and to grant it the same legal status with that enjoyed by the state-owned land; as for the circulation of the property rights on rural land, the institutional barriers shall be removed so as to establish an integrated market for urban and rural land.

Key words: legal reform, land market, restriction on land rights, use right on land for construction, expropriation, market-oriented circulation, development rights on land

Abstract

In Cina, il sistema dualistico di proprietà delle terre, diviso in area urbana di proprietà statale (cheng shi guo you tu di) e terreni rurali di proprietà collettiva (nong cun ji ti suo you tu di), è stato istituito nel 1956 dal movimento Socialista. A causa dell'ideologia socialista e della strategia economica di sviluppo, la zona rurale e l'agricoltura sono state subordinate allo sviluppo economico della zona urbana, in particolare allo sviluppo dell'industria pesante durante i primi 30 anni dalla fondazione della Repubblica Popolare Cinese. Di conseguenza, i fattori produttivi della zona rurale sono stati esportati verso l'area urbana in modo da contribuire al suo sviluppo economico. Fino all'entrata in vigore della riforma del 1978, i contadini sono stati impegnati sulle terre per fornire materiali per la produzione industriale, e i terreni agricoli sono stati limitati all'uso agricolo, a sua volta subordinato alla necessità dell'area urbana. In altre parole, nel sistema economico centrale pianificato, i diritti di proprietà sulle terre agricole sono stati discriminati.

Negli ultimi tre decenni, la maggior parte della società cinese ha vissuto evoluzioni importanti e la riforma ha concesso la libertà e l'eguaglianza ai cittadini dell'area urbana e agli agricoltori delle zone rurali. Tuttavia, i diritti di proprietà sulle terre agricole sono stati lasciati come ultima priorità in quanto il sistema dualistico sulle terre è ereditato e rigorosamente seguito dal sistema giuridico attuale, in base al quale le terre rurali sono soggette ad una serie di restrizioni per la sua capitalizzazione rispetto a quelle urbane. Il fatto più grave è che questo sistema dualistico di diritti è strettamente mantenuto dal sistema di diritto fondiario vigente, il quale non ha avuto modifiche sostanziali negli ultimi trent'anni, anche dopo l'approvazione del "Diritto di Proprietà" del 2007.

In primo luogo, la proprietà della terra non è negoziabile sul mercato; solo il diritto all'uso della terra potrebbe essere scambiato. Dal punto di vista dell'offerta, la terra rurale non può essere distribuita liberamente sul mercato. Ciò è possibile solo

quando la terra viene convertita in proprietà statale attraverso espropriazione da parte dello Stato. Dopo l'espropriazione, la terra può essere utilizzata per scopi civili e/o commerciali. Perciò lo Stato monopolizza il mercato primario per la fornitura delle terre e di conseguenza i contadini non possono godere dei benefici economici derivanti dal trasferimento delle proprie terre. Allo stesso tempo, il governo ha accumulato abbondanti capitali per sostenere la riforma economica e sociale attraverso l'espropriazione delle terre rurali con un prezzo relativamente basso rispetto a quello della terra urbana. Tale fatto è meglio conosciuto come "Finanza di Terra". Per questo motivo, lo scontro tra l'espropriazione da parte del governo e i contadini è sempre più grave e provoca sempre accesi dibattiti pubblici.

Tranne per quanto concerne la restrizione alla fornitura della terra, gli altri diritti di proprietà privata sulle terre rurali sono discriminati. Ad esempio, il diritto all'uso di terre agricole non può essere trasferito ai soggetti che non sono membri della collettività del villaggio, o ipotecati per il prestito da parte delle banche. Ecco perché il valore di mercato delle terre rurali è inferiore a quello delle terre urbane. Una considerazione politica per la restrizione alla libera circolazione della terra rurale e dei diritti di proprietà è quella di vietare l'annessione della terra nella zona rurale al fine di proteggere i fattori produttivi fondamentali degli agricoltori. Nella sua sostanza economica, si tratta di una sorta di sicurezza sociale per gli agricoltori che non saranno soggetti alla disoccupazione, anche durante per esempio una crisi economica, e perciò il governo pretende di mantenere la stabilità sociale in tutte le zone rurali. Le normative vigenti impongono anche vari limiti all'uso specifico delle terre rurali; il motivo è dovuto a numerose considerazioni politiche. Ad esempio, al fine di garantire l'approvvigionamento alimentare, è severamente vietato convertire la terra in destinazione d'uso per abitazioni e costruzioni. La conseguenza economica di questo sistema dualistico è che i contadini cinesi sono impossibilitati nel partecipare all'urbanizzazione delle proprie terre; d'altra parte, senza la libera circolazione delle terre in un mercato fondiario, il problema della carenza strutturale dei terreni per le costruzioni diventa sempre più grave, in quanto

le terre demaniali urbane non possono soddisfare la domanda dello sviluppo urbano, mentre la maggior parte delle terre rurali viene usata in modo inefficiente o addirittura lasciata inutilizzata.

Con le restrizioni di cui sopra, molti si chiedono se i diritti sulle terre rurali di cui godono gli agricoltori sono diritti di proprietà privata veri e propri, e se le considerazioni politiche di cui sopra potrebbero giustificare le restrizioni ai diritti di proprietà e i suoi bassi prezzi nel mercato fondiario. La risposta sembra essere no. Molti chiedono la necessità di una riforma fondamentale del sistema di diritto fondiario vigente, in cui il legislatore elimini tutte le restrizioni irragionevoli sui diritti di proprietà privata delle terre rurali e, nello stesso tempo, crei un mercato fondiario integrato, tramite il quale alla terra rurale sarà concesso lo status giuridico equo di cui godono i terreni demaniali urbani.

I governi regionali, come Chongqing, Guangdong, Sichuan etc, hanno adottato diverse iniziative per riformare il sistema giuridico attuale del territorio, cercando di concedere più privilegi al diritto di proprietà degli agricoltori e al libero scambio di terreni rurali, in modo da consentire agli stessi di condividere i benefici economici derivanti dall'urbanizzazione. Tuttavia, queste iniziative di riforma hanno violato le normative vigenti, in particolare il "Property Law" del 2007 e la "Land Administration Law" del 2004. La mancanza di giustificazione giuridica significa alto rischio legale per queste iniziative di riforma. A tal fine, nasce il bisogno di una riforma globale del sistema delle leggi attuali del territorio e l'istituzione di un mercato integrato per i suoli urbano e rurale. Questi sono gli obiettivi sui quali si concentrerà l'attuale attività di ricerca.

La tesi è composta da sei capitoli, così come segue:

Capitolo Uno: Introduzione.

Capitolo due: quadro giuridico dei diritti sulle terre, sia di proprietà che di uso del suolo. Il dato più importante del sistema giuridico sulle terre cinesi è che esso è costituito da un sistema dualistico condiviso dalla terra statale e collettiva, attraverso il quale tali terre sono state giuridicamente differenziate. Allo stesso tempo, il sistema giuridico vigente della terra è imposto da una serie di limitazioni e privato della possibilità della sua circolazione nel mercato fondiario. Lo status giuridico discriminato e le restrizioni ai diritti di proprietà dei terreni rurali risulta dal fatto che gli agricoltori non possono condividere i benefici dello sviluppo economico con la sua capitalizzazione nel processo di urbanizzazione e industrializzazione. In questa parte, il capitolo prevede una revisione generale di tutte le considerazioni politiche del sistema dualistico per la proprietà della terra e dei diritti di proprietà sulle terre, muovendo dall'interrogativo fondamentale consistente nel chiedersi se le restrizioni sui diritti di proprietà siano ancora giustificate dalle considerazioni sullo sviluppo sociale ed economico della Cina. In realtà, con il rapido cambiamento sociale degli ultimi tre decenni, la Cina ha imposto grandi sfide al sistema dualistico vigente, che ora non può soddisfare le esigenze nel contesto sociale mutato.

Capitolo Tre: il capitolo è incentrato sull'espropriazione della terra collettiva rurale, attraverso la quale i diritti di proprietà sui terreni agricoli possono essere diffusi nel mercato fondiario primario, fornendo al governo cinese sufficiente terra per sostenere la rapida urbanizzazione e industrializzazione a scapito degli interessi economici degli agricoltori. Questa parte analizzerà i problemi esistenti di espropriazione della terra collettiva e il suo danno per la circolazione dei terreni per le costruzioni rurali. Uno dei problemi più importanti è l'interesse pubblico che non è chiaramente definito dalla legislazione vigente e quindi non specifica esattamente il confine tra proprietà privata e restrizione dello stato sulla terra rurale collettiva. Questa è anche una delle possibili cause dell'espropriazione violenta degli ultimi dieci anni. In seguito, il capitolo descrive come riformare il meccanismo di esproprio attraverso la definizione rigorosa delle procedure di espropriazione e

delle ragionevoli compensazioni spettanti agli agricoltori espropriati, in modo da proteggere i diritti legittimi di tali persone che vedranno perdere le proprie terre. Lo scopo più importante è limitare l'espropriazione solo a fini dell'interesse pubblico, in modo da eliminare la backdoor istituzionale e gli incentivi economici dei governi locali per gli espropri.

Capitolo Quattro: il capitolo analizzerà la fattibilità della riforma orientata al mercato della circolazione delle terre rurali di proprietà collettiva. La causa fondamentale dell'esproprio violento del territorio rurale sta nel fatto che non c'è un canale istituzionale per la libera circolazione delle aree rurali nel mercato fondiario primario, a parte l'espropriazione statale. Inoltre, la circolazione delle terre rurali nel mercato fondiario secondario è anche imposta da una serie di restrizioni. Quindi il problema è come ricostruire il sistema di diritto fondiario, in modo da porre le basi giuridiche per la libera circolazione dei diritti di proprietà sui terreni agricoli, in particolare per quelli ad uso abitativo. In questo caso, sia nella zona urbana sia in quella rurale, sarebbe stabilito un mercato fondiario integrato. Questo capitolo analizzerà anche la riforma nelle diverse regioni della Cina, come Guangdong, in modo da esplorare i possibili mezzi per la circolazione della terra collettiva. Si prevede che i terreni rurali potrebbero essere fatti circolare nei seguenti modi: affitto, trasferimento della proprietà, da offrire come contributi nella società, donazione, e ipotecato per i prestiti bancari. A causa della complessità dei diritti di proprietà sui terreni, si devono analizzare attentamente i soggetti, gli oggetti e le finalità nella circolazione dell'uso della terra ad uso abitativo collettivo, e analizzare il modo possibile ed equo per distribuire il gettito economico derivante dalla circolazione del diritto ad utilizzare i terreni collettivi per la costruzione, in modo da permettere agli agricoltori di condividere i benefici di urbanizzazione.

Capitolo Cinque: tale capitolo discuterà della possibilità di introdurre il diritto allo sviluppo, diffuso nel Regno Unito e negli Stati Uniti d'America, nel sistema giuridico cinese delle terre rurali. Il capitolo analizzerà inoltre come introdurlo.

Tramite la concessione del diritto allo sviluppo dei terreni agricoli, il conflitto tra la circolazione libera nel mercato e la comproprietà collettiva sarà mitigato. Attraverso questa riforma, l'equilibrio degli interessi economici tra i titolari dei terreni agricoli potrebbe essere raggiunto. Potrà essere eliminata la conversione disordinata e illegale dei terreni agricoli in terreni non agricoli e si potrà promuovere la ragionevole circolazione di terreno ad uso costruttivo urbano e rurale.

Capitolo Sei: Conclusione. Sulla base delle analisi di cui sopra, viene raccomandato l'avviamento di una riforma radicale del sistema giuridico vigente della terra per eliminare le discriminazioni sulla terra rurale e concedere lo stesso status giuridico alle terre statali; per la circolazione dei diritti di proprietà sulle terre rurali, le barriere istituzionali dovranno essere rimosse in modo da creare un mercato integrato sia per le terre urbane sia per quelle rurali.

Parole chiave: terra statale, terra rurale, riforma giuridica, restrizioni sui diritti alla terra, terra ad uso edilizio, espropriazione, diritto allo sviluppo della terra, mercato fondiario

Chapter I. Introduction

1.1 Context of study

Land is the most important source of all production. And the reforms of land system in the history profoundly promoted the advance of human society. Nowadays, the Chinese economy is almost market-oriented in nearly all the sectors, but the legal framework governing collectively-owned land for construction use and its circulation is still that enacted in the thought of planned economy, which cannot meet the requirements of social development. According to Constitution of the People's Republic of China, land ownership is historically divided into the urban state-owned and the rural (or suburban) collectively-owned¹. According to "Land Administration Law of the People's Republic of China", art.43² and art.63³, the circulation of collective construction land is severely limited to the interior members of the collective economic organizations, usually the peasants⁴ within the same collective organization; as for the construction in urban area using collectively-owned construction land, the collectively land must be in the first place expropriated by government to convert its ownership from the collectively-owned to the state-owned, which then be used as state-owned land for construction.

¹ See Constitution of the People's Republic of China (promulgated in 1982), art.10. par.1 and 2. "Land in the cities is owned by the state. Land in the rural and suburban areas is owned by collectives except for those portions which belong to the state in accordance with law; house sites and privately farmed plots of cropland and hilly land are also owned by collectives." In this dissertation, to facilitate the discussion of land ownership, suburb is considered as same to rural area.

² See Land Administration Law of the People's Republic of China, art.43. "All units and individuals that need land for construction purposes shall, in accordance with law, apply for the use of state-owned land, with the exception of the collective economic organizations and peasants of such organizations that have lawfully obtained approval of using the land owned by peasants' collectives of these organizations to build township or town enterprises or to build rural residential houses for villagers and the units and individuals that have lawfully obtained approval of using the land owned by peasant collectives to build public utilities or public welfare undertakings of a township (town) or village. 'The state-owned land' mentioned in the preceding paragraph includes land owned by the State and land originally owned by peasants' collectives but expropriated by the State."

³ See Land Administration Law of China, art.63. "No right to the use of land owned by peasant collectives may be assigned, transferred or leased for non-agricultural construction, with the exception of enterprises that have lawfully obtained land for construction in conformity with the overall plan for land utilization but have to transfer, according to law, their land-use right because of bankruptcy or merging or for other reasons."

⁴ According to the Chinese household registration system, citizens are divided into those holding urban registered residences and those holding rural registered residences. In this dissertation, peasant and farmer refer to the citizens holding rural registered residences, based on this kind of identity, no matter what their occupations are.

The State monopolizes the market supply of collectively-owned land for urbanization, which results in that there is no institutional channel for the collective construction land to enter into the land market, and thus there is not normal and real market price of it as that of the state-owned land. Property rights on rural land have long been repressed, hampering farmers to use their collective lands as capital to participate in and share benefits from urbanization and industrialization through the circulation of collective construction land. In the progress of urbanization, urban public infrastructure facilities and commercial projects of real estate development require numerous construction lands⁵. However, the limited urban land reserves are far unable to meet the increasing demand⁶, while a large number of collective construction land cannot freely enter the land market, but only comply with “expropriation first and use second”, or be traded clandestinely through black case work, or be used inefficiently, or even be laid idle. This creates a serious structural shortage of land for construction between urban and rural areas. In this case, the reform of market-oriented circulation of collective construction land becomes the key point to achieve the coordinating development in urban and rural areas, which in turn shall be dependent on the grant of the liberty to the circulation of rural land, and on the equalized status of property rights on urban and rural lands.

“Liberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid he would be no longer possessed of liberty, because all his fellow-citizens would have the same power.”⁷ The liberty and restriction of

⁵ In 2013, the total supply of state-owned land for construction use was 730 thousand hectares, a growth of 5.8 percent over the previous year. Of this total, the supply for mining storage was 210 thousand hectares, up 3.2 percent; that for real estate was 200 thousand hectares, up 26.8 percent; and that for infrastructure facilities was 320 thousand hectares, down 2.9 percent. See Statistical Communiqué of the People’s Republic of China on the 2013 National Economic and Social Development, by National Bureau of Statistics of China, February 24, 2014. It is also accessible at http://www.stats.gov.cn/english/PressRelease/201402/t20140224_515103.html, visiting date 2014.11.24.

⁶ The survey from Ministry of Land and Resources of the People’s Republic of China shows that in addition to land for building communications and water conservancy facilities, the actual amount of construction land is approximately 250,000 square kilometers, of which more than 70,000 square kilometers is state-owned land, and more than 180,000 square kilometers is collectively-owned by peasants, getting 72% of the total land for construction use. China Economic Times (electronic version), at http://lib.cet.com.cn/paper/szb_con/108419.html. visiting date 2013.07.01

⁷ See Charles de Secondat, Baron de Montesquieu, translated by Thomas Nugent, *The Spirit of Laws*, Batoche Books, Kitchener, 2001, p.172.

property rights reflect the core value of civil law. Liberty cannot be exercised without sound order; to achieve a better order needs appropriate restriction on liberty. Legitimate exercise of land rights helps to create wealth, and illegitimate expansion of rights will lead to disorder on the use of land. The restriction over rural land rights will affect the balance of farmers' economic interests and public interests, the fairness and efficiency of the land use, as well as the sustainable development of the whole society. Therefore, in China, it has practical meaning and theoretical value to examine the integrated circulation of urban and rural lands for construction use from a perspective of liberty and restriction of collective land rights.

1.1.1 The current situation of land use in China

The National Land Use Planning Outline (2006-2020) imposes the most rigid limitations on diverse uses of land, particularly those on arable land. By the year 2020, China's urbanization rate will reach 58% and land for construction use shall be controlled within 37.24 million hectares⁸; at the same time, the amount of land reserved for cultivation in the countryside shall be sustained at 120.33 million hectares, and the total area of agricultural land must be stable at 668.84 million hectares.⁹ On one hand, urban industrial and residential construction, the infrastructure facilities, rural development and so on, require a lot of construction land. On the other hand, with increasing efforts devoted to protection of arable land and ecological environment, China's land resource that can be used as newly added construction land is extremely limited. Urban population increasing by one percentage point per year means that 15 million people move from countryside into cities. By 2020, to reach the goal of 58% of urbanization and 70% of industrialization, the land for construction has to increase 10 million hectares more; but in the warning line of 120.33 million hectares of arable land, there will be an

⁸ See National Land Use Planning Outline (2006-2020), promulgated by Ministry of Land and Resources of the People's Republic of China, October, 2008, at http://www.gov.cn/jrzq/2008-10/24/content_1129693_2.htm, visiting date 2013.07.02.

⁹ Ibid.

insufficiency of 8 million hectares urban construction land.¹⁰

There are two ways to resolve the problem of shortage of urban construction land. One is to expand the scope of the purpose of land expropriation by government, allowing the government to expropriate collectively-owned land beyond the purpose of public interest¹¹ and then to assign it to the units demanding construction land. The other way is to permit the collective land for construction use to get in the land market directly, breaking the State monopoly of the construction land market.¹² In recent years, to accelerate the urbanization, some regional governments did not distinguish whether the lands were used for public interest purpose or not, but always implemented collective land expropriation without exception in pursuit of urban economic development. The abuse of the expanded expropriation power not only causes serious damage to farmers' interests, which leads to many social conflicts, but also fails to effectively resolve the problem of free circulation of collective construction land in land market. Especially that, the first approach expanding expropriation scope does not comply with international legislative practices. Continuing to implement "expropriation first and use second" can only in a further step widen the gap between the rural and urban development level. For these reasons, to coordinate urban and rural development, to propel the market-oriented circulation of collective land for construction, and to equalize the right to use land for construction in urban and rural areas, are crucial points to the land system reform.

The current Chinese legislation does not recognize the market transaction of collective land rights, and farmers are devoid of disposal right to circulate collective land in the market. In the outer suburbs, lots of collective construction

¹⁰ See proposal No.0125 in the first plenary session of the eleventh Chinese People's Political Consultative Conference (CPPCC) National Committee (in the system of the multi-party cooperation and political consultation led by the Communist Party of China, CPPCC plays an important role in the country's political and social life), at <http://www.cppcc.gov.cn/2011/09/19/ARTI1316434127046139.shtml>. The unit for original data is mu, a Chinese area unit, 1 mu = 0.0667 hectares.

¹¹ See The Chinese Constitution art.10 par.3.

¹² See Han Song, *On Legal Issues of Market Allocation of Collective Building Lots*, China Legal Science, Mar. 2008.

land are used inefficiently or even laid idle, resulting in a great waste of land resources. In the suburbs that are around cities, driven by differential rent profits, a great deal of collective land is clandestinely circulated, which breaks the law; houses with limited property rights¹³ emerge in large numbers, resulting in a huge loss of arable land; the use and administration of collective land fall into disorder. Insufficient support of legislation will negatively affect China's long-term arrangement for land rights system. It can be said that, the unlawful circulation of collective land against regulations tending to be increasingly active in the society has formed great pressure on the legal construction of rural land law system in China.

1.1.2 The legal status of rights on construction land in China

Before the promulgation of the “Property Law of the People's Republic of China” in 2007, provisions regulating land rights are scattered in “General Principles of the Civil Law”, “Land Administration Law”, “Urban Real Estate Administration Law”, “Guarantee Law”, and “Law on Land Contract in Rural Areas”, which respectively regulate urban and rural land rights. The “Property Law” regulates and enriches the land rights system, but it does not abandon the legislative thought of differentiating urban and rural land rights. In terms of land used for construction purpose, art.151 of the “Property Law” prescribes that, in the case where a piece of collectively-owned land is used as land for construction, it shall be handled according to the “Land Administration Law” and other relevant laws,¹⁴ which obviously circumvents the problem of the circulation of collectively-owned construction land.

¹³ Houses with limited property rights usually refer to the rural collective economic organizations, beyond land-use planning and without government’s approval, build houses on collective land and sale these houses to the dwellers with urban registered residence. Houses with limited property rights are not recognized as commercial residential buildings according to law, and buyers cannot get the title certificate of real estate. They are cheaper but illegal. Note by the author.

¹⁴ See Property Law of the People’s Republic of China, art. 151.

At present, Chinese legislation regulating the circulation of urban and rural construction lands is still in a separating status that the rights to use urban state-owned construction land and rural collectively-owned construction land are respectively adjusted by the “Property Law” and the “Land Administration Law”. Containing all the functions of usufruct, the right to use state-owned land for construction plays a role similar as ownership, which can be more freely transferred, mortgaged and can produce corresponding profits arising from its circulation. Through the market-oriented circulation, the right to use state-owned land for construction sufficiently reveals the property attribute of state-owned land. On the contrary, with severe restrictions on the disposal and profit functions, the right to use collective land for construction follows a general principle of prohibiting circulation,¹⁵ which becomes limited usufruct. The non-market-oriented circulation of the right to use collective construction land cannot reveal the asset attribute of collective land, and farmers’ collectives are not in a position to use their lands as the capital to participate in market economy activities or to promote the integrated development in urban and rural areas. In recent years, largely because farmers could not achieve the rightful incremental revenue of collective land, the economic gap between the urban and the rural areas is enlarging.

To promote the urbanization process and to coordinate the urban and rural development, the unified administration of urban and rural lands should be undertaken, which demands to amend the illegitimate legislation on collective land rights. Under the present system of dualistic land ownership, establishing a unified construction land market, realizing the equalization of rights on urban and rural construction lands, and activating the property attribute of collective land rights, can encourage farmers to gain non-agricultural income, can as well as help to promote the rational allocation of land resources. Therefore, it is urgent to improve and rebuild the legislation on collective land rights, and on the unified circulation of urban and rural lands for construction use.

¹⁵ See “Land Administration Law”, art. 43.

In Oct., 2008, the Communist Party of China (CPC) issued the Decision on Certain Issues Concerning the Advancement of Rural Reform and Development (“2008 Decision”)¹⁶, which the CPC described as “the most significant land reform package in three decades.” Hereby, in certain limited extent, the central policy approved the market-oriented circulation of collectively-owned construction land. It is delivered that, beyond the coverage of urban construction land determined by land-use planning, the rural collective profit-oriented construction land that is lawfully obtained¹⁷ can be circulated in integrated and tangible land market through opening and regulatory transfer of the right to use collective land for construction; regardless of the different ownerships, urban and rural construction lands shall be granted with the same rights, to realize “the same land-use type with equal rights”¹⁸. This market-oriented and rights-equalized policy is conducive to build a unified urban and rural construction land market. Furthermore, in Nov., 2013, the CPC issued the Decision on Major Issues Concerning Comprehensively Deepening Reforms (2013 Decision), through which, the highest quarters of the ruling party reemphasized to “form a unified construction land market for both urban and rural areas...allow rural collectively owned profit-oriented construction land to be assigned, leased and appraised as shares, on the premise that it conforms to planning and its use is under control, and ensure that it can enter the market with the same rights and at the same prices as state-owned land.”¹⁹ Hence, the central

¹⁶ See *Zhong gong zhong yang guan yu tui jin nong cun gai ge fa zhan ruo gan zhong da wen ti de jue ding* (Decision of the CCCPC on Certain Issues Concerning the Advancement of Rural Reform and Development), adopted at the Third Plenary Session of the 17th Central Committee of the CPC on October 12th, 2008. Hereinafter “2008 Decision”. At http://www.gov.cn/jrzq/2008-10/19/content_1125094.htm, visiting date 2013.07.02.

¹⁷ According to “Land Administration Law” art.43, the collective profit-oriented construction land that is lawfully obtained is collective land for building township or town enterprises.

¹⁸ Beyond the scope of urban construction land determined by land-use planning, with government’s approval, constructing non-public interests projects can occupy rural collective land, in which, farmers are allowed to participate in the development and operation in various ways according to law and farmers’ legal rights shall be protected. Gradually establish a unified urban and rural construction land market. As for the legally obtained rural collective profit-oriented construction land, the construction land-use right shall be transferred in a unified and tangible market and through opening and regulatory means, enjoying the equal rights with state-owned land under the premise in line with the land use planning. See CPC 2008 Decision, Section 3, No.2.

¹⁹ See *Zhong gong zhong yang guan yu quan mian shen hua gai ge ruo gan zhong da wen ti de jue ding* (Decision of the CCCPC on Some Major Issues Concerning Comprehensively Deepening Reforms), adopted at the close of the Third Plenary Session of the 18th CPC Central Committee on November 12th, 2013. Hereinafter

policies shall be enshrined in law and be implemented thoroughly, to coordinate the use of urban and rural construction land, and to provide the legal support for the marketization and equalization of land rights.

1.2 Objects of research and the structure of dissertation

1.2.1 Objects of research

In China, “the State formulates overall plans for land utilization in which to define the purposes of use of land and classify land into land for agriculture, land for construction and unused land”²⁰. The “land for construction” means “land for constructing buildings and other structures, including land for housing in urban and rural areas, for public utilities, for factories and mines, for communications and water conservancy, for tourism and for military installations”²¹. The different usages of the land can be modified. Farmland can be converted into construction land, and construction land can also be converted into farmland. Nevertheless, because of the purpose of protecting arable land, the former conversion is strictly limited. According to land ownership system, land for construction use can be divided into the state-owned and the collectively-owned. The urban state-owned construction land refers to land in built-up areas of cities, for urban housing, for public facilities and public welfare undertakings, for commercial and industrial use. The rural collective construction land refers to the collective non-agricultural land used to build township or town²² enterprises, to build houses for villagers and to build public utilities or public welfare undertakings of a township (town) or village²³.

“2013 Decision”. See CPC 2013 Decision, Section 3, No.11. At http://www.china.org.cn/chinese/2014-01/17/content_31226494_3.htm , visiting date 2014.11.20.

²⁰ See Land Administration Law of China, art.4.

²¹ Ibid.

²² The administrative division of the People's Republic of China is as follows: 1) The State is divided into provinces, autonomous regions and municipalities directly under the Central Government; 2) Provinces and autonomous regions are divided into autonomous prefectures, counties, autonomous counties, and cities; 3) Counties and autonomous counties are divided into townships, nationality townships, and towns. See Constitution of China, art.30.

²³ See “Land Administration Law”, art.43.

Land is a kind of immovable property. What can be traded in land market are the property rights on land. Thereby, what is called “land circulation” is actually the transfer of land rights, which mainly refers to the transfer of land ownership and the right to the use of land, leading to the alteration of the subjects of land rights. Circulation is not a normative concept in the context of market economy. In general cases, the alteration of land rights is termed land transaction in countries exercising system of market economy, meaning the deal of the ownership and use-rights of land in land market.²⁴ In the context of public land ownership in China²⁵, the current legislation doesn’t permit to transfer the ownership of state-owned land, and the ownership of collective land can only be transferred via administrative expropriation. The land ownership in China is non-tradable. In late 1980s, the reform on the usage system of state-owned land created the transferable land-use right, which is an important tool to deal with the non-transferable land ownership in the context of building market economy with Chinese characteristics²⁶. However, if allow the collective land ownership to be transferred among market subjects in a certain scope, it can activate the land market and the integrated economy in urban and rural areas, and can promote the progress of urbanization. Thus, with respect to the discussion, in a narrow sense, the circulation of urban and rural construction land refers to the circulation of the land-use right; while in a broad sense, it also covers the circulation of collective land ownership through state expropriation and state purchase in the market; however, the circulation of the right to use land for construction is the main method for land element to connect with market in China.

The circulation of the right to use land for construction includes the initial circulation and the secondary circulation. The initial circulation of the right to use state-owned land for construction refers to that the construction land-use right is

²⁴ See Cai Jiming, Cheng Shiyong, *Circulation of Rural Construction Land and Changes of Land Property System*, Southeast Academic Research, 2008, (6).

²⁵ This context excludes Hong Kong, Macao and Taiwan.

²⁶ See Gao Fuping, *The Status of the Right to the Use of Land in the Property Law—A Comment on Provisions in the Property Law*, Northern Legal Science, 2010.04, (4).

separated from the state land ownership, exerting functions to possess, to use and to benefit, in order to meet the demand of social development, almost like what land ownership does. There are two means to actualize the initial circulation of the right to use state-owned land for construction under current Chinese land law system. One way is that the department of land and resources under the people's government of a city or a county assigns the land-use right with charge through bid invitation, auction and quotation²⁷, to supply land for commercial operations. The other way is that, according to law, people's government at or above the county level gratuitously allocates²⁸ such right to meet the needs of constructing public projects. The secondary circulation of the right to use state-owned land for construction refers to that the land-use right holder can transfer, exchange, offer as equity contributions, donate or mortgage such right²⁹, leading to the change of right subjects. By contrast, the current legislation does not regulate the market-oriented circulation of the right to use collective land for construction. However, in principle, it can be operated consulting the circulation method to the right to use state-owned land for construction. Through circulation of land rights, the land can be efficiently used, which will realize the rational allocation of land resources, and all parties in the process can respectively achieve their benefits.

In addition, Land Development Rights shall be created. Because the State strictly

²⁷ See Provisions on the Assignment of State-owned Construction Land Use right through Bid Invitation, Auction and Quotation (issued by Ministry of Land and Resources in 2007), art.2: The establishment of state-owned construction land-use right on the land surface, on the ground or beneath the ground by the assignment through bid invitation, auction and quotation within the territory of the People's Republic of China shall be governed by these Provisions. The "assignment of state-owned construction land-use right through bid invitation" as mentioned in these Provisions refers to such an act in which the department of land and resources under the people's government of the city or county (hereinafter referred to as the assigner) releases the bid invitation notice, invites specific or non-specific natural persons, legal persons and other organizations to participate in the bidding of the state-owned construction land-use right, and determines the holder of state-owned construction land-use right according to the bidding results. The "assignment of state-owned construction land-use right through auction" as mentioned in these Provisions refers to such an act in which the assigner releases the auction notice, and the competitive buyers conduct open price competition at a designated time and place, and the holder of state-owned construction land-use right will be determined according to the results of price competition. The "assignment of state-owned construction land-use right through quotation" as mentioned in these Provisions refers to such an act in which the assigner releases the quotation notice, list and announce the trading terms about the land for assignment at a designated land exchange within the term specified in the notice, accepts the quotations of competitive buyers and updates the quotation, and determines the holder of state-owned construction land-use right according to the quotation results at the expiry time for quotation or the onsite quotation results.

²⁸ See Land Administration Law of China, art.54.

²⁹ See Property Law of China, art.143.

limits agricultural land to be converted into construction land, and at the meantime, constrains the free development of collective land. The allocation and transfer of collective land development rights can make up for farmers' loss caused by the limitation on the development of collective land, and can availably solve the problem of social interests imbalance due to different land-use purposes, and may effectively control the illegal conversion of farmland driven by economic interest. Thus the discussion covers the transfer of land development rights.

To sum up, the collective land rights studied in this dissertation include the ownership, the use right and the development rights. It has profound significance to boost the reform of collective land expropriation, of market-oriented circulation of collective construction land, and of the creation of land development rights. Finally, the improvement of land law system and the establishment of integrated construction land market shall be attained.

1.2.2 The structure of dissertation

From the perspective of liberty and restriction of collective land rights in China, this dissertation analyzes the defects of the legislative restrictions on the circulation of the right to use collective land for construction, and the institutional barriers on integrating the circulation of urban and rural construction land-use rights, and discusses how to regulate the expropriation of collective land, how to marketize the circulation of collective construction land under the premise of conforming to the land use planning, and how to operate the mechanism of land development rights, in order to improve the land law system, and to form a unified construction land market for both urban and rural areas.

The structure of this dissertation will be arranged as following:

(1) Review of the current system of circulating urban and rural construction land. Because of the dualistic land administration system, collective land rights manifest

obvious characters with collective status, and the incomplete collective land ownership lacks the right to benefit from and dispose of collective construction land³⁰, resulting in that, with severe restriction, collective construction land can neither be circulated freely in market, nor fully actualize its capital function. Compared with the right to use state-owned land for construction, on an unequal position, the right to use collective land for construction is limited to be circulated in the interior of rural collective economic organizations, which does not comply with the requirement of freely and equally developing in the context of market economy.³¹ Urban-rural integration and market economy demand to fully realize the property attribute of collective land, to grant collective land with complete property rights, to equally deal with urban and rural land rights, and to unify the circulation of urban and rural construction land-use rights.

(2) The reform of the expropriation of collective land. Under current Chinese land law system, all units and individuals that need land for construction purposes, in principle, shall apply for the use of state-owned land,³² and collective land expropriation is the only channel to increase urban state-owned land. However, in fact, the urban construction projects using the expropriated collective land include public interest program and those of non-public interest, such as industrial zones. For a long time, the practice of “expropriation first and use second” blocked the way to circulate collective construction land for non-public construction projects through market means, infringed farmers’ rightful interests, and impeded the effective allocation of land resources. Local government uses administrative power to expropriate collective land, while compensates in a much lower price than market price, and then assigns the “state-owned land” to units demanding construction land in a high charge (market price), which brings about that the farmers suffer from huge damage, and the process of expropriation is fully filled

³⁰ Owners of immovables or movables shall be entitled to possess, use, benefit from and dispose of the immovables or movables according to law. See Property Law of China, art.39.

³¹ The State maintains a socialist market economy and guarantees the equal legal status and the right to development of all the mainstays of the market. See Property Law of China, art.3, par.3.

³² See “Land Administration Law”, art.43. There are three exceptions for the use of collective land for construction purposes.

with social conflicts. Therefore, through the reform of expropriation, to clarify the rational extent of regulation restricting collective land rights, to severely limit the expropriation within the scope of public interest and to rationally compensate, is the basis to promote collective land to be circulated in market and to effectively protect farmers' interests.

(3) The reform of market-oriented circulation of collective construction land. When accomplishing the reform of collective land expropriation, collective construction land will confront how to enter the market to be used for non-public projects. The Decision on Major Issues Concerning Comprehensively Deepening Reforms (2013 Decision of CPC) required to establish an integrated construction land market in China and to ensure that rural collective profit-oriented construction land can enter the market with the same rights and at the same prices as state-owned land.³³ Marketizing the circulation of the right to use collective land for construction is the most important way to ensure the free trade of collective land rights and to realize the rational allocation of land resources. The conditions for collective land to enter the market, the scope and method of collective construction land circulation, and how to distribute the revenue from the circulation of collective land rights among governments, farmers and rural collectives, will be all discussed in this part.

(4) The creation of land development rights. Propelling the circulation of the right to use collective land for construction shall be under the premise of keeping the total area of land for construction under control and of paying special attention to conserve cultivated land. Because of land's attribute of public resource, the US, the UK and some other countries restrict land rights holders to further develop and use lands through legislation, land use planning and land control, meanwhile, within these jurisdictions, the mechanism of the transfer of land development rights can balance those land titleholders' interests. To create and operate land development rights in China, to establish the institution of converting agriculture land into

³³ See CPC 2013 Decision, Section 3, No.11, at http://www.china.org.cn/chinese/2014-01/17/content_31226494_3.htm.

non-agriculture land based on the exercise of land rights, and to recognize the legal status of collective land development rights in Chinese property law system, can effectively protect agricultural land, can make up for farmers' loss due to the severe restriction on the conversion of farmland, can mitigate the social problem of interests imbalance because of the difference of land-use purpose, and can coordinate the development in urban and rural areas.

1.3 Methodology and Innovation

1.3.1 Methodology

(1) Empirical research. Under the support of central polities, lots of Chinese provinces run pilot reforms of collective construction land circulation, and issue local rules and regulations to support pilot projects. Through analysis of these practices in reformational programs and relevant local rules and regulations, this dissertation discusses how to effectively connect the practical requirement of market-oriented circulation of collective land with the legal system. Mature reformational experience, policies, local rules and regulations, shall be adopted by national legislation in time, which will provide legal support for integrative circulation of urban and rural construction land and will promote the development of Chinese land law system.

(2) Economic analysis study. This dissertation analyzes the practical and instructive significance of the economic theory of property rules and liability rules³⁴ to the circulation of urban and rural construction land, and uses the differential rent theory and its method of distributing land incremental revenue to analyze the reasonable distribution of the profits arising from collective land circulation, which will ensure the efficiency and justice for unified circulation of urban and rural construction land, will protect all interested parties lawful benefits, and will reduce the urban and rural

³⁴ See Guido Calabresi and Douglas Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral, Harvard Law Review, vol. 85, 1972.

disparity.

(3) Comparative study. Comparing the system of land expropriation, the system of land development rights, and the relation between government's administrative power and the liberty of private property rights in China with that in some other extraterritorialities, Chinese legislation can take useful reference to reform the circulation of urban and rural construction land and to improve land law system.

1.3.2 Innovation

(1) It is put forward that, according to the principle of equally protecting the property right of the State, the collectives, the individual persons and other obligee,³⁵ the illegitimate restrictions on rural collective land owners due to the "collective status" shall be eliminated, and it shall be promoted to completely recover the property attribute of collectively-owned land and to annul the irrational legal restrictions on the integrated circulation of urban and rural construction land. It has to be clarified that the legitimate basis for restricting land rights could only be the public interest provided for by law, the land-use planning, the contract of land circulation, and the general principle preventing abuse of private rights, through which to actualize the equalization of urban and rural construction land-use rights and the marketization of the right to use collective land for construction.

(2) The property rules and the liability rules in economic theory can be introduced to resolve problems on construction land circulation. The circulation of collective land ownership can be done through government expropriation for public interest and through government purchase with reasonable price for non-public projects. The free circulation of the right to use collective land for construction can be taken as the sally port, to bring compensation standard for expropriated collective land in line with just reward.

³⁵ See "Property Law", art.4.

(3) The prevalent system of land development rights transfer in the U.S. can be taken for reference to establish a similar system in China with Chinese characteristics. Peasants' collective organizations can be granted independent and transferable land development rights, and the transfer of collective land development rights can bring rural collectives with non-agriculture profits. The operation of land development rights mechanism will regulate the conversion of agricultural land into non-agricultural land and the conversion of arable land. The administrative power running mode depending only on rigid land-use planning and land control shall be changed, in order to balance social interests, and to impel sustainable development in urban and rural areas.

(4) Through the reform of collective land expropriation, of marketizing collective land circulation, and of creating land development rights on collective land, promote the establishment of integrative construction land market in both urban and rural areas and the development of land law system in China.

Chapter II Analysis and review of the circulation of rural construction land in China

In China, the ownership of land can never be traded, and only the use-right on land is permitted to be circulated in the market. However, compared with state-owned land right, the collective land ownership is devoid of the right to benefit from and dispose of the land, and the right to use collective land for construction is imposed with more restrictions, both of which result in that collective land cannot be rationally allocated through market. Because of the structural shortage of construction land in urbanization and the requirement of marketizing collective land circulation, to integrate the circulation of urban and rural construction land-use rights is the absolute choice.

2.1 Rights bundle on urban and rural lands

2.1.1 The connotation of land rights

2.1.1.1 The concept and attribute of land rights

“Land” has two levels of significance. In general meaning, land refers to “an immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and everything growing on or permanently affixed to it”³⁶. The second significance refers to “an estate or interest in real property”.³⁷ Land is the material basis for the living and production

³⁶ See Bryan A. Garner, *Black's Law Dictionary* (8th ed. 2004), p2559.

³⁷ *Ibid.* “In its legal significance, ‘land’ is not restricted to the earth's surface, but extends below and above the surface. Nor is it confined to solids, but may encompass within its bounds such things as gases and liquids. A definition of ‘land’ along the lines of ‘a mass of physical matter occupying space’ also is not sufficient, for an owner of land may remove part or all of that physical matter, as by digging up and carrying away the soil, but would nevertheless retain as part of his ‘land’ the space that remains. Ultimately, as a juristic concept, ‘land’ is simply an area of three-dimensional space, its position being identified by natural or imaginary points located by reference to the earth's surface. ‘Land’ is not the fixed contents of that space, although, as we shall see, the owner of that space may well own those fixed contents. Land is immovable, as distinct from chattels, which

of human being. When land ownership came into being in the history, land was granted property function, and a series of property rules formed.³⁸ Land is naturally inseparable with rights, but functions of lands are various because of different land rights systems. The extent of liberty in granting and implementing land rights always affects the exertion and realization of land functions. Land rights' holders can control and use the land to achieve their benefits and the needs of the society, which reveals property functions of land.

In different contexts of jurisdictions, all states enact their own property laws governing the rights on land. In Civil Law System context it is the "law of ownership" and in Common Law System context it is the "law of estate".³⁹ They have differences in conceptions and systems, but the essential functions of land rights in various jurisdictions are similar.

Land rights in Civil Law System context refer to all kinds of rights taking land as the object and set up on land, which include property right on land and obligatory right on land.⁴⁰ Obligatory right of land means the right requesting for delivery of possession of land and for transferring relevant property right of land. While, the property right of land means the right dominating the land and relevant property interests and excluding other's interference.

Land rights generally talked about, always refer to property right of land, and this dissertation also discusses land rights on the aspect of property right. Of all the land rights, what stands in the central position is land ownership, a kind of complete property right and the original right to other land rights, based on which, the land owner is entitled to possess, use, benefit from and dispose of the land according to law. On the basis of ownership, on account of the usage value and the exchange

are moveable; it is also, in its legal significance, indestructible. The contents of the space may be physically severed, destroyed or consumed, but the space itself, and so the 'land', remains immutable." Peter Butt, *Land Law*, p.9 (2nd ed. 1988).

³⁸ See Bi Baode, *Land Economics*, 6th ed. Beijing, China Renmin University Press, 2010, p.7.

³⁹ See John Henry Merryman, *Ownership and Estate (Variations on a Theme by Lawson)*. 48 Tul. L. Rev.916, June, 1974.

⁴⁰ See Cui Jianyuan, *Research on Land Rights*. Beijing, Law Press, 2004, p.1.

value of land, land usufruct and land real right for security⁴¹ are derived. With social development, the focus on land rights system gradually turns from the ownership to the best use of land, and the right types are continuously being various. “General Principles of the Civil Law of the People's Republic of China” (1986) regulates the rights of the State and rural collectives to their lands.⁴² The “Property Law of China” (2007), respectively regulates the ownership, usufruct and real right for security of the state-owned land and the collectively-owned land. Hereinto, usufruct is independent property right enjoyed by a non-owner to possess, use and benefit from the state-owned land or collectively-owned land according to law or contract stipulations, which includes the right to agricultural land contractual management⁴³, the right to the use of land for construction, the right to the use of residential house sites, and easements. Real rights for security refers to that, on the premise of not transferring the possession of land but setting the value of land rights as the security for the debt, the creditor is thus entitled to sell the land rights to realize the creditor’s rights when debtor cannot fulfill obligation on time.

In Common Law System context, “land rights are those property rights that pertain to real estate land. Because land is a limited resource and property rights include the right to exclude others, land rights are a form of monopoly. Those without land rights must enter into land use agreements, since they must reside somewhere. In western culture, land rights are derived from the sovereign.”⁴⁴ Between the two concepts, Ownership and Property, there is not clear boundary. Property refers to the right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel), as well as the right of ownership. It also termed bundle of rights.⁴⁵ Property right can be deemed as an assemblage of many different rights, some of which can be transferred temporarily on the condition of reserving the ownership.

⁴¹ Land usufruct is established on the purpose of developing or using others’ land. Land real right for security is that setting the security on the land owned by one himself or others or on land rights.

⁴² General Principles of the Civil Law of the People's Republic of China, Chapter V Civil Rights, Section 1, Property ownership and related ownership rights

⁴³ See “Property Law”, art.124.

⁴⁴ See “land rights” on web page “the free dictionary”, at <http://encyclopedia.thefreedictionary.com/Land+rights>, visiting date: 2013.07.05.

⁴⁵ See Bryan A. Garner, Black’s Law Dictionary (8th ed. 2004), p3841.

Unless the owner of the property exhausts the property object, the owner will not lose the title to property. Land rights form a bundle of rights centering on usage. What directly attached to the land is not only the ownership, but also the usufruct, including all the obligee's property rights to use the land at present or in the future.

To sum up, land rights are important property rights in all countries, a bundle of rights which can be divided and respectively transferred. "The concept of ownership incorporates not only possessory rights, but also rights to transfer these possessory rights; an owner is usually presumed to be able to sell or give away his property, in which case the acquirer obtains all the possessory rights held by the owner, as well as the rights to transfer these rights."⁴⁶ The liberty area of property law, above all, includes self-use right and, in principle the transfer right and disposal right enjoyed by the owner. It is thus clear that possessing property to obtain interests of use and transferring property to achieve interests of exchange are the two basic aspects of property right, neither of which is dispensable. Transferability is the concrete manifestation of the disposal right, without which it cannot be genuine property right.

2.1.1.2 The liberty of land rights and restriction on land rights

The liberty of land rights refers to that the titleholder can possess, use, benefit from and dispose of his land or land rights, without others' interference. Land rights are property, because the transfer of such rights can promote land to be combined with technology element and capital element to produce wealth, through which the rights holder obtain economic returns. Property rights boost the owner to endeavor his best ability to utilize the property to produce. On the basis of free contract and free trade, property can be freely transferred, and in virtue of operation in market, the highest efficient use of resources can be achieved, which will create more products and services to meet the requirement of social development, so that resources could not be wasted or idle. This meets the greatest advantage of the whole society, and

⁴⁶ See Steven Shavell, *Foundations of Economic Analysis of Law*, The Belknap Press of Harvard University Press, 2004, p11.

this is also the most function that property rights shall achieve.⁴⁷

However, the liberty is not absolute. “Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional powers of those who use it.”⁴⁸ In late 19th century, the social standard thought was in vogue.⁴⁹ Because of the public character and scarcity of land resources, and taking account of the overall interests of the whole society, many countries exercise restrictions on land rights, i.e. that the titleholder shall enjoy and exercise land rights on premise of meeting social public interests. This is not only the titleholder’s social obligation, but also the premise on the normal operation of the market mechanism. Nevertheless, to what shall pay attention is that unilaterally emphasizing social obligation of land ownership easily leads to excessive and illegitimate restrictions on land rights.

Considering that land has the special character of public resource, the legislative restrictions on land rights include restriction in public law and in private law, and the restriction shall have not only the legitimate legal basis, but also rational extent, which could not exceed the boundary of social obligation to maintain the common interests of the overall society. Only combining the limited liberty with the moderate restriction, the balance among the subjects of social interests can be achieved, and social fairness and harmony can be finally realized. To protect land rights, the legislation shall strictly identify and examine the basis of restrictions on land rights, which must be from the foothold of public interest and “limited to the

⁴⁷ See Xie Zhesheng, *Monographic Study on Property Law*, Taiwan, San Min Book Co., Ltd., 1995, p.201-202.

⁴⁸ See *Marsh v. Alabama*, 326 US 501, 506, 66 S. Ct. 276, 278 (1946) (Black, J.). Black’s Law Dictionary (8th ed. 2004), p3503.

⁴⁹ The socialization of ownership theory was derived from the deontology of ownership (Rudolph Ritter von Jhering) and the social solidarism (Léon Duguit) in late 19th century. Jhering thought that the purpose of exercising ownership shall not only for the owner’s interest, but also for social interest; the titleholder’s ownership has a function to be beneficial to the society, so it shall earn others’ respect. Duguit held the opinion that, living in the society, a person as an independent individual has the special personal character, and as a member of the society, the person has social solidarity. Since Weimar Constitution (1919, Germany), lots of countries discarded the ideas that private property, without any restriction, has absolute liberty, turning to advocate necessary restriction to private property rights. Weimar Constitution, art.153: Property is guaranteed by the Constitution. Laws determine its content and limitation... Property obliges. Its use shall simultaneously be service for the common best.

necessary extent”⁵⁰. The free transfer of land rights and the freedom of land development are generally restricted through land expropriation, land use planning, legislation of environment protection and interested parties’ agreement on easement burden, etc., to ensure that, when land rights are freely exercised, social interests and others’ rightful interests can be taken into account. Because of the difference in historical backgrounds and the political and cultural traditions, legislative routes on the protection of private property rights reveal different features between China and other countries. “Occidental countries go through the route from absolute protection to relative protection, and China experiences from negation and no protection to recognition and protection. Finally, in these countries there is a common trend that the protection and restriction on private property rights are in a dynamic balance.”

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2.1.2 The ownership of collective land

2.1.2.1 The ownership

In China, the ownership of state-owned (owned by the entire Chinese people) land refers to the State has the rights to possess, use, benefit from and dispose of the state-owned land, which is complete property right. Departments of land and resources under the people's government represent the State to exercise the rights. Of all the above mentioned rights, the right to dispose is the comparatively more important right. The State separates land-use right from state land ownership, transfers it as a kind of independent property right to land-use units, and obtains land assignment charge as land revenue to increase local public finance. According to the Constitution and “Regulations on the Implementation of the Land Administration Law of the People’s Republic of China”, the state-owned land ownership covers the following areas⁵²: (1) land in urban districts; (2) land in rural

⁵⁰ See Xie Zhesheng, *Freedom and Limits of Real Property*, China Legal Science, 2006, (3).

⁵¹ See Shi Youqi, *Choice of Ways to Protect Private Property Ownership by Public Law*, Journal of Jiangnan University (humanities sciences), 2005, Vol.24, (2).

From 1986, in which year the General Principles of the Civil Law of the People’s Republic of China was enacted, the State started to recognize and protect people’s private rights.

⁵² See Regulations on the Implementation of the Land Administration Law of the People’s Republic of China,

areas and suburban districts that have been confiscated, expropriated or purchased according to law and turned into state ownership; (3) land requisitioned by the State according to law; (4) forest land, grassland, barren land, shoals and other land not under collective ownership according to law; (5) land previously under collective ownership by the members of a rural collective economic organization whose entire membership have become urban and township residents;⁵³ and (6) land previously under collective ownership by the migrated peasants but no longer in use after the peasants' collective migration and shifting due to state-organized migration or natural disasters.

The ownership of collectively-owned land refers to farmers' collective has the rights to possess, use, benefit from and dispose of the rural and other collectively-owned land. According to "Land Administration Law of China", Land in rural and suburban areas is owned by peasants' collective, except for those portions of land which belong to the State as provided for by law; residential house sites and private plots of cropland and hilly land are owned by peasants' collectives.⁵⁴

Compared with state-owned land ownership, collectively-owned land ownership was born with restrictions. Some scholars hold that, state land ownership is absolute right enjoyed by the State as the owner and exercised by the representatives to state-owned land; while, collective land ownership is dominant right enjoyed by peasants' collectives of rural collective economic organizations in accordance with law to the collective land, but restricted by law.⁵⁵ The different

art.2.

⁵³ According to Regulations on the Implementation of the Land Administration Law of the People's Republic of China, art.2, No.5, the collective land can be turned into state-owned land through administrative order but not expropriation. The farmers will thus get the urban household registration automatically, but the cost is deprived of the transfer interest of collective land. In practice, some local governments take "rural registered residence converting into urban registered residence" project to expand cities in an extremely low price, which seriously infringes the interests of farmers. Therefore, this clause gets repeated criticism. In the author's opinion, there is no doubt that the previous collective land turns into state-owned land after the collective set is annulled, but the legislation shall provide that after the annulling of collective set, the previous collective land can turn into state-owned land only on the premise of compensating the farmers in an appropriate price.

⁵⁴ See "Land Administration Law of China", art.8.

⁵⁵ See Wang Weiguo, *Research on the Construction of Legal System of Land Rights in China*, Beijing, China University of Political Science and Law Press, 2002, p.228 and 237.

definitions root in the fact that the collective land ownership is restricted excessively and is deprived of the right to freely dispose of and benefit from the land. The disparity of collective land ownership and State land ownership in legal status is the source of the imperfection of collective land rights, the root of administrative power determining the disposal of collective land and the reason of one-way circulation of collective land ownership.⁵⁶ The legislative spirit of Chinese “Property Law” shall grant the state, rural collectives, individuals and other property right owners with equal legal status in market economy context; according to “Property Law”, art.39⁵⁷, collective land ownership shall be a kind of complete property right, enjoying all the powers and functions of property right, and there shall not be illegitimate disparity between state and collective land ownerships. The current relevant land administrative legislation is based on the value choice of the thought of planned economy system, which shall be adjusted in time, to ensure collective land ownership become the really complete property right, equal with state land in powers and functions.

2.1.2.2 The subject of collective land ownership

As for the subject of collective land ownership, since the accomplishment of socialist transformation in China in 1956, relevant legislative provisions have been different in different periods, and it is difficult to exactly define the subject of collective ownership. Collective is a concept with extensive meaning but not precise connotation, which refers to an organizational entirety gathering a lot of people. So, the subject of collective land ownership is an abstract organization. According to Regulations of the State Council on Administrative Division Management and other regulations, the rural collective, as the owner of collective land, is arranged through delimiting the boundary of the rural region. This institutional arrangement that determines the scope of a rural collective simply through administrative measure, further shakes the definition and the stabilization of the subject of collective land ownership. “Property Law”, art.59 elaborates that

⁵⁶ See Liu Jun, *Research on the Theory of Chinese Land Law*, Beijing, Law Press, 2006, p.137.

⁵⁷ See Property Law of China, art.39.

“the immovables and movables collectively owned by the farmers belong to the members of the collective”⁵⁸, which affirms that the essence of farmers’ collective ownership is a kind of members’ collective ownership. In accordance with law, members of rural collective organization, through exercising the right to make significant decision, to be distributed with proceeds, to know the finance, to appeal and other members’ rights, can in common possess, use, benefit from and dispose of collective property. This institutional design can, in a certain extent, resolve the problem of the vacancy of collective land rights’ subjects. However, because the subject system of the collective land ownership is the consequence of the movement to form People's Communes⁵⁹ in rural areas in the history but not the design according to civil right system, the problem cannot be really resolved when farmers, the real subjects of rural land rights, exercise collective land rights.

After the foundation of the People’s Republic of China, the government gratuitously allocated the previous landlords’ and rich peasants’ land to farmers through land reform. “The Common Programme of the Chinese People’s Political Consultative Conference” (promulgated in 1949, as interim constitution, art.27), “Land Reform Law” (1950, art.30), Constitution (1954, art.8) confirmed that rural land was privately owned by individual peasants. In the end of 1952, the Chinese Communist Party put forward the “the General Line in the Transition Period”, and in 1953, China started the socialist transformation of agriculture, handicraft industry, and capitalist industry and commerce, and began to implement the policy that realizes industrialization and gives priority to the development of heavy industry. In 1956, a new upsurge of agricultural cooperatives was set off in the rural, and rural land began to be collectively owned by these agricultural cooperatives; and in 1958, supported by central policy, the whole country began to carry out the People's Commune Movement, and almost all the previous private rural lands were completely converted into collective land. After the transformation, the most

⁵⁸ See “Property Law”, art.59.

⁵⁹ See Wang Weiguo, *Research on the Construction of Legal System of Land Rights in China*, Beijing, China University of Political Science and Law Press, 2002, pp.95-96.

important reason of that the rural lands were owned by peasants' collectives but not nationalized was to conductively develop rural productivity and to facilitate the State to control the agricultural surplus to flow to non-agricultural sector in lower costs and in unobstructed channels.⁶⁰ Therefore, farmers had to transfer the private land ownership to People's Commune when joining in the Commune. Land owned by people's commune is that owned by peasants' collective. It is thus obvious that, collective ownership was the product of the Chinese Communist Party's historical policy that anxiously realizes socialism and industrialization in China, and was "an institutional arrangement of rural socialist movement that the State controlled but rural collectives endured the consequence arising from state's control."⁶¹ "Collective land ownership" is the result of political movement, and it is impossible to comply with the traditional civil law theory to construct the subject of civil rights. The vacancy of collective land ownership's subject, the incomplete powers and functions of collective land rights and a series of other drawbacks are all due to its political rather than right-oriented background in history, and make it difficult to restructure the subject of collective land ownership corresponding to civil right system.

Some scholars propose the nationalization reform of collective land⁶²; some scholars suggest the privatization reform of collective land⁶³; as well as scholars put forward to restructure the subject of collective land ownership comparing with juridical person of share cooperative in civil formation⁶⁴, etc. Nevertheless, at present, the nationalization reform and privatization reform of collective land involve the fundamental transformation of land ownership and the alteration of Constitution's corresponding provisions, while, China does not have the political and economic base to change the collective ownership. On the premise of reserving

⁶⁰ See Dong Zhikai, *Mao Zedong and New China's Economic Construction*. Journal of the Party School of CPC Ningbo Municipal Committee, Vol.26, No.2, 2004.

⁶¹ See Zhou Qiren, *Property Rights and Institutional Transition*, Beijing, Peking University Press, 2004, p.7.

⁶² See Wang Weiguo, *Research on Chinese Land Rights*, Beijing, China University of Political Science and Law Press, 1997, p.108.

⁶³ See Cai Jiming, *Land Ownership System Shall Be Diversified*, at <http://www.china.com.cn/chinese/jingji/294407.htm>, visiting date 2013.07.08.

⁶⁴ See Gao Fei, *Research on Civil Construction of the Subject of Collective Land Ownership*, Journal of Studies in Law and Business, 2009, No.4.

the collective ownership, “Law on Land Contract in Rural Areas” (2003) restructured farmers’ property rights on farmland through granting farmers right to agricultural land contractual management. So, there is feasibility to restructure the property rights on collective construction land through market-oriented circulation of the right to use collective land for construction. In practice, the censure of collective land ownership is mainly due to that powers and functions of collective land rights are fragmentary, and farmers, the real owners of collective land, cannot sufficiently achieve the rightful interests from collective land. Therefore, as long as the liberty of collective land rights and farmers’ lawful interests get fully protected, the debate on the transformation of collective land ownership can be laid aside. The gradual reform that completely recovering collective land ownership and land-use right, to let farmers’ collectives obtain land’s capital interests through market-oriented circulation of collective construction land, and based on which, to restructure the subject system of collective land ownership and to effectively protect farmers’ rights of disposing of and benefitting from collective land, can cost fewer and be realized faster than other routes.

2.1.2.3 Exercise of collective land ownership

Exercising rights and enjoying rights are different: the former is the description of realizing the right content from a dynamic aspect, and the latter one analyzes the interests protected by law and actually enjoyed by the obligee in a static aspect. Land circulation is a dynamic process that land rights holders exercise the right of disposing of land to realize the benefit right. The Chinese “Property Law”, art.60 distinguishes the owner of collective land and the representatives exercising collective land ownership⁶⁵. Farmers’ collective is the owner of collective land, which includes the collective of farmers of a village, those two or more collectives of farmers within a village, and the collective of farmers of a town or township. The corresponding representatives are: the collective economic organization of the village or the villagers committee, the respective collective economic organizations

⁶⁵ Property Law of China, art.60.

or villagers' teams concerned within the village, and the collective economic organization of the town or township. Representatives exercise the rights to possess, use, benefit from and dispose of the collective land on behalf of the farmers' collective. Due to the foregoing representatives cannot correspond to civil subjects' category in "General Principles of the Civil Law", and, as private law norms, the "Property Law" is impossible to regulate how to generate the collective representatives and these representatives' behavior patterns. In practice, the villagers committee generally exercises collective land rights on behalf of farmers' collective.

The villagers committee is autonomous organization at the grass-roots level, in which the villagers manage their own affairs, educate themselves and serve their own needs and in which election conducted, decision adopted, administration maintained and supervision exercised by democratic means.⁶⁶ For a long time, the election of villager committee members and the decision on relevant significant events in a rural collective could not completely represent the true public opinion, so that farmers cannot effectively use the power of the organization to negotiate with the outside or protect their own rights and lawful interests. And in practice, sometimes villagers committees are controlled by local governments or become a tool for a minority of persons to seek profits. "Organic Law of the Villagers Committees", amended in 2010, further improves the democratic procedure system⁶⁷, provides for the composition, the convention, the authority and other matters of villagers committee and villagers assembly, and provides for that villagers assembly has right to revoke or change inappropriate decisions of the villagers committee, all of which help the exercise of collective land ownership to reflect farmers' interests. However, the procedure of representatives exercising collective land ownership must be regulated, which shall include the convening procedure of collective members assembly, voting procedure, minority's relief

⁶⁶ See Organic Law of the Villagers Committees of the People's Republic of China, art.2.

⁶⁷ Ibid., art.21, 22, 23.

procedure, the execution and monitoring procedure of daily affair,⁶⁸ to protect farmers' subject status of collective ownership in the use and circulation of collective land.

2.1.2.4 The disparity between state land ownership and collective land ownership

The State, with dual identities, is not only the ownership subject of state land but also the administrative subject of land resources administration. As a civil subject, the State is entitled to state land ownership, can separate land-use right from the ownership, and can assign the use-right to other market subjects with land assignment charges to develop economy; as the administrative subject, according to law, the State exercises administrative power to land-use, formulates and implements urban and rural planning to control land-use, and guarantees the rational allocation of land resources and the development of society and economy. The exercise of state land ownership by people's governments and land administration departments at each administrative level embodies in that: (1) as for state-owned land lawfully occupied by official organs, enterprises, institutions and social organizations as legal persons, and individual citizens, people's governments at or above the county level shall, according to law, handle the registration and record, upon verification, issue certificates to confirm their rights to the use of such land and charge for land-use fees; (2) the authority assigns the right to use state-owned land with charge, or gratuitously allocates such right;⁶⁹ (3) the authority concerned may, with the approval of the people's government that has originally approved the use of land or that possesses the approval authority, take back the right to the use of the state-owned land.⁷⁰ As long as corresponding to land use planning, any type of construction project could be permitted.

In comparison, the exercise of collective land ownership suffers from more

⁶⁸ See Yang Daixiong, *Construction of the Procedure of Rural Collective Land Ownership and Its Limitation: Prerequisite Reflection on the Circulation System of Rural Land Rights*, Legal Forum, 2010 Jan., No. 1 (Vol. 25).

⁶⁹ See "Land Administration Law", art.54.

⁷⁰ See "Land Administration Law", art.58.

restrictions, and cannot fully reflect the property attribute of collective land. (1) Collective land ownership can only be coercively expropriated by the State administrative authority, but not freely circulated in market. The right of disposal is deprived. (2) Collective construction land can only be used to build township or town enterprises, houses for villagers and public utilities or public welfare undertakings of a township (town) or village,⁷¹ but not for other construction, especially banned for real estate development. Therefore, the freely transferable right to use collective land for construction cannot be separated from collective land ownership, and land rights are devoid of disposal right and benefit right. (3) Strict land use control particularly restricts the conversion of land-use type from agricultural land to non-agricultural land. It is thus clear that, in the current system of Chinese land law, collective land ownership which becomes to “incomplete ownership” is not for the sake of making concession to public interest. Compared with state land ownership, the powers and functions of collective land ownership are incomplete, which results in that the property attribute of collective land ownership is concealed, and that farmers are unable to take land as capital to participate in the urbanization, as well as that market-oriented allocation of land resources through the circulation of land rights are hindered. Therefore, three characteristics of rural collective land ownership emerge out: “the incompleteness of farmers’ collective land ownership, the expansion and arbitrariness of that the State monopolizing the disposal right of collective land, as well as the deprivation of farmers’ substantial property rights, all of which consist of the institutional factors that lead to farmers’ poverty of land property rights.”⁷²

The main causes for the legislation severely restricting collective land ownership are as follows. (1) The collective land ownership formed as the consequence of a political movement, was not structured according to civil right system, unable to be granted complete powers and functions of land ownership, leading to its innate

⁷¹ See “Land Administration Law”, art.43.

⁷² See Hong Zhaohui, *Chinese Farmers’ Poverty in Land Property Rights*, at <http://wenku.baidu.com/view/bd4b4436ce06eff9aef8078b.html>, visiting date 2013.07.08

deformity of capability. (2) The dual structure of land system under the institution of urban-rural divisional administration was “to realize industrialization as soon as possible through retaining collective land ownership and utilizing the price scissors of industrial and agricultural products.”⁷³ In the early years, the State regulated collective land rights from the legislative considerations of giving priority to the development of industry with the rural supply, so that the status of collective land ownership was subordinate to state-owned land ownership, leading to that the two types of ownerships were actually in unequal status. “Urban Real Estate Administration Law” (1994, art.8) and “Land Administration Law” (1998, art.43 and 63) provide for “expropriation first and use second” to peasants’ collective construction land, which expresses such legislative guidelines: in China's historical process of industrialization and urbanization, maintain the constitutional principle that urban land is owned by the State; retain the State monopoly of the primary market of urban construction land, and the monopolization of the huge differential rent of urban construction land.⁷⁴ (3) Because of the vacancy of subject of collective land ownership, farmers cannot get earnest support from the unsound system of collective economic organization to claim the liberty of collective land rights, and have to endure illegitimate legislative restrictions.

To all members of a rural collective, the collective ownership is public right, but to the whole society it is private right.⁷⁵ Collective land ownership is a system with Chinese characteristics, which is neither the derivative of state land ownership, nor affiliating to the State land ownership, but independent civil right.⁷⁶ From the view point of private rights’ relationship, all rights’ subjects shall be on an equal status, as well as the legal protection shall be same; private rights can be restricted because of public interest according to law, but shall not be discriminatory based on the

⁷³ See Qiao Xinsheng, *On the Legal Problem of the Circulation of Rural Collective Construction Land: Analysis and Revelation About Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes*, China Land, No.10, 2005.

⁷⁴ See Li Kaiguo, “Expropriation first and use second” for Urban Construction Land: A Perspective of Justice and Efficiency, *Modern Law Science*, Vol.29, No.4, 2007.

⁷⁵ See Liang Huixing, *Research on Chinese Property Law*, Beijing, Law Press, 1998, p.267.

⁷⁶ See Gao Shengping and Liu Shouying, *Modification on Land Administration Law in the Context of Property Law*, China Land Science, Vol.22, No.7, 2008.

status of their subjects; state land ownership and collective land ownership shall be equal private rights with same right contents. In China, the core of current social and economic reform is to “separate the transferable property right system from the traditional system in which political powers and economic rights are mixed. While, there are two tasks involved: one is the property right transformation of public property, and the other is to restructure private rights system, and to radicate the legal status of private rights.”⁷⁷ Therefore, the collective land ownership and use-right shall be restructured as genuine property right, to get complete property right functions in the market economy context. Collective land rights shall be granted the equal legal status and liberty to state-owned land rights.

“Land Administration Law” severely restricts the market-oriented circulation of collective land. “The value of property should be reflected in circulation. Prohibiting circulation equals to stifle the property itself.”⁷⁸ “Property Law” confirms that owners of immovables are entitled the complete rights to possess, use, benefit from and dispose of the immovables according to law.⁷⁹ It can be said that, before 2007, in which year the Property Law was promulgated, Chinese farmers did not really enjoy land property rights in the sense of modern civil law. “Chinese traditional ethical-legal value system which was in patriarchal standard and mixed law and morality in the melting furnace dilutes the significance of the modern civil law on the appeal of land property rights.”⁸⁰ The Property Law reflects the practical appeal to recover the complete powers and functions of collective land ownership, but it is difficult to get implemented due to the lack of specific and concrete arrangements.

⁷⁷ See Gao Fuping, *Real Right Law in China: Institution Design and Innovation*, China Renmin University Press, 2005, p.65.

⁷⁸ See Jiang Ping, *Protection of the Private Property Rights*, Justice of China, No.7, 2004.

⁷⁹ See “Property Law”, art.39.

⁸⁰ See Gong Pixiang and Xia Jinwen, *History and Reality: Modernization of the Chinese Legal System and Its Significance*, the Jurist, Vol.43, No.4, 1997.

2.1.3 The use-right on land for construction

In the context of public ownership in mainland China, the current legislation doesn't permit to transfer the ownership of state-owned land, and the ownership of the collective land can only be transferred via administrative expropriation. The ownership of Chinese land is non-tradable. In the process of developing market economy system, different land-use rights can be separated from the two kinds of public land ownerships through restructuring public land ownership as property right to join in the market. The land granted with construction land-use right can be supplied for construction development, and the land granted with right to agricultural land contractual management can be operated for agriculture.

It is elaborated in "Property Law" that, in exercising his rights, the usufruct shall observe the provisions of law governing the protection and reasonable exploitation and utilization of resources; the owner shall not interfere with the exercise of rights by the usufruct holder.⁸¹ Separated from land ownership, the core value of the right to use land for construction lies in its liberty to exercise these rights; unless in accordance with mandatory provisions of law, these rights, which have independent property right attribute, shall not be restricted or be deprived. For this reason, it is feasible to make the land circulation system established under the public ownership of land. "In the institutional level, construction land-use right in China actually plays a role bearing social functions like what the land ownership under the context of private ownership bears, which is the foundation and core of land use. It is thus determined that, from the perspective of land development and utilization, the right to use land for construction takes a significant status in Chinese land rights system."⁸² Therefore, the circulation of Chinese construction land mainly refers to the circulation of the right to use land for construction.

2.1.3.1 The concept and connotation of the right to the use of land for construction

⁸¹ See "Property Law", art.120.

⁸² See Sun Xianzhong, *the General Theory of the Real Right Law in China*, Beijing, Law Press, 2003, pp.74-75.

Literally, the right to the use of land for construction refers to the right to utilize other owners' land to construct buildings and structures. To accurately define the concept and connotation of the right to the use of land for construction, it shall be firstly clarified that the relationship between it and land-use right. Because of the transition of relevant land legislation and the mixed use of some legal norms, the relevant provisions in "Property Law" (promulgated in 2007) and that in "Land Administration Law" (hereinafter LAL, promulgated in 1986 and lately amended in 2004) are different.

Concepts and connotations of the "right to use land for construction" and "land-use right" in "LAL" are chaotic. According to "LAL", art.11 and "Regulations on the Implementation of LAL", art.4, in rural areas, the right to the use of land for construction refers to the right to develop and construct on collectively-owned land, i.e. that land owned by peasants' collectives to be lawfully used for non-agricultural construction shall be registered with and recorded by people's governments at the county level, which shall, upon verification, issue certificates to confirm "the right to the use of the land for construction." But, according to "LAL" art.55 and 58⁸³, the right to utilize state-owned land for development and construction is defined as "the right to the use of the State-owned land". At the same time, the connotation of "the right to the use of land" in "LAL" is mixed. Sometimes, it means "the right to the use of land for construction", as art.11 par.3, art.55, 56, 57, 58; and sometimes it refers to the general meaning of "the right to the use of land", as art.12, art.16.

The "Property Law" art.135⁸⁴ uses the terminology, "the right to the use of land for construction", whose object is limited to the land owned by the State. Meanwhile, the "Property Law" also provides the right to agricultural land contractual

⁸³ See "LAL" art.55 par.1 elaborates: "A construction unit that obtains right to the use of State-owned land by such means of compensation as assignment shall, in accordance with the rates and measures prescribed by the State Council, pay, among other charges, compensation for use of land such as charges for the assignment of land-use right, before it can use the land." Art.58 provides the conditions to "take back the right to the use of the state-owned land". "Regulations on the Implementation of LAL" art.5 also defines the right to use state-owned land for development and construction to "the right to the use of the state-owned land".

⁸⁴ It elaborates: "A person who enjoys the right to the use of land for construction shall, according to law, possess, use and benefit from the land owned by the State, and shall have the right to use the land for erecting buildings and structures and the facilities attached to them."

management and other land-use rights. Therefore, in the framework of “Property Law”, “land-use right” shall be understood as the meaning of creating a serious of usufructuary rights on the land, and it shall be the upper-seat concept of the right to agricultural land contractual management (only on collective farmland), the right to the use of land for construction (only on state-owned land) and the right to the use of residential house sites (only on collective land), while, it shall also cover the land-use right in the attribute of obligatory rights.

However, the expression of “the right to the use of land for construction” is not rigorous. (1) In “Property Law”, the right to the use of land for construction refers to the right to the use of “state-owned land” for construction. In Chapter 12 (title: the right to the use of land for construction), art.135 to 150, all these articles provide the right to the use of “state-owned land” for construction, but art.151 provides for the quotative norm of collective land for construction use⁸⁵, which results in the chaotic logic in the connotation of the right to the use of land for construction. In the chapter of the right to the use of land for construction, there are “the right to use land for construction” and “the right to use collective land for construction”. (2) Art.135 regulates construction land-use right based on the object of construction land-use right, i.e. state-owned land. But art.183 regulates the right to the use of land for construction enjoyed by a town (township) or village enterprise (pointing at collective land), which is based on the subject of construction land-use right. Within a law, there are two distinguishing standards⁸⁶, and the disunity of standards leads to the semantic confusion. (3) Because of the two kinds of ownerships, the two appellation terms, the “right to use state-owned land for construction” and the “right to use collective land for construction”, which have been used for a long time in practice, shall be corresponding. But the legislation rigidly limited the object of construction land-use rights to the state-owned land, easily leading to confusion in practical application. To sum up, in the context of the integration of urban and rural areas, directly arranging collective

⁸⁵ See Property Law, art.151.

⁸⁶ See Property Law, art.135, 183.

construction land as the object of the right to the use of land for construction, and integrating urban and rural construction land-use right in “Property Law”, shall be the trend of reform.

Meanwhile, “Property Law” art.136 adopts the legislative pattern from Civil Law System to create land space right, which elaborates that the right to the use of land for construction may be separately created on the surface, above or under the ground. This was the first time to confirm the rights to use the space above and under the land on legislative level in China, allowing the creation of construction land-use right on the surface, above or under the ground to meet the tridimensional development requirement.

2.1.3.2 The scope of use right on collective land for construction

According to “Land Administration Law”, the right to use collective land for construction refers to the use right set on collective land for construction use, generally including the rights to use collective construction land to build township or town enterprises by collective economic organizations, to build houses for villagers, and to build public utilities or public welfare facilities of a township (town) or village.⁸⁷ Recognized by “LAL”, these types of building projects using collective construction land that exist as exceptions of the principle that all units and individuals needing land for construction shall apply for the use of state-owned land.⁸⁸ In context of “LAL”, the right to use collective land for construction is in a broad sense.

“Property Law” arranges “the right to the use of residential house sites” (in rural area) as an independent kind of usufruct into a single chapter, juxtaposed with the chapter of right to use land for construction. So, the concept of the right to the use of collective land for construction in “Property Law”, excluding the right to the use of residential house sites, is in a narrow sense. Based on farmers’ special status of

⁸⁷ See “Land Administration Law”, art.43.

⁸⁸ Ibid.

rural collective members, the right to the use of residential house sites is gratuitously allocated to farmer members by collective organization. Characteristics of the right to use residential house sites, such as free charge, collective status and some kind of welfare in arrangement, reflect the legislative purpose of protecting peasants' social security and living guarantee, which are different from general characters of construction land-use right, but these special characters shall not deny the essence of the right to the use of residential house sites as the right to use collective land for construction. And the integration of urban and rural areas will result in that farmer becomes an occupation choice, but not status choice. So, the status character of the right to the use of residential house sites could be gotten rid of from legislation, and the right to the use of residential house sites could be regulated in the chapter of right to use land for construction in "Property Law", to unify the powers and functions and circulation rules of urban and rural construction land-use right.

To conclude, the right to use collective land for construction has the same attributes with the right to use state-owned land for construction in essence, but because of the urban and rural dualistic administration, they are regulated in accordance with different legislative norms. So, construction land-use right shall be defined according to the usage of land and the content of right, and shall include the right to use state-owned land for construction and the right to use collective land for construction; right to use collective land for construction shall include the right to the use of residential house sites and others. In this dissertation, the demonstration of the right to use collective land for construction applies to the right to the use of residential house sites.

2.2 Restrictions on the circulation of the right to use collective land for construction

2.2.1 The institutional transition of the circulation of rights to use state-owned and collectively-owned lands for construction

After the foundation of the People's Republic of China, there were three times of land reforms.⁸⁹ Because of the "Reform and Opening-up" from 1978 to now, nowadays in rural areas, the right to agricultural land contractual management is almost accomplished to be restructured as independent usufruct, and the circulation of such right presents a trend of diversified development⁹⁰. But the legislation relating to the circulation of the right to use collective land for construction, which is also usufruct on collective land but only for different type of land-use compared with the right to agricultural land contractual management, is seriously lagging behind, unable to adapt to social and economic development.

2.2.1.1 A review on the institutional transition of the circulation of the right to use state-owned land for construction

In the context of planned economy system, state-owned land and collective land were gratuitously allocated by the State to be used, and the allocation of land resources was in plan. The Law on Chinese-Foreign Equity Joint Ventures (promulgated in 1979) made a try of compensated use of land. But under the

⁸⁹ The first time of land reform, started in 1950, was to confirm that rural land was privately owned by individual peasants. The second time of reform, which started in 1953, through socialism movements, especially Agricultural Cooperative and People's Commune, converted farmers' land ownership into collectively-owned ownership. The third time of reform, which started from the third plenary session of the 11th central committee of the Communist Party of China in 1978 and with the overall design of China's Reform and Opening-up, granted farmers with rights to agricultural land contractual management.

⁹⁰ The transition of the circulation of the right to agricultural land contractual management from not being permitted to being permitted; the circulation form from single form (subcontracting) to diversity (subcontracting, exchanging or transferring); from gratuitous circulation to compensated circulation; from enclosed type (among farmers internal one collective) to enclosed type and open type coexisting; the circulation permitted areas expands from the eastern coastal areas to middle and western inland areas; the time limit from short-term to short-term and long-term coexisting; from restricted to restricted and free coexisting; the protection of circulation parties' rights from obligatory right to obligatory right and property right coexisting; from regulated only by policies to regulated by policies and laws and mainly by laws; relevant legal provisions are more normative. And it has been persisted that the land ownership and agricultural usage cannot be changed.

principles of 1982 Constitution, both “Land Administration Law” (1986) and “General Principles of the Civil Law” (1986) banned the rent and transfer of land. The characteristics of land use system were gratuitous, dateless and non-transferable.

With the deepening of China's economic reform and the transition of planned economy to market economy, the circulation of land element gradually got recognized by the institution. In 1987, the mainland China took the land leasehold institution in Hong Kong as reference and began to reform the usage system of state-owned land for construction, aiming at opening the urban land market. In 1987 Apr., the State Council for the first time proposed the policy that land-use right could be transferred with charge, and at the same time, pilot reforms were set in Tianjin, Shanghai, Guangzhou and Shenzhen these four cities. In 1988, the constitutional amendment, art.10 par.4⁹¹ annulled the stipulation that land could not be rented, and added “the rights to the use of land may be transferred according to law”, which was the first time to confirm its legal status in legislation.

Compatible with the constitutional amendments, in 1988 Dec., “LAL” art.2 added “the State applies, in accordance with law, a system of compensated use of State-owned land” and “land-use rights of the state-owned and collectively-owned land can be transferred in accordance with law. The specific measures of land-use right transfer shall be formulated by the State Council separately.” Accordingly, taking compensated circulation of urban construction land as a breakthrough of the reform, the State Council made “Interim Regulations Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas” in 1990, beginning to practice the land leasehold institution which was based on separating the ownership and use right of land and took compensated assignment of

⁹¹ Before the amendment in 2004, the Chinese Constitution, art.10 par.4 provided: No organization or individual may appropriate, buy, sell or otherwise engage in the transfer of land by unlawful means. After the amendment, it provides: No organization or individual may appropriate, buy, sell or otherwise engage in the transfer of land by unlawful means. The right to the use of land may be transferred according to law.

the right to use state-owned land for construction as the characteristic.⁹² Thus, the reform of the institution of state-owned land use, from the “gratuitous, dateless and non-transferable” characteristic to the “compensated, terminable and transferable” characteristic, removed the legal obstacles. In 1994, “Urban Real Estate Administration Law” elaborates “the land-use right may be granted by means of auction, bidding or agreement between the two parties. For land used for commercial, tourism, recreation and luxury housing purposes, where conditions permit, the means of auction or bidding shall be adopted; where conditions do not permit and it is impossible to adopt the means of auction or bidding, the means of agreement between the two parties may be adopted.”⁹³ From then on, the circulation system of urban construction land-use right was almost formed.

The circulation of the right to use state-owned land for construction brought the quickly value-added effect of land transaction, leading to the abuse of power rent-seeking and the black-box operation behavior. Gradually the State made a series of policies and regulations to regularize the circulation means of the right to use state-owned land for construction, and the compensated circulation gradually became openness and standardization. In 2002, the Ministry of Land and Resources promulgated “Provisions on the Assignment of State-owned Construction Land-use Right through Bid Invitation, Auction and Quotation”, which elaborates: “with respect to the land for commerce, tourism, entertainment, commercial housing or other business operations, or on which there are two or more intending land users, the assignment thereof shall be conducted through bid invitation, auction or quotation”,⁹⁴ stopping the assignment manner of agreement. And in 2007, the land use for industry was added in art.4, promoting the extent of marketization.

It is visible that, the circulation of the right to use state-owned land for construction,

⁹² See “Interim Regulations Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas”, art.2.

⁹³ See “Urban Real Estate Administration Law”, art.12.

⁹⁴ See “Provisions on the Assignment of State-owned Construction Land-use Right through Bid Invitation, Auction and Quotation”, art.4.

a mandatory institutional transition launched by the state, adapts to the needs of economic development. It took 9 years from attempting land compensated use in 1979 to permitting the circulation of land-use right according to Constitution amendment in 1988. And it only took 6 years from the circulation getting support of Constitution to the formation of a relatively complete circulation system in 1994. In comparison, the legislation pace on the circulation of the right to use collective land for construction is obviously lagging far behind.

2.2.1.2 The institutional transition of the circulation of the right to use collective land for construction

Before 1978, in which year the Reform and Opening-up started, the legislation and policies definitely prohibited the circulation of collective construction land. With the deepening reform in rural areas, the requirement of collective land-use grew rapidly, as well as the spontaneous circulation of collective land. In 1985, central policies began to permit collective land to circulate in a certain extent⁹⁵. In 1988, the amendments of Constitution and Land Administration Law supported the circulation of collective land-use right. But due to the strategy of agriculture supporting the development of industry in priority and the more complex situations in rural areas, the State chose the state-owned land as the breakthrough to exercise the reform of the circulation of construction land-use right, and did not regulate the circulation of the right to use collective land for construction at legislative level. So, until the mid-1990s, the circulation of the use right of collective land for construction was in disorder and spontaneous situation.

In mid-1990s, the CPC Central Committee, the State Council and the Ministry of Land and Resources began to promulgate a series of documents to regularize the circulation of the right to use collective land for construction. Land Administration Law (1998 amendment), art.63 clearly manifested that, when the transfer institution

⁹⁵ In 1985, the CPC Central Committee and the State Council put forward “Ten Policies for Further Activating Rural Economy”. It elaborated: in rural areas, permit the store houses and service facilities that were built up by regional economic cooperative organizations according to the planning to be independently operated and rented out. It created policy conditions for the circulation of collective construction land.

of state-owned land was initially formed, the legislation still, in principle, prohibited the circulation of collective construction land, and the permission of its circulation was confined only to exceptions, which induced alternative ways for collective construction land to be circulated clandestinely through black case work. The rise of town (township) enterprises had a strong internal demand of collective construction land, particularly driven by huge differential land rent in suburbs, resulting in that a large number of collective land, even cultivated land, were leased, transferred, and a large invisible collective land market was formed, which severely affected the order of land market.

In 1999 Nov., the Ministry of Land and Resources set the city of Wuhu as the first pilot city to operate the circulation of the right to use collective land for construction, allowing that the land-use right can be circulated in the means of transfer, lease, equity contributions, joint construction, and mortgage. In 2000, the Ministry of Land and Resources set pilot projects of the circulation of collective construction land in 9 cities including Suzhou, Nanhai and others. In 2004, “Decision of State Council on Deepening the Reform and Strict Land Management” provided for that, in accordance with the planning, farmers’ right to use collective land for construction in villages, towns can be circulated according to law.⁹⁶ In 2005 Jun., Guangdong Province promulgated “Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes”, which was the first time, in the legislative formation of government regulation, to permit collective construction land within the province to be circulated directly in market, and provided for that the right to the use of collectively-owned land for construction purposes could be assigned, leased, transferred, subleased and mortgaged, implementing “the same land-use type with equal rights” on both state-owned land and collective land.

Although “Property Law” circumvented the sensitive problems of the right to use

⁹⁶ See “Decision of State Council on Deepening the Reform and Strict Land Management”, No.10.

collective land for construction, it left free space to amend “Land Administration Law” to regularize the circulation of collective construction land. To actively explore the ways and means of the circulation of collective construction land in market becomes a great mission of this era. Many explorations of local government regulations to the circulation reform of collective construction land supported the innovation in practice, but broke the restrictions in “Land Administration Law” and “Property Law” on the circulation. Therefore, the circulation reform urgently desiderates legal support.

In conclusion, because of the Reform and Opening-up, the right to use state-owned land for construction was separated from state land ownership to be circulated in market, and through its market-oriented circulation, the property functions of state-owned land rights were amply realized; but the “market-oriented circulation” of the right to use collective land for construction has not been supported by law, and this kind of land-use right could not, as real usufruct, bring property income to farmers. At present, China is developing market economy with Chinese characteristics, and the attribute of market economy is justice and free trade. Only collective land rights have the transferability and exert the attributes of property, can they promote the rural development, to achieve the strategic transformation of industry re-feeding agriculture. The urban-rural dualistic land market, dualistic law system of land rights and dualistic land administration confront the institutional innovations and challenges in this era.

2.2.2 Legislative differences on circulations of urban and rural construction land-use rights

2.2.2.1 The subjects of urban and rural construction land-use rights are different

The governmental departments of land and resources, on behalf of the State, separate the right to use state-owned land for construction from the ownership, and assign it with charge or gratuitously allocate it to actual land users. The State, legal

persons, unincorporated organizations and natural persons⁹⁷ can all be subjects of the right to use state-owned land for construction. The subjects are diversified, and a natural person would not be distinguished by his/her identity with urban registered residence or with rural registered residence. Users of state-owned construction land may exercise their rights according to law, and the users and the right subjects are the same.

Subjects of the right to use collective land for construction are comparatively simplex, which can only be rural collective economic organizations, township and village enterprises and farmers⁹⁸. Citizens with urban registered residence cannot be subjects of the right to use collective land for construction. The right to use collective land for construction is mainly enjoyed by rural collective economic organizations; except the right to the use of residential house sites, generally, individual farmers cannot directly exercise the right to use collective land for construction and on this situation, users and right subjects are separated.

2.2.2.2 Powers and functions of urban and rural construction land-use rights are different

The right to use state-owned land for construction is exercised almost like ownership, so that the right holders are entitled to possess, use and benefit from the construction land, as well as transfer, rent, mortgage and other ways to dispose of the construction land. The content of such right is complete, and it can be freely circulated in market. The mechanism that land price forms in market can protect users to obtain fair consideration from the circulation of land-use right. All of these reflect the liberty of state-owned land rights.

Powers and functions of the right to use collective land for construction are incomplete. The right holders can only possess and use collective construction land,

⁹⁷ Natural person cannot directly get the right to use state-owned land for construction through the assignment procedure because of qualification for management issues, but can indirectly get it through purchase of buildings and other properties.

⁹⁸ As for exceptions, see "Land Administration Law", art.63.

but not trade the land rights in market. They are severely restricted to get the right to benefit from and dispose of the construction land. The incomplete powers and functions are mainly manifested as follows. (1) Cannot be traded in land market. Collective construction land cannot be traded directly in the primary land market, but can only be expropriated and be converted into state-owned land firstly, and then can be traded in market. (2) Due to non-market circulation, it is impossible to form the market pricing mechanism in circulating land rights through negotiation. The price can only be decided in land expropriation by the government, which is formed in the unilateral pricing determination mechanism led by government and based on government's evaluation instead of market price⁹⁹. (3) "Property Law" clearly provides for that, the right to the use of the land owned by the collective, such as cultivated land, residential house sites, private plots and private hills, may not be mortgaged; the right to the use of the land for construction enjoyed by a town (township) or village enterprise may not be mortgaged separately, while where workshops and other buildings of a town (township) or village enterprise are mortgaged, the right to the use of the land for construction within the area occupied by the workshops or other buildings shall be mortgaged along with the workshops and other buildings¹⁰⁰. (4) Peasants' collectives do not enjoy land development rights. The conversion of farmland to nonagricultural land has to be examined for approval of the land administrative government departments. Collective construction land can be only used for public utilities or public welfare undertakings of a township (town) or village, township or town enterprises and houses for villagers, but cannot be assigned for city development and other enterprises, especially for the development of commercial housing. (5) The circulation is limited to the internal of collective economic organizations, which rules out the possibility that other subjects beyond collective economic organizations obtain collective land to establish enterprises. And residential house sites cannot circulate to urban residents and residents not belonged to the collective economic organizations. (6) The right to the use of land owned by peasants'

⁹⁹ See Land Administration Law, art.47.

¹⁰⁰ See Property Law, art.183, 184.

collectives may not be assigned, transferred or leased for non-agricultural construction, which takes the prohibition of circulation as the principle and takes the permission of circulation as the exception. There are only 3 exceptions¹⁰¹: a. a rural collective economic organization sets up enterprises by using land for construction, or does so with other units or individuals by investing its land-use right as shares or through joint operation, gets the right to use collective land for construction through government's examination and approval; b. where land is to be used for the construction of township (town) or village public utilities or public welfare undertakings, the right to use collective land for construction can be assigned through government's examination and approval; c. enterprises that have lawfully obtained land for construction in conformity with the overall plan for land utilization but have to transfer, according to law, their land-use right because of bankruptcy or merging or for other reasons.

2.2.2.3 Methods of distributing land incremental revenues from circulations of land rights are different

In the case of expropriating the right to use state-owned land for construction, such as expropriating buildings on state-owned land, "the compensation for the value of houses to be expropriated shall not be less than the market price of the real estate comparable to the houses to be expropriated on the date of the public notice of the house expropriation decisions"¹⁰². This means that the right to use state-owned land for construction which is taken back due to houses expropriation, can be compensated referring to the explicit market price in the real estate market. The land incremental revenue can be appropriately adjusted by the market mechanism, and the persons whose houses are expropriated may obtain a portion of the proceeds. When the initial circulation of the right to use state-owned land for construction happens, the State takes charge of land assignment fees as the land incremental revenue; the incremental revenue from land rights retransfer in the secondary land market shall be obtained by the obligee, and the State collects

¹⁰¹ See Land Administration Law, art.60, 61, 63.

¹⁰² See Regulations on the Expropriation of Houses on State-owned Land and Compensation Therefor, art.19.

taxation from the transaction.

As for the circulation of the right to use collective land for construction, because there are not legitimate market-oriented channels for the circulation, the profits of land-use rights cannot be manifested through the market mechanism. When expropriating, according to relevant provisions in Land Administration Law, the government unilaterally fixes a compensation price in accordance with the agricultural output value multiples¹⁰³, which can even not yet fully make up for the loss of collective land-use right, so there is no way to mention farmers' distribution of value-added land benefits. In contrast, local governments and land developers will carry off considerable land incremental value. The clandestine circulation always leads to that the parties concerned who illegally circulate the land-use rights obtain unrightful interests. The lack of relevant legal provisions and regulations to allow and regulate the circulation of collective construction land rights results in that the exchanging interest of the land rights cannot get protected.

To conclude, the right to use state-owned land for construction has the property attribute of free transfer, while the right to use collective land for construction suffers from discrimination based on its collective status and severe restriction on its circulation. "The differences are mainly due to that the different ownerships of state-owned land and collectively-owned land, or that rural land is not treated as property."¹⁰⁴ Collective construction land cannot be circulated in market, resulting in obvious devaluation of collective land, which is also the source that farmers cannot, through participating in land market, obtain the land incremental revenue and wealth growth on the basis of economic and social development, and trap in poverty. Collective construction land and state-owned construction land are "the same land-use type with different rights", in violation of the principle that property rights shall get equal protection, which is the fundamental institutional factor

¹⁰³ See Land Administration Law art.47.

¹⁰⁴ See Gao Fuping, *Land Use Right and Usufruct—Research on the Immovable Property Right System in China*, Beijing, Law Press, 2001, p.147.

hindering the formation of urban and rural integrated land market.

2.2.3 Review of the restrictions on the circulation of the right to use collective land for construction

2.2.3.1 The institutional reasons for restricting the circulation have lost its value

At present, the strict institutional restrictions on the circulation of the right to use collective land for construction arising from the thought of planned economy system have lost the previous institutional value in the current market economy system. First of all, with the development of market economy and the recovery of property attribute of collective land, farmers have an increasing requirement to take collective land rights, through land market, to participate in urbanization. Secondly, soaring prices of urban land lead to inflated housing prices. On the situation of no institutional response, farmers have no choice but to spontaneously transfer collective construction land, which leads to a bottom-up induced institutional transition¹⁰⁵. As a result, the loss of arable land is serious and the order of land administration gets severely impacted. And because of the lack of institutional support, farmers could not achieve the reasonable profits from spontaneous circulation of collective land. Despite repeated prohibitions, houses with limited property rights become the chronic disease of the society. Land assignment revenue is the important portion of local government's fiscal revenue¹⁰⁶. Local governments

¹⁰⁵ See Zhang Wenlu, *Research on Transfer Driving Models for Collective Construction Land in China*, West Forum, 2011, Nov., vol.21, No.6.

There are two types of institutional transition: inductive institutional transition and forced one. Inductive institutional transition refers to that when an individual or a group of persons respond to the lucrative opportunities, they spontaneously advocate, organize and implement the change or substitution of current institutional arrangements, or the creation of a new institutional arrangement. In contrast, the forced institutional transition is introduced and implemented by the government orders. Inductive institutional transition must be caused by a lucrative opportunity which cannot be achieved in the original institutional arrangement, while the forced institutional transition can be caused purely by redistributing current income in different voters groups. In the process of spontaneous institutional transition, especially official institutional transition, the transition process always needs to be promoted by government's act. See Lin Yifu, *Economic Theories on Institutional Transition: inductive institutional transition and forced institutional transition*, at <http://4a.hep.edu.cn/nCourse/ep/resource/part1/WE/18.htm>, visiting date 2013.07.09.

¹⁰⁶ Beyond the financial budget, the revenue of local government generally consists of administrative fees, government funds and land assignment fees. In recent years, with the central government standardizing administrative fees of local government, administrative fees takes a decreasing portion in extra-budgetary revenue, by contrast, land assignment revenue is in a more important status. See Liu Shouying and Jiang Xingsan, *Financial Risks of Land Financing by Local Governments—Case Study of a Developed Area in East China*, China Land Science, Vol.19, No.5, 2005.

earn the huge price difference through land assignment fees deducting compensation for collective land expropriation, and collect taxes from the circulation of the right to use state-owned land for construction. But due to unregulated circulation of collective land rights, the State loses the corresponding taxes, and farmers' collectives lose land incremental revenue in market.

On the background of increasing economic gap between urban and rural areas and the requirement of coordinating development of the whole society, the State has adjusted the policy, the urban regurgitation-feeding the poor rural.¹⁰⁷ Meanwhile, rural collective land bears the responsibility of guaranteeing farmers' survival and the land supply for urban development. The relevant legal system strictly restricting the circulation of collective land rights has been proved by practice that it trapped in institutional crisis. It is urgent to improve the legal system, to integrate urban and rural construction land market. Only through regulating rural land element as capital to be operated by legislation, can it promote the flow of capital, information and technology to integrate urban and rural development.

2.2.3.2 Collective ownership cannot justify the restriction on the circulation of collective construction land

As for land relevant legislations in developed countries, restrictions on land rights are based on the public interest purposes, land use planning and contracts, not yet status-based restrictions on land rights, because status-based restrictions are always deemed as the discriminatory treatments in these countries. State-owned and collectively-owned construction land-use rights are both on same construction land-use type, but because of the collective ownership, the latter is strictly restricted. Restrictions based on titleholders' rural status form discriminations on the right to

¹⁰⁷ It is, in first time, formally put forward that "industry promotes agriculture and urban areas support rural development" in "Suggestion of the Central Committee of Communist Party of China on the Formulation of the 11th 'Five-Year Guideline of the People's Republic of China'" (adopted at the Fifth Plenary Session of the 16th Central Committee of the Communist Party of China on October 11, 2005), No.6. In "Report on the Work of the Government" (delivered at the First Session of the Twelfth National People's Congress on March 5, 2013, by Wen Jiabao, former Premier of the State Council), Section 3, No.2, it is suggested to "build a new type of relations between industry and agriculture and between urban and rural areas in which industry promotes agriculture, urban areas support rural development, industry and agriculture reinforce each other, and urban development and rural development are integrated".

use collective land for construction. “The basis of contemporary ownership restriction theory is to reconcile conflicts between individual and social interests, to protect the interests of the whole society, so that individual interests have to defer to the social interests.”¹⁰⁸ Maine said that “the movement of the progressive societies has hitherto been a movement from status to contract”¹⁰⁹. The basis of “status society” is natural economy, while that of “contract society” is market economy. Equality is the essential character of market economy, and all parties involved in market transactions must be equal, without discrimination due to their different economic statuses and subject identities. The status-based restrictions do not meet the requirement of developing market economy.

In the past three decades of economic reform in China, farmers were not like urban residents who abundantly shared the achievement of urbanization and industrialization. The ratio of urban residents’ and rural residents’ per capita annual income expanded from 2.57:1 in 1978 to 3.03:1 in 2013, and the per capita income gap widened from 209.8 yuan (RMB, Chinese currency) to 18059.2 yuan¹¹⁰. The urban-rural gaps in social welfare, wealth situations, living standards, urban and rural education, medical conditions and government investment in infrastructure are also widening. The income growth ratio of rural residents in 2010 was faster than that in the urban, the first time since 1998, but the per capita annual income of rural households was still less than 1/3 of that in the urban¹¹¹. The increasing gap between urban and rural areas causes many social problems: exacerbating social conflicts, hindering economic development, against building a harmonious society.

¹⁰⁸ See Cheng Ping, *Protection and Restriction of Property Ownership*, Beijing, Chinese People's Public Security University Press, 2006, p.155.

¹⁰⁹ Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas*, Chapter V, Primitive Society and Ancient Law, at http://en.wikisource.org/wiki/Ancient_Law/Chapter_V, visiting date 2013.07.09.

¹¹⁰ Per capita disposable income of urban households was 343.4 yuan in 1978, and that was 26955.1 yuan in 2013. Per capita net income of rural households was 133.6 yuan in 1978, and that was 8895.9 yuan in 2013. See China Statistical Yearbook 2014, 6-4 Per Capita Income and Engel's Coefficient of Urban and Rural Households, compiled by National Bureau of Statistics of China.

¹¹¹ In 2010, Per capita annual disposable income of urban households was 19109.4 yuan, increased by 11.3%, after deducting price factors, actually 7.8%; and per capita annual income of rural households was 5919 yuan, increased by 14.9%, after deducting price factors, actually 10.9%. See China Statistical Yearbook 2014.

In the process of urbanization, farmers are aspiring after equal rights with urban residents, including appeals of economic rights, political rights and social rights¹¹². The core of these aforementioned pursuits cannot go without relying on collective land. The land to farmers, are not only means of production and social security, but also farmers' most valuable property. The fact that collective construction land cannot be circulated freely results in that, land elements cannot combine with technology and capital to promote rural economic development, and farmers are unable to benefit the wealth of land incremental value. Collective land ownership is an independent civil right, with equal status to state-owned land ownership¹¹³. The right to use collective land for construction is an independent usufruct, essentially, property right. "Bundle of rights" on land is property rights, because, through free circulation, they can produce economic interests, which has legal basis. The different statuses of ownership subjects shall not be the ground to impair property rights' functions and effectiveness. It can be said that, without market-oriented circulation, the loss of property function of collective land will inevitably lead to peasants' poverty and the widening urban-rural gap. The market-oriented circulation of collective construction land is an inescapable choice of market economy.

"Land-use right is the basis of land property right; land disposal right is the symbol of land property right; while land profit right is the essence of land property right. The so-called 'farmers' poverty of land property rights' is that farmers' rights to use, to dispose of and to benefit from collective land are ostracized and deprived. The fundamental way to resolve farmers' poverty shall and must be granting farmers land rights, protecting farmers' rights and developing farmers' rights. The choice and orientation in improving farmers' poverty of land property rights are: regularization of collective land expropriation, marketization of collective land

¹¹² Economic rights appeals are mainly: the equal land property rights, the equal rights of interest distribution, the equal rights of rural public service, and the equal rights of market trading. Political rights appeals include: the rights of making decision, of circumscribing, of knowing, in public affairs, enterprises operation, community development and others. Social rights appeals are social security. See Zhang Linlin, *The Demand of Chinese Farmers' Rights in the Process of Urbanization*, Law and Social Development, 2011, No.1.

¹¹³ See Jiang Ping, *Science of Civil Law*, Beijing, China University of Political Science and Law Press, 2000, p.404.

circulation and diversification of collective land property rights.”¹¹⁴ In 2004, on the 4th Plenary Session of the 16th Central Committee of CPC, the Party put forward the thought that “industry promotes agriculture and urban areas support rural development”. However, solely relying on the “regurgitation-feeding” from industry and cities and external support, it is unable to efficiently mobilize all the production factors to promote rural economic development. Granting rural construction land with equal legal status and capability of circulation to urban construction land, making peasants’ collectives enjoy rights in rural land development, and realizing the independent development of rural economy, can promote urbanization from both urban areas and rural interior.¹¹⁵ In CPC “2008 Decision”, it was pointed out that, regardless of the different ownerships, the urban and rural construction land under planning should have the same right¹¹⁶, to realize “the same land-use type with equal rights”, which means that the marketization and equalization reform on the right to use collective land for construction is advancing from theory to practice, and means the recovery of the disposal and benefit rights on collective construction land. Similar proposals were also written in the CPC “2013 Decision”, which require ensuring that rural collectively-owned profit-oriented construction land can enter the market with the same rights and at the same prices as state-owned land.¹¹⁷ These central-made guidelines on unifying the circulation of urban and rural construction land-use right are urgent to be shrined into the legal system.

¹¹⁴ See Hong Zhaohui, *Chinese Farmers’ Poverty of Land Property Rights*, at <http://wenku.baidu.com/view/bd4b4436ee06eff9acf8078b.html>, visiting date 2013.07.10.

¹¹⁵ See Gao Fuping, *Promote the Reform of Rural Construction Land, Realize the Self-development in Countryside*, Conference Article of the 69th International Forum on China's reform, 05/08/2010, at http://www.chinareform.org.cn/forum/crf/69/paper/201008/t20100805_39108.htm, visiting date 2013.07.13.

¹¹⁶ See CPC 2008 Decision, Section 3, No.2, at http://www.gov.cn/jrzq/2008-10/19/content_1125094.htm, visiting date 2013.07.13.

¹¹⁷ See CPC 2013 Decision, Section 3, No.11. At http://www.china.org.cn/chinese/2014-01/17/content_31226494_3.htm, visiting date 2014.11.20.

2.3 Reformational requirements on establishing integrated market of urban and rural land for construction

2.3.1 Rights to use state-owned and collective land for construction should be on equal status

Land rights shall be enjoyed and be exercised. Legal restrictions on rights are always implemented through restricting the two main factors of rights: the capacity of a subject and the freedom to act, which actually is just a kind of instrumentality, while its essential purpose is to restrict the inherent interests contained in the rights. Legislative restrictions on land rights shall always be based on the purpose of guaranteeing public interests. Through public law, legislators utilize the means of land use control and land expropriation to restrict the free exercise of land rights; through private law, they utilize the means of easement agreement, statutory adjacent relation and other means to prevent land rights subjects abusing rights to infringe others' rights and social public interests.

The essence of expropriation determines that what is restricted by public powers can only be the free exercise of private property rights, not the public property rights. Except that, any other restriction shall not distinguish the public or private status of rights subjects. Relative to state-owned land ownership, rural collective land ownership and use rights are private rights. Under the strategy that the rural supporting the development of industry in priority in the planned economy period, the current land legislation, distinguishing the status of land ownership and regularizing the urban and the rural separately on the basis of the market subjects' qualifications confirmed by the urban-rural household registration system, imposes unfair restrictions on the collective land, forming and consolidating the substantial inequality between urban and rural residents, which does not take legitimacy.

The equalization of urban and rural construction land-use rights, in essence, refers

to that the right to use collective land for construction shall obtain the same legal status and functions with the right to use state-owned land for construction under the existing institution, to realize that all the urban and rural construction lands are endowed with the same rights content, the same functions and the same rights to be disposed of and benefited from, and that legislation regularizes them according to the same rules. From the perspective of entitlement, urban and rural land shall be granted same rights; from the perspective of restricting rights, legislation shall unify the implementation of restriction and its standards, methods, such as to make a uniform provision: “the use of land and the exercise of land rights shall not violate law and social public interests”. Entitlement and restriction of land rights based on the same standard, means that the same type of rights on state-owned land and collective land are treated equally, which is not only the basic requirement to achieve the complete collective land ownership through exercising construction land-use rights, but also the necessary institutional conditions to break the urban-rural dualistic social structure, to achieve integration of urban and rural areas, and to effectively protect the interests of farmers.

“To integrate the circulation of urban and rural construction land, to achieve the same land-use type with equal rights and same functions in the urban and rural, it has to be exercised that, on one hand, reforming rural construction land property rights, cutting off the relations between restriction with the collective status of rural land, realizing the commercialization and propertization of collective land-use rights, to make farmers gain land revenue; on the other hand, permitting rural collective land owners to carry out commercial development of land according to land use planning.”¹¹⁸ The property value of collective construction land has to be reflected through the market-oriented circulation, meanwhile, only eliminating irrational restrictions on rural collective land rights, granting development rights to collective land and permitting independent development of collective land, can realize “the same land-use type with equal rights” and integrated land market.

¹¹⁸ See Gao Fuping, *Study on the Reform of Rural Construction Land System*, Journal of Shanghai University of Finance and Economics, Vol.12, No.2, Apr. 2010.

2.3.2 Circulation of the right to use collective land for construction should be market-oriented

Current legislative principles forbidding free circulation of collective construction land is the consequence of planned economy system, which leads to the structural shortage of urban construction land, as well as that the property attribute of collective land rights could not be manifested, and even the poverty of farmers and the widening gap between the urban and the rural. Due to the severe restriction without mechanism to balance social interests, the long repressed collective land rights would inevitably break the shackles of the law to be circulated spontaneously, and the illegal clandestine circulation is such a typical phenomenon.

“In China, usufruct of rural land has dual characters: the function of social security to farmers and the merchandise attribute. Emphasizing the former has to severely restrict its circulation in order to protect farmers’ basic survival and living conditions and to maintain the stability in rural areas; emphasizing the latter shall permit the usufruct of rural land to be freely circulated, to optimize the allocation of land resources and to improve economic efficiency. How to balance the two characters of rural land usufruct needs further exploration.”¹¹⁹ “The root of land rights problems in China is the structure of state governance. The entire rural land system is not designed for free transaction of land by farmers, or for achieving maximum benefits from rural land...The land on which the commercial houses are built is state-owned. This encourages the expropriation of collective land by local governments at low prices and the sale of it to developers, thus urban housing prices inflate. Under a privatized and market-oriented land system, the supply of land is not limited to governmental administration, but also rested with millions of farmers...allowing farmers to trade their collectively-owned land in the market

¹¹⁹ See Wen Shiyang and Zhou Jun, *the Chinese Characteristics and the Time Spirit of Chinese Property Law*, Jiangxi Social Science, No.3, 2007.

would diversify the supply of land for construction and reduce the expensive housing prices in cities. Meanwhile, it could prevent waste and disorder during the process of land redevelopment.”¹²⁰ On market economy circumstance, land property rights essentially have the transferable and profitable characteristics. The market-oriented circulation is the best guarantee of free transaction of property rights. But in reality, the right to use collective land for construction cannot be circulated in land market, which leads to that collective land rights cannot achieve the property values. Permitting its circulation in market means the return of property attribute of collective land rights. “Property rights owned by each social subject shall be tradable, which is the basic requirement of market economy to the design of property rights.”¹²¹

The market-oriented circulation of the right to use collective land for construction refers to that such right can be freely transferred in a unified and open market, which takes the market requirements as orientation and encourages market competition as the means to achieve the market-oriented allocation of urban and rural land resources. The characteristics shall be as follows. (1) The market in which land rights circulate is open and free to all transaction parties, and will not restrict or prohibit a certain type of subjects to access due to their statuses. (2) Market subjects are equal. Subjects of market transactions enjoy the same legal status, follow the same trading rules, and will not suffer from discrimination because of their statuses. (3) Ways of market-oriented circulation are diversified, and market subjects are free to choose particular transaction way, to set conditions on the transaction, in order to meet different demands of land rights transactions. (4) The rule of free competition in market is survival of the fittest, and under the premise of not violating the social interests to achieve maximum individual interests. The market-oriented reform of circulating the right to use collective land for construction will not only rationally allocate urban and rural construction land

¹²⁰ See Zhang Jialin, *China's Slow-motion Land Reform*, Policy Review, vol.159, February 2010.

¹²¹ See Gao Fuping, *Market Economy Reform and the Reconstruction of Chinese Property Rights System*, at <http://wenku.baidu.com/view/ab680888d0d233d4b14e69f8.html>, visiting date 2013.07.13.

and promote effective and intensive use of land through equal and voluntary market transactions in the whole society, but also increase farmers' nonagricultural income, gradually narrowing the gap between urban and rural areas.

2.3.3 The institutional barriers on integrating the circulation of urban and rural construction lands should be eliminated

2.3.3.1 The institution of dualistic land administration

Observing the course of economic development in developed countries, it can be reached that the urban-rural dualistic economic structure is the essential transitional form from traditional agricultural society to an industrialized society, and different development levels between urban and rural areas will inevitably lead to urban-rural gap.

Chinese urban-rural divisional land system typically reveals dualistic characteristics. (1) Based on land ownership, urban land is owned by the State and rural land is owned by rural collectives. The ownerships and use rights of urban and rural lands are not permitted to be freely and intersectantly converted. (2) Land market is divided into state-owned land market and rural land market; rural land can become state-owned land through expropriation. (3) The pricing system of urban and rural land is divided. (4) Urban and rural land-use planning and land administration have dualistic characteristics.¹²²

The Chinese scholar, Zhou Qiren, thinks that the current land system, which was designed for taking up rural land to achieve industrialization and urbanization at low cost, reflects that “land ownership are not tradable and the incremental value belongs to the State” (compulsory expropriation of rural land), “the State industrialization” (compensation in extreme low price), “collective ownership”

¹²² See Zhang Helin and Hao Shouyi, *Innovation of Unified Urban & Rural Land Market System and Policy Suggestions*, China Soft Science, No.2, 2007.

(farmers' collective is the only legal representative of farmers) and "land assignment system" (experience from Hong Kong).¹²³ It is a unique land system in the world. This mixed land system has the following characteristics. (1) Subjects of rural land property rights are not legally qualified as a party of land transaction and not entitled to take part in price bargaining. (2) Governments make judgment on land requirement for industry and city development, and then use administrative power to decide on the supply of land. (3) The rent seeking of administrative power, rather than the rent of land property rights, stimulates farmland to be converted into industrial and urban land.¹²⁴ The institution of dualistic land administration results in the absurd restrictions on collective land rights, while, the process of urban-rural integration is the inescapable impetus of equally treating collective land rights. In 2007, the promulgation of "Urban and Rural Planning Law" marked that the era of urban and rural integrated planning in China started. Urban and rural land administration shall also break barriers, and eliminate the discrimination on rural land rights, to achieve legislative equality; it has to transform the institution of land administration that divides urban and rural construction land in accordance with the attribute of land ownership, and gradually establish a unified administrative institution of urban and rural construction land; it has to reform the urban-rural divisional land legislation, to meet the demand of urbanization development via market-oriented circulation of collective land, to push forward the perfection of legislation through equalizing urban and rural construction land rights.

2.3.3.2 The vacancy of subject of collective land ownership

In China, civil subjects include the State, natural persons, legal persons and unincorporated organizations. According to the Constitution, the "Property Law" distinguishes land ownership subjects into the State and farmers' collective, and provides for that farmers' collective enjoys collective land ownership. However, the current Chinese civil legislation has not yet clearly structured "farmers' collective"

¹²³ See Zhou Qiren, *Property Rights and Institutional Transition*, Beijing, Peking University Press, 2004, pp.109-110.

¹²⁴ Ibid.

as a type of civil right subject in civil right system, not confirmed the legal position of representatives of collective land ownership—the collective economic organization within a village, villagers committee and villagers group as civil right subject, and not concretely regulated how these representatives exercise collective land ownership. Besides that, a considerable number of rural collective economic organizations are imperfect, which cannot truly represent the fundamental interests of farmer members. “Property Law” clearly elaborates that farmers enjoy collective member rights to collective land ownership¹²⁵, but there is not relevant provision to regularize how the farmers could exercise the collective member rights. Because the civil status of “farmers’ collective” is not clear and the mechanism of declaration of farmers’ intention is far from perfection, collective land owners cannot effectively enjoy or exercise land ownership, resulting in “vacancy of subject of collective land ownership”¹²⁶. In Chinese Professor Chen Xiaojun’s research report, it is put forward that “farmers’ earnest desire for private land ownership originates in that farmers expect to have a strong voice concerning on the issue of land rights”¹²⁷. Farmers are eager for discourse right, which reflects farmers’ bewilderment that, as collective members, they could not enjoy and exercise collective land rights according to their own wills.

The vacancy of subject of collective land ownership leads to the disorder of rural land circulation. “The clarification and concretion of the subject of collective land ownership are the primary topic to resolve the collective ownership drawbacks. Only clarifying and reifying the subject of collective ownership and making it operable, can achieve the legal significance of collective ownership.”¹²⁸ The matter of the subject of collective land ownership is one of the most complex institutional problems in Chinese “Property Law”. Under the premise of sustaining the current land ownership system, how to restructure the subject of collective land ownership

¹²⁵ See “Property Law”, art.59, 62, 63.

¹²⁶ See Wang Weiguo, *Research on Chinese Land Rights*, Beijing, China University of Political Science and Law Press, 1997, p.97.

¹²⁷ See Chen Xiaojun, *Investigation and Research on the Legal Institution of Rural Land: Report of the investigation in Ten Chinese Provinces*, Beijing, Law Press, 2010, p.6.

¹²⁸ See Sun Xianzhong, *Argument and Thinking: Notes of Property Rights Legislation*, China Renmin University Press, 2006, p.540.

in accordance with market economy rules affects the success of land reform.

2.3.3.3 Collective land rights cannot be freely transferred and the integrated urban-rural land market does not materialize

“Property Law” confirms collective land ownership as civil right, but it reveals “incomplete ownership” characters, because “Property Law” and “Land Administration Law” restrict its circulation. The rights to dispose of and benefit from collective land are severely limited, and the right to use collective land for construction, an incomplete usufruct, could not link up to the market, both of which result in the loss of property function of collective construction land. These situations not only hinder farmers to obtain land incremental revenue through its circulation, but also restrict the rational allocation, the development and utilization of collective construction land. The problem of structural shortage of land for construction cannot be resolved so far.

“From the perspective of the long-term requirements of developing market economy, the key to integrate urban and rural construction land market is to establish a land property rights system connecting the urban with the rural. The right basis of market-oriented operation of state-owned construction land is the assignment of the right to use state-owned land for construction, and the right basis to operate collective construction land is that collective land owners actually enjoy the right to use collective land for construction. The ways to acquire the two kinds of land-use rights and the price formation mechanisms are different, as well as the rights content, so the two kinds of land-use rights cannot be simply merged, and the interests balance between the two kinds of land-use rights shall be well tackled.”¹²⁹ Through “expropriation first and use second”, the State restricts collective land circulation and grabs the value-added benefits of collective land. If indiscriminately regularizing the unified circulation of urban and rural construction land-use right, it is bound to face the redistribution of all parties’ interests. Therefore, to restructure

¹²⁹ See Wang Xiaoying, *Establishing Urban and Rural Construction Land Market is Imperative*, at <http://www.china.com.cn/chinese/OP-c/278232.htm>, visiting date: 2013.07.15.

legal institution of marketizing the right to use collective land for construction has to take account of all parties' interests in order to promote social harmony and sustainable development, which bears great responsibility and has a long way to be achieved.

2.3.3.4 Rural land registration system is seriously lagging behind

The confirmation of land right is the basis of urban and rural construction land reform and the precondition of effective land circulation. Land registration system has important significances in strengthening land cadastre management, ascertaining the attribution of land rights, protecting land transactions and collecting land tax. But for many years, the institutional loopholes in management of rural land ownership lead to: (1) rural land registration authorities are distempered; (2) the registration procedure has not been effectively established; (3) the registration staff are obviously insufficient; (4) registration system is devoid of publicness; (5) the work of rural land right registration is lagging behind. These situations result in ambiguous ownership of rural land rights, ill-defined borderline of rural land plots, collective land circulation in limitation and the lack of protection for the transaction security, which constrain the formation and development of integrated urban-rural land market.

In the legislative process of making "Property Law", because there were so many difficulties in rural land rights registration, the legislature took Registration Antagonism to right to agricultural land contractual management,¹³⁰ but took Registration Effectiveness to the right to use state-owned land for construction.¹³¹ If legislation removes these irrational restrictions on collective land circulation, the circulation will be certainly active, and without sound registration system, it will cause chaos in the land market. Chinese rural collective land has a numerous quantity and a wide geographic distribution, but registration staff are in a limited number, and in recent years, the clandestine circulation of collective land increased

¹³⁰ See "Property Law", art.127.

¹³¹ See "Property Law", art.139.

the difficulty of land rights registration. The task to establish a sound system of collective land rights registration is indeed arduous.¹³²

2.3.3.5 The lack of legal support to integrate circulation of urban and rural construction land

At present, the equalization and marketization of collective construction land circulation is devoid of recognition at legal level, and to practically integrate urban and rural construction land circulation in a certain extent remains at policy and pilot level. Policies precede law, which could not effectively deal with relevant disputes in practice. Moreover, for a long time, due to urban-rural dualistic land administration, the current institutions of land use planning, land expropriation and land use control are difficult to meet the administrative requirements of unified circulation of urban and rural construction land. Land use planning and urban-rural planning lack effective cohesion, and land use planning at different levels of administrative divisions lack organic combination in rigidity and flexibility. Land use control, rooting on the thought of planned economy system and relying only on the administrative power to enforce control, cannot effectively achieve farmland protection. Land expropriation is still the unique legitimate channel to supply newly-added construction land for urban construction projects, and the specific institution in reforming collective land expropriation only for public interest is not yet finalized. The level of farmers' social security is too inferior to totally replace the security function of collective land.

In summary, the transformation from urban-rural dualistic social structure, which has been existed for almost 60 years, to the integration of urban and rural areas, needs to overcome institutional barriers in the process of balancing all parties' interests, and then gradually generates intrinsic and rational mechanism of urban and rural construction land circulation. The establishment and improvement of relevant legal system and supporting system are essentially institutional guarantee.

¹³² "Regulations on Real Property Registration" will be implemented on March 1st, 2015.

Unified circulation of urban and rural construction land-use rights has become an oriented direction of central policy, but whether induced transition could be ultimately confirmed by institutional transition or not depends on the legitimacy and rationality of institutional construction. The institutional construction shall take the interest-balance mechanism of rational allocation of land resources as the basis. “On one hand, land expropriation shall return to its public essence; on the other hand, the right and the power on the land shall be reasonably allocated, to construct rational interest structure on land.”¹³³ Nowadays, China is in the era of rebuilding farmers’ land property rights system on the basis of recovering the right to use collective land for construction. To restructure the rural land law system and to establish integrated construction land market shall implement the reforms from three aspects. The first one is the reform of collective land expropriation, to promote the right to use collective land for non-public construction project to rationally enter land market. The second one is the market-oriented circulation of collective construction land, to promote unified circulation of urban and rural construction land-use rights. The last one is the creation of land development rights, to guarantee the lawful conversion of agricultural land into nonagricultural land and the rational distribution of land incremental revenue.

¹³³ See Zhang Qun, *Reconstruction of the Legal Mechanism Balancing Rural Interests in a Responding Society*, Beijing, Law Press, 2008, pp.44-45.

Chapter III The reform of collective land expropriation

The abusing of expropriation power violates the legitimate purpose of collective land expropriation, which infringes farmers' property rights, blocks the channel of free transaction of collective land-use rights, and infringes the liberty of collective land circulation. The reform of collective land expropriation will strictly restrict land expropriation within the scope of necessary public interest land-use, and will reserve channels for market-oriented circulation of non-public land-use. In the scope of public interest, the liberty of collective land circulation is restricted, but through gearing the compensation of the expropriated land to the standard of market price of construction land circulation, the equal exchange values of collective land rights could be protected, which could lead farmers to enjoy the achievement of urbanization, and ensure the liberty of market-oriented circulation of collective land beyond the scope of public interest. Therefore, the reform of collective land expropriation is the guarantee to promote the rational marketization of collective land and the integrated circulation of urban and rural lands for construction.

3.1 Land expropriation and property rights

3.1.1 Land expropriation and its restriction on property rights

3.1.1.1 The meaning of land expropriation

Expropriation refers to a governmental taking or modification of an individual's property rights.¹³⁴ The essence of expropriation is “the legal right to acquire

¹³⁴ See Bryan A. Garner, *Black's Law Dictionary* (8th ed. 2004), p.1752. Expropriation, also called eminent domain in the US, which means the inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking (ibid. p.1585). The term “eminent domain” is said to have originated with Grotius, the seventeenth century legal scholar. Grotius believed that the State possessed the power to take or destroy property for the benefit of the social unit, but he believed that when the State so acted, it was obligated to compensate the injured property owner for his losses. Blackstone, too, believed that society had no general power to take the private property of landowners, except on the payment of a reasonable price. (ibid.)

property by forced rather than by voluntary exchange”¹³⁵, on the premise of paying reasonable compensation and for the public interest. Proceeding from the ultimate protection of property rights, modern expropriating institution expands the traditional connotation of expropriation: not taking the transfer of ownership to the State or other subjects as the necessary condition, even that the public authority merely restricting private property rights for public interest purposes, which also causes serious damage to the property rights holders, they can also be defined as expropriation,¹³⁶ such as restrictions on the intensity of land-use pursuant to urban land-use planning and prohibitions to land conversion based on maintenance of historic monuments.

Chinese “Property Law”, elaborates: “for public interests, land owned by the collectives, and the houses and other immovables of units and individuals may be expropriated within the limits of power and in compliance with the procedures provided for by law...Where houses and other immovables of units or individuals are expropriated, compensations for their resettlement shall be paid according to law, and their lawful rights and interests shall be protected; and where the housings of individuals are expropriated, their living conditions shall be guaranteed”.¹³⁷ Obviously, in China, the meaning of Land Expropriation is limited to the government exercising public power to deprive land ownership and land-use rights, which is in the traditional sense and specifically includes two aspects: one is to the ownership of rural collective land and the above-ground fixtures of the land; the other one is to the ownership of urban houses and the right to use state-owned land for construction corresponding to the range of the land occupied by the houses.

3.1.1.2 Land expropriation and acquisition by purchase

Drawing on economic analysis, in general, the State can either simply purchase

¹³⁵ See Patricia Munch, *An Economic Analysis of Eminent Domain*, The Journal of Political Economy, vol.84, No.3, 1976.

¹³⁶ In Germany, the ordinary courts expand the concept of expropriation, covering all the state’s control measures to property rights, and those of which causing rights holders’ damage, the authority has to compensate.

¹³⁷ See Property Law, art.42.

property from private holders, or it can possess a legal right to take it—the power of expropriation. The advantages of expropriation are: first of all, if, though, the presumption is that the State will not compensate for takings, and then expropriation enjoys a cost advantage over acquisition by purchase; the second is that expropriation may be warranted by the advantage of avoiding the bargaining problems associated with purchase, and possibly by transaction cost savings, which can guarantee the efficiency of transaction.¹³⁸ If the expropriation must be compensated reasonably, it will bear the cost similar to purchase, and the first advantage will be lost. Expropriation is “designed to increase social wealth by facilitating certain transactions that otherwise would not take place, or that would take place only at an inefficiently high cost.”¹³⁹ If that the resources required for public project are actually few in the market or even that there is only one, and the owner is aware of its scarcity, extracting high rents from a buyer or monopolizing the resource to unacceptably transaction costs, which leads to the incomplete of social interest projects, the expropriation power can be exercised. But if the resources are numerous in the market, and there is no holdup for seeking high price, because of the higher administrative costs of guaranteeing the due procedure and just compensation of expropriation, it will be cheaper for the authority to purchase in the market than to expropriate. Through the theoretical analysis of the situations exercising or non-exercising land expropriation, American scholars come up with different conclusions to conventional assumptions, i.e. that “eminent domain is not necessarily a more efficient institution than the free market...In practice, prices paid under eminent domain may differ systematically from the fair market value standard, depending on court costs of buyer and seller. Evidence from urban renewal supports the hypothesis that, due to the structure of court costs, high-valued properties receive more than market value and low-valued properties receive less than market value.”¹⁴⁰ Therefore, the exercise of expropriation shall

¹³⁸ See Steven Shavell, *Foundations of Economic Analysis of Law*, Harvard University Press, 2004, pp.123-127.

¹³⁹ See Thomas W. Merrill, *The Economics of Public Use*, Cornell Law Rev. Vol.61, 1986.

¹⁴⁰ See Patricia Munch, *An Economic Analysis of Eminent Domain*, The Journal of Political Economy, vol.84, No.3, 1976.

eliminate the potential monopoly, reduce the cost of obtaining the necessary property for the authority and improve public welfare.

From the perspective of property rights, rights holders enjoy the liberty to trade the certain property, which includes the liberty of trading and non-trading, and have right, based on the free will, to decide whether transfer the property or not. But if fully complying with the rights holder's autonomy of will may lead to the government unable to supply communal product, which means that if not restrict the liberty of this property right, the government may not achieve public functions, and the public interest will be harmed. On this situation that restriction is necessary, the government can, on the premise of seeking public interest, exercise compulsory expropriation of someone's property, to achieve the public interest but at the cost of the “special sacrifice” that individual property rights are in forced alienation. Of course, the restriction only reflects in the forced alienation of the rights rather than in compensation for expropriation.

In China, collective land is practically exercised “expropriation first and use second”, which does not strictly distinguish whether it meets the standard of public interest or not and is not in line with market economy rules. Therefore, the reform of collective land expropriation shall primarily distinguish whether the usage of land is for public or not and then respectively applies to expropriation for public interest or acquisition by purchase. Within the scope of public interest, the liberty of collective land rights could be restricted, and without the scope of public interest, the liberty of collective land rights shall be guaranteed. Through the definition of “public interest” and the determination of the compensation standards, it shall both prevent the public authority to wantonly infringe collective land rights, and prevent the overprotection of collective land rights to affect the realization of public interest, to keep the dynamic balance between the maintenance of public interests and the protection of property rights.

3.1.2 Property rules, liability rules and inalienability rules¹⁴¹

American scholars introduced property rules, liability rules and inalienability from institutional economics into expropriation system, noting that property rights owners, following the property rules, have the right to make free transaction, but because the exercise of expropriation is for the purpose of public interest, the owners, as members of the society, shall perform their duty of tolerance and transfer their property rights, regardless of their will.¹⁴² In society with rule of law, citizens' land property rights are legally protected in accordance with the property rules, and land rights can only be freely transferred in accordance with the prices agreed by all parties. After the transfer of rights, the transferer will gain subjective value that reflects the individual evaluation of the rights. When property rights face the administrative power of expropriation, the protection of law may convert from property rules to liability rules.

Under the rules of liability, when rights get violated, the law requires the infringer to pay damages to the victim, which shall take no account of the obligee's subjective value. Therefore, when the government expropriates land, the landowner may not reject the transfer of land rights, and the right to bargain will be restricted, so that the owner can only get objective value adjusted by the market.¹⁴³ However, the conversion of rights protection rules is not unconditional. If the cost for government to acquire land through market mechanism is lower than the cost of land expropriation, there will be no necessity for the government to exercise

¹⁴¹ “Whenever society chooses an initial entitlement it must also determine whether to protect the entitlement by property rules, by liability rules, or by rules of inalienability. In our framework, much of what is generally called private property can be viewed as an entitlement which is protected by a property rule. No one can take the entitlement to private property from the holder unless the holder sells it willingly and at the price at which he subjectively values the property. Yet a nuisance with sufficient public utility to avoid injunction has, in effect, the right to take property with compensation. In such a circumstance the entitlement to the property is protected only by what we call a liability rule: an external, objective standard of value is used to facilitate the transfer of the entitlement from the holder to the nuisance. Finally, in some instances we will not allow the sale of the property at all, that is, we will occasionally make the entitlement inalienable...Because the property rule and the liability rule are closely related and depend for their application on the shortcomings of each other, we treat them together.” See Guido Calabresi and Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, Harvard Law Review, vol. 85, 1972.

¹⁴² See Guido Calabresi and Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, Harvard Law Review, vol. 85, 1972.

¹⁴³ See Chen Guofu and Qin Zhiqiong, *An Economic Analysis of the Interests of the Farmers Who Lose Their Lands in the Disorderly Process of Urbanization*, Open Times, 2007, (5).

expropriation. So, “when a buyer seeking to acquire a property has the power of eminent domain, he must attempt to negotiate a voluntary sale. But if his highest offer is rejected, he may condemn the property, that is, obtain a forced sale at a price determined in a court of law.”¹⁴⁴

In China, the state implements the strictest protection of basic farmland. According to “Regulations on the Protection of Basic Farmland”, no unit or individual shall change or occupy the basic farmland protection zone upon delimitation according to law; in the event of inability to move away from basic farmland protection zones in site selection for such major construction projects as state energy, communications, water conservancy and military installations that require occupation of basic farmland involving conversion of agricultural land into non-agricultural land or land expropriation, it must be subject to the approval of the State Council.¹⁴⁵ The basic farmland system applies the inalienability rules.

3.1.3 Legislative defects relevant to collective land expropriation

Since 1950, China had gradually established the land expropriation institution which was based on public ownership and reflected characteristics and requirements of the planned economy institution. The expropriation in China reflects requirements of state interests and planned economy thought, reveals the authority of the state in the process of expropriation, and shows state responsibility in compensation, thereby forming a planned expropriation institution, widely different from capitalist countries’ expropriation institution in content and characteristics.¹⁴⁶ When government expropriates collectively-owned land, the purpose whether it is for public interest is not strictly examined and it exercises “expropriation first and use second” for urban construction, which infringes

¹⁴⁴ See Patricia Munch, *An Economic Analysis of Eminent Domain*, The Journal of Political Economy, vol.84, No.3, 1976.

¹⁴⁵ See “Regulations on the Protection of Basic Farmland” (promulgated by the State Council of the People’s Republic of China on December 27, 1998) art. 15.

¹⁴⁶ See Wang Kun and Li Zhiqiang, *Research on the Land Expropriation System of New China*, Beijing, Social Sciences Academic Press, 2009, p.2.

farmers' land rights and blocks free circulation channel for non-public interest use of collective land in the market. Artificially decreasing the standard of collective land compensation meets the rapid development and the low-cost expansion of cities, but it widens the urban-rural income gap. "The notion of free alienability is a fundamental property right; transfers of land through rent-seeking activities rather than market forces rob the landowner of her alienability rights and create market inefficiency by removing decisions from the marketplace and inserting them into the political sphere."¹⁴⁷ In China's process of institutional transition from planned economy to market economy, free trade in market would be gradually in a dominant position, and the government power shall play its role in macroeconomic control. "From a regional perspective, local governments shall focus on creating a business environment conducive to risk-taking, entry and expansion rather than attempting targeted economic development through eminent domain or other means."¹⁴⁸

The current legislative defects in China lead to the abuse of expropriation power. Ministry of Land and Resources conducted a survey of land expropriation projects in Beijing, Shanghai, Shandong and other, in total 16, provincial-level administrative regions, which revealed that, over the past decade, land expropriation projects in eastern region of China were mainly used for business operations, and those used for public interest were less than 10%.¹⁴⁹ The CPC "2008 Decision" put forward to "reform the expropriation institution, strictly define construction land for public interest and that for business operations, gradually narrow the scope of land expropriation, and improve compensation mechanism."¹⁵⁰ Moreover, the CPC "2013 Decision" also put forward that, "narrow the scope of land expropriation, regulate the procedures for land appropriation, and improve the rational, regular and multiple security mechanism for farmers whose land is

¹⁴⁷ See Benjamin D. Cramer, *Eminent Domain for Private Development – Irrational Basis for the Erosion of Property Rights*, Case Western Reserve University, Winter, 2004, 55 Case W. Res. 409.

¹⁴⁸ See Marc Scribner, *This Land Ain't your Land; this Land is my Land – A Primer on Eminent Domain, Redevelopment, and Entrepreneurship*, *Advancing Liberty – From the Economy to Ecology*, vol.164, 2010.

¹⁴⁹ See Sun Xuyang, *Survey on the Dilemma of Land Expropriation in Chinese Urban-village: Fewer Than 10 Percent Used for Public Interest*, 2010.03.25, at <http://www.chinanews.com/gn/news/2010/03-25/2188702.shtml>, visiting date: 2013.07.19.

¹⁵⁰ See CPC 2008 Decision, Section 3, No.2, at http://www.gov.cn/jrzq/2008-10/19/content_1125094.htm, visiting date: 2013.07.19.

requisitioned... reduce land appropriation for non-public welfare projects”.¹⁵¹ Therefore, the reform of collective land expropriation shall first narrow the scope of land expropriation, only expropriate collective land in accordance with public interest, and retain a free circulation channel for non-public interest use of collective land; while the compensation shall be adequate, effective and prompt, to prevent any arbitrary land expropriation due to huge economic interests. “The establishment of unified urban and rural construction land market and the restraint of government’s expropriation power are strongly related and mutual supporting.”¹⁵²

3.1.3.1 Unclear scope of public interest

Public interest is the boundary of free exercising collective land rights, the “joint of public rights and private rights, and the main reason of restricting citizens’ property rights.”¹⁵³ Defining the scope of the public interest has dual characteristics both in restricting and protecting property rights: on one hand, it limits the expropriation power within the range of public interest, to restrict government arbitrarily expropriating collectively-owned land; on the other hand, it guarantees to freely exercise collective land rights beyond the public interest. The Chinese relevant legislative defects are as follows:

(1) Lack of the implicit definition of “public interest” and relevant defining procedures. The Chinese Constitution, “Land Administration Law” and “Property Law” all provide that the State may, in the purposes of public interest and in accordance with law, expropriate land for its use and make compensation for the land expropriated.¹⁵⁴ However, the public interest itself is an equivocal concept, while the legislation only provides for the principles, and lack of corresponding

¹⁵¹ See CPC 2013 Decision, Section 3, No.11. At

http://www.china.org.cn/chinese/2014-01/17/content_31226494_3.htm , visiting date 2014.11.20.

¹⁵² See Shen Kaiju, Cheng Xueyang, *The Reform and Legalization of Chinese Land Administration Institution—on the Background of the Third Plenary Session of the 17th Central Committee of the CPC*, Administrative Law Review, Vol.12, No.1, 2009.

¹⁵³ See Wang Liming, *The Perfection of Expropriation Institution in Property Law Draft*, China Legal Science, No.6, 2005.

¹⁵⁴ See Chinese Constitution art.10, Land Administration Law, art.2 and Property Law, art.42.

legal provisions or institution to implicitly define it or enumerate the types¹⁵⁵; there is no corresponding defining procedure, thus the government can arbitrarily define “public interest” and impose it to rural collectives; superadded that the current collective ownership of rural land cannot effectively express farmers’ real will, even if the farmers’ collective has dispute of the “public interest” unilaterally defined by government, there is no corresponding procedure to resolve the problem, which further encourages the arbitrary exercise of expropriation.

(2) There is no free circulation channel for non-public interest use of collective construction land. In china, all units and individuals that need land for construction purposes shall, in accordance with law, apply for the use of State-owned land.¹⁵⁶ The stock of state-owned land is limited, while there is only one method for the increment of state-owned land, i.e. expropriation of collective land, which makes the expropriation break through the scope of public interest and makes “public interest” mutating into a symbol. Even real estate development and other obviously commercial requirements of land are also named as promoting local economic development to plunder collective land through expropriation. The legislation does not remain free circulation channel for non-public interest use of collective construction land, resulting in collective land either to be expropriated or to be illegally circulated.¹⁵⁷ The public ever hoped the “Property Law” (2007) could complete the task of defining “public interest”. But because that “public interest can be defined differently in various areas and situations, and it is not appropriate to have Property Law make a unified definition”¹⁵⁸, “Property Law” sidestepped this

¹⁵⁵ Law of the People's Republic of China on the Administration of the Urban Real Estate art.23 clarifies that the land-use right for the following land used for construction may, if really necessary, be allocated upon approval by the people’s government at or above the county level in accordance with the law: (1) land used for State organs or military purposes; (2) land used for urban infrastructure or public utilities; (3) land used for projects of energy, communications or water conservancy, etc. which are selectively supported by the State; and (4) land used for other purposes as provided by laws or administrative rules and regulations. These are commonly deemed as the definition of “public interest”, but the legislation did not explicitly interpret whether expropriation of collective land shall refer to these provisions.

¹⁵⁶ See “Land Administration Law” art.43.

¹⁵⁷ With the exception of the collective economic organizations and peasants of such organizations that have lawfully obtained approval of using the land owned by peasants’ collectives of these organizations to build township or town enterprises or to build houses for villagers and the units and individuals that have lawfully obtained approval of using the land owned by peasants’ collectives to build public utilities or public welfare undertakings of a township (town) or village.

¹⁵⁸ See Sun Xianzhong, *Chinese Property Law: Explanation of the Principles and Interpretation of the*

problem. In 2011, the State Council promulgated “Regulations on the Expropriation of Houses on State-owned Land and Compensation Therefor” to regularize “public interest”, compensation and procedures of expropriating houses on state-owned land. But so far, there has been not exercisable legislation to regularize expropriation of collective land, and it has to expropriate collective land in the name of public interest to resolve urban construction land demand.

3.1.3.2 Unjust compensation

Just compensation can not only guarantee the exchange interests of collective land rights but also prevent the government arbitrarily expropriating due to the huge economic interests. According to an economic analysis, because of the insurance coverage against takings by the state, risk-averse individuals’ desire for compensation for losses may be not a reason for the state to pay compensation for the property that it takes, and payment of compensation may serve as a check on excessive expropriation; working against payment of compensation, were higher administrative costs, the implicit costs of raising funds through taxation, and the potential for individuals to overinvest in their property.¹⁵⁹ Therefore, the problem of compensation standard is the continuation of the relations between public interest and private interest. (1) Expropriation without compensation or with low compensation will lead to losses for land rights holders who may resist expropriation and lose the incentive of property investment, which actually sacrifices private interests to guarantee the public interest. (2) If the compensation is excessive, or compensating for individuals’ overinvest in their property, the excessive compensation will be borne by taxpayers, which will produce new unfairness. So, only just compensation can effectively balance the protection of property rights and the restriction of expropriation power, and the relations between the public and private interests. Legislative defects in compensation for expropriated collective land are mainly in:

Legislation, Beijing, Economy and Management Publishing House, 2008, p.197.

¹⁵⁹ See Steven Shavell, *Foundations of Economic Analysis of Law*, Harvard University Press, 2004, pp.127-134.

(1) The standard of compensation does not reflect the exchange interests of collective land rights. In the perspective of equivalent exchange of property, expropriated land property rights include the right to control the property, while if the domination interest is lost, it shall turn to protect the second target value of property rights—exchange value, i.e. the reasonable exchange price of equal transaction. But, “Land Administration Law” elaborates that the compensation for expropriated cultivated land, including compensation for land, farmers’ resettlement subsidies and compensation for attachments and young crops on the requisitioned land, shall be multiple times of the average annual output value of the expropriated land¹⁶⁰. However, the aforementioned “compensation for land” is the compensation for land owners’ and land users’ loss in aspects of land investment and income, not for the collective land ownership; “resettlement subsidies” and “compensation for attachments and young crops on the requisitioned land” are to the farmers who enjoy the right to agricultural land contractual management, but it can only compensate farmers’ loss for investment, while not including compensation for the value of their property rights. “Property Law” adds the premiums for social insurance of the farmers whose land is expropriated¹⁶¹, which simply replaces the social security function of collective land. “To guarantee their daily lives” is only to protect farmers’ the right to survival, and still cannot reflect the value of collective land property rights. Therefore, as a non-market-oriented but policy-guided

¹⁶⁰ Land expropriated shall be compensated for on the basis of its original purpose of use; compensation for expropriated cultivated land shall be six to ten times the average annual output value of the expropriated land, calculated on the basis of three years preceding such requisition.... The standard resettlement subsidies to be divided among members of the agricultural population needing resettlement shall be four to six times the average annual output value of the expropriated cultivated land calculated on the basis of three years preceding such expropriation. However, the maximum resettlement subsidies for each hectare of the expropriated cultivated land shall not exceed fifteen times its average annual output value calculated on the basis of three years preceding such expropriation.... If land compensation and resettlement subsidies paid in accordance with the provisions of the second paragraph in this Article are still insufficient to enable the peasants needing resettlement to maintain their original living standards, the resettlement subsidies may be increased upon approval by people’s governments of provinces, autonomous regions and municipalities directly under the Central Government. However, the total land compensation and resettlement subsidies shall not exceed 30 times the average annual output value of the expropriated land calculated on the basis of three years preceding such expropriation. See “Land Administration Law” art.47.

¹⁶¹ See “Property Law” art.42 par.2: Where land owned by the collective is expropriated, such fees as compensations for the land expropriated, subsidies for resettlement and compensations for the attachments and the young crops on land shall be paid in full according to law, and the premiums for social insurance of the farmers whose land is expropriated shall be arranged in order to guarantee their daily lives and safeguard their lawful rights and interests.

compensation, the current standard of compensation for expropriated collective land cannot reflect collective land rent, the manifestation of land ownership, cannot reflect the locational price of collective land, cannot reflect the value of the right to agricultural land contractual management and other independent property rights, even cannot reflect the distribution of land incremental value because of the conversion of land-use type. In the process of expropriation, collective land ownership is transferred to the State in an extremely lower price than that in the market, and farmers and the collective cannot obtain full compensation equal to their land rights, resulting in the distortion of economic element market in China.¹⁶²

(2) Unreasonable distribution of land incremental value. Collective land to farmers has both the function as social security, and the role to increase farmers' wealth, but the institution of "expropriation first and use second" separates the collective land owners from urban developers. As the executant of expropriation, the government takes the collective land and compensates in accordance with multiple times of the average annual output value of the expropriated land, and as expropriated land owners, the government assigns land-use rights and charges land assignment fees in accordance with market price which is dozens of times higher than compensation for expropriation. Urban real estate developers offer a price to government, while the government compensates to farmers' collective for the expropriated land. In fact, land assignment fees have no legal relations with compensation for land expropriation. Government becomes the intermediary of land transaction and obtains the enormous interests of land incremental value. Collective land expropriation results in that land incremental value is mainly achieved by the State and developers, while farmers lose the important opportunity to create wealth through disposal of collective land and are in the dry tree in the game of distributing land incremental value. According to statistical analysis of a survey data, the distribution pattern of land expropriation interest is roughly that local governments took 20%~30%, primary land market developers took 40%~50%,

¹⁶² See Zou Xiuqing, *The Institution of Rural Land Property Rights and the Protection of Farmers' Land Rights in China*, Jiangxi Publishing Group, 2008, p.185.

collective organizations in villages took 25%~30%, and farmers took only 5%~10%.¹⁶³ According to an incomplete statistics, since the beginning of Reform and Opening-up (1978), governments and enterprises had taken approximately 5 trillion yuan from farmers through the price scissors of collective land expropriation, which made a large number of landless peasants whose interests were severely deprived interests in trouble.¹⁶⁴ The distribution of land incremental value “has no opening, transparent and effective institutional guarantee, which breeds a mass of injustice and corruption. The conflict between the institution of land expropriation with high-characters of planned economy and market economy development is increasingly serious.”¹⁶⁵ Therefore, determining the standard of just compensation for collective land expropriation can not only prevent collective land rights suffering from “sacrifice in the second time”¹⁶⁶ due to expropriation, but also weaken local governments’ incentive of land expropriation due to the economic interests, to coordinate land expropriation and acquisition by purchase.

(3) The standards of compensation for expropriation in the urban and that in the rural are different. Because of dualistic administration of urban and rural land, the Chinese legislation implements dualistic standards of compensation for expropriation in the urban and that in the rural. The expropriation of urban houses applies to “Regulations on the Expropriation of Houses on State-owned Land and Compensation Therefor” and “Regulation on the Dismantlement of Urban Houses”; while, there is no specific legislation for collective land expropriation, which generally applies to the relevant principles of “Land Administration Law” and “Regulations on the Implementation of the Land Administration Law”. “Land Administration Law” provides that when the land is needed for the benefits of the

¹⁶³ See proposal No.0001 in the second plenary session of the tenth Chinese People's Political Consultative Conference (CPPCC) National Committee, 2004 March, at <http://www.people.com.cn/GB/34948/34951/34959/2970647.html>, visiting date: 2013.07.20.

¹⁶⁴ See proposal No.0001 in the second plenary session of the tenth Chinese People's Political Consultative Conference (CPPCC) National Committee, at <http://www.people.com.cn/GB/34948/34951/34959/2970647.html>, visiting date: 2013.07.20.

¹⁶⁵ See Chai Taoxiu and Liu Xiangnan, *Review and Prospect on the Transition of Land Requisition System in China*, China Land Science, Vol.22, No.2, 2008.

¹⁶⁶ Collective land rights cannot freely circulate in market, which is the “sacrifice in the first time”. If the compensation for expropriation is unreasonable, it is the “sacrifice in the second time”.

public or the use of the land needs to be readjusted for renovating the old urban area according to city planning, the land administration department of the people's government may take back the right to the use of the State-owned land and the user granted with the land-use right shall be compensated appropriately.¹⁶⁷ "Regulations on the Expropriation of Houses on State-owned Land and Compensation Therefor" art.18 elaborates that "the compensation for the value of houses to be expropriated shall not be less than the market price of the real estate comparable to the houses to be expropriated on the date of the public notice of the house expropriation decisions." It can be seen that the scope of urban building expropriation includes the title of the house and the state-owned land-use right of the area occupied by the expropriated house; compensation standards are "market price". Urban construction land-use right can be freely circulated, and can realize market pricing. Urban residents can get full compensation for property loss, and can share land incremental value through adjustment of market mechanism. But for rural collective land expropriation, because the legislation prohibits free circulation in principle, there is no real market price to be taken for reference to determine the value of rural collective land rights, and the compensation which is calculated on multiple times of the average annual output value of the expropriated land cannot equalize farmers' loss. "In accordance with current law and regulations, in some cities of large or medium sizes, for the land in the same regional location, the statutory standard of compensation for expropriated collective land takes only 3%~6% the standard of compensation for expropriated state-owned construction land."¹⁶⁸

3.1.3.3 Lack of due process of collective land expropriation

Regularizing the process of collective land expropriation exercised by government, which includes the exercising mode, the sequential step and the due time, can guarantee collective land rights holders to be on an equal legal status with

¹⁶⁷ See Land Administration Law, art.58.

¹⁶⁸ See Cheng Gang, *The Third Time Land Reform Targets At Resolving Urban-rural Dualistic Institution*, China Youth Daily, 2008.10.23, at http://www.china.com.cn/news/txt/2008-10/23/content_16651973.htm

government; can make land rights holders know whether the expropriation has the legitimacy of public interest; and enables collective land rights holders, on the basis of enjoying the right to know and the right to participate, to realize the protection of land rights through consultation based on equality and the restraint of expropriation power. “The lack of due process is an important reason of breeding and spreading corruption.”¹⁶⁹ The legislative defects in the process of expropriation mainly manifest as follows:

(1) Lack of sound hearing procedure and other public participation procedures. In Common Law System, the principle of natural justice is identified with the two constituents of a fair hearing, which are the rule against bias (“no man a judge in his own case”), and the right to a fair hearing (“hear the other side”)¹⁷⁰. As for farmers’ collective, because land expropriation depriving farmers’ property rights is a kind of major adverse behavior to them, they have the right to know whether the expropriation is legitimate and rational or not, have the right to participate in the process and to make decisions on the series of problems. But the “Land Administration Law” and its implementation regulations do not provide the hearing procedure. And “Provisions on the Hearings In Respect of Land and Resources” enacted by Ministry of Land and Resources only prescribes the hearing of compensation for expropriation, which is far from perfection.

(2) Lack of remedy procedures to revoke expropriation. “Land Administration Law” and its implementation regulations prescribe the basic process of expropriating collective land.¹⁷¹ When the process of expropriation is completed, if

¹⁶⁹ See Jiang Ming’an, *Due Legal Process: A Barrier against Corruption*, China Legal Science, 2008, (3).

¹⁷⁰ In English law, natural justice is technical terminology for the rule against bias (*nemo iudex in causa sua*) and the right to a fair hearing (*audi alteram partem*). While the term natural justice is often retained as a general concept, it has largely been replaced and extended by the more general “duty to act fairly”. At http://en.wikipedia.org/wiki/Natural_justice#cite_note-8, visiting date 2013.07.22.

¹⁷¹ The basic process of expropriating collective land: (a) Expropriation of land shall be subject to approval by the people’s governments at and above the provincial level, and be submitted to the State Council for the record. Land for agriculture shall be expropriated after conversion of use of the land is examined and approved. (b) Municipal, county people’s government of the locality whose land has been requisitioned shall, upon approval of the land expropriation plan according to law, organize its implementation, and make an announcement in the town (township), village whose land has been expropriated on the approval organ of the land expropriation, number of the approval document, use, scope and area of the expropriated land as well as the rates for compensation of land expropriation, measures for the resettlement of agricultural personnel and duration for

the expropriated land is used for non-announcement or non-public interest use, there are not remedy procedures to revoke the expropriation. When the expropriation is done and the land-use violates relevant regulations, farmers involved can only appeal for economic compensation for the expropriation, but the infringed collective land rights, which have been converted into state-owned land rights, are unable to be resumed. More seriously, people's courts are reluctant to accept the litigation on the dispute over compensation and relocation due to land expropriation, resulting in that judicial authority can not restrict executive authority's abuse of administrative power.¹⁷²

China's current institution of land expropriation has many problems, mainly because it was guided and designed by planned economy thought, which is lagging behind the overall reform of the market economy system. Although the guiding ideology of the administration of collective land expropriation meets the requirements of urban construction and industry development, it ignores farmers' land property rights. The barbarism of expropriation infringes farmers' collective land rights, and hinders the formation of unified construction land market.

processing land expropriation compensation. (c) Persons of ownership and persons of use right of the expropriated land shall, within the duration prescribed in the announcement, go to the competent department of people's government designated in the announcement to go through the registration for land expropriation compensation on the strength of land ownership certificates.(d) The competent departments of municipal, county people's governments shall, on the basis of the approved land expropriation plan and in conjunction with the departments concerned, draw up land expropriation compensation and resettlement plan, make an announcement thereof in the town (township), village wherein the requisitioned land is located to solicit the views of the rural collective economic organizations and peasants on the expropriated land. (e) The competent departments of land administration of municipal, county people's governments shall, upon approval of the land requisition compensation and resettlement plan submitted to the municipal, county people's governments, organize its implementation. Where a dispute arises over the compensation rates, coordination shall be carried out by local people's government above the county level; where coordination has failed, arbitration shall be resorted to by the people's government that approved the land expropriation. Land expropriation compensation and resettlement dispute shall not affect the implementation of the land expropriation plan. (f) Payment of various expenses for land requisition shall be effected in full within 3 months starting from the date of approval of the land requisition and resettlement plan. See "Land Administration Law" art.45-48, and "Regulations on the Implementation of the Land Administration Law" art.25, 26.

¹⁷² Reply of the Supreme People's Court on Whether or Not the People's Court Shall Accept the Civil Litigation on the Dispute over Compensation and Relocation Whereby the Parties Concerned Fail to Reach an Agreement of Compensation and Relocation Regarding House Demolishment and Relocation (Fa Shi [2005] No.9, adopted at the 1358th meeting of the Judicial Committee of the Supreme People's Court, promulgated and come into force as of August 11, 2005) provides that, if the party implementing house demolition and the party whose house is demolished, or the party implementing house demolition, the party whose house is demolished and the tenant of this house fail to reach an agreement of compensation and relocation, and bring a civil action on the dispute over compensation and relocation to the people's court, the people's court shall not accept the litigation, and inform the parties concerned can, according to Regulation on the Dismantlement of Urban Houses, Article 16, apply for related authority department's ruling. This judicial interpretation reflects the lagging judicial system and the super administrative power in China.

Therefore, it is urgent to reform the institution of collective land expropriation.

3.2 The scope of public interest

The scope of “Public interest” determines the bounds of state power and private property rights. Through defining the scope of “public interest”, to limit the boundary of expropriation and to reasonably expand the market-oriented circulation of collective construction land has a complementary relation. Assuming that the quota of construction land is in a constant, if the supply of construction land through expropriation increases, it signifies that the circulating volume of collective construction land in market relatively decreases, while, on the contrary, the reduced amount of expropriated collective land is the increased amount of market-oriented circulation of collective construction land. If the requirement of construction land is due to public interest, the government authority may, in accordance with the liability rules, exercise expropriation. Non-public interest requirements of construction land shall follow the property rules, to freely and equally transfer collective land in accordance with landowners’ autonomy of will, on which situation the government may purchase it or let it directly circulate in market. Only the expropriation is strictly limited within the scope of public interest, can the market-oriented circulation channel for non-public interest use of collective construction land be unobstructed.

“Public interest” is one of the concepts which are most difficult to be defined in human history. In Black’s Law Dictionary, “public interest” means the general welfare of the public that warrants recognition and protection; something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation.¹⁷³ The concept of “public interest” involves the scope of “public” and the content of “interest”. But how many individuals gathering can constitute the “public”, while the interest reflecting the majority’s opinion may not be the public

¹⁷³ See Bryan A. Garner, Black’s Law Dictionary (8th ed. 2004), p3883.

interest. Because of modern constitutional thought, people's cognizance of the concept of public interest, gradually turned from making a point of "uncertain major beneficiaries" to the "nature" of public interest, which means that on the basic spirit of Constitution to determine the most important social interest, even the supporting behaviors to minor beneficiaries (such as a few persons who are in an inferior social position) can also be considered as conforming to the modern concept of public interest.¹⁷⁴ The "public character" of public interest determines that the connotation of public interest shall be defined by the legislature, national people's congress, which is on behalf of all the people's will in China. But the historical characteristic of public interest and the stability of legislation determine the legislature cannot enumerate all the concrete manifestation patterns of public interest. Therefore, avoidance of its definition in legislation reflects legislators' wisdom. But if lawmakers cannot offer the patterns of public interest, it may lead to the government authority exercising peremptory power to private property rights, and trapped into the predicament of public interest.¹⁷⁵ "Public interest" itself shall be recognized and respected in the society, and the legitimacy of a state restricting citizen's private rights on the basis of public interest purposes shall be above suspicion. But that restriction based on public interest shall not be queried does not mean that the specific interests incorporated into the category of "public interest" by the state are not unchallengeable. Whether specific interests are truly vested in the "public interest" is a process of value choices.¹⁷⁶

3.2.1 "Public use" in the U.S.

At present, China is in the rising development stage, and needs to circulate a lot of rural land to meet the requirement of urbanization; meanwhile, China is facing a market economy reform. The United States has a history more than 200 years in the

¹⁷⁴ See Chen Xinmin, *Basic Theories of Basic Constitutional Rights*, Taipei, Angle Publishing Co. Ltd., 2002, P.176.

¹⁷⁵ See Wang Yangwen, *Study on the Protection of Private Property via Administrative Law*, Beijing, People's Publishing House, 2009, 267.

¹⁷⁶ See Hu Honggao, *On the Legal Concept of Public Interest*, China Legal Science, No.4, 2008.

institution of land expropriation, and its legal experience accumulated in the long-term judicial practice can be taken as reference in the current Chinese land expropriation reform. The U.S. is the first country making constitutional legislation of expropriation in the world. As early as 1791, the Fifth Amendment (Amendment V) to the United States Constitution clearly elaborated: “nor shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”¹⁷⁷

“Public use” is the precondition for the US government to exercise expropriation. Only that the purpose of government expropriating private property is for public use, the exercise of expropriation power is legitimate. The breadth of the definition of public use, which is debatable, determines the extent of the government's power. For a long time, US courts have formed the narrow and broad senses of “public use”.

Until the mid-twentieth century, the US Supreme Court generally maintained a traditional interpretation of public use consistent with the actual-use theory.¹⁷⁸ In this narrow sense, “public use” requires that the expropriated property shall be directly used or entitled to practically use by the public, i.e. “use by the public”, which contains two cases: (1) use by the public through government use, such as the expropriated land are used to construct government office building, military base, and so on; (2) actual use by the public, such as the road, schools, hospitals. U.S. Supreme Court Justice Thomas ever interpreted “public use” in the most natural interpretation: “that the government may take property only if it actually uses or gives the public a legal right to use the property.”¹⁷⁹ However, with the rapid social development, especially the rise of state control in the 1930s, after the Great Depression, courts increasingly tended to interpret “public use” in a broad

¹⁷⁷ See the Fifth Amendment (Amendment V) to the United States Constitution.

¹⁷⁸ See Emily L. Madueno, *the Fifth Amendment's Takings Clause: Public Use and Private Use; Unfortunately, There Is No Difference*, Loyola of Los Angeles Law Review, Vol. 40:809, winter 2007.

¹⁷⁹ See Thomas, J., dissenting, *Susette Kelo, et al., Petitioners v. City of New London, Connecticut, et al*, On Writ of Certiorari to the Supreme Court of Connecticut. At <http://www.law.cornell.edu/supct/html/04-108.ZD1.html>, visiting date 2013.07.24

sense.¹⁸⁰ The broad sense of public use does not require the expropriated property to be used actually by the public, but used for public benefit or purpose, even transferring someone's private property to another private individual, as long as promoting the public interest.

In an 1896 case upholding a mining company's use of an aerial bucket line to transport ore over property it did not own, Justice Holmes stressed "the inadequacy of use by the general public as a universal test."¹⁸¹ The Court has repeatedly and consistently rejected the "use by the public" test since. The disposal of the property owners' objections therefore turned on the question whether the city's development plan serves a "public purpose". Supreme Court decisions had defined that concept broadly, deferring to legislative judgments in this field.

In *Berman v. Parker* case (1954),¹⁸² the Supreme Court upheld a redevelopment plan targeting a blighted area of Washington D.C. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities. The owner of a department store located in the area challenged the condemnation, pointing out that his store was not itself blighted and arguing that the creation of a "better balanced, more attractive community" was not a valid public use. If the department store property was not "blighted" then the condemnation action had no authority to affect his land. Justice Douglas refused to evaluate this owner's claim in isolation, deferring instead to the legislative and agency judgment that the area "must be planned as a whole" for the plan to be successful. The Court explained that "community redevelopment programs need not, by force of the Constitution, be reviewed on a piecemeal basis—lot by lot, building by building."¹⁸³

¹⁸⁰ With the expansion of social functions performed by the government on the context of industrialization and urbanization, the term of "public use" in American judicial practice was more interpreted as "public purpose", which is close to the legislative intent and connotation of the "public interest" in China. See Lin Laifan, Chen Dan, *Defining Public Interest in House Demolition in Cities*, *Legal Science*, 309 (8), 2007.

¹⁸¹ See *Strickley v. Highland Boy Gold Mining Co.*, 200 U. S. 527, 531 (1906).

¹⁸² See *Berman v. Parker*, 348 U.S. 26 (1954).

¹⁸³ See 348 US 26, 33. "We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive.... The values it represents are spiritual as well as

In *Hawaii Housing Authority v. Midkiff*¹⁸⁴ (1984), the Supreme Court considered a Hawaii statute whereby fee title was taken from lessor/landowners and transferred to lessees in return for just compensation to reduce the concentration of land ownership. The Court unanimously upheld the statute and rejected the view that the states' action was "a naked attempt on the part of the state of Hawaii to take the property of A and transfer it to B solely for B's private use and benefit." The Supreme Court concluded that the State's purpose of eliminating the "social and economic evils of a land oligopoly" qualified as a valid public use. This court also rejected the contention that the mere fact that the State immediately transferred the properties to private individuals upon condemnation somehow diminished the public character of the taking.¹⁸⁵

Therefore, prior American Supreme Court decisions recognized that the needs of society varied in different parts of the nation, just as they have evolved over time in response to changed circumstances. The earliest Supreme Court cases in particular embodied a strong theme of federalism and recognized the respective roles of federal and state government authority, emphasizing the "great respect" that the Court owes to state legislatures and state courts in discerning local public needs.

Kelo v. City of New London (2005)¹⁸⁶ was a case decided by the Supreme Court of the United States involving the use of expropriation to transfer land from one private owner to another private owner to further economic development. In a 5:4 decision, the Court held that the general benefits a community enjoyed from economic growth qualified private redevelopment plans as a permissible "public use" under the Takings Clause of the Fifth Amendment.

physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community shall be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled... It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital shall be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."

¹⁸⁴ See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

¹⁸⁵ "It is only the taking's purpose, and not its mechanics", the court explained, that matters in determining public use. *Hawaii Housing Authority v. Midkiff*, 467 US 229, 244.

¹⁸⁶ See *Kelo v. City of New London*, 545 U.S. 469 (2005), at Cornell University's Law School Legal Information Institute website: <http://www.law.cornell.edu/supct/html/04-108.ZO.html>, visiting date 2013.07.24.

Although the decision was controversial in this case, it was not the first time “public use” had been interpreted by the Supreme Court as “public purpose”. In the majority opinion, Justice Stevens wrote the “Court long ago rejected any literal requirement that condemned property be put into use for the general public” (545 US 469). Thus precedent played an important role in the 5:4 decision of the Supreme Court. The Fifth Amendment was interpreted the same way as in *Midkiff* (467 US 229) and other earlier expropriation cases. However in those earlier cases the court justified the use of expropriation on the basis of elimination of social harms such as barriers to efficient exploitation of agricultural and mineral-bearing land, elimination of slums, or large-scale title misallocation. None of these factors were present in *Kelo* case; it was a case in which the city merely wanted to increase its tax revenues, and attract a wealthier population in place of the lower middle class home owners in the redevelopment project area.

Against the judgment, public reaction to the decision was highly unfavorable.¹⁸⁷ Much of the public viewed the outcome as a gross violation of property rights and as a misinterpretation of the Fifth Amendment, the consequence of which would be to benefit large corporations at the expense of individual homeowners and local communities. As of June 2012, 44 states had enacted some type of reform legislation in response to the *Kelo* decision. Of those states, 22 enacted laws that severely inhibited the takings allowed by the *Kelo* decision, while the rest enacted laws that place some limits on the power of municipalities to invoke eminent domain for economic development.

On the preconditions of explicitly stating “nor shall private property be taken for public use, without just compensation” in the US Constitution, usually, the definition of “public use” could be guaranteed by legislature or judicature,

¹⁸⁷ See Adam Liptak, the Nation; Case Won on Appeal (to Public), the New York Times, July 30, 2006, at <http://query.nytimes.com/gst/fullpage.html?res=9807E2DE133FF933A05754C0A9609C8B63&n=Top/Reference/Times%20Topics/Subjects/P/Public%20Opinion>, visiting date: 2013.07.24.

meanwhile, citizens' rights to participate and to learn the truth are protected by the due judicial procedure. Property owners' rights of free trade shall be fully guaranteed, and any restrictions on their rights must be derived from the mandatory provisions of law, which must have legislative rationality and legitimacy. "Public use" is the fundamental principle in the US constitution to regularize and restrict the power of expropriation. When the expropriation based on public demand violates property rights owners' autonomy of will in transferring property rights, the owner shall bear the restriction.

3.2.2 "Public interest" in Europe

3.2.2.1 A general view

Three European Union legal instruments regulate the expropriation of private property. The Treaty on the Functioning of the European Union ("TFEU"), in consort with court decisions, outlines EU jurisdiction to regulate expropriation. The Charter of Fundamental Rights of the European Union ("Charter") and the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") establish conditions for legal expropriation.

The TFEU addresses EU jurisdiction over property law in member states, that "the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership."¹⁸⁸ The European Court of Justice has established that the EU may impose some standards on expropriation, such as the requirement of non-discrimination.¹⁸⁹ Meanwhile, the Court of Justice of the European Free Trade Association has found that expropriation shall satisfy "the requirements of suitability and necessity under the principle of proportionality."¹⁹⁰ In essence, the

¹⁸⁸ See The Treaty on the Functioning of the European Union, Article 345.

¹⁸⁹ See *Robert Fearon and Company Limited v. Irish Land Commission*, case 182/83, E.C.R. 3677, par. 7 (1984), at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61983CJ0182:EN:PDF>, visiting date: 2014.11.23.

¹⁹⁰ See *EFTA Surveillance Authority v. Norway*, Case E-2/06, EFTA Court Report 2007, par. 81 (2007), at http://www.eftacourt.int/fileadmin/user_upload/Files/AnnualReports/efta-court-annual-report-2007.pdf, visiting date: 2014.11.23.

EU “reserves for Member States only the power to decide whether and when expropriation occurs and not the conditions under which such expropriation takes place.”¹⁹¹

The Charter protects property from expropriation, “except in the public interest and in cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.”¹⁹²

The ECHR echoes Charter. Art. 1 of Protocol 1 to the ECHR reads as follows: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession except in the public interest and subject to conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”¹⁹³

In Europe, expropriation is only permitted in order to achieve a public interest. Though states interpret “public interest” differently, it generally signifies that the property, once put to the intended use, will benefit the community or country generally rather than a particular individual or group. In principle, “because of their direct knowledge of their society and its needs”¹⁹⁴, states are better placed than the international judge to appreciate what is “in the public interest”. For instance, national security, economic growth, and social justice usually qualify as public interests.¹⁹⁵ The European Court of Human Rights has held that expropriations “in

¹⁹¹ See Angelos Dimopoulos, *Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Relations*, Croatian Yearbook of European Law and Policy, p101 (116), Vol.4, 2008.

¹⁹² See Charter of Fundamental Rights of the European Union, art.17 (1).

¹⁹³ See Convention for the Protection of Human Rights and Fundamental Freedoms, Art.1 of Protocol no.1.

¹⁹⁴ See *James & Others v. United Kingdom*, application no. 8793/79, Eur. Ct. H.R., par. 46 (1986).

¹⁹⁵ Law on Land, art.45(1) (Lithuania 2007) provides an exhaustive list of public interests that may justify expropriation, including national security and defense, transportation infrastructure, pipelines, transmission

pursuance of legitimate social, economic or other policies may be ‘in the public interest’, even if the community at large has no direct use or enjoyment of the property taken”¹⁹⁶. For instance, the transfer of property between two private parties may improve social justice and thus “constitute a legitimate means for promoting the public interest”¹⁹⁷. This rationale justified the transfer of property from certain estate owners to their longtime tenants under the United Kingdom’s leasehold reform legislation.¹⁹⁸ European courts respect state legislature’s judgment on the legitimacy of expropriation actions unless such judgment is “manifestly without reasonable foundation.”¹⁹⁹

The expropriation employed must also be proportional to the public interest sought to be realized.²⁰⁰ State expropriations shall achieve a “fair balance...between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.”²⁰¹ In fact, the individual property owners shall not personally bear an “individual and excessive burden” to achieve the public purpose.²⁰² A common measure of proportionality is whether the public purpose could be achieved through less restrictive means. If no, the expropriation is probably not proportional to the sought public purpose.

In *Sporrong and Lönnroth v. Sweden*, the European Court of Human Rights made a judgment in the basis of the three principles in Article 1 of Protocol 1 of the European Convention of Human Rights²⁰³ in ruling that Sweden had imposed “an

lines, “social infrastructure” such as educational, scientific, cultural, health, environmental, public order, and exercise facilities, waste management, cemeteries, economic projects recognized as important by the executive or legislature.

¹⁹⁶ See *James & Others v. United Kingdom*, application no. 8793/79, Eur. Ct. H.R., par.45 (1986).

¹⁹⁷ Ibid. Par.40.

¹⁹⁸ Ibid. Par.45.

¹⁹⁹ See *Lithgow and Others v. United Kingdom*, Eur. Ct. H.R., Applications Nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, par.122 (1986), at

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57526#{"itemid":\["001-57526"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57526#{), visiting date 2014.11.25.

²⁰⁰ See *James & Others v. United Kingdom*, application no. 8793/79, Eur. Ct. H.R., par.50 (1986).

²⁰¹ Ibid.

²⁰² See *Sporrong and Lönnroth v. Sweden*, Eur. Ct. H.R., Application no. 7151/75; 7152/75, par.73 (1982), at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57580#{"itemid":\["001-57580"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57580#{), visiting date 2014.11.25.

²⁰³ In the *Sporrong and Lönnroth v. Sweden* case, the Court stated that Article 1 contains “three distinct rules”: “The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set

individual and excessive burden” on the claimants and thereby violated the protocol. Plaintiffs brought suit when the Swedish government granted the city council of Stockholm a zonal expropriation permission to allow the city to build a viaduct leading to a major relief road over one of the city’s main shopping streets. The permission, which covered 164 private properties, would also allow the city to construct one of the viaduct’s supports directly on the plaintiffs’ property, and therewith convert the rest of the property into a car park.²⁰⁴ Moreover, two years before the government’s issuance of the permit, the Stockholm County Administrative Board imposed an official prohibition on construction on the disputed property, stating the city’s plans would affect that property’s use.²⁰⁵

Although the Court held that no expropriation had occurred under the first Article 1 rule, which “enounces the principle of peaceful enjoyment of property”, compensation was still required. According to the Court, the state’s failure to mitigate the inconveniences imposed on the plaintiffs by the permit and prohibition on construction placed “an individual and excessive burden” on the plaintiffs in direct violation of Article 1.²⁰⁶

3.2.2.2 “Public interest” in Germany

Under German law, individual property rights are a fundamental part of personal liberty, leading the individual to enjoy a self-governing life.²⁰⁷ The Basic Law permits expropriation only for the “public good.”²⁰⁸ The Constitutional Court has developed a four-part test to determine the proportionality of the expropriation to

out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph... The Court must determine, before considering whether the first rule was complied with, whether the last two are applicable.” See *Sporrong and Lönnroth v. Sweden*, Eur. Ct. H.R., par. 61.

²⁰⁴ Ibid. Par.11.

²⁰⁵ Ibid. Par.16.

²⁰⁶ See “Indirect Expropriation” and the “Right to Regulate” in International Investment Law, Organization for Economic Co-operation and Development (Sept. 2004), p.18, at http://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf, visiting date 2014.11.25.

²⁰⁷ See Donald P. Kommers, *the Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, 1997, p.251.

²⁰⁸ See Germany Constitution, art.14 (3) (1949).

the end it serves. Under this test, the expropriation must: (1) be authorized by law; (2) be an appropriate means of accomplishing the public purpose; (3) be necessary and the least intrusive means possible to accomplish the public goal; and (4) advance a public interest that outweighs the private property interest. The public purpose must be impossible to achieve by less restrictive measures.²⁰⁹

The Constitutional Court permits expropriations that serve a private as well as a public interest. Public authorities may transfer expropriated property to a private entity, provided that the private entity serves a public interest. For instance, in one case, the Court permitted the expropriation of property that was transferred to a private school. However, in another case, the Court forbade the expropriation of property from one business to a large motor company that would transform the area into a testing ground. Although authorities claimed that Daimler-Benz would stimulate the local economy and provide employment, the Court held that the expected public benefit did not justify the private deprivation.²¹⁰

3.2.2.3 “Public interest” in Poland

Due to historical circumstances, Poland experienced widespread deprivation of private property. Under communism, formerly private land was collectivized. But since the collapse of the communist power, Poland has restored private property to individuals as a general policy and pursued certain expropriations to achieve specific state goals.

Under current Polish law, public authorities can only expropriate property if agreements for a voluntary transfer fail, and expropriation is necessary to achieve a public purpose. The Polish Constitution (1997) protects property rights and sets forth the legal basis and conditions for expropriation.²¹¹ Under the Polish

²⁰⁹ See Kevin E. McCarthy, *Eminent Domain*, Office of Legislative Research of the Connecticut General Assembly, Nov. 22, 2005, at <http://www.cga.ct.gov/2005/rpt/2005-r-0321.htm>, visiting date: 2013.07.26.

²¹⁰ See A.J. van der Walt, *Constitutional Property Clauses: A Comparative Analysis*, Cape Town, Juta & Company Ltd. 1999, p.148.

²¹¹ See Poland Constitution art.21 (1997).

constitution, fundamental rights such as property ownership may only be limited “for the protection of [Poland’s] security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons”²¹². The Real Estate Management Act provides a non-exhaustive list of public purposes that justify interference in property rights, including transportation infrastructure, environmental protection facilities, and the protection of cultural heritage.²¹³ Expropriation is justified only when no other measure can achieve the specific public purpose.²¹⁴

In case *Potomska and Potomski v. Poland*, a Polish couple purchased real property from the state in the 1970s that was classified as farming land. In 1987, the regional authority declared the property a historic monument because it had been a Jewish cemetery and was one of few vestiges of Jewish civilization in the region. This designation prevents the couple from developing the property in any way, but local authorities say that they lack the funds to provide monetary compensation and have not found acceptable alternative replacement land. The Court found that “the fair balance between the demands of the general interest of the community and the requirements of the protection of property had been upset and the applicant couple had had to bear an excessive burden, in violation of Article 1 of Protocol No. 1.”²¹⁵

3.2.3 To define “Public interest” for collective land expropriation in China

The amendment (2004) of Chinese Constitution and the “Property Law” establish the expropriation principle that the State may, in the public interest and in

²¹² See Poland Constitution art.31 (3) (1997),

²¹³ See Marek Walacik, Sabina Zrobek, *Chosen Principles of Land Acquisition for Public Purposes and Just Compensation Determination in Poland*, Olsztyn: Polish Real Estate Scientific Society, 2010, at http://www.tnn.org.pl/tnn/publik/18/TNN_monografia_2010.pdf, visiting date 2013.07.27.

²¹⁴ See Land Administration Act (Poland 1997), sec.112: “Expropriation can be carried out where public-interest aims cannot be achieved without restriction of those rights and where it is impossible to acquire those rights by way of a civil law contract.”

²¹⁵ See *Potomska and Potomski v. Poland*, Eur. Ct. H.R., Application no. 33949/05 (2011). Violation of article P1-1; Question under article 41 reserved. At [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104145#{"itemid":\["001-104145"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104145#{), visiting date: 2014.11.27.

accordance with law, expropriate or requisition land for its use and make compensation for the land expropriated or requisitioned,²¹⁶ but do not define the public interest, which is a generalized legislation model. However, this model cannot prevent the abuse of expropriation power due to profit-driven motivation and the defects of judicial rules. So, the legislation shall make “public interest”, especially that in the context of collective land expropriation, concrete and exercisable. The legislative model both providing the list of public interest and making a general definition of public interest is a feasible scheme, and defining public interest for collective land expropriation shall involve two aspects in substantive law and in procedural law.

3.2.3.1 Definition in substantive law

(1) A feasible legislative model

The content of public interest and its beneficiaries are uncertain, and the connotation of public interest is dynamic, so, the concrete situations cannot be exhaustively enumerated. But generalizing the types of “public interest” is sound at the coverage and radiation of its content, which is easy to exercise. Even case law system countries also generalize “public interest” list through constantly summarizing the cases.²¹⁷ Chinese legislation shall summarize the types of public interest through social practices and express the scope of expropriation, supplemented with a general definition of public interest and miscellaneous provisions. Thus the legislative model can be: general definition plus enumerated list plus miscellaneous provisions, and the type beyond the legislation and

²¹⁶ See Constitution of the People's Republic of China (2004), art.10 and Property Law of the People's Republic of China, art.42.

²¹⁷ After the case *Kelo v. City of New London* in the United States, then-President George W. Bush signed an order elaborating that “nothing in this order shall be construed to prohibit a taking of private property by the Federal Government, that otherwise complies with applicable law, for the purpose of: (a) public ownership or exclusive use of the property by the public, such as for a public medical facility, roadway, park, forest, governmental office building, or military reservation; (b) projects designated for public, common carrier, public transportation, or public utility use, including those for which a fee is assessed, that serve the general public and are subject to regulation by a governmental entity; (c) conveying the property to a nongovernmental entity, such as a telecommunications or transportation common carrier, that makes the property available for use by the general public as of right; (d) preventing or mitigating a harmful use of land that constitutes a threat to public health, safety, or the environment; (e) acquiring abandoned property; (f) quieting title to real property; (g) acquiring ownership or use by a public utility; (h) facilitating the disposal or exchange of Federal property; or (i) meeting military, law enforcement, public safety, public transportation, or public health emergencies.” This can be deemed as the scope of “public use”. See Executive Order 13406 of June 23, 2006 Specific Exclusions. <http://www.gpo.gov/fdsys/pkg/FR-2006-06-28/pdf/06-5828.pdf>, visiting date 2013.07.28

individual cases in disputes could be adjudged by the judicial system, which can adapt to the developing content and connotation of “public interest” in social transition, can determine the boundary of exercising expropriation power, and can reserve channel for the market-oriented circulation of collective land.

Specifically, the general definition can refer to that “the property, once put to the intended use, will benefit the community or country generally rather than a particular individual or group”²¹⁸. The type list of “public interest” in the context of collective land expropriation can refer to the provisions in occidental countries as well as the relevant provisions in “Regulations on the Expropriation of Houses on State-owned Land and Compensation Therefor” (released by the State Council, 2011), which can be summarized as follows: (a) the needs of national defense and foreign affairs; (b) the needs of energy, transportation, water conservation and other infrastructure construction projects carried out under the organization of the governments; (c) the needs of science and technology, education, culture, health, sports, environmental and resource protection, disaster prevention and mitigation, heritage conservation, social welfare, municipal utilities and other public utility projects carried out under the organization of the governments; (d) the needs of construction projects for affordable residential houses carried out under the organization of the governments; and (e) the needs of old city reconstruction projects for districts where dilapidated buildings are concentrated and poor infrastructure facilities are located that are carried out by the governments pursuant to relevant provisions of the urban and rural planning law.²¹⁹ The various construction activities that absolutely need collective land expropriation pursuant to the aforementioned types shall comply with the economic and social development planning, overall land use planning, urban and rural planning and special planning. The use of rural collective land and that of urban land are different, so the concrete manifestation of the public interest will be different in some areas.

²¹⁸ It is concluded in Section 3.2.2.1 of this dissertation, noted by the author.

²¹⁹ See Regulations on the Expropriation of Houses on State-owned Land and Compensation Therefor (released by the State Council, 2011), art.8.

It shall be noted that not all land requirements of public interests shall be expropriated. Exercising expropriation power shall follow the principle of proportionality and the principle of necessity, i.e. that the individual property owners shall not personally bear an “individual and excessive burden”²²⁰ to achieve the public interest and if not exercise expropriation power, the public interest will not be realized in effect.

According to the principle of legal reservation, solely the legislature can make public interest clauses to restrict citizens’ fundamental rights, thus excluding the government authority to restrict citizens’ fundamental rights through making executive order or regulatory documents. Because legislation cannot list every type of public interest, the specific types not stipulated in law need to be determined through the interpretation of relevant miscellaneous provisions, such as “the needs of other public interests as set forth in laws”. In practice, the controversial cases about public interest shall be referred to judicial review.

(2) Whether land for the implementation of city planning can be brought into the scope of land expropriation or not

According to “Land Administration Law” art.58 (2), under the circumstance that “the use of the land needs to be readjusted for renovating the old urban area according to city planning”, the land administration department of the people’s government concerned may, with the approval of the people’s government that has originally approved the use of land or that possesses the approval authority, take back the right to the use of the state-owned land.²²¹ It means that the right to use state-owned land can be expropriated for implementing city planning; “implementation of city planning” has the equal legal status with “public interest” in land expropriation; “implementation of city planning” becomes another legal

²²⁰ See *Sporrong and Lönnroth v. Sweden*, Eur. Ct. H.R., par.73 (1982), at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57580#{"itemid":\["001-57580"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57580#{), visiting date 2014.11.27.

²²¹ See “Land Administration Law” art.58 (2).

basis of expropriation besides “public interest”. In practice, local governments always expropriate collective land which is in the city planning area.²²²

According to Constitution spirits, “implementation of city planning” does not conform to the essence of “public interest”, and it shall not be the legal basis of collective land expropriation. (a) The use of land in city planning area does not always reflect the requirement of public interest, such as demolishing old buildings and using the land for building high-end flats or entertainment venues. However, the orientation of the reform of collective land expropriation is to strictly restrict the scope of “public interest” in expropriation and to reserve market-oriented circulation channel for non-public interest use of collective land. (b) The collective land area within city planning area while without city built-up area, which is in a large-scale, has the maximum locational advantage, and if this area is brought into the bound of collective land expropriation, farmers will lose the land capital which has the greatest vendibility. (c) If the collective land is delimited in city planning area and then to be expropriated regardless of whether the factual land-use within this area complies with public interest or not, it means that the city expansion has no boundary, and the State can occupy collective land easily by making city planning through administrative procedure, to which the peasants’ collective is unable to contend. Exactly, collective land expropriation in city planning area reflects the super administrative power in China.

(3) Whether land for the stimulation plan of economic development can be brought into the scope of land expropriation or not

In recent years, whether the plan stimulating local economic development can be

²²² In 2009, Ministry of Land and Resources of the People's Republic of China released an amendment draft of Land Administration Law and its art.68 provides for that, “for the requirements of public interest and if collectively-owned land is needed to construct the following projects, the collectively-owned land concerned shall be expropriated according to law: (1) in the area of urban construction land which is determined by general land use planning, the construction for the state to implement city planning; (2) without the area of urban construction land which is determined by general land use planning, the construction for public purposes, such as public infrastructure, public administration and service facilities, and military facilities, etc.” But because the Ministry’s draft circumvented the problem of collective land circulation and the Ministry insisted some planned economy measures in controlling land-use quota and in land-use examination and approval administration, the draft is far from the expectation aim, and the stubborn illness of sectional interests has been starkly shown up.

the legitimate basis of land expropriation or not aroused fervent arguments in China. Projects promoting economic development are always based on pursuing commercial interests, some of which can simultaneously and incidentally improve communal environment and other public interests. Chinese scholars generally consider that the public interest does not include commercial interests. However, some scholars hold opinion that, in recent years, local economic development in China was achieved largely depending on that local government assigned land-use rights in order to attract capital. If completely deny commercial interests as the public interest, it will undoubtedly generate adverse effects to local economic development.²²³ Nevertheless, in a long period, the inertia of the abuse of expropriation power has caused the definition of “public interest” much too loose; if still allowing collective land expropriation in the name of developing economy, it will lead to the unfettered exercise of expropriation power. If the circulation of collective construction land still continues the means of expropriation, the reform of market-oriented circulation of collective land will come to naught. Therefore, the expropriation taking economic development as the reason shall be forbidden. Although purchasing the right to use collective construction land may increase the cost of potential participants in economic development projects than purchasing the right to use expropriated land (state-owned land) from government authority, the government could offer tax breaks, grants, and other incentives to these commercial projects in order to offset participants’ increased costs. “The money to pay for these tax breaks and grants would, of course, come from the public treasury, meaning that the additional costs of property acquisition arising from the unavailability of eminent domain would be spread among all taxpayers. Spreading the cost is much more just than concentrating the burden of subsidizing economic development projects on the few people whose property would otherwise be marked for condemnation.”²²⁴ Similar discussions happened in the *Kelo* case in the U.S.

²²³ See Sun Xianzhong: *Chinese Property Law: Explanation of the Principles and Interpretation of the Legislation*, Beijing, Economy and Management Publishing House, 2008, p.201.

²²⁴ See Charles E. Cohen, *Eminent Domain after Kelo v. City of New London: an Argument for Banning Economic Development Takings*, Harvard Journal of Law and Public Policy, vol.29, No.2, 2006.

In the case *Kelo v. City of New London*, the Supreme Court of Connecticut State held that the use of eminent domain for economic development did not violate the public use clauses of the state and federal constitutions; if a legislative body has found that an economic project will create new jobs, increase tax and other city revenues, and revitalize a depressed urban area (even if that area is not blighted), then the project serves a public purpose, which qualifies as a public use.²²⁵ In a 5:4 decision, the Supreme Court of the United States held that the general benefits a community enjoyed from economic growth qualified private redevelopment plans as a permissible “public use” under the Takings Clause of the Fifth Amendment.²²⁶ Justice Kennedy of the United States Supreme Court concurred: “the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause...The trial court concluded...that benefiting Pfizer was not ‘the primary motivation or effect of this development plan’; instead, ‘the primary motivation for [respondents] was to take advantage of Pfizer’s presence.’...Likewise, the trial court concluded that ‘[t]here is nothing in the record to indicate that... [respondents] were motivated by a desire to aid [other] particular private entities’.”²²⁷

But the dissenting opinion suggested that the use of this taking power in a reverse Robin Hood fashion— take from the poor, give to the rich— would become the norm, not the exception: “any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms.”²²⁸ Justice O’Connor argued that the decision eliminates “any distinction between private and public use of property — and thereby effectively delete[s] the

²²⁵ See *Kelo v. City of New London*, 545 U.S. 469 (2005), at http://en.wikipedia.org/wiki/Kelo_v._City_of_New_London, visiting date 2013.07.29.

²²⁶ Ibid.

²²⁷ Kennedy, J., concurring, Supreme Court of the United States, No. 04-108, *Susette Kelo, et al., Petitioners v. City of New London*, Connecticut, et al. on Writ of Certiorari to the Supreme Court of Connecticut, June 23, 2005, at <http://www.law.cornell.edu/supct/pdf/04-108P.ZC>, visiting date 2013.07.30.

²²⁸ O’Connor, J., dissenting, Supreme Court of the United States, No. 04-108, *Susette Kelo, et al., Petitioners v. City of New London*, Connecticut, et al. on Writ of Certiorari to the Supreme Court of Connecticut, June 23, 2005, at <http://www.law.cornell.edu/supct/pdf/04-108P.ZD>, visiting date 2013.07.30.

words 'for public use' from the Takings Clause of the Fifth Amendment.”²²⁹ The dissent tried to build emotional energy around two points: first, the *Kelo* decision puts every property owner at risk of having her land taken by a condemnation action that serves a public purpose and chases speculative gains and outcomes; second, allowing states to determine what is a public use is an abdication of judicial authority to review state law on constitutional matters that are recognized as questions of law.²³⁰ Justice Thomas supports the position that the Constitution is to be interpreted according to the original intent of its drafters and the language they used.²³¹

However, the majority decision gave rise to “a tidal wave of outrage” in the U.S., and the debate over eminent domain has only grown more heated. Proponents of eminent domain claim that its use for economic redevelopment is a valuable tool for local policy makers and that a blanket ban on using eminent domain to foster economic growth would tie the hands of government officials in their ongoing battle against blight. Opponents argue that economic redevelopment does not constitute “public use,” which the Constitution requires governments to show in order to justify takings. They argue that increased takings weaken private property rights due in part to the lack of a bright-line standard on what specifically constitutes “public use.” They also note that eminent domain takings are inherently politicized, so local governments may be biased in favor of larger, politically connected property owners and interests, at the expense of small business owners, entrepreneurs, and homeowners—particularly those at the lower end of the income scale. Moreover, use of eminent domain circumvents market processes that could

²²⁹ Ibid.

²³⁰ See John C. Becker, *Kelo v. City of New London: A Study of Property Rights, Separation of Powers, State Rights and the Constitution*, the Interdisciplinary Environmental Association Colloquium, 2007, at <http://agsci.psu.edu/agenvlaw/news-you-can-use/tax-land-ownership/KelovCityofNewLondon.pdf>, visiting date 2013.07.30.

²³¹ Clarence Thomas: “This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a 'public use'...Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not.” See *Kelo v. City of New London*, 545 U.S. 469, 518 (2005).

better promote economic development.²³² Numerous people thought the decision simply applied existing law and deferred to the judgments of local officials; even someone radically said that “they won that particular case and they lost the entire country.”²³³

The *Kelo* decision touched off a firestorm of controversy and a grassroots backlash, leading to numerous legislative changes and citizen initiatives. Since the June 23, 2005, decision, legislators in 47 states have introduced, considered or passed legislation limiting the government’s eminent domain powers in instances of private use.²³⁴ More than 40 states eliminated the purposes of developing economy, creating new jobs, increasing tax and other city revenues from the “public use” scope.²³⁵ States toughened up to protect private property through amending state constitutions and laws. The expropriation not for the strict sense of “public use” could not be directly covered by law.

3.2.3.2 Determination in procedure

“The requirement of public interest can only be determined through the interaction and legitimacy of procedure. Because not only the content of public interest shall be considered, but also that who shall define the public interest, and finally, the rationality and necessity between public interest and expropriation shall be judged. Therefore, an applicable legal procedure participated by the public, parties whose rights are restricted and public authorities shall be designed... It shall be treated as a basic strategy of social governance to make up for the legitimacy of substantive law through procedural mechanism. The legality of social activities can also be guaranteed on the precondition of being restricted by procedure.”²³⁶ The current

²³² See Marc Scribner, *This Land Ain't your Land; this Land is my Land – A Primer on Eminent Domain, Redevelopment, and Entrepreneurship*, Advancing Liberty – From the Economy to Ecology, vol.164, 2010.

²³³ See Adam Liptak, *The Nation; Case Won on Appeal*, July 30, 2006, at <http://query.nytimes.com/gst/fullpage.html?res=9807E2DE133FF933A05754C0A9609C8B63>, visiting date 2013.08.01.

²³⁴ See Institute for Justice, Press Release: *Susette Kelo Lost Her Rights, She Lost Her Property, But She Has Saved Her Home*, July 1, 2006, at http://www.nolandgrab.org/archives/2006/07/institute_for_j.html, visiting date 2013.08.01.

²³⁵ See Xu Yingchun, Wen Guanzhong, *On the US System of Farmland Takings and its Revelation to the Chinese System of Farmland Takings*, East China Economic Management, Vol.25, No.5, 2011.

²³⁶ See Gao Shengping and Liu Shouying, *Modification on Land Administration Law in the Context of*

Chinese legislation does not stipulate the subject which can define “public interest” and regulate the relevant procedures.²³⁷ Judicial review is after the expropriation taking effect, unable to prevent starting unlawful expropriation.²³⁸ To reduce the adverse impact of the uncertainty of public interest, it shall be considered to entitle particular organization with the power to define public interest and let it weigh and consider the practical situation of specific case to make decision.

Institutions of organizations defining “public interest” in property expropriation are various in different countries and regions. In occidental countries, the definition of public use is mainly made by the legislature, and reviewed by judicial authorities; case law is the major source of defining public use in the substantive aspect.²³⁹ The court makes judicial review on the justification of expropriation actions in order to prevent abuse of expropriation power.²⁴⁰

The author holds that in the reform of collective land expropriation in China, to make the supervision and restriction mechanism among legislative, judicial and administrative organs fully works, the occasion for judicial review shall be moved in advance to the step of determining public interest. Before administrative organ makes the decision of expropriation under Chinese law framework, through the hearing process, the party whose property will be expropriated shall be guaranteed

Property Law, China Land Science, Vol.22, No.7, 2008.

²³⁷ See “Land Administration Law” art.58: “Expropriation of land shall be subject to approval by the people’s governments at and above the provincial level, and be submitted to the State Council for the record.” Regulations on the Expropriation of Houses on State-owned Land and Compensation Therefor art.8: “In order to protect national security, promote economic and social development and for other public interests, if houses are absolutely required to be expropriated...decisions on house expropriation shall be made by municipal and county governments.”

²³⁸ Regulations on the Expropriation of Houses on State-owned Land and Compensation Therefor art.14: “If any person whose house is to be expropriated has objection to the decisions on house expropriation made by municipal and county people’s government, such person may apply for administrative reconsideration or file an administrative action according to law.” As for collective land expropriation, there is not relevant regulation.

²³⁹ See Liu Xiangmin, *Comparison of Chinese and American Expropriation Systems*, China Legal Science, No.6, 2007.

²⁴⁰ Judicature shall be the last defense line of social justice, but sometimes deferring to the judgment of the legislature, it cannot really play its role. According to Dana Berliner, “for many years, courts simply rubber-stamped any use of eminent domain. In recent years, however, courts have ruled against the government in a sizable minority of the cases where owners do challenge the condemnation. Courts rejected condemnations for private use or overturned blight designations (which authorize condemnations) permitting such condemnations a total of 37 out of 91 times (40 percent) between 1998 and 2002.” See Dana Berliner, *Public Power, Private Gain: A Five-Year State By State Report Examining the Abuses of Eminent Domain*, April 2003, at http://castlecoalition.org/pdf/report/ED_report.pdf, visiting date 2013.08.02.

to enjoy the right to know, to participate and to make decision. If the authority's determination is unacceptable, the party who will suffer expropriation may apply for administrative reconsideration or file an administrative action. The judicial organ shall take judicial review on whether the justification for expropriation is legitimate and shall make the final determination. As the party who will suffer expropriation, farmers' collective's representatives shall exercise their lawful rights. In the process of participating in the hearing, applying for reconsideration, administrative litigation and other procedures, the contents of the aforementioned representatives' rights, as significant events, shall be democratically determined in villagers' assembly.

According to Administrative Procedure Law of the People's Republic of China, the defendant shall have the burden of proof for the specific administrative act he has undertaken and shall provide the evidence and regulatory documents in accordance with which the act has been undertaken.²⁴¹ Some scholars advocate that in the administrative litigation on expropriation, the government authority shall take the burden of proof for the legitimacy of the public interest in its expropriation decision. The proof shall justify that: (a) the beneficiaries are nonspecific and multitudinous; (b) the achievement of the expropriation's purposes has necessity; (c) the higher beneficial result of the use of expropriated property; (d) the direct and substantive benefit to the public; (e) the monopoly of the to be expropriated property and the requirement of the to be expropriated property's location; (f) the certainty of the benefit from the expropriation.²⁴² The six aspects make an organized and integrated whole, and together constitute the standards of proof to justify the public interest for expropriation. If any of these criteria is not achieved, the People's Court shall exercise the power to revoke the decision of expropriation. In practice, collective land rights cannot compete thoroughly with the public administrative power. Strictly limiting the determination of "public interest" through government's

²⁴¹ See Administrative Procedure Law of the People's Republic of China, art.32.

²⁴² See Wang Hongping and Fang Shaokun, *On the Verification Standard and Judicial Review of Public Interest in Acquisition*, Legal Forum, Vol.21, No.5, 2006.

burden of proof can be conducive to guarantee the maximum liberty of collective land rights.

3.3 The definition of just compensation

Generally, “just compensation” refers to that the public authority shall compensate the property owner in accordance with the full value of the property when the property is expropriated, which shall be under the precondition of the derogation of the property value and shall take account of the realistic value of the deprived property when used in a lawful manner by the owner. The two essential elements of just compensation are efficiency and justice²⁴³, which are mainly manifested in three aspects: (1) compensated subjects: the subjects who have rights to obtain compensation include not only the owner of expropriated property, but also the beneficiaries related to the property, such as a leaseholder of real estate; (2) objects of compensation: the objects include not only the real estate itself, but also attachments to the land and relevant immaterial assets; (3) compensation standard: just compensation shall be in accordance with fair market value. Therefore, just compensation, including compensation standards, the scope and the way to compensate, and even the time of issuing compensation, etc., shall reflect the full guarantee to the expropriated property rights.

3.3.1 “Just compensation” in the U.S.

Just Compensation is required to be paid by the Fifth Amendment to the US Constitution (and counterpart state constitutions) when private property is taken for public use.²⁴⁴ While the Constitution elaborates just compensation, courts are left to determine how much compensation is necessary and just.²⁴⁵ There are two main

²⁴³ See Michael A. Heller and James E. Krier, *Deterrence and Distribution in the Law of Takings*, Harvard Law Review, Vol. 112, No. 5, Mar., 1999.

²⁴⁴ See the just compensation clause of the Fifth Amendment to the U.S. Constitution.

²⁴⁵ The phrase “just compensation” was not originally defined, and like “public use”, has been largely defined by the courts. The first takings case to reach the Supreme Court was *Monongahela Navigation Co. v. United*

problems of just compensation: one is how to determine the value of expropriated property; the other one is how to determine the reasonable compensation.

“A right is as big as what the court will do.”²⁴⁶ The Supreme Court’s views on just compensation interpret that compensation should make the property owner pecuniarily whole.²⁴⁷ In the case *Olson v. United States* (1934), the Supreme Court of the U.S. illustrated “just compensation” as fair market value.²⁴⁸ However, the value of property has its root in subjective needs and attitudes, thus the same property may have different values to the property owner and the public authority. It has always been associated with the potential distinction between the “value to the owner” and market value to determine compensation to expropriated owners. The Courts’ articulated standard for this is the fair market value of property expropriated,²⁴⁹ which is understood by courts as what a willing buyer would pay a willing seller.²⁵⁰ There appear to be three main reasons²⁵¹: (1) although such things as emotional attachment or sentimental value may be important to individual owners of property, they are not readily and objectively measurable; (2) the award would be expected to vary in each case; (3) the final alleged drawback of the value

States (148 U.S. 312, 326 (1893)), in which the court articulated its own definition of just compensation. The Court's understanding of just compensation was, and remains, as follows:

The noun “compensation”, standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that, if the adjective “just” had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective “just”. There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not to the owner.

The court understood “just” compensation, as compensation equivalent with the property being taken. Thirty years later, in *Olson v. United States* (292 U.S. 246 (1934)), the Supreme Court articulated the “equivalency” discussed in *Monongahela* as fair market value.

²⁴⁶ See Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, *Northwestern University Law Review*, 2005, Vol.99, pp.679-680.

²⁴⁷ See Gary Knapp, Annotation, Supreme Court's Views as to What Constitutes "Just Compensation" Required, Under Federal Constitution's Fifth Amendment, for Taking of Private Personal Property for Public Use, 155 L. Ed. 2d 1185, 1195 (2006).

²⁴⁸ See *Olson v. United States*, 292 U.S. 246, 254-255 (1934).

²⁴⁹ See Gary Knapp, Annotation, Supreme Court's Views as to What Constitutes “Just Compensation” Required, Under Federal Constitution's Fifth Amendment, for Taking of Private Personal Property for Public Use, 155 L. Ed. 2d 1185, 1195 (2006).

²⁵⁰ See David L. Callies and Shelley Ross Saxer, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in Kelo*, in *Eminent Domain Use and Abuse: Kelo in Context*, p.137 (Dwight H. Merriam & Mary Massaron Ross eds., 2006); James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, *Minn. L. Rev.* Vol.69, 1985, p.1277.

²⁵¹ See Jack L. Knetsch, Thomas E. Borchering, *Expropriation of Private Property and the Basis for Compensation*, *The University of Toronto Law Journal*, vol.29, No.3, 1979.

to the owner basis for determining compensation is that it would result in “excessive” claims and a consequent “burden” on taxpayers²⁵². The presumption behind these compensation practices is that an award of market value enables owners of expropriated parcels to purchase a similar property and consequently be made no worse off by reason of the expropriation action.²⁵³ “The use of the market value measure...has, among other things, some administrative advantages over estimates of the value to owners for determining compensation. But the alternative approaches also differ in their recognition of reservation values of property owners. Most owners are unwilling to sell their holdings at the prevailing market prices, not because they are irrational or unreasonable, but simply because they value the particular properties more than other people.”²⁵⁴ Meanwhile, as opposed to such personal and variant standards as value to the particular owner whose property has been taken, market value, the transferable value, has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use. In view, however, “of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship.”²⁵⁵

Fair market value requires the highest and best available use of the expropriated property, yet Glynn Lunney argued that property owners must be persuasive when articulating the highest and best use for their properties.²⁵⁶ In the U.S., fair market value includes special uses derived from businesses, interest accrued between the

²⁵² However, in the case *United States v. 50 Acres of Land*, the Court emphasized that fair market value served as a minimum standard, and that Congress could authorize greater compensation. See *United States v. 50 Acres of Land*, 469 U.S. 24, 30 (1984).

²⁵³ See Jack L. Knetsch, Thomas E. Borcharding, *Expropriation of Private Property and the Basis for Compensation*, *The University of Toronto Law Journal*, vol.29, No.3, 1979.

²⁵⁴ See Jack L. Knetsch, Thomas E. Borcharding, *Expropriation of Private Property and the Basis for Compensation*, *The University of Toronto Law Journal*, vol.29, No.3, 1979.

²⁵⁵ *Kimball Laundry Co. v. United States*, 338 US 1, 5 (1949), at <http://supreme.justia.com/cases/federal/us/338/1/case.html>, visiting date 2013.08.03.

²⁵⁶ See Glynn S. Lunney, Jr., *Compensation for Takings: How Much is Just?* *Catholic University Law Review*, Vol. 42, 1993, p726; Ann E. Gergen, *Why Fair Market Value Fails as Just Compensation*, *Hamline Journal of Public Law and Policy* Vol.14, 1993, p.189.

date of a taking and the date of compensation, productivity of land, improvements to land, and ceiling prices in effect at the time of taking,²⁵⁷ but excludes government enhanced value,²⁵⁸ removal or relocation costs,²⁵⁹ business interests,²⁶⁰ or any “undue enrichment” to the property owner.²⁶¹

There is a unified land market in the United States, and the transaction mechanism of land market is almost mature. The location, size and price of each piece of land and the date of land transaction are registered by land administration department. The fair market value of a parcel will be assessed by an independent certified public valuer. When expert valuers evaluate the market price of expropriated land, they always refer to the sale price of recently sold land in similar plots to calculate the market price of newly expropriated land, which will be more accurate.²⁶² If the land owner does not accept the certified public valuer’s evaluation, he would have to present, in court to the judge and jury, the income evidence of the land’s product, to make them believe that the fair market value of the land is higher than the valuer’s evaluation and thus to obtain just compensation.²⁶³

However, there is loud criticism to compensation standard of fair market value, rebuking that the standard does not account for precondemnation activity²⁶⁴ or damage of a business’ good will²⁶⁵, excludes consequential damages²⁶⁶, wholly

²⁵⁷ See Ann E. Gergen, *Why Fair Market Value Fails as Just Compensation*, Hamline Journal of Public Law and Policy Vol.14, 1993, p.189.

²⁵⁸ See *McGovern v. New York*, 229 US 363, 371-372 (1913).

²⁵⁹ See *United States v. Petty Motor Co.*, 327 US 372, 378-379 (1946). But see Terry J. Tondro, *Urban Renewal Relocation: Problems in Enforcement of Conditions on Federal Grants to Local Agencies*, 117 U. Pa. L. Rev. 183 (1968). In this article, Tondro points out that Congress has adopted urban renewal reforms that include relocation costs for federal renewal projects. Id. pp.184-85, 188-91. Also, some states have similar urban renewal statutes. Id. at 219.

²⁶⁰ See *United States v. Miller*, 317 U.S. 369, 376-377 (1943). See also Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, Boston College Law Review, Vol.32, 1991, pp.286-287.

²⁶¹ See *Bauman v. Ross*, 167 U.S. 548, 567-74 (1897).

²⁶² See Xu Yingchun, Wen Guanzhong, *On the US System of Farmland Takings and its Revelation to the Chinese System of Farmland Takings*, East China Economic Management, 2011, 25(5).

²⁶³ Ibid.

²⁶⁴ See David L. Callies and Shelley Ross Saxer, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in Kelo*, in *Eminent Domain Use and Abuse: Kelo in Context*, p.146 (Dwight H. Merriam & Mary Massaron Ross eds., 2006).

²⁶⁵ See Glynn S. Lunney, Jr., *Compensation for Takings: How Much is Just?* Catholic University Law Review, Vol. 42, 1993, pp. 743-744.

²⁶⁶ See Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, Northwestern University Law Review, Vol.99, 2005, p.679.

ignores the losses suffered by tenants²⁶⁷, and may not get a property owner “made whole”²⁶⁸. Accordingly, there are arguments from scholars. “The Fifth Amendment should require governments to compensate condemned [land] owners for all of their losses associated with eminent domain, making at least a reasonable approximation of those losses that are difficult to quantify or verify.”²⁶⁹ Other critics agree that courts should consider more factors for fair market value²⁷⁰, as well as alternatives to fair market value²⁷¹. Christopher Serkin holds opinion that replacement value should be used as an alternative to fair market value when fair market value is either unavailable or when consequential losses are very high.²⁷² John Fee presents a strong case for compensation for emotional damages. He argues that while it is difficult to place a value on emotional loss, one cannot assume the value is always zero, and contends that, if tort law can recognize and calculate emotional losses, there is no reason that eminent domain law cannot.²⁷³ According to him, reform could set a plot five or ten percent premium to increase fair market value in expropriation. The much fairer way to compensate for emotional losses may probably be a graduated premium, hypothetically ranging from one to twenty percent. Somebody who purchased his house one year ago might only receive a two percent premium on fair market value, while someone who had lived in his flat for fifty years, raised a family there, and would have to change communities if forced to be expropriated might receive a twenty percent premium on fair market value. This measure would not avoid a formulaic constituent, but could be much less arbitrary

²⁶⁷ See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, Harvard Law Rev. Vol.80, 1967, p. 1254.

²⁶⁸ The Court does allow two exceptions to the general rule. First, the government must pay any increase in value for lands eventually taken that were outside of the scope of the original project. Second, the Court generally denies property owners compensation for any decrease in value attributable to pre-condemnation activity, unless the property owner can show that the condemner intentionally drove down the property value. In practice, these standards mean that property owners suffer losses in value, but do not benefit from enhancement in value associated with precondemnation activity.

²⁶⁹ See John Fee, *Reforming Eminent Domain*, in *Eminent Domain Use and Abuse: Kelo in Context*, p.134 (Dwight H. Merriam & Mary Massaron Ross eds., 2006).

²⁷⁰ See David L. Callies and Shelley Ross Saxer, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in Kelo*, in *Eminent Domain Use and Abuse: Kelo in Context*, pp.150-151 (Dwight H. Merriam & Mary Massaron Ross eds., 2006).

²⁷¹ See Ann E. Gergen, *Why Fair Market Value Fails as Just Compensation*, Hamline Journal of Public Law and Policy Vol.14, 1993, pp.194-198.

²⁷² See Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, Northwestern University Law Review, Vol.99, 2005, pp.702-703.

²⁷³ See John Fee, *Reforming Eminent Domain*, in *Eminent Domain Use and Abuse: Kelo in Context*, p.134 (Dwight H. Merriam & Mary Massaron Ross eds., 2006).

than the flat's fair market value. To calculate emotional damages is not impossible, and would probably do more to achieve just compensation's fairness purpose. Meanwhile, the premiums aforementioned could deter eminent domain in some cases, but this could actually play the positive role in restraining the overuse and abuse of expropriation.

In 1970, the "Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Act" (URA) was issued, which, in federally funded projects, provides assistance to property owners in the form of moving expenses, dislocation allowance, and help with down payments for displaced persons, as well as other incidentals.²⁷⁴ States usually follow federal standards for just compensation and do not run far from fair market value. However, the URA has influenced some states to afford relocation compensation.²⁷⁵ States and courts actually make great discretion in adjusting just compensation. State legislatures could grant premiums, and state courts could consider more factors in determining fair market value. Some states do exceed federal standards for compensation through their legislatures, courts, or constitutions. These states' reforms demonstrate the ways that just compensation could be more fair and efficient. Georgia recognizes that fair market value is not the only method for calculating just compensation, and that, other methods, such as replacement value, may be more proper.²⁷⁶ A number of states have reformed the unequal federal standard for precondemnation actions. For example, Alabama instructs the government to ignore any increase or decrease in value resulting from a project²⁷⁷, meaning that property owners obtain the fair market value of their property before precondemnation. Alaska also protects property owners' compensation from alteration for any increase or decrease in property value associated with

²⁷⁴ See Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Act of 1970, 42 U.S.C. Chapter 61.

²⁷⁵ See David L. Callies and Shelley Ross Saxer, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in Kelo*, in *Eminent Domain Use and Abuse: Kelo in Context*, p.152 (Dwight H. Merriam & Mary Massaron Ross eds., 2006).

²⁷⁶ See Georgia Code Annotated § 22-1-5 (1999).

²⁷⁷ See Alabama Code §§ 18-1A-171, 18-4-14 (2006).

expropriation.²⁷⁸ Some of the precondemnation provisions in California and Pennsylvania’s statutes specifically and similarly claim that former standards forcing owners to bear losses for precondemnation activity were unfair.²⁷⁹ Kansas, Iowa, and Oregon’s just compensation statutes contain provisions requiring relocation assistance.²⁸⁰ Linda Oswald argues that a business itself is property, and that the rule against business damages lacks foundation.²⁸¹ Florida was the first state to pass a statute allowing recovery for business losses.²⁸² Vermont awards compensation for business losses associated with highway construction.²⁸³ Wyoming and California’s statutes also compensate for business losses for loss of goodwill such as benefits of location and customers.²⁸⁴ Kansas is the only state to obviously supplement fair market value. It adds a twenty-five percent premium to market value when property is expropriated for redevelopment.²⁸⁵ Louisiana’s constitutional reforms regarding just compensation give Louisiana property owners greater protection against becoming “net-losers” to eminent domain than they would receive in any other state in the U.S.²⁸⁶ In 1974, the legislature of Louisiana redrafted its constitution. Its previous just compensation provision required “just and adequate compensation”, but its new constitution replaced this description with

²⁷⁸ See Alaska Statutes, Section 09.55.440 (2006). Alaska’s just compensation statute provides a number of protections to property owners, including but not limited to 10.5 percent interest on fair market value for the time elapsed between taking and payment, excluding decrease in value from precondemnation activity when determining fair market value, and the most comprehensive compensation for business losses of any state in the country. The Alaska Supreme Court expressly rejected the general rule against business losses in *State v. Hamer* (550 P.2d. 820, 826, Alaska, 1976), rejecting the Supreme Court’s rule in *United States v. Mitchell* (267 U.S. 341, 1925), for being unfounded and unjust. Alaska’s bold decision in *Hamer* protected lessees and property owners alike, and insisted that its state constitution required recovery for consequential damages like temporary loss of profits.

²⁷⁹ See California Code of Civil Procedure § 1263.330 (West 1982); Pennsylvania Statutes Annotated § 26-1-604 (West 1997).

²⁸⁰ See *Tomasic v. Unified Gov’t of Wyandotte County*, 962 P.2d. 543, pp.559-560 (Kansas, 1998). See also Iowa Code Annotated § 6B.42, 6B.54 (West 2001); Oregon Revised Statutes § 35.510 (2005).

²⁸¹ See Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, Boston College Law Review, Vol.32, 1991, pp.353-354.

²⁸² Id. p.322 (citing Laws of Florida, Chapter 15927, No.70 (1933), amending the Compiled General Laws of Florida section 5089, previously the Revised General Statutes of Florida section 3281).

²⁸³ Id. p.326 (citing Act of June 21, 1957, 1957 Vermont Laws 242 (currently codified, as amended, at Vt. Stat. Ann. tit. 19 § 501 (1987))).

²⁸⁴ Id. p.329, Wyoming and California adopted § 1016 of the Uniform Eminent Domain Code which provides for recovery of loss of goodwill. See Uniform Eminent Domain Code § 1016, (the U.S. National Conference of Commissioners on Uniform State Laws, 1974).

²⁸⁵ See David L. Callies and Shelley Ross Saxon, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in Kelo*, in *Eminent Domain Use and Abuse: Kelo in Context*, p.218 (Dwight H. Merriam & Mary Massaron Ross eds., 2006).

²⁸⁶ See Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, Boston College Law Review, Vol.32, 1991, pp.354-361.

a requirement that “the owner shall be compensated to the full extent of his loss”.²⁸⁷

These reforms show that American states have recognized some of the injustices of traditional just compensation standards and are attempting to amend them. The new requirements calculatedly expand property rights in expropriations, limit the public expropriation through ensuring compensation that would account for all of a property owner’s losses, and guarantee a jury trial for determination of compensation. All in all, under-compensation of property owners may result in overuse of expropriation and that benefits do not actually offset costs. However, augmented compensation may over-deter expropriation, but would encourage the authority to undertake more realistic, efficient cost-benefit analyses when considering condemnations, and protect landowners from bearing a disproportionate amount of the costs involved. Compensating owners for their “full losses” shall be in an effort to put them in as good of a position as if their property had not been taken.²⁸⁸ How to deal with efficiency and justice is a permanent question.

3.3.2 “Just compensation” in Europe

3.3.2.1 A general view

Art. 41 of the ECHR provides for a right to compensation (“just satisfaction”) for violations of the Convention: “If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”²⁸⁹ The award of just satisfaction is not an spontaneous result of a finding by the European Court of Human Rights that there has been a violation of a right guaranteed by the European

²⁸⁷ Id. pp.355-356.

²⁸⁸ In the *Kelo* Case, Justice Breyer addressed the Court’s professed goal that just compensation put property owners in as good of a position as if their property had not been taken, asking “[I]s there some way of assuring that the just compensation actually puts the person in the position he would be in if he didn’t have to sell his house? Or is he inevitably worse off?”

²⁸⁹ See European Convention for the Protection of Human Rights and Fundamental Freedoms, art.41.

Convention on Human Rights or its Protocols. According to the language of Article 41, it is clear that the Court shall afford just satisfaction only if internal law does not allow complete reparation to be made, and even then only “if necessary”. Furthermore, the Court will only award such satisfaction as is considered to be “just” in the circumstances. Consequently, regard shall be paid to the particular features of each case.²⁹⁰

The compensation rule under general public international law, making an individual fully compensated, utilizes the so called “Hull”-formula, which requires compensation to be prompt, adequate, effective and the victim has to receive full compensation.²⁹¹ State authorities interpret these norms, while generally, international courts bow to state interpretations, “unless that judgment [is] manifestly without reasonable foundation.”²⁹²

European states determine the appropriate measure of “adequate” compensation and generally interpret it to the fair market value of the expropriated property, which may also include other losses suffered as a consequence of expropriation,

²⁹⁰ The Court may decide that for some heads of alleged prejudice the finding of violation constitutes in itself sufficient just satisfaction, without there being any call to afford financial compensation. It may also find reasons of equity to award less than the value of the actual damage sustained or the costs and expenses actually incurred, or even not to make any award at all. This may be the case, for example, if the situation complained of, the amount of damage or the level of the costs is due to the applicant’s own fault. In setting the amount of an award, the Court may also consider the respective positions of the applicant as the party injured by a violation and the Contracting Party as responsible for the public interest. Finally, the Court will normally take into account the local economic circumstances. When it makes an award under Article 41, the Court may decide to take guidance from domestic standards. It is, however, never bound by them. See *Just satisfaction claims*, Practice Direction, Rules of Court – 1 July 2014, issued by the President of the Court, at http://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf, visiting date 2014.11.30.

²⁹¹ See Stefan Kirchner and Katarzyna Geler-Noch, *Compensation under the European Convention on Human Rights for Expropriations Enforced Prior to the Applicability of the Convention*, Jurisprudence, 2012, No. 19(1), p.20 (citing Peters, A. *Einführung in die Europäische Menschenrechtskonvention*, 1st ed. Munich: Verlag C. H. Beck, 2003, p.196). Also that when human rights are violated, the International Covenant on Civil and Political Rights (“ICCPR”) requires states to provide an “effective remedy” to the victim. This includes “adequate compensation for any property”. See Committee on Economic Social and Cultural Rights, General Comment 7, the right to adequate housing (Art. 11(1)): forced evictions, par.3 (May 20, 1997). International investment law derives largely from bilateral investment treaties (“BITs”) between states, which have proliferated enormously since the 1970s and require that the expropriation of foreign property serve a public purpose, refrain from discrimination, and be accompanied by “prompt, adequate, and effective” compensation. Many BITs mandate “full” compensation, usually equal to the property’s market value. See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Oxford, 2nd Ed, 2008, pp.89-91.

²⁹² See *Lithgow and Others v. United Kingdom*, Eur. Ct. H.R., Applications Nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, par.122 (1986), at <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain?page=publisher&publisher=ECHR&type=&coi=GBR&docid=3ae6b7230&skip=0>, visiting date 2013.08.03.

such as transition costs, legal fees, and lost profits.²⁹³ Adequate compensation excludes highly speculative losses or the subjective value of the property to the owner.

However, in some cases, states under ECHR do not have to compensate the actual value of the property. The European Court of Human Rights held in *Lithgow and Others v. United Kingdom* that “economic reform or measures designed to achieve greater social justice may call for less than reimbursement of the full market value.”²⁹⁴ In *Lithgow*, the applicants claimed the compensation they received from the authority after the Aircraft and Shipbuilding Industries Act 1977 nationalized some of their property was “grossly inadequate,” “discriminatory,” and violated multiple articles of the European Convention on Human Rights.²⁹⁵ Considering that domestic authorities know and understand their resources and societal interests best, thus they are “better placed than an international judge to appreciate what measures are appropriate [in situations of nationalization]”²⁹⁶, the Court adjudged in favor of the United Kingdom and gave broad discretion to the state to determine compensation.

Furthermore, although the Contracting States under ECHR are generally obliged to afford compensation, in some exceptional circumstances, such as German reunification and the Greek transition from a monarchy to a republic, a total lack of compensation may be justifiable.²⁹⁷ In the case *Jahn and others v. Germany* (2005), the applicants complained of an interference of their rights under the Convention through the perpetuation by the reunified Germany of the 1945 land reform in the Soviet-occupied East Germany (the so-called “Modrow Law”) which did not

²⁹³ For example, Croatia elaborates compensation “equal to market value” of the lost property and does not provide for flexibility. In contrast, Germany provides great flexibility by requiring that compensation be determined based on a fair balance of public interest and private property rights.

²⁹⁴ See *Lithgow and Others v. United Kingdom*, Eur. Ct. H.R., par.121 (1986).

²⁹⁵ *Ibid.*, par.9.

²⁹⁶ *Ibid.*, par.122.

²⁹⁷ See Ulrike Deutsch, *Expropriation without Compensation – the European Court of Human Rights Sanctions German Legislation Expropriating the Heirs of “New Farmers”*, German Law Journal Vol.06, No. 10, 2005, at http://www.germanlawjournal.com/pdfs/Vol06No10/PDF_Vol_06_No_10_1367-1380_Developments_Deutsch.pdf visiting date 2013.08.04.

foresee any compensation at all. In this case, the Grand Chamber of the European Court of Human Rights instructively recognized that a complete denial of compensation is justifiable only under exceptional circumstances however the State possesses a wide margin of appreciation when passing laws in the spirit of reforms.²⁹⁸ In the unique context of the German reunification process the Court did not find any violation of Article 1 of Protocol 1. One of those circumstances was the uncertainty of the legal position and the reasons of social justice upon which the German authorities relied.

Generally, effective compensation may take the form of money, real estate, or other property such as investment securities. Sometimes, state circumstances render a particular form of compensation ineffective. For instance, high inflation may make cash virtually worthless and make tangible property the more reliable form of compensation.

State law also determines the meaning of “prompt” compensation. Most states require the payment of compensation before or concurrently with the actual expropriation. In urgent cases, however, some states permit immediate expropriation and a later time frame for compensation.

3.3.2.2 “Just compensation” in Germany

The German “Basic Law” (constitution of German) elaborates that expropriation “may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse is within the ordinary courts.”²⁹⁹

²⁹⁸ See *Jahn and others v. Germany*, Eur. Ct. H.R, Applications Nos. 46720/99, 72203/01 and 72552/01, Grand Chamber Judgment of 30 June 2005, par. 111.

²⁹⁹ See Germany Constitution, art.19 (2) (1949).

All expropriation actions must unambiguously grant compensation.³⁰⁰ To award compensation may take the form of money, alternative real estate, or the transfer of other rights. If the previous owner's livelihood depended on the land, compensation must be provided in the form of alternative land.³⁰¹ An expropriation measure that does not explicitly grant compensation is unconstitutional.

Independent experts will calculate compensation³⁰² according to an "equitable balance between the public interest and the interests of those affected."³⁰³ Theoretically, compensation shall enable the previous owner to purchase new property with the same quality and characteristics. Thus, the compensation consists of not only the market value of the property when the decision is adopted,³⁰⁴ but also all additional expenses incurred by the owner in acquiring another comparable land and/or to establish same business as before.³⁰⁵ Nevertheless, the Federal Building Code provides that the compensation for these additional expenses shall be assessed giving proper consideration to the respective interests of the public and of the parties concerned.³⁰⁶

To protect the former property owner's rights, a full advance payment must be made before the property is seized.³⁰⁷ In the case of public urgency, however, the administrative authority may issue an immediate property transfer order.³⁰⁸

3.3.2.3 "Just compensation" in Poland

Polish law requires compensation for expropriated property³⁰⁹ in cash or, with the

³⁰⁰ See Athanasios Gromitsaris, *Expropriation, Takings Annual Report 2011 Germany*, IUS PUBLICUM, July 2011, at http://www.ius-publicum.com/repository/uploads/21_03_2012_12_05_Gromitsaris_Expropriation.pdf, visiting date 2013.08.05.

³⁰¹ See Federal Building Code, sec.100 (1) (Germany 1997).

³⁰² See Federal Building Code, sec.192 (1) (Germany 1997).

³⁰³ See Germany Constitution, art.14 (3) (1949).

³⁰⁴ See Federal Building Code sec.95 (1) (Germany, 1997).

³⁰⁵ See Winrich Voss, *Appropriate Compensation in Terms of Compulsory Purchase in Germany*, in *Some Aspects of Compulsory Purchase of Land for Public Purpose*, Polish Real Estate Scientific Society, ed., 2010, at http://www.tnn.org.pl/tnn/publik/18/TNN_monografia_2010.pdf, visiting date: 2013.08.05.

³⁰⁶ See Federal Building Code sec.96 (1) (Germany, 1997).

³⁰⁷ See Winrich Voss, *Appropriate Compensation in Terms of Compulsory Purchase in Germany*, in *Some Aspects of Compulsory Purchase of Land for Public Purpose*, Polish Real Estate Scientific Society, ed., 2010.

³⁰⁸ See Federal Building Code sec.116 (1) (Germany, 1997).

³⁰⁹ See Poland Constitution art.21 (2) (1997).

agreement of the landowner, in the provision of a replacement plot of land.³¹⁰ Compensation shall be based on the market price of the property as determined by an expert assessment. If the market value cannot be confirmed, the compensation will be based on the owner's projected costs to purchase and develop a plot of land with similar characteristics.³¹¹ The owner is also entitled to recover the lost profits from timber and crops.

Polish law also provides incentives for both parties to fulfill their legal obligations in expropriation. If the owner transfers the property to public authorities within 30 days of receiving notice of the expropriation decision, the compensation amount increases by 5 percent.³¹² On the contrary, if public officials do not afford compensation as regulated by law, the previous owner will obtain interest payments.

3.3.3 “Just compensation” for expropriation of collective land in China

3.3.3.1 The connotation of just compensation for expropriation of collective land in China

When land rights holders cannot help but be expropriated based on liability rules, the protection of land rights converts into the protection of the exchange value of land rights. Just compensation can protect the replacement benefit of property rights in expropriation. Just compensation for expropriation of collective land shall balance the expropriation power and the protection of property rights, fully protect the replacement benefits of collective land rights, be “adequate, effective and prompt” on the basis of the equality of urban and rural land rights, and reflect the true price of land as the important resource, as the capital and as the social security to farmers.

³¹⁰ See Land Administration Act, sec.131 (Poland 1997).

³¹¹ See Marek Walacik, Sabina Zrobek, *Chosen Principles of Land Acquisition for Public Purposes and Just Compensation Determination in Poland*, Olsztyn: Polish Real Estate Scientific Society, 2010, at http://www.tnn.org.pl/tnn/publik/18/TNN_monografia_2010.pdf, visiting date 2013.08.06.

³¹² Ibid.

(1) Just compensation shall make up the total loss of collective land rights caused by expropriation

Collective land expropriation may result in farmers lose living guarantee, job opportunity, direct income and land incremental value. Where there is right, there shall be remedy. Farmers, who lose land rights because of expropriation, shall get just compensation for the loss of the rights themselves and the incidental loss, and for direct and indirect losses. The consideration standards of just compensation shall guarantee farmers not to lose the living standards and away from other negative impacts arising from the land loss; farmers shall not worry about their living, which would generally meet urban residents' living standard, and enjoy the adequate fund to develop; their lives shall integrate into the process of urbanization.

(2) There shall be statutory minimum standard for compensation

In consideration of the drawbacks of farmers' representatives exercising collective land ownership, as well as the situation that for a long time the circulation of collective land has been restricted and the integrated circulation market of urban and rural land did not take shape, there will be a transitional period to form the compensation in fair market value. Therefore, in order to protect farmers' land rights, the legislation shall lay down the minimum and unalterable compensation standard for expropriated collective land, which cannot be changed even in all parties' negotiation. To work out the minimum compensation standard, it shall consider that: (a) the original use of the collective land, the output value of the land, the regional location of the land and the local economic developing level; (b) the function of farmers' social security burdened by the collective land, guaranteeing farmers' living standard to be improved and their long-term livelihood; (c) the reasonable distribution of land incremental revenue, guaranteeing farmers to enjoy the achievement of economic development. The current compensating manner of multiple times the average annual output value of the expropriated land³¹³ does not

³¹³ See "Land Administration Law" art.47: "Compensation for expropriation of cultivated land shall be six to ten times the average annual output value of the expropriated land, calculated on the basis of three years

reflect collective land's function of social security and incremental value, thus it cannot be the minimum compensation standard. If the compensation is lower than the minimum standard, the expropriated land owner shall be entitled to claim for augmenting compensation to the minimum standard.

(3) Just compensation shall be prompt

“Justice delayed is justice denied.”³¹⁴ To award the compensation for expropriated collective land shall generally be completed before farmers' collective transfers land possession right, unless the special circumstances, such as providing disaster relief, construction in public urgency, etc. Transferring collective land possession right on the situation without prior compensation may result in farmers do not have enough fund for resettlement and endangering social stability. Therefore, legislation shall clarify that before affording compensation for the expropriation, farmers can keep possession of the collective land. As for other non-pecuniary compensation methods, such as reserving land for resettlement, stock dividends, they shall be regarded as fully compensated when a written contract is signed and the authority provides sufficient guarantees.

3.3.3.2 The market value of compensation for collective land expropriation

According to property rules, when an initial property right is entitled, the value of the property shall be determined by the parties in the transaction, while the government cannot further intervene in the value of the property.³¹⁵ “The most probable price (in terms of money) which a property shall bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus.”³¹⁶ In 1993, the International Valuation Standards Committee,

preceding such requisition...the total land compensation and resettlement subsidies shall not exceed 30 times the average annual output value of the expropriated land calculated on the basis of three years preceding such expropriation.”

³¹⁴ Proverb by William Ewart Gladstone.

³¹⁵ See Guido Calabresi and Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, Harvard Law Review, vol. 85, 1972.

³¹⁶ Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby: the buyer and seller are typically motivated; both parties are well

participants adopted a definition of Market Value: “The estimated amount for which an asset or liability shall exchange on the valuation date between a willing buyer and a willing seller in an arm’s length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion”.³¹⁷ Currently, the transaction of collective land ownership is legally forbidden in China, so it cannot form the fair market price in compensating collective land expropriation on the basis of market transaction and the extraterritorial market-oriented compensation standard shall not be simply applied in China.

Theoretically, “the so-called market-oriented compensation manner refers to make the unequal relationship between farmers’ collective economic organizations and the subject exercising land expropriation revert to the equal status of market subjects, and in accordance with the general market price of the expropriated land and the attachments on the land to adequately compensate farmers.”³¹⁸ At present, as for the specific operation, the government can refer to the assignment price of the right to use state-owned land for construction, reasonably determine the distribution proportion of the incremental revenue after the transfer of collective land ownership and the land-use alteration, assess the market price of the expropriated collective land, and then determine the compensation standard for expropriation. But, the market value of construction land-use right is only a part of the value of land ownership; land ownership, which has recoverability after the expiration of the term for land-use right, can indefinitely enjoy rent, an economic manifestation form of land ownership; and the assignment price of the right to use state-owned land for construction includes all the benefits from state-owned land reserve, the development of primary market of real estate, the assignment of land development right and incremental revenue of land. So, the compensation for

informed or well advised, and acting in what they consider their best interests; a reasonable time is allowed for exposure in the open market; payment is made in terms of cash in United States dollars or in terms of financial arrangements comparable thereto; and the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale. At <http://www.hud.gov/offices/adm/hudclips/handbooks/hsg/4150.2/41502c4HSGH.pdf>, visiting date 2013.08.06.

³¹⁷ See International Valuation Standards Committee, International Valuation Glossary, at <http://www.ivsc.org/glossary>, visiting date 2013.08.06.

³¹⁸ See Wang Zhenjiang, *Research on Property Rights of Rural Land and Compensation for collective land Expropriation*. China Renmin University Press, 2008, pp.181-182.

collective land expropriation cannot be simply determined according to the assignment price of construction land-use right.

The fundamental way to seek the real market value of collective land is to open the market of rural collective land circulation. The collective land circulation of non-public interest use may form market prices, and compensation for collective land expropriation which is for public interest can refer to market-oriented circulation price of the same type of land.

3.3.3.3 Compensation methods

“Regulations on the Expropriation of Houses on State-owned Land and Compensation Therefor” provide for that the compensation to be paid to the persons whose houses are to be expropriated shall include the compensation for the value of the houses to be expropriated, for relocation and temporary resettlement arising from the house expropriation, and for losses arising from production and business suspension caused by the house expropriation.³¹⁹ Because of the dualistic administration of urban and rural land, the aforementioned provisions are not applied to collective land. Meanwhile, there are not analogous regulations to regulate the expropriation of collective land and the compensation therefor. However, the principles and spirits reflected in the abovementioned provisions are applicable. The CPC’s 2008 Decision required promptly and sufficiently awarding just compensation to rural collective organizations and farmers whose collective land are expropriated and well resolving the farmers’ employment, housing, and social security arising from the collective land expropriation.³²⁰ The CPC’s 2013 Decision developed the previous expression, requiring improving the rational, regular and multiple security mechanism for farmers whose land is expropriated.³²¹

³¹⁹ See Regulations on the Expropriation of Houses on State-owned Land and Compensation Therefor, art.17.

³²⁰ See *Decision of the CCCPC on Certain Issues Concerning the Advancement of Rural Reform and Development*, adopted at the Third Plenary Session of the 17th Central Committee of the CPC on October 12th, 2008, Section 3, No.2.

³²¹ See *Decision of the CCCPC on Some Major Issues Concerning Comprehensively Deepening Reforms*, adopted at the close of the Third Plenary Session of the 18th CPC Central Committee on November 12th, 2013, Section 3, No.11.

The compensation methods for collective land expropriation shall be diversified, such as compensation in currency, reserving land for resettlement, stock dividends, help for re-employment, and so on, which can guarantee farmers' previous living standard after the expropriation. As for those farmers who got permanent urban registered household due to loss of land, because some of them have sole agricultural labor skill, and it is difficult for them to find a job without farmland, the government shall organize skills training courses for farmers. Meanwhile, considering that currently the social security standard in rural area is much lower than that in urban area in China, after the expropriation and besides the compensation, the government shall handle relevant urban social security for farmers who lose land and pay a certain amount fees of social security for these farmers, in lieu of collective land's social security function to farmers.

3.4 Due process preserves the efficiency and justice

3.4.1 "Due process" in the U.S.

Both of the Fifth and the Fourteenth Amendments to the United States Constitution contain Due Process Clauses.³²² Due process deals with the administration of justice and thus the Due Process Clause acts as a safeguard from arbitrary denial of life, liberty, or property by the Government outside the sanction of law.³²³ In the context of U.S. Constitution, Due Process of Law can be explained as "a fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's life, liberty, or property. Also, a constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious."³²⁴

³²² See the Fifth Amendment to the U.S. Constitution: "no person shall be ... deprived of life, liberty, or property, without due process of law" and the Fourteenth Amendment to the U.S. Constitution: "nor shall any State deprive any person of life, liberty, or property, without due process of law ..."

³²³ See P.A. Madison, *Historical Analysis of the Meaning of the 14th Amendment's First Section*, at http://www.federalistblog.us/mt/articles/14th_dummy_guide.htm#due, visiting date 2013.08.08.

³²⁴ See Law Library - American Law and Legal Information - Free Legal Encyclopedia, at

The notion of due process originated in English Common Law. The rule that individuals shall not be deprived of life, liberty, or property without notice and an opportunity to defend themselves antedates written constitutions and was widely accepted in England. The Magna Carta, an agreement signed in 1215 and defining the rights of English subjects against John, King of England, includes a clause that declares, “no free man shall be seized, or imprisoned ... except by the lawful judgment of his peers, or by the law of the land” (Clause 39).³²⁵ The concept of the law of the land was later transformed into the phrase “due process of law”.

In the U.S., due process is generally considered including substantive due process and procedural due process. Substantive due process rights are mainly concerned with the liberties of citizens.³²⁶ Substantive due process aims to protect individuals against majoritarian policy enactments which exceed the limits of governmental authority—namely, courts find that the majority’s enactment is not law and cannot be enforced as such, regardless of how fair the process of enforcement actually is.³²⁷ Substantive due process also refers to those rights that, while not specifically mentioned in the U.S. Constitution, are nevertheless recognized because they are “of the very essence of a scheme of ordered liberty”³²⁸, according to the U.S. Supreme Court. For instance, many substantive due process cases discuss the constitutional right to privacy, even though the word privacy does not appear in the constitution. The early 40 years of the 20th Century were the heyday of what has been called the “freedom of contract” version of substantive due process. During those years, the Court often used the Due Process Clause of the Fourteenth

<http://law.jrank.org/pages/6315/Due-Process-Law.html>, visiting date 2014.12.03.

³²⁵ See Magna Carta, “the Great Charter”.

³²⁶ “When courts face questions concerning substantive due process, the controlling issue is liberty. Courts must determine the nature and the scope of the liberty protected by the Constitution before affording litigants a particular freedom”, see Free Legal Encyclopedia, at <http://law.jrank.org/pages/10591/Substantive-Due-Process.html>, visiting date 2014.12.03.

³²⁷ See Timothy Sandefur, *The Right to Earn a Living: Economic Freedom and the Law*. Washington D.C.: Cato Institute, 2010, pp. 90-100.

³²⁸ See *Palko v. Connecticut*, 302 U.S. 319 (1937). This was a United States Supreme Court case concerning the incorporation of the Fifth Amendment protection against double jeopardy. Justice Benjamin Cardozo held that the Due Process Clause protected only those rights that were “of the very essence of a scheme of ordered liberty”.

Amendment to void state regulation of private industry, particularly regarding terms of employment such as maximum working hours or minimum wages.³²⁹ In modern times, the Supreme Court deals with substantive due process rights in three main areas that are described in *United States v. Carolene Products Co.*. These areas include the first ten amendments to the constitution; rights related to the political process, such as voting; and the rights of “discrete and insular minorities”, such as racial groups.³³⁰ Other substantive due process rights the Supreme Court has recognized include the right to marry³³¹, the right to have an abortion free from state interference³³², and the right to have one’s children instructed in a foreign language³³³, etc.

As for procedural due process, it aims to protect individuals from the coercive power of government by ensuring that adjudication processes under valid laws are fair and impartial (e.g., the right to sufficient notice, the right to an impartial arbiter, the right to give testimony and admit relevant evidence at hearings, etc.).³³⁴ The phrase “procedural due process” refers to “the aspects of the Due Process Clause that apply to the procedure of arresting and trying persons who have been accused of crimes and to any other government action that deprives an individual of life,

³²⁹ See *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). In this case, the Court struck down a New York law (N.Y. Laws 1897, chap. 415, art. 8, § 110) that prohibited employers from allowing workers in bakeries to be on the job more than ten hours per day and 60 hours per week. The Court found that the law was not a valid exercise of the state’s Police Power. It wrote that it could find no connection between the number of hours worked and the quality of the baked goods, thus finding that the law was arbitrary.

³³⁰ See *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). This case is best known for “Footnote Four”, considered to be “the most famous footnote in constitutional law”. Justice Stone suggested there were reasons to apply a more exacting standard of judicial review in other types of cases. Footnote Four outlines a higher level of judicial scrutiny for legislation that met certain conditions: (1) on its face violates a provision of the Constitution (facial challenge); (2) attempts to distort or rig the political process; (3) discriminates against minorities, particularly those who lack sufficient numbers or power to seek redress through the political process. This higher level of scrutiny, now called “strict scrutiny”, was first applied in Justice Black’s opinion in *Korematsu v. U.S.* (1944).

³³¹ See *Loving v. Virginia*, 388 U.S. 1 (1967). This case was a landmark civil rights decision of the United States Supreme Court which invalidated laws prohibiting interracial marriage.

³³² See *Roe v. Wade*, 410 U.S. 113 (1973). The Court ruled 7-2 that a right to privacy under the due process clause of the 14th Amendment extended to a woman’s decision to have an abortion, but that this right must be balanced against the state’s two legitimate interests in regulating abortions: protecting prenatal life and protecting women’s health.

³³³ See *Meyer v. Nebraska*, 262 U.S. 390 (1923). This was a U.S. Supreme Court case that held that a 1919 Nebraska law restricting foreign-language education violated the Due Process clause of the Fourteenth Amendment.

³³⁴ See Timothy Sandefur, *The Right to Earn a Living: Economic Freedom and the Law*. Washington D.C.: Cato Institute, 2010, pp. 90-100.

liberty, or property.”³³⁵ It restricts the exercise of power by the state and federal governments by requiring that they follow certain procedures in criminal and civil matters.³³⁶ In cases where an individual has claimed a violation of due process rights, courts must determine whether a citizen is being deprived of “life, liberty, or property”, and what procedural protections are “due” to that individual. The Bill of Rights contains provisions that are central to procedural due process, which give individuals a list of rights and freedoms in criminal proceedings.³³⁷ Procedural due process also protects persons from government behaviors in the civil. These protections have been extended to include not only land and personal property, but also entitlements, including government-provided benefits, licenses, and positions, and so forth.³³⁸ Court decisions regarding procedural due process have exerted a great deal of influence.

In the process of expropriation, “public use” is the substantive factor in determining whether the expropriation is legitimate, and is a prerequisite to implement the expropriation power. “Just compensation” is the quantitative factor in judging whether the expropriation is reasonable, and is the crux of relieving property owners’ loss caused by the public power. Only the power of expropriation is circumscribed by “public use” and “just compensation”, can the exercise of expropriation generate net social welfare, and guarantee citizens’ property rights effectively. Meanwhile, due process is the guarantee of defining the scope of “public use” and the determination of “just compensation”, which not only prevents the improper exercise of public power against private property rights, but also

³³⁵ See Procedural Due Process Law & Legal Definition, at <http://definitions.uslegal.com/p/procedural-due-process/>, visiting date 2014.12.04.

³³⁶ Ibid.

³³⁷ These rights and freedoms include freedom from unreasonable searches and seizures; freedom from double jeopardy, or being tried more than once for the same crime; freedom from self-incrimination, or testifying against oneself; the right to a speedy and public trial by an impartial jury; the right to be told of the crime being charged; the right to cross-examine witnesses; the right to be represented by an attorney; freedom from cruel and unusual punishment; and the right to demand that the state prove any charges beyond a reasonable doubt. In *Gideon v. Wainwright* (372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963)), the Supreme Court unanimously ruled that states are required under the Fourteenth Amendment to the U.S. Constitution to provide counsel in criminal cases to represent defendants who are unable to afford to pay their own attorneys. The case extended the identical requirement that had been imposed on the federal government under the Fifth and Sixth Amendments.

³³⁸ For example, the Court has ruled that the federal government must hold hearings before terminating welfare benefits. See *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970).

preserves the efficiency and justice.

Usually, when a unit of U.S. government wishes to expropriate privately held land, the following steps (or a similar procedure) are as follows.³³⁹ (1) The government attempts to negotiate the purchase of the property for fair value. (2) If the owner does not wish to sell, the government files a court action to exercise eminent domain, and serves or publishes notice of the hearing as required by law. (3) A hearing is scheduled, at which the government must demonstrate that it engaged in good faith negotiations to purchase the property, but that no agreement was reached. The government must also demonstrate that the taking of the property is for a public use, as defined by law. The property owner is given the opportunity to respond to the government's claims. (4) If the government is successful in its petition, proceedings are held to establish the fair market value of the property. Any payment to the owner is first used to satisfy any mortgages, liens and encumbrances on the property, with any remaining balance paid to the owner. The government obtains title. (5) If the government is not successful, or if the property owner is not satisfied with the outcome, either side may appeal the decision.

3.4.2 “Due process” in Europe

3.4.2.1 A general view

In European states, expropriation actions shall issue from authorities concerned and comply with “adequately accessible and sufficiently precise domestic legal provisions”.³⁴⁰ Such state laws must contain fair and proper procedural protections to ensure that expropriations do not occur arbitrarily or for unjust reasons.³⁴¹ The

³³⁹ See Aaron Larson, Eminent Domain - The Process of Eminent Domain, at http://www.expertlaw.com/library/real_estate/eminent_domain.html, visiting date 2013.08.08.

³⁴⁰ See *Lithgow and Others v. United Kingdom*, Eur. Ct. H.R., Applications Nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, par.110 (1986).

³⁴¹ See *Hentrich v. France*, Eur. Ct. H.R., Application no. 13616/88, par.40-42 (1994), at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57903#{"itemid":\["001-57903"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57903#{); also see *ŠPAČEK, s.r.o. v. The Czech Republic*, Eur. Ct. H.R., Application no. 26449/95, par.54, 60 (1999), at <http://caselaw.echr.globe24h.com/0/0/czech-republic/1999/11/09/case-of-spacek-s-r-o-v-the-czech-republic-583-58-26449-95.shtml>, visiting date 2014.12.06.

due process frameworks shall provide landowners with timely notice of the expropriation decision and its justifications, and the opportunity to challenge the expropriation before an independent decision-maker.³⁴²

3.4.2.2 “Due process” in Germany

German laws specifically and clearly elaborate the procedures for expropriation. First, public officials must endeavor to negotiate with the owner for a voluntary transfer of the property. This requirement is only fulfilled if the officials present a reasonable offer to the owner.³⁴³ If negotiations fail, officials may initiate a formal procedure wherein the parties are invited to a hearing and another attempt is made to reach a voluntary agreement.³⁴⁴ If negotiations fail again, officials may seek an expropriation order from the expropriation authority. The authority may decide on both the question of expropriation and the compensation figure, or defer the compensation decision to a later date.³⁴⁵ If the request is urgent for reasons of public welfare, the authority may issue an immediately effective transfer order at the hearing.³⁴⁶

The Basic Law explicitly permits individuals to appeal the manner and amount of compensation to courts of ordinary jurisdiction.³⁴⁷ The Constitutional Court has held that if a property owner does not receive any compensation, the owner must seek to have the decision invalidated as unconstitutional rather than request an appellate court to revise the decision.³⁴⁸

3.4.2.3 “Due process” in Poland

³⁴² See Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, *The Emergence of Global Administrative Law*, Law and Contemporary Problems, Vol. 68, Summer/Autumn 2005, pp.45-46, at <http://iilj.org/GAL/documents/TheEmergenceofGlobalAdministrativeLaw.pdf>, visiting date 2014.12.07.

³⁴³ See Winrich Voss, *Appropriate Compensation in Terms of Compulsory Purchase in Germany*, in *Some Aspects of Compulsory Purchase of Land for Public Purpose*, Polish Real Estate Scientific Society, ed., 2010, at http://www.tnn.org.pl/tnn/publik/18/TNN_monografia_2010.pdf, visiting date 2013.08.09.

³⁴⁴ See Federal Building Code, sec.108 (Germany, 1997).

³⁴⁵ See Federal Building Code, sec.111 (Germany, 1997).

³⁴⁶ See Federal Building Code, sec.116 (1) (Germany, 1997).

³⁴⁷ See Germany Constitution, art.14 (3) (1949).

³⁴⁸ See Stephan W. Schill, *International Investment Law and Comparative Public Law*, 2011, at <http://www.iilj.org/research/documents/if2010-11.schill.pdf>

The 1997 Polish Constitution protects property rights and sets forth the legal basis and conditions for expropriation.³⁴⁹ Specific procedures come from the Land Administration Act (1997) and the Real Estate Management Act (1997). Primarily, public officials must attempt to negotiate the sale of the land with the property owner. If negotiations fail to produce an agreement, public officials must file an application with an administrative authority, which designates an additional period (usually two months) for the parties to negotiate a voluntary agreement to transfer the property. If negotiations fail again, the administrative authority decides whether to expropriate the land and determines just compensation.³⁵⁰

When the decision takes effect, ownership is transferred to the State Treasury or a local government unit.³⁵¹ Payment of just compensation is due within fourteen days of the decision's effective date. If the expropriation of one portion of a property undermines productive use of the remaining portion, the owner may obtain expropriation of (and compensation for) the remaining portion as well.³⁵² Individuals may appeal the expropriation decision to courts under the general rules of administrative procedure, as well as to the Constitutional Tribunal.³⁵³

3.4.3 “Due process” in collective land expropriation in China

When legislature making law and administrative organs acting, if the balance of public interest and private right has to be weighed, it must be brought into legal process, which is not only the spirit of rule of law, but also a defense to ensure that private rights could not be infringed.³⁵⁴ Regulating expropriation power through

³⁴⁹ See Poland Constitution art.21 (1997).

³⁵⁰ See Marek Walacik, Sabina Zrobek, *Chosen Principles of Land Acquisition for Public Purposes and Just Compensation Determination in Poland*, Olsztyn: Polish Real Estate Scientific Society, 2010, at http://www.tnn.org.pl/tnn/publik/18/TNN_monografia_2010.pdf, visiting date 2013.08.09.

³⁵¹ See Miroslaw Belej and Marek Walacik, *Land Acquisition for Public Purpose in Poland on Example of Public Roads Construction*, 2008, at http://www.fig.net/pub/fig2008/papers/ts04b/ts04b_03_belej_walacik_2849.pdf, visiting date 2013.08.09.

³⁵² See Marek Walacik, Sabina Zrobek, *Chosen Principles of Land Acquisition for Public Purposes and Just Compensation Determination in Poland*, Olsztyn: Polish Real Estate Scientific Society, 2010.

³⁵³ See Poland Constitution art.78-79 (1997).

³⁵⁴ See Shen Weixing, *Construct modern Chinese Property Law under the Balance of Public Power and Private Right*, *Contemporary Law Review*, Vol.130, No.4, 2008.

the democratic and legal process can prevent illegal expropriation of collective land expropriation and can preserve the efficiency and justice. Relevant lawful procedures in collective land expropriation shall be improved in China.

3.4.3.1 Establish the negotiation procedure

Before the expropriation, public officials shall negotiate the sale and conditions of transferring land with the owner. If the negotiation fails, the administrative authority can decide whether to use the power to expropriate the land. The design of the institution of expropriation shall guarantee the efficiency and justice. However, the complicated procedures to strictly define the “public interest” in specific case and to ensure just compensation may not actually achieve efficiency. Then, the best institutional choice to achieve the pursuit of fairness and efficiency is that all parties negotiate a voluntary agreement on land transferring transaction. A state has the capacity to penetrate civil society, while it implements logistically political decisions more and more relying on institutional negotiation through social groups.³⁵⁵

In the countries where it is ruled by law, negotiation is a necessary procedure in advance of authorities exercising expropriation power. “When a buyer seeking to acquire a property has the power of eminent domain, he must attempt to negotiate a voluntary sale. But if his highest offer is rejected, he may condemn the property, that is, obtain a forced sale at a price determined in a court of law.”³⁵⁶

Negotiation procedure reflects the principle of autonomy of will in Civil Law. The free exercise of property rights cannot go without freedom of contract. Collective land rights shall have the freedom of trade, unless such a free transaction violates public interest and suffers from prohibition or restriction according to law. Facing to the public power which vindicates the public interest, the owner of collective

³⁵⁵ See Michael Mann, *The autonomous power of the state: its origins, mechanisms and results*, 1984, at <http://www.sscnet.ucla.edu/soc/faculty/mann/Doc1.pdf>, visiting date 2013.08.10.

³⁵⁶ See Patricia Munch, *An Economic Analysis of Eminent Domain*, *The Journal of Political Economy*, vol.84, No.3, 1976.

land forfeits the autonomy of will in transferring property rights, but still has the liberty to acquire a reasonable replacement price of his property rights, which shall be protected. Meanwhile, considering the uncertainty of the public interest scope in some cases, it can obviate confusion in defining specific public interest to require the government to negotiate with the collective land owner before making a decision of expropriation.

All in all, the ideal replacement price of collective land rights is an objective valuation, but in the process of expropriation there is always filled with much bargaining, and pursuing a complicated procedure to guarantee justice in expropriation may lead to the comedown of administrative efficiency. Therefore, negotiation procedure in advance of expropriation can better guarantee the justice and efficiency. The Chinese legislation on collective land expropriation shall elaborate that the government have to negotiate with the collective land owner in advance of expropriation in a certain prescribed time. Only when the government is willing to compensate in the highest market price, and the further negotiation is failed, or the parties do not achieve an agreement during the prescribed time, the authority can apply to the implementation of expropriation.

3.4.3.2 Improve the hearing procedure

The legislature has taken cognizance that farmers' participation in procedure and the rights to express their will in the process of expropriation shall be guaranteed, but the relevant procedure is still far from perfection. "Provisions on the Hearings in Respect of Land and Resources"³⁵⁷ provides the hearing procedure in land expropriation, but there are many limitations. (1) The hearing procedure is limited to make compensation standards and resettlement programs for land expropriation, and this kind of hearing is in the scope due to the expropriated land owner's application other than due to the government's authority.³⁵⁸ If the expropriated collective organization does not request a hearing in time for some reason, the

³⁵⁷ Order No.22 of the Ministry of Land and Resources January 9, 2004.

³⁵⁸ See "Provisions on the Hearings in Respect of Land and Resources", art.19.

procedure cannot effectively protect the farmers' interests.³⁵⁹ (2) There is no hearing procedure for defining "public interest". As for public project, if there is no relevant public to participate to confirm whether the project accords with public interest, and if the government does not fully take views of interested parties and the public, it is hard to say that the "public interest" defined by the government can really represent the public interest. Therefore, the hearing procedure defining "public interest" shall be adopted, or it is difficult to prevent the abuse of expropriation power. (3) The current legislation just generally set down the hearing procedure, lack of specific measures to guarantee the procedural justice, adding that the hearing is held by the land expropriating authority, thus the hearing procedure is almost an empty shell.³⁶⁰

In Common Law System, it is fundamental to fair procedure that both sides shall be heard. Besides promoting an individual's liberties, the right to a fair hearing has also been used by courts as a base on which to build up fair administrative procedures.³⁶¹ It is now well established that it is not the character of the public authority that matters but the character of the power exercised.³⁶² In Europe, the right to a fair hearing is guaranteed by Article 6(1) of the European Convention on Human Rights which elaborates that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."³⁶³ Only that the interested party who may suffer from adverse effect in the process of land expropriation exercises the right to know the facts on expropriating his land, the relevant evidence, the legal basis and the discretionary factors in government exercising administrative powers, can this party have ample opportunity to express his views and opinions, and controvert the administrative action restricting his land rights to protect the rights. Specifically, the Chinese

³⁵⁹ See "Provisions on the Hearings in Respect of Land and Resources", art.5 and 21.

³⁶⁰ See Liang Yarong and Liu Yan, *Construction of Proper Procedure of Land Expropriation*, China Land Science, vol.22 No.11, 2008.

³⁶¹ See Henry W. R. Wade and Christopher F. Forsyth, *Administrative Law* (10th ed.), Oxford University Press, 2009, p.402.

³⁶² Ibid. P.405.

³⁶³ See Article 6(1) of the European Convention on Human Rights.

hearing procedure of land expropriation shall be improved in three aspects.

(1) Prior notice of hearing. The interested parties have the right to adequate notification which allows sufficient time to them to effectively prepare their own cases. “Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”³⁶⁴ Therefore, prior to the hearing in a reasonable term (generally 30 days), the hearing authority shall inform the interested parties, such as the owner of the collective land, the holders of the right to agricultural land contractual management, the holders of the right to use land for construction and the tenants of leased land, and make it known to the public that the date, time, place of the hearing as well as detailed notification of the case to be met. In order to facilitate interested parties to prepare rebuttal, the notice shall contain the following details: (a) the range of land expropriation; (b) the name, the scale, the floor area ratio and other specific conditions of the proposed project after land expropriation; (c) the name of construction unit and investment unit; (d) the legal basis and substantial facts on land expropriation; (e) the compensation standard and resettlement program for land expropriation; (f) the procedure of expropriation, of settling dispute, and of remedy.

(2) Cross-examination and debate. At the hearing, the to be expropriated owner shall have the right to challenge the legitimacy, the necessity and the rationality of the expropriation decision made by the government; the local government shall make a detailed description of the expropriation decision to the expropriated owner, which includes: the legal basis and substantial facts of land expropriation, the

³⁶⁴ See *R. v. Secretary of State for the Home Department*, ex parte Doody, [1994] 1 A.C. 531 at 560, H.L. (United Kingdom), at <http://www.bailii.org/uk/cases/UKHL/1993/8.html>. *Kioa v. West* (1985) 159 C.L.R. 550, High Court (Australia), par.28: “it is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it... The reference to ‘right or interest’ in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.” At http://www.austlii.edu.au/au/cases/cth/high_ct/159clr550.html, visiting date 2013.08.10.

compensation standard for land expropriation and its issuance time, etc. All interested parties can make cross-examination and debate. The local government shall not take persuading the to be expropriated owner and other hearing representatives as the purpose, but comprehensively reveal relevant aspects of the expropriation decision, and fully hear the controversial opinions of the to be expropriated owner and other hearing representatives.

(3) According to law and the record of the hearing, the authority in charge shall fully consider the opinions of interested parties, and make the decision of whether expropriation shall be permitted. Meanwhile, the reason for the hearing decision shall be revealed. Otherwise, such decision also lacks the regularity and transparency that distinguish them from the mere say-so of public authorities. On such grounds, there are obvious benefits for the disclosure of reasons for decisions. First, procedural participation by people affected by a decision promotes the rule of law by making it more difficult for the public authority to act arbitrarily.³⁶⁵ Requiring the giving of reasons helps ensure that decisions are carefully thought through, which in turn aids in the control of administrative discretion.³⁶⁶ Secondly, accountability makes it necessary for the public authority to face up to the people affected by a decision. When a public authority acts on all the relevant considerations, this increases the probability of better decision outcomes and, as such, is beneficial to public interests.

3.4.3.3 Establish the procedure of revoking expropriation

Even expropriation projects pass rigorous reviews on “public interest”, the possibility that there will be no benefit to the public, or much less benefit than that anticipated, is always present.³⁶⁷ Indeed, in the U.S., among those states that permit

³⁶⁵ See Timothy Andrew Orville Endicott, *Administrative Law*, Oxford University Press, 2009, p.110.

³⁶⁶ See Thio Li-ann, *Law and the Administrative State*, in Kevin Yew Lee Tan, *The Singapore Legal System* (2nd ed.), Singapore: Singapore University Press, 1999, p.194.

³⁶⁷ In the famous case *Poletown Neighborhood Council v. City of Detroit* (304 N.W.2d 455, 410 Mich. 616 (1981)), the Detroit government expropriated 465-acre neighborhood for the construction of a General Motors plant, because that the removal by General Motors of its Cadillac manufacturing operations to a more favorable economic climate would mean the loss to Detroit of at least 6,000 jobs as well as the concomitant loss of literally thousands of allied and supporting automotive design, manufacture and sales functions, and there

takings for economic development, none imposes any requirement that the condemning authority or the transferee provide any legally binding assurances that the projected economic benefits actually will occur.³⁶⁸ In China, there are also cases that expropriated land is no longer used for public interest due to the change of land use planning and other reasons; while, collective land expropriations beyond the scope of public interest are in big number. Because of the lack of relevant legislation, in practice, these kinds of cases, which are “fait accompli”, are always not tackled. The lack of subsequent control mechanism makes it difficult to ensure the achievement of public interest. Implementing subsequent supervision, control and management of expropriated land, and establishing the procedure of revoking expropriation, can ensure that the expropriated land is indeed used for the public interest project which has been approved, and will remedy the omission in previous procedures. Combining prior review and subsequent review and revocation can efficiently eradicate the abuse of expropriation power and guarantee the realization of public interest.

Chinese “Land Administration Law” elaborates: “All units and individuals are forbidden to leave cultivated land unused or let it lay waste. Where a stretch of cultivated land, for which the formalities of examination and approval have been gone through for its use for non-agricultural construction projects...if construction is not started for over one year, the land user shall, in accordance with the regulations of provinces, autonomous regions and municipalities directly under the Central Government, pay charges for leaving the land unused. If the land is not used for two years running, the people’s government at or above the county level shall, with the approval of the original approving organ, take back the user’s right to the use of the land without compensation. If the said land is originally owned by

would necessarily follow, as a result, the loss of millions of dollars in real estate and income tax revenues. The court, over a public use challenge, upheld the expropriation decision. Indeed, the actual benefits provided by the General Motors plan fell far short of the 6,150 jobs projected. Seven years after displacing 4,000 residents, destroying 1,400 homes and between 140 and 600 businesses, the plant employed only about 2,500 people. See Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, Michigan State Law Review, Vol. 2004, No. 4, pp. 1005-1039, Winter 2004 (Symposium on *County of Wayne v. Hathcock*).

³⁶⁸ See Charles E. Cohen, *Eminent Domain after Kelo v. City of New London: an Argument for Banning Economic Development Takings*, Harvard Journal of Law and Public Policy, vol.29, No.2, 2006.

peasants' collectives, it shall be returned to the original collective economic organization of the village for resumption of cultivation.”³⁶⁹ This provision is limited to the situation that the idle expropriated land shall be taken back but does not cover the situation that the expropriated land is not actually used for the public interest, which has not been able to improve the subsequent remedial mechanism of expropriating land for public interest.

Germany “Land Acquisition Act” (Landbeschaffungsgesetz, LBG, 1957) sets up the right of “back expropriation”, i.e. that if the expropriated land is no longer needed for the purposes of art.1, or within two years after the expropriation decision, the planned project on the expropriated land does not come into operation, the former owner may, in order to achieve his interest, require back expropriation according to the provisions of this Law.³⁷⁰

The “Land Act” in Taiwan region of P. R. China sets up the “redemption right”, i.e. that the original owner of a compulsorily purchased private land may, within six years of the day following the completion of the payment of compensation, apply to the Municipal or County (City) Land Office for its redemption at the purchase price originally paid him, if the land is not used according to the approved plan one year after the completion of the payment of compensation, or it is not used for the undertaking of the business of which compulsory purchase was originally approved.³⁷¹ Meanwhile, the “Land Expropriation Act” in Taiwan provides the institution of revoking expropriation: the land use applicants shall properly use the expropriated land according to the approved plan and the established time limit. Before completing the use of land according to the expropriation plan, the applicant shall review its undertaking project every year, and its superior authority in charge of the undertaking shall put the project under control. In case of any of the stipulated five situations, the expropriation shall be cancelled or revoked.³⁷²

³⁶⁹ See “Land Administration Law” art.37, par.1.

³⁷⁰ See Germany “Land Acquisition Act” (Landbeschaffungsgesetz, LBG, 1957) art.57 (1).

³⁷¹ See “Land Act” (Taiwan region of P. R. China) art.219.

³⁷² See “Land Expropriation Act” (Taiwan region of P. R. China) art.49.

The Chinese legislation shall stipulate to carry out a subsequent review of the construction project on expropriated land, shall entitle the expropriated owner to claim the return of expropriated collective land, shall allow the government to take back the transferred construction land-use right through the procedure of revocation and permit the collective organization to buy back the land ownership in accordance with the compensation price if any of the following situations happens: (1) the expropriated land is not used for two years running; (2) the practical use of the expropriated land is not for public interest; (3) the expropriated land is not used according to the announced usage. If the collective does not exercise the claim right of recovery, the government shall initiatively take back the land-use right from the land user and return the land to the original collective. If the collective will not, or cannot buy back the land, the state shall bring the land into the urban land reserve. When the use right of reserved land is assigned, the government shall give back the reasonable proportion of the incremental land revenue to the collective organization. These regulations can, in maximum extent, protect the land rights owner's interest and guarantee expropriated land to be used as the approved public interest.

To sum up, in China, the promulgation of “Regulations on the Expropriation of Houses on State-owned Land and Compensation Therefor” make the legislation of expropriating state-owned land-use right and houses on state-owned land basically improved, but legislation on collective land expropriation is far from perfection and the conflict in practice is still prominent. Therefore, the legislature shall improve the relevant legislation as soon as possible, to legislatively confirm the reform of collective land expropriation, to lay the legal basis for integrating urban and rural construction land circulation.

Chapter IV The market-oriented reform of the circulation of collective construction land

The reform of collective land expropriation which is designed in the preceding chapter strictly limits the expropriation to the scope of public interest, then, the “non-public interest” use of collective land is faced with how to achieve route selection. Based on dualistic land ownerships, to integrate the rights to use state-owned and collectively-owned lands for construction within a unified land market shall be the basic orientation to the reform of construction land circulation in China. The market-oriented circulation of collective construction land is an elementary path to guarantee the free transaction of collective land rights.

4.1 The marketization of collective land and the protection of land property right

4.1.1 The marketization of collective construction land and the revival of collective land rights

4.1.1.1 The connotation of marketization of collective construction land

The marketization of collective land has the broad sense which includes direct and indirect circulation of collective land in market, and the narrow sense which means direct circulation in market. Indirect marketization means that after authority expropriating collective land, the previous collective land converts into state-owned land, and then the State extracts construction land-use right from the ownership of the state-owned land and assigns the use right with charge or freely allocates it to construction unit. Direct marketization means that, on the precondition of reserving collective land ownership unchanged, farmers or farmers’ collective allow the construction unit beyond the collective to get the right to use collective land for

construction in a certain manner, including marketization of existing collective construction land and of collective construction land converted from farmland through authority's approval. The marketization of collective land discussed in this dissertation refers to that, according with the general land use planning and urban and rural planning, collective land for the use of construction, with legitimate status, circulates in land market; in addition to peasants' collective, a farmer with his right to use collective land for construction can also directly conduct a transaction in land market.

The characteristics of direct marketization of collective land are as follows: (1) rural collective construction land is legally obtained by farmers' collective through government approvals; (2) collective land circulation in the market is on the precondition of preserving collective land ownership unchanged; (3) farmers can directly obtain land revenue from the transferee of the right to use collective land.³⁷³

4.1.1.2 The revival of collective land rights

For a long time, the circulation of collective construction land has been strictly limited in China. The restriction guaranteed governments' implementation of rural land administration and the rural support of the urban prior development. While, with the development of market economy in China, collective construction land's nature of asset gradually reveals; phenomena of collective construction land spontaneously circulating in assignment, transfer and other forms have been increasingly expanding in quantity and in scale; the invisible market of collective construction land exists objectively. Although these phenomena conflict with the current administrative institution of rural collective construction land in a certain extent, they reflect the internal demand of the market for the circulation of the right to use collective land for construction. The process of the circulation of urban state-owned land-use right changing from being prohibited to being permitted

³⁷³ See Zhang Zhiqiang, *Research on Marketization of Rural Collective Construction Land*, doctoral dissertation of the Party School of the Central Committee of C. P. C., 2010.

manifests the revival of the nature of land property rights. The right to use collective land for construction, which is a kind of independent usufruct, has the character of free circulation. But the restrictive legislation makes the market mechanism hard to play the fundamental role of allocating land resources, which lags behind the realistic requirement. “The right to use collective land for construction with strict rural status is lacking the basic attribute of transferable property. In order to freely circulate rural construction land-use right, it has to be liberated from the rural status, to make farmers’ land rights and interests no longer solely be represented as farmers’ direct use, but rather be reflected in transferring use rights to other users and letting farmers obtain profits from the transfer.”³⁷⁴ Therefore, it shall resuscitate the property right attribute of collective land, liberate the circulation of collective land from severe restrictions, establish the institution of using transferable collective construction land with fees, with time limit, and improve relevant legislation treating the circulation of urban and rural construction land-use right equally.

In the Chinese constitutional framework, “Land Administration Law” provides the exception of prohibiting the circulation of collective construction land,³⁷⁵ which sets a narrow channel of the circulation of collective construction land but is far from the actual requirement of economic development. Only collective land, through circulation, combines with appropriate social capital, can collective land achieve the value as essential productive factor, and land resources realize reasonable allocation. Meanwhile, the transfer of urban real estate which has

³⁷⁴ See Gao Fuping, *Study on the Reform of Rural Construction Land System*, Journal of Shanghai University of Finance and Economics, vol.112, No.12, Apr. 2010.

³⁷⁵ The Chinese Constitution art.10, par.4 elaborates that “no organization or individual may appropriate, buy, sell or otherwise engage in the transfer of land by unlawful means. The right to the use of land may be transferred according to law.” Herein “the right to the use of land” shall be interpreted including the construction land-use right of state-owned land and rural collective land through the logical relation and the systematical interpretation of the five clauses in art.10. “Land Administration Law” art.2, par.3 provides that “the right to the use of land may be transferred in accordance with law”; art.9 elaborates that “land owned by peasants’ collectives may be lawfully determined to be used by units or individuals”; but art.43, par.1 elaborates that “All units and individuals that need land for construction purposes shall, in accordance with law, apply for the use of State-owned land, with the exception of the collective economic organizations and peasants of such organizations that have lawfully obtained approval of using the land owned by peasants’ collectives of these organizations to build township or town enterprises or to build houses for villagers and the units and individuals that have lawfully obtained approval of using the land owned by peasants’ collectives to build public utilities or public welfare undertakings of a township (town) or village”. It is obvious that the right to use collective land for construction is strictly restricted.

complete property rights and function can make urban residents enjoy the incremental value of the rise of whole asset market, but farmers are not entitled to freely transfer their collective construction land and cannot increase property income, which shall be made up through different institutional arrangements.³⁷⁶ With the activity of market economy, the free circulation of collective construction land becomes uncontrollable objective social needs. To improve the disordered state of the unsystematic spontaneous circulation, the central government made a series of policies³⁷⁷. The policy choice of regulating the marketization of collective construction land is the result of induced institutional transition of land institution. The market-oriented circulation of collective land gradually integrating with the circulation of state-owned land, which will finally form the unified urban and rural land market, is the inevitable choice of the transition of Chinese land institution.

4.1.2 Basic models of the marketization of collective construction land circulation

In recent years, various Chinese government authorities at both central and local levels (as represented by the Ministry of Land and Resources, and local departments of Land and Resources) have been exploring some pilot reforms to permit limited circulation of collective construction land on regional basis, which kind of process was started in certain areas in Guangzhou and Jiangsu provinces, and has now been expanded to many major cities and provinces in China, such as Chongqing, Chengdu, Shanghai, Zhejiang, Anhui, Hubei, Hebei, Henan, Dalian and Nanjing, etc..

³⁷⁶ See Zhou Qiren, *Increase Chinese Peasant Families' Property Income*, Rural Finance Research, No.11, 2009.

³⁷⁷ Such as "Notice of the State Council on Intensifying the Land Control" (2006); "Notice of the State Council on Promoting the Land Saving and Intensive Use" (2008); especially "Notice of the Ministry of Land and Resources on insisting on Administrating the Land Saving and Intensive Use According to the Law and Regulation to support the construction of a new socialist countryside" (2006) provided to promote pilot reforms of the circulation of collective non-agricultural construction land; "Decisions on Deepening Reform and Strengthening Land Administration" (Guo Fa [2004] No. 28), issued by the State Council, October 2004; "Several Opinions on Promoting Steady Development of Agriculture, Sustainable Growth of Farmers' Income and Enhancing Balanced Development of Urban and Rural Areas" (Guo Tu Zi Fa [2009] No. 27), issued by the Ministry of Land and Resources, March 2009.

4.1.2.1 The pilot reform in Guangdong Province

On May 17, 2005, the government of Guangdong Province adopted the first operational and lawfully effective document in China to regularize the marketization of collective construction land circulation in the Province of Guangdong — “Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes”, which inaugurated a new era of “land revolution” that the expropriation of collective land and the market-oriented circulation of collective construction land coexist. With respect to collective construction land in Guangdong Province, pursuant to the overall land-use planning and urban and rural zoning plans, subject to approvals of the competent government authorities, this document covered most major aspects of the land-use right circulation, including among others, the permitted purpose of use for the land to be circulated, the permitted maximum term of the land to be circulated, circulation procedures and distribution of circulation proceeds:

(1) Permitted Purpose of Use: In addition to be used pursuant to the “Land Administration Law”, and in accordance with the Guangdong pilot program, the rural collective construction land is also permitted to be used by non-rural members (including without limitation, state-owned entities, urban collectively-owned organizations, private companies, domestic individuals and foreign invested enterprises³⁷⁸) for business operation purposes, but in no event such land may be used for commercial or residential real estate development³⁷⁹. This has significantly lifted the restrictions on the use of the collective construction land by non-rural members as provided under the “Land Administration Law”.

(2) Circulation Means and Restrictions: According to the Guangdong pilot program,

³⁷⁸ “Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes” art.8.

³⁷⁹ “Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes” art.5.

the owner or user of a piece of the collective construction land may circulate the use right of such land to non-rural members by way of assignment or lease (“Initial Circulation”), transfer or sublease (“Secondary Circulation”), or mortgage³⁸⁰ (together with the Initial Circulation and the Secondary Circulation, collectively, the “Circulation”). However, no Circulation is allowed in any of the following situations³⁸¹: (a) the proposed purpose of use of the land contradicts with the overall land utilization planning or any urban or rural zoning plans; (b) the legal title of the land is in dispute; (c) the land is subject to judicial or administrative procedures; or (d) the land is designated to build up self-use residential houses for the members of the rural collective economic organizations (except that the land is circulated as a result of legal transfer, lease or mortgage of the buildings or structures situated thereon).

(3) Circulation Procedures: Pursuant to the Guangdong pilot program, as for a piece of collective construction land, the Initial Circulation and mortgage of the underlying land-use right shall be approved by at least 2/3 members of the villagers’ conference (or 2/3 representatives of the villagers) of the collective economic organization owning such land³⁸². If anyone intends to use the collective construction land through Initial Circulation for commercial purposes such as constructing shopping malls, hotels, restaurants, tourism sites or entertainment projects, such Initial Circulation must be conducted by reference to the land granting procedures applicable to the state-owned land with the same purpose of use (i.e., through a public invitation for bid, auction or quotation procedure)³⁸³. Unlike the Initial Circulation, procedures for a Secondary Circulation are quite straightforward. In order to obtain the relevant land-use right certificate, the parties to a Secondary Circulation only need to enter into a land-use right transfer or lease

³⁸⁰ “Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes” art.2.

³⁸¹ “Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes” art.4.

³⁸² “Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes” art.7, par.1.

³⁸³ “Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes” art.15.

contract in writing and go through relevant registration procedures with competent land administration authorities.³⁸⁴ Neither approval from villagers' committee or villager representatives of the relevant collective economic organization, nor public bid, auction or quotation procedure is mandatorily required in the case of a Secondary Circulation.

(4) Circulation Term: The maximum term of the right to use the collective construction land achieved in an Initial Circulation is essentially the same as that applicable to a piece of assigned state-owned land with the same purpose of use.³⁸⁵ The term of the land-use right with respect to the collective construction land achieved in a Secondary Circulation shall be no more than the remaining term of the land-use right concerned (i.e., the term obtained in the Initial Circulation minus the term that has lapsed from the Initial Circulation through the Secondary Circulation).³⁸⁶ Upon expiration of the circulation term, the land owner is entitled to take back the underlying land for free and the disposal and/or distribution of the buildings and other constructions situated thereon shall be dealt with in accordance with the relevant land-use right assignment or lease agreement entered during the Initial Circulation.³⁸⁷

(5) Distribution of Circulation Revenue: The proceeds derived from Initial Circulation of a piece of collective construction land shall be treated and managed as the property collectively owed by the members of the relevant collective economic organization. A minimum of 50% of such proceeds shall be deposited in a special bank account opened with the relevant rural credit cooperative bank and shall only be used to improve social welfare conditions for the members of the

³⁸⁴ "Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes" art.19.

³⁸⁵ "Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes" art.13, par.2.

³⁸⁶ "Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes" art.18, par.3.

³⁸⁷ "Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes" art.16.

underlying rural collective economic organization.³⁸⁸

Since most of the pilot schemes are formulated and implemented by local government authorities on regional basis, theoretically speaking, the legal effect of such local rules would be challenged if they conflict with applicable laws or regulations promulgated by upper level legislation authorities, such as the “Land Administration Law” promulgated by the Standing Committee of the National People’s Congress of P.R. China. Nevertheless, from a practical perspective, all of the CPC Central Committee, administrative and judicial authorities at the central level have publicly expressed their supports to local pilot reforms for more than a few times in the past years.³⁸⁹ However, the practice in the name of reform is prone to damage the authority of law, especially in China where there is not tradition of rule of law. Procedurally, in reforms where law is required to be adjusted, the law shall be amended first, and then the reform can be started.

4.1.2.2 General analysis of basic models of collective construction land circulation in China

Allowing circulation of the right to use collective land for construction, pilot reforms, such as that in Guangdong Province, pointedly speed up land market transition from a dualistic system to an integrated and streamlined land supply market in China. In the pilot areas, the right to use collective land for construction has gradually been unified into a market-oriented land supply system, and non-rural members are able to use the collective construction land in a way almost the same as they use the state-owned granted land for construction purpose, even though

³⁸⁸ “Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes” art.25.

³⁸⁹ For example, the State Council has showed its support in its “Decisions on Deepening Reform and Strengthening Land Administration” (Guo Fa [2004] No. 28) to legal circulation of the collective construction land in villages, towns and designated towns as long as such circulation complies with applicable land-use planning and zoning plans. Further, to support the pilot land reforms, the Supreme People’s Court, the highest judicial agency in China, issued the “Several Opinions on Providing Judicial Guidance and Legal Service to Promote Reforms and Developments of Rural Areas” (Fa Fa [2008] No. 36) and required local courts to properly balance the legislative innovation and the stabilization of currently effective laws and regulations with higher legal effect when hearing cases involving the circulation of collective construction land and try to avoid negative impacts that their judicial practices may cause to the reforms of collective construction land circulation. Besides those aforementioned, the CPC 2008 Decision and 2013 Decision also stand by such circulation. With all of these supports, it seems that legal risks associated with such local pilot rules are generally remote.

there are still irrational restrictions in such administrative regulations in pilot areas. Nation widely, in accordance with whether transferring collective land ownership, basic pilot reform models of collective construction land circulation can be categorized as follows³⁹⁰:

(1) The model of “transferring ownership and obtaining profits”. In this model, rural collective no longer reserves the construction land ownership, which will be transferred to the State through expropriation; a great proportion of the revenue derived from circulating this piece of land will be returned to the former owner according to the principle of fairness in distribution. The cities of Ningbo, Wenzhou, Changzhou, and others exercise this model. This is an indirect marketization model, which emphasizes the State’s subject status in the assignment of land-use right and has substantial legal basis. The essence of this model is still “expropriation first and use second”, but the distinction is that, in this model, government refunds the majority of land revenue to the collective economic organization.

(2) The model of “reserving ownership and obtaining profits” (i.e., direct marketization model). On the precondition of reserving collective land ownership, in accordance with the management approaches of paid-using state-owned construction land, the use right of collective construction land can be directly assigned and leased to the land user in a certain term, which achieves the market-oriented circulation. No matter the collective construction land locating within or without the urban planning area, no matter the stocked or incremental construction land, all kinds of enterprises can, according to certain procedures, use collective construction land pursuant to the land-use planning and government’s approvals on the precondition of keeping collective land ownership unchanged, which forms the system of “two kinds of ownerships, the same market, integrated management”. The cities of Wuxi, Wuhu, Suzhou, and others exercise this model.

³⁹⁰ See the research group of Land Use Department of Ministry of Land and Resources of PRC, *Institutional Innovation and regulated circulation— research report of collective construction land circulation*, National Land & Resources Information, at <http://wenku.baidu.com/view/97b14aa1b0717fd5360cdc55.html>, visiting date 2013.08.11.

(3) The model of “‘transferring ownership and obtaining profits’ within the urban planning area and ‘reserving ownership and obtaining profits’ without the urban planning area” (i.e., “transferring ownership within the circle and reserving ownership without the circle” or the mixed model). Collective construction land within the urban planning area mainly follows the model of “transferring ownership and obtaining profits” to circulate; in the circulation, the collective land will be converted into state-owned land. As for collective construction land without the urban planning area, its use right can be directly assigned, leased to the land user in a certain term pursuant to the land-use planning and government’s approvals, and the farmers’ collective can benefit directly. Cities of Hangzhou, Huzhou and others exercise this model.

(4) The model of “quasi-nationalization”. In this model, farmers’ collective reserves the land ownership, but the government offers a unified management according to state-owned land administration and the user pays reward to the collective organization and the government. The cities of Jinjiang, Shunde, Huzhou and others exercise this model.

Although there are not unified and nationwide administration and regulations of collective construction land circulation in the whole country, a lot of local governments conduct beneficial exploration. These four models above can generally be summarized from two reformational thoughts of market-oriented circulation of collective land. (1) The reformational thought of “transferring ownership”. Firstly the collective land is converted into state-owned land, then the use right of state-owned construction land is assigned to users, which forms “one kind of ownership in one market”. (2) The reformational thought of “reserving ownership”. Peasants’ collective reserves the collective land ownership, then assigns the use right of collective construction land to users, which forms “two kinds of ownership in one market”.

The reformational thought of “reserving ownership” shall be the trend of collective construction land circulation. Because the use rights of collective construction land and that of state-owned construction land are both independent civil rights, the rights with same nature shall be in the same legal status, shall have the same function, and shall apply to same rules. On the occasion of marketizing collective construction land circulation, the use right of collective construction land shall be resuscitated, to achieve the property rights reform of “the same land-use type with equal rights”. Meanwhile, for the user of the land, there is no substantive significance to distinguish whether the land status is collectively owned or state-owned. But, “considering from protecting farmers’ rights and interests in the process of marketizing collective land property, it is more secure to choose the thought of property rights reform of reserving collective land ownership and creating and assigning the use right of collective land. This can absolutely realize a comprehensive integration of urban and rural construction land market on the basis of the right to use collective land for construction assigned by the collective and the right to use state-owned land for construction assigned by the State, which are different in modality but equivalent in right content and right efficacy.”³⁹¹ The market-oriented butt joint of collective and state-owned construction land-use rights requires the integration of right circulation and right capacities. Thus, the connection point of the unified market-oriented circulation and of “the same land-use type with equal rights” has to be considered.

4.1.2.3 The model choice of the market-oriented circulation of collective land

In comparison, combined with the pace of gradual reform in China, the model of “‘transferring ownership and obtaining profits’ within the urban planning area and ‘reserving ownership and obtaining profits’ without the urban planning area” is more appropriate to be generalized in China. With the process of industrialization and urbanization, the urban area expands and rural collective land in suburban will

³⁹¹ See Wang Xiaoying, *Reformational Thought of Marketizing Collective Construction Land*, China Economic Times, 2006/01/06, at <http://theory.people.com.cn/GB/49154/49155/4004237.html>

be merged into the urban planning area. This results in that, in the urban area, there are state-owned and collectively-owned lands, which violate the constitutional provision that “land in the cities is owned by the state”³⁹². Moreover, if not divide the range of collective land and the circulation of its use right from the urban state-owned land by planning area boundary, the State may freely acquire collective land by expropriation and it will lead to massive expansion of the city, which is not conducive to the harmonious development of society. Therefore, determining the circulation model bordering by urban planning area is undoubtedly the realistic choice: within the planning area, collective land ownership ought to be circulated, and without the planning area, collective land-use right shall circulate directly in the market. This model can prevent collective land and state-owned land coexisting within the urban planning area which violates the relevant constitutional provision, and can prevent arbitrarily converting collective land into state-owned land which reserves the necessary land resources and material basis for collective economic organizations and indeed protects farmers’ rights and interests. It is the sound model choice on the background of integrating urban and rural areas in China, and is “the measure to resolve the problems arising from planning changes in the urbanization process.”³⁹³

(1) Allowing the direct market-oriented circulation of the right to use collective land for construction without urban planning area. Extracted from collective land ownership, the right to use collective land for construction, as independent usufruct, circulating in land market can reasonably allocate land resources; meanwhile, “it is

³⁹² See Chinese Constitution art.10, par.1. How to define the “city” in Chinese Constitution art.10 par.1? On time dimension, does it refer to that land in cities with the boundary of the year 1982, in which year the current Constitution was made, is owned by the State, or, as long as a region is declared to be a city on the basis of the State administrative power since then, all the land in this region is naturally owned by the State? And on the spatial dimension, does the connotation and extension of the “city” refers to “urban planning area”, or “urban built-up area”, or “city proper”? The 1982 Constitution amendment Committee and all the previous National People’s Congresses since then did not interpret these issues, which results in the current disputes and confusion. Scholar Peter Ho explains it as “intentional institutional ambiguity” which means that policymakers could have elaborated an institution of property rights clearly in law or policy, but in order to make up leeway to deal with social contingencies, the ambiguous provisions were chosen ultimately. See Peter Ho, *Institutions in Transition: Land Ownership, Property Rights and Social Conflict in China*, Oxford University Press, 2005, p.12. In practice, local governments acquiesce in that land in “urban planning area” for construction project should be State-owned land, such as “Measures of the City of Jingdezhen for Administrating the Right to the Use of State-owned Land in Urban Planning Area”.

³⁹³ See Song Zhihong, *Study on the Legal Institution of the Circulation of the Right to the Use of Collective Land for Construction*, Beijing, China Renmin University Press Co.,LTD, 2009, p.157.

helpful to simplify the procedure of land-use rights circulation, to reduce transaction costs, to improve the efficiency of land use, and to earnestly protect farmers' legitimate rights and interests."³⁹⁴ Therefore, with respect to the demand of collective land for business operations, relevant legislation shall recover the content of the right to use collective land for construction, permitting the land-use right to be directly circulated in the market, and shall regulate the circulation methods, circulation rules, distribution of land revenue, and circulation term, to make integrated circulation of the two kinds of construction land-use rights on the precondition of "the same land-use type with equal rights" and to form a unified market of urban and rural construction land circulation.

(2) Allowing the circulation of collective land ownership within urban planning area. If the collective land within urban planning area is not allowed to be converted into state-owned land, it will lead to the coexistence of collectively-owned and state-owned land, which violates the constitutional provision that "land in the cities is owned by the state". Currently, there is no relevant policy to guide how to circulate collective land ownership within urban planning area, and in practice expropriation is extensively exercised.

Collective land rights shall be indeed reflected in that, pursuant to law, farmers' collective enjoys the rights to possess, use, dispose of and benefit from the collective land, and to eliminate others' intervention on the owners' exercise of land rights, while the market-oriented circulation is undoubtedly the best way to protect collective land rights. In accordance with the reform design of land expropriation, the circulation of collective land ownership in urban planning area shall be distinguished in two situations: (a) As for public interest projects, expropriation can be implemented. (b) with respect to non-public interest projects, if the collective land can be determined as urban construction land in accordance with the general land-use planning, and is in the scope of land reserve, the State, as an equal civil

³⁹⁴ See Chen Xiaojun, *Investigation and Research on the Legal Institution of Rural Land: Report of the investigation in Ten Chinese Provinces*, Beijing, Law Press, 2010, p.250.

right subject, can negotiate with the farmers' collective to purchase the collective land, otherwise it may be contrary to the direction of land expropriation reform. The essential distinction between State purchasing collective land and expropriating land is that purchasing land is market dealing happened among market subjects with equal legal status on the premise of fully respecting collective land owner's autonomy of will. Whether making transactions and how to determine prices and other conditions shall be negotiated by the two parties of the deal; if the negotiation fails, the collective land ownership shall be kept unchanged, maintaining the current utilization status of the collective land; until the situation changes and accords with the expropriation condition, the collective land can be expropriated; if it cannot achieve the prerequisite of expropriation all along, the collective land ownership shall be reserved. As long as government's scheme of purchasing collective land can fully protect farmers' lawful rights and interests, it can well resolve the problem of converting collective land ownership within urban planning area. Without urban planning area, the circulation of collective land ownership shall be strictly restricted to protect the collective economy.

All in all, the market-oriented circulation of the right to use collective land for construction shall be the main method of farmers taking collective land as the capital to participate in the process of urbanization.

4.1.3 The route choice of market-oriented circulation of collective land ownership

4.1.3.1 The liberty of market-oriented circulation of collective land ownership

(1) According to "Property Law", owners of immovables or movables shall be entitled to possess, use, benefit from and dispose of the immovables or movables according to law; no units or individuals shall be allowed to acquire ownership of the immovables which are exclusively owned by the State; for public interests, land

owned by the collectives may be expropriated.³⁹⁵ But “Property Law” does not provide whether the collective land ownership can be circulated. So, can collective land ownership be circulated freely? The relationship between an owner's liberty and the restriction on the ownership is that, if there is no explicit restriction pursuant to law, the owner can freely dispose of the property; the owner disposing the property shall not infringe others' rights. Each kind of restriction on an ownership must be necessary in a certain situation and the restriction shall have rational reason. “The behaviors of citizens, without being forbidden by law, are not lawbreaking.”³⁹⁶ Current Chinese legislation does not forbid the circulation of collective land ownership, thus, the collective land ownership can be freely circulated in land market; farmers' collective has the right to decide whether transfer, on what conditions to transfer and at what time to transfer the land ownership and other land rights.³⁹⁷

(2) The purpose is not proper and the act is not legitimate to expropriate collective land for non-public interest project. If purchasing collective land for non-public project is forbidden, the collective land and state-owned land will coexist in the urban planning area, which violates the constitutional provision that “land in the cities is owned by the state”. Meanwhile, some of the construction projects in urban planning area integrate the public and commercial characters. Allowing the government to acquire collective land by purchase can fill the hole in the institution of market-oriented circulation of collective land, and is conducive to exert the basic function of market to allocate land resources.

³⁹⁵ See “Property Law” art.39, 41, and 42.

³⁹⁶ Proverb by Charles de Secondat, Baron de Montesquieu.

³⁹⁷ Because the Chinese constitution provides that the land is owned by the State or rural collectives, thus individuals, enterprises, urban collective economic organizations and other entities cannot privately hold land ownership. Theoretically, there is the probability that collective land ownership can be circulated from one rural collective organization to another rural collective organization. But the boundary of a piece of collective land is determined by the relevant department of the government according to law, which cannot be arbitrarily changed, such as change through land transaction; meanwhile, there is no law supporting this type of circulation of collective land ownership. In practice, a piece of collective land, which is large enough, can meet the requirement for a collective economic organization to construct and develop. If a collective economic organization would like to invest and construct on another piece of collective land which is beyond its collective land boundary, the collective economic organization will be treated as a private construction land user. Therefore the market-oriented circulation of collective land ownership discussed herein refers to the land ownership transferring from the farmers' collective to the State.

(3) Land reserve is a general method of the government intervening in land market and optimizing the allocation of land resources. The term “land reserve” in China refers to acts of legally obtaining land, prior developing it and storing it for future land supply which are done by the administrative departments of land and resources under the municipal and county people's governments for realizing the objective of regulating and controlling land market and enhancing the reasonable utilization of land resources.³⁹⁸ Strengthening land regulation and control, regulating the operation of land market, enhancing the saving and intensive utilization of land and improving the capability for guaranteeing the land used for building are the purposes of perfecting the land reserve system.³⁹⁹ The land administrative department of a municipal government shall work out the annual land reserve plan and the mid-term and long-term land reserve plan according to the master land use plan, master city plan, near-term city construction plan, land supply plan and actual use of land resources, and implement them after obtaining the approval of the Municipal Government.⁴⁰⁰ The land reserve institution reserves the land obtained by the Government through expropriation, land transfer, repossession, purchase, swap, etc. according to the law, carrying out necessary arrangement and daily management and providing land under the annual land supply plan.⁴⁰¹ Land reserve does not certainly have the public nature. In order to prevent the government managing the city through “land reserve”, if the land use cannot be determined for public interest, the collective land shall be purchased by the government following the principle of autonomy of will in accordance with fair market rule, which is conducive to achieve justice and efficiency in implementing the institution of land reserve.

4.1.3.2 Government procurement in purchasing collective land ownership

The circulation of collective land ownership can be achieved by methods of

³⁹⁸ See “Measures for Land Reserve Administration” (China, 2007) art.2.

³⁹⁹ See “Measures for Land Reserve Administration” (China, 2007) art.1.

⁴⁰⁰ See “Measures for Land Reserve Administration”, art.5.

⁴⁰¹ See “Measures for Land Reserve Administration”, art.3.

expropriation and purchase. As for the purchase means, establishing the institution of government procurement⁴⁰² of collective land may smooth the route of its market-oriented circulation and protect farmers' collective's interest in maximum. The reasons are as follows:

(1) There are many parcels of collective land owned by different rural collective organizations around the city, thus there are lots of different collective land owners. After the government issues a bidding invitation, all the collective land owners willing to transfer land ownership can bid. When the government determines the bidder, both parties negotiate about transferring the collective land ownership. This method will change the previous disadvantage that, if the government or the developer settles on a parcel of land, this parcel of land has to be transferred, and it fully respects collective land owner's will.⁴⁰³

(2) Government procurement is a kind of civil act⁴⁰⁴ which is on the basis of respecting collective land owner's autonomy of will in transferring property rights. The diversified manners of government procurement⁴⁰⁵ can simultaneously guarantee the interests of the State and rural collective organizations.

(3) Government making procurement of collective land within urban planning area

⁴⁰² "Government Procurement" refers to the purchasing activities conducted with fiscal funds by government departments, institutions and public organizations at all levels, where the goods, construction and services concerned are in the centralized procurement catalogue compiled in accordance with law or the value of the goods, construction or services exceeds the respective prescribed procurement thresholds. See The Government Procurement Law of the People's Republic of China, art.2.

⁴⁰³ Within urban planning area, collective land which has not been stocked can either keep the original purpose or be purchased separately through negotiation between the government and the land owner. For example, the construction unit puts forward land use application, and then the government examines and approves this application; the government offers solicitation of acquiring land to the collective land owner, and the construction unit negotiates with the collective land owner to determine the market price; then the construction unit pays for the collective land with the negotiated price, and the government acquires the ownership of previous collective land, assigns the land-use right to the land user, and collects taxes.

⁴⁰⁴ "Procurement" refers to activities conducted by means of contract for the acquirement of goods, construction or services for consideration, including but not limited to purchase, lease, entrustment and employment. See Government Procurement Law of the People's Republic of China, art.2.

⁴⁰⁵ The following methods shall be adopted for government procurement: (1) public invitation; (2) invited bidding; (3) competitive negotiation; (4) single-source procurement; (5) inquiry about quotations; and (6) other methods confirmed by the department for supervision over government procurement under the State Council. Public invitation shall be the principal method of government procurement. See The Government Procurement Law of the People's Republic of China, art.26.

can convert the land ownership from the collectively-owned to the state-owned⁴⁰⁶, which may efficiently resolve the unconstitutional problem.

4.1.3.3 The scope of market-oriented circulation of collective land ownership shall be appropriately restricted

(1) The market-oriented circulation of collective land ownership shall apply only to the urban planning area in order to guarantee the collective land owner to independently develop and utilize the collective land beyond the scope of land expropriation and land reserve. (2) As in a civil act, the government shall respect collective land owner's will. It shall be bilaterally negotiated to determine whether transfer, on what price and conditions to transfer the collective land ownership, eliminating the interference of administrative power. (3) Collective land owners are diversified, and the purchase shall be conducted in the integrated construction land market to protect farmers' collective's interest through open and transparent transaction procedure. (4) The government may incorporate purchased land into the scope of land reserve for regulating urban construction land market, and shall prevent the behavior of purchasing collective land in the name of "land reserve" and then reselling it at a profit which infringing collective land rights.

4.2 The scope of the circulation of the right to use collective land for construction

The scope of the circulation of the right to use collective land for construction is indeed the boundary of the liberty and the restriction of exercising collective construction land rights. It relates to fostering the circulation market of the right to use collective land for construction and maintaining the stability of the market of state-owned land-use right, and the stability of land market is the basis of making overall plan of urban and rural development and promoting social harmony; it also

⁴⁰⁶ The procuring entity and the collective land owner who is the winner of the bid shall, within 30 days from the date the notice informing the said winner of their acceptance is sent out, sign a government procurement contract converting the collective land into state-owned land and reserving it for urban construction.

relates to the distribution of incremental land value among the state, local governments and farmers, while, the distribution of land revenue is a critical issue in reforming rural land law system.

4.2.1 Subjects in the circulation of the right to use collective land for construction

4.2.1.1 The assigner of the right to use collective land for construction

First of all, the precondition of market-oriented circulation of collective construction land is the clear land ownership which prevents unnecessary disputes and is the basis of distributing incremental land revenue. Therefore, before the market-oriented circulation of collective construction land, the ownership of the collective land shall be clear with the registration of the ownership and the “Collectively-owned Land Ownership Certificate” shall be issued.⁴⁰⁷ Secondly, the right to use collective land for construction shall be clear. The government shall issue the collectively-owned land-use right certificate to the natural person, the legal person or other legal entities who legally obtaining the right to use collective land for construction and completing the registration to ensure that the actor has a legitimate authorization and the qualification of land trading subject. According to “Property Law”, rural collective organization, which is the owner of collective land and is entitled to possess, use, benefit from and dispose of the collective land according to law⁴⁰⁸, can extract the right to use collective land for construction and transfer the right. Thus, rural collective organization shall be the assigner in initial

⁴⁰⁷ “Collectively-owned Land Ownership Certificate” is the lawful voucher of collective land owners enjoying the rights to possess, use, benefit from and dispose of the collective land pursuant to law. “Property Law” (2007) art.9 elaborates that the creation, alteration, transfer or extinction of the property right shall become valid upon registration according to law; otherwise it shall not become valid, unless otherwise provided for by law. According to “Measures for Land Registration” (issued by Ministry of Land and Resources, 2008), art.17, land rights certificate includes: (1) state-owned land-use right certificate; (2) collectively-owned land ownership certificate; (3) collectively-owned land-use right certificate; (4) certificate for other land rights. May 6, 2011, Ministry of Land and Resources, Ministry of Finance, Ministry of Agriculture issued “Notice on Accelerating the Work of Clarifying and Registering Rural Collective Land Rights and Issuing the Certificate” to promote the relevant work on collective land ownership, the right to the use of residential house sites and the right to the use of collective land for construction.

⁴⁰⁸ See “Property Law” art.39.

circulation⁴⁰⁹; the user of collective construction land is the assigner in secondary circulation.

According to “Property Law” and “Land Administration Law”, collective land ownership can be exercised by the peasants’ collective of a village, the rural collective economic organization in the village or villagers’ group, and the rural collective economic organization of the township (town)⁴¹⁰, all of which are subjects of collective land ownership. Generally, with respect to a piece of collective construction land, the Initial Circulation of the underlying land-use right shall be approved by at least 2/3 members of the villagers’ conference (or 2/3 representatives of the villagers) of the collective economic organization that owns such land.

In the process of clarifying and registering collective land ownership, the owners of a large amount of collective land cannot be clearly determined. “Notice on Accelerating the Work of Registering Collective Land Ownership and Issuing the Certificate Pursuant to Law” (issued by Ministry of Land and Resources, 2001) section 2 (3) provides that the collective land which cannot be proved owned by the villagers’ group or the rural collective economic organization of the township (town) shall be determined owned by the peasants’ collective of a village pursuant to law. Although “Property Law” does not explicitly elaborate what shall be the default subject of rural collective land ownership, “Property Law” art.60 firstly clarifies the subject status of farmers’ collective of a village in Clause 1⁴¹¹. Some scholars hold that this is a legislative design on purpose, and it could be interpreted that, in the

⁴⁰⁹ There are scholars denying the initial circulation and the land owner as the subject and holding that the subject assigning land-use right can only be the land users (within and without the rural collective). See Li Yanrong, *Subjects and Objects in the Circulation of Collective Construction Land Shall Be Distinguished*, China Land, No.2, 2006.

⁴¹⁰ Land owned by peasants’ collectives that belongs lawfully to peasants’ collectives of a village shall be operated and managed by collective economic organizations of the village or by villagers committees; land already owned by different peasants’ collectives that belong to two or more different collective economic organizations in the village shall be operated and managed by the rural collective economic organizations in the village or by villagers’ groups; land already owned by a peasants’ collective of a township (town) shall be operated and managed by the rural collective economic organization of the township (town). See “Land Administration Law” art.10. The same provision can also refer to “Property Law” art.60.

⁴¹¹ See “Property Law” art.60.

property law system, farmers' collective of a village is the default subject of rural collective land ownership, and rural collective economic organizations in a village and the rural collective economic organization of a township (town) designed as subjects of rural collective land ownership shall be special cases⁴¹². The collective land which cannot be proved that it is owned by a rural collective economic organization in a village or villagers' group or the rural collective economic organization of a township (town) shall be determined owned by the peasants' collective of a village. In addition, the legislative purpose of designating the peasants' collective of a village as the default subject of rural collective land ownership is obvious in "Land Administration Law" art.10⁴¹³. The representatives of a rural collective can exercise collective land rights pursuant to law and regulation, and the profits shall belong to the rural collective, i.e., all the members of this rural collective.

The user of collective construction land is the assigner in secondary circulation. Because the user of collective construction land has the right to possess, use, benefit from the land, and to dispose of the land-use right itself. Therefore the user can freely dispose of the usufruct pursuant to law and the contract, including transferring the right to use collective land for construction to others, and benefit from the disposal of the rights. Land property rights mean that land rights holder is entitled to obtain benefits from using land and transferring land rights, i.e. achieving the value in land use through the development and utilization of land resources or the exchange value of land rights through circulation. The user of collective construction land shall be entitled to achieve the consideration through transferring the land-use right to others.

Whether the secondary circulation of the collective land-use right for construction shall need the approval of the owner? Collective land owner setting up and

⁴¹² See Cai Lidong and Hou Debin, *Default Ownership Subject of Rural Collective Land*, Contemporary Law Review, No.6, 2009.

⁴¹³ See "Land Administration Law" art.10.

assigning construction land-use right means that the owner agrees the circulation of the use right. In order to obtain the relevant land-use right certificate, the parties to a secondary circulation only need to enter into a land-use right transfer or lease contract in writing and go through relevant registration procedures with competent land administration authorities. Neither approval from villagers committee or villager representatives of the relevant collective economic organization, nor public auction or quotation procedure is mandatorily required in the case of a secondary circulation, except it is otherwise agreed in the initial land rights assigning contract. When the registration completes, the alteration of land-use right happens. On the preconditions of making the collective land ownership clear and intensifying the planning and regulation, it shall allow and promote the circulation of collective land-use right for construction, regularize the conditions and procedures of the circulation, rationally distribute benefits from the circulation, and effectively protect collective construction land user's lawful interest.

4.2.1.2 The assignee of the right to use collective land for construction

According to China's current legislation, subjects of the right to use collective land for construction are limited into the scope of the collective organizations.⁴¹⁴

Generally, those who are the members of the collective economic organization can obtain the right to use collective land for construction. "Because only specific persons can obtain this capacity of the subject status, the circulation of the right to use collective land for construction is limited to persons with the subject status."⁴¹⁵

According to "Provisions on Some Issues Concerning the Trial of Enterprise Bankruptcy Cases" of the Supreme People's Court, even when enterprises in townships and towns go bankruptcy and the liquidation committee disposes of leaseholds to collectively owned land, leaseholds to collectively owned land for

⁴¹⁴ All units and individuals that need land for construction purposes shall, in accordance with law, apply for the use of State-owned land, with the exception of the collective economic organizations and peasants of such organizations that have lawfully obtained approval of using the land owned by peasants' collectives of these organizations to build township or town enterprises or to build houses for villagers and the units and individuals that have lawfully obtained approval of using the land owned by peasants' collectives to build public utilities or public welfare undertakings of a township (town) or village.

⁴¹⁵ See Wang Weiguo, *Research on Chinese Land Rights*, Beijing, China University of Political Science and Law Press, 1997, p.181.

which no requisition procedures were carried out shall be assigned within the collective.⁴¹⁶ Some scholars, emphasizing the effect of consanguinity relationship through the whole traditional families to the structure of land rights institution and the mission of developing rural economy carried by collective construction land, take that the assignee of the assignment contract of the right to use collective land for construction shall be limited into township or town enterprises and other collective economic organizations within the town (township) or village.⁴¹⁷ However, it has to be said that this kind of opinion is quite antiquated.

If the circulation of the right to use collective land for construction is confined within the collective organization, it cannot form the open market and farmers cannot fully achieve the benefits from the exercise of land rights. Only allowing all types of enterprises to use collective construction land and achieving the equal subject status as assignees of the right to use collective land for construction, can there be the possibility to indeed form the integrated urban and rural construction land market. In practice where reformational pilot projects run, with external capital flowing to the countryside, with the introduction of foreign capital and the cooperation project between urban and rural areas, numerous assignees of the right to use collective land for construction in these pilot regions are non-rural enterprises beyond peasants' collective organizations; meanwhile, most of the benefits of land revenue are arising from the external circulation of collective construction land. Therefore, breaking through the limitation on the mandatory scope of assignee subjects is the prerequisite of circulating collective construction land in the market, and is conducive to achieve the fair market value of the right to use collective land for construction.

⁴¹⁶ See "Provisions on Some Issues Concerning the Trial of Enterprise Bankruptcy Cases" of the Supreme People's Court (2002), art.80. "Be assigned within the collective" is the principle, while, "Land Administration Law" (2004), art.63 provides for the exception that enterprises that have lawfully obtained collectively-owned land for construction in conformity with the overall plan for land utilization but have to transfer, according to law, their land-use right because of bankruptcy or merging or for other reasons.

⁴¹⁷ See Yu Wenli and Chen Ligen, *Dilemma and Choice: Research on the Transferring System of the Right to Use the Collective Construction Land under the Urbanization Background*, Contemporary Law Review, No.2, 2008.

Moreover, before the right to use collective land for construction gets into the market-oriented circulation, the collective economic organization owning the collective land shall satisfy its own demand in construction land use to realize the collective economic development. Property owner lawfully has this right. As for the land-use right, through the democratic procedure⁴¹⁸ and the competent government department's approval, circulating in land market, in principle, all types of enterprises shall access to the right through fair market competition, and no land-use unit or entity shall be imposed with discriminatory treatment. However, the phenomena of collective members' rent-seeking should be prevented, such as a few members establishing enterprise in the name of the collective organization and seeking personal profits from the collective land.

4.2.2 Objects in the circulation of the right to use collective land for construction

Objects in the circulation of the right to use collective land for construction should include the use rights of collective land for building township or town enterprises, public utilities or public welfare undertakings of a township (town) or village and houses for villagers, and of newly added collective construction land. Where land for agriculture is to be used for construction purposes, the formalities of examination and approval shall be gone through for the conversion of use.⁴¹⁹ Collective land for building township or town enterprises is commercial land, and there should be no doubt that this kind of collective construction land can be circulated in market. Hereafter, it discusses whether the use right of other types of collective land for construction could be circulated in market-oriented circulation.

4.2.2.1 The right to the use of collective land for building public utilities or public

⁴¹⁸ Generally, with respect to a piece of collective construction land, the Initial Circulation of the underlying land-use right shall be approved by at least 2/3 members of the villagers' conference (or 2/3 representatives of the villagers) of the collective economic organization that owns such land.

⁴¹⁹ See "Land Administration Law" art.44.

welfare undertakings of a township (town) or village.

Some scholars propose that, in rural areas, “objects in the circulation should be limited to profit-oriented construction land, excluding collective land for public utilities or public welfare undertakings, in order to guarantee the achievement of public interest.”⁴²⁰ According to the practices in the reformational pilot regions, there generally are not prohibitive regulations for the circulation of collective construction land for public welfare undertakings and facilities of a township (town) or village.⁴²¹

The author holds that the market-oriented circulation of collective construction land for rural public use should be allowed. According to Chinese legislation, where the right to the use of land for construction is transferred, exchanged, offered as equity contributions, or donated, the buildings and structures and the facilities attached to them which are attached to the said land shall be disposed of along with it⁴²²; where buildings and structures and the facilities attached to them are transferred, exchanged, offered as equity contributions, or donated, the right to the use of the land for construction to which the said buildings and structures and facilities are attached shall be disposed of along with them⁴²³. On one hand, the use right of collective land for building rural public utilities or rural public welfare undertakings may be circulated due to the alteration of ownership of the buildings and structures attached to the said land. If the circulation of collective land for building rural public project is absolutely prohibited, it may lead to the separation of building’s ownership and the construction land-use right, which violates law. On the other hand, when the collective construction land for rural public project does not bear the public function any more, the public nature of the land use can be changed

⁴²⁰ See Yu Wenli and Chen Ligen, *Dilemma and Choice: Research on the Transferring System of the Right to Use the Collective Construction Land under the Urbanization Background*, Contemporary Law Review, No.2, 2008.

⁴²¹ “Trial Measures of Anhui Province for the Paid Use of Collectively-owned Land for Construction and the Circulation of Right to the Use of Collectively-owned Land for Construction” art.27, par.2 elaborates: “collective land for building public utilities or public welfare undertakings of a township (town) or village can be directly circulated on the prerequisite of keeping the original use; if the use changes, the transferee shall sign a paid use contract with the collective economic organization and pay compensation for use of land.”

⁴²² See “Property Law” art.146.

⁴²³ See “Property Law” art.147.

through the circulation, on which situation, if the circulation of collective land for building rural public project is prohibited, it will lead to the waste of land resources. Meanwhile, the land-use right of the allocated state-owned land for public interest is allowed to be circulated after the transferee goes through the formalities for the granting of the land-use right and pay the fees therefore according to the relevant regulations of the State.⁴²⁴ The land-use right of collective construction land for rural public project shall be gratuitously obtained by means of allocation. In order to establish the integrated market of urban and rural land circulation, pursuant to relevant provisions on state-owned land-use right obtained by the means of allocation, it should allow the collective land-use right obtained by allocation for building rural public project to be circulated in market through the approval of the competent land administration authority.

4.2.2.2 The right to the use of residential house sites

The right to the use of residential house sites refers to that the member of a rural farmers' collective economic organization is entitled to make use of the collectively-owned land for constructing residential houses pursuant to law.⁴²⁵ According to "Land Administration Law", for villagers, one household shall only have one house site; applications for other residential house sites made by villagers who have sold or leased their houses shall not be approved.⁴²⁶ The "Property Law" even elaborates that the right to the use of residential house sites cannot be

⁴²⁴ See "Urban Real Estate Administration Law" art.39. Generally, the land-use right obtained by means of allocation is for public projects. See "Land Administration Law" art.54.

⁴²⁵ According to law and relevant official interpretation, the right to the use of residential house sites has the following characters. (1) The subject of the right to the use of residential house sites can only be the member of the rural collective economic organization. Citizen holding urban registered residence is prohibited to purchase rural residential house sites, unless he converts his urban household registration into the rural household registration of the rural collective economic organization. (2) The use of residential house sites is limited to construct individual residential house of the farmer. The residential house includes its affiliated facilities, such as the courtyard wall. (3) For villagers, one household shall only have one house site, the area of which may not exceed the limits fixed by provinces, autonomous regions and municipalities directly under the Central Government. Villagers shall build residences in keeping with the township (town) overall plan for land utilization and shall be encouraged to use their original residential house sites or idle lots in the village as much as possible. Land to be used by villagers to build residences shall be subject to examination and verification by the township (town) people's government and approval by the county people's government. However, if land for agriculture is to be used for the purpose, the matter shall be subject to examination and approval in accordance with the relevant provisions. Applications for other residential house sites made by villagers who have sold or leased their houses shall not be approved. (4) The initial acquisition of the right to the use of residential house sites is gratuitous, which is the social welfare to peasants.

⁴²⁶ See "Land Administration Law" art.62.

mortgaged.⁴²⁷ Therefore, the right to the use of residential house sites can be transferred, only with the sold or released house attached to the said house site, to other villagers within the rural collective. The reason it is legislated in this way is that: farmer's initial acquisition of the right to the use of residential house sites is gratuitous and based on farmer's special identity, a member of a rural collective, which is a kind of social welfare to peasants and guarantees farmer's living accommodation; if the right to the use of residential house sites is allowed to be circulated in market, it may lead to the homeless of the farmer. As scholar Chen Xiaojun said, "in order to make farmers exclusively enjoy the welfare and social security of residential house sites provided by the State for farmers, and to prevent the public authority and other social members' interference, through a multi-level institutional design by the State, which includes the acquisition, exercise and transfer of the right to the use of residential house sites, there formed a set of legal system with obvious character of rural status, and built up a complete institutional system of the right to the use of residential house sites, which consists of the Constitution, basic laws, administrative regulations, local regulations, rules and the relevant provisions."⁴²⁸

The practices in all the reformational pilot regions of circulating the right to use residential house sites do not break through the framework of current Chinese law.⁴²⁹ However, the right to the use of residential house sites is a kind of usufruct which is confirmed by "Property Law"⁴³⁰ and a usufruct shall have the right to possess, use and benefit from the immovables owned by another⁴³¹, while, the best

⁴²⁷ Unless it is otherwise prescribed by any law. See "Property Law" art.184 (2).

⁴²⁸ See Chen Xiaojun, *Investigation and Research on the Legal Institution of Rural Land: Report of the investigation in Ten Chinese Provinces*, Beijing, Law Press, 2010, p.231.

⁴²⁹ See Zheng Meizhen, *Analysis on Current Legislation of Circulating the Right to Use Collective Land for Construction in Pilot Regions*, China Policy and Law for Land and Resources, February 24, 2010, at <http://www.gtzyzcf.com.cn/news.asp?Id=8045>, visiting date 2013.08.15. Such as the provision in "Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes" art.4: "the right to the use of residential house sites can be transferred, leased or mortgaged because the building or any other adhesive substance on the said land is transferred, leased or mortgaged. After a villager sells or leases his dwelling house, he may not apply for a new house site again."

⁴³⁰ All the provisions about the right to use residential house sites in "Property Law" are under Part Three - "Usufructs", Chapter XIII - "The Right to the Use of House Sites".

⁴³¹ See "Property Law" art.117.

way to realize benefits from the right to the use of residential house sites is to achieve its incremental value through market-oriented circulation; although “Property Law” prescribes persons with the right to the use of residential house sites merely enjoy the right to possess and use the land,⁴³² the complete functions of the right to the use of residential house sites as usufruct should not be neglected, and the market-oriented circulation of the right to the use of residential house sites and constructions attached to the said land should be permitted.

Firstly, allowing the market-oriented circulation of the right to the use of residential house sites and constructions attached to the said land is the guarantee of farmers’ most important property right. The privatization reform of urban housing⁴³³ made citizens, holding either urban or rural household registration, have opportunities to obtain the ownership of the houses and the right to use state-owned land for construction to which the said houses are attached, and achieve the incremental family wealth due to the incremental land value. The right to the use of residential house sites and the houses attached to the sites should be farmers’ huge family wealth, but the restriction on their circulation makes them unable to exert property function. Discriminatory legal treatment exacerbates the economic gap between urban and rural areas which is extremely serious in China. “The market economy is liberal economy. To structure the legal system of the right to the use of residential house sites on the background of market economy should entitle the land user with sufficient freedom, especially, the freedom of disposal.”⁴³⁴ The provision that “for villagers, one household shall only have one residential house site; applications for other residential house sites made by villagers who have sold or leased their houses shall not be approved”⁴³⁵ is based on farmers’ collective status and welfare

⁴³² See “Property Law” art.152.

⁴³³ Before the privatization reform of urban housing which started in 1980, the public housing institution of freely distributing public housing or collecting extremely low rent had been exercised for a long time, which has the character of planning economy. Nowadays, the urban housing market is established in Chinese cities and security housing institution is in development, but there are still numerous welfare housings in government and huge state-owned enterprises which causes social inequality. All in all, the achievement of reform is positive.

⁴³⁴ See Li Zuofeng, *the Circulation Institution of the right to the use of residential house sites on the Perspective of the Property Law*, Economic and Social Development, Vol.7, No.7, 2009.

⁴³⁵ See “Land Administration Law” art.62.

character of rural residential house sites. If the legislature annuls the provision that farmers acquiring the right to the use of residential house sites without compensation, and, referring to the reform of urban housing, provides for that the acquisition should be paid reasonably according to the price of the collective land⁴³⁶, the foresaid provision can also be changed accordingly. It can be said that this change is the inevitable trend on the background of developing market economy, and the usufruct character of the right to the use of residential house sites should not be affected by farmers' collective status.

Secondly, prohibition on the market-oriented circulation of rural residential house sites is discrimination on the collective land property rights enjoyed by farmers, which is against farmers' achievement of property income. On one hand, the prohibition leads to farmers cannot mortgage the right to the use of residential house sites to raise capital to produce or to invest, which cannot fully reflect the asset character of the land. On the other hand, as for those farmers working and living in cities, it may lead to those farmers cannot collect enough fund to settle down in cities. "The provision prohibiting the commercial use of the right to the use of residential house sites such as mortgage and fund contribution will severely restrict rural development and urbanization and is not compliant with the basic principle of market economy. Therefore, the approach and rules of commercial circulation of the right to the use of residential house sites should be open to farmers."⁴³⁷ The commercial use of residential house sites mainly refers to its market-oriented circulation in sell, lease and mortgage, etc. Moreover, it is not necessary for the government to worry that permitting the market-oriented circulation of the right to the use of residential house sites may lead to the social problem of numerous homeless peasants. As persons with full capacity for civil conduct, farmers have right to decide how to dispose of the right to the use of residential house sites according to their autonomy of will, and are responsible to

⁴³⁶ Otherwise, the collective economic organization can charge comparatively lower than the market price to stimulate farmers' enthusiasm in the rural reform, meanwhile, it can reflect the welfare character of the reform.

⁴³⁷ See Gao Fuping, *Land Use Right and Usufruct—Research on the Immovable Property Right System in China*, Beijing, Law Press, 2001, p.450.

their behaviors.

Thirdly, although the national legislation prohibits the market-oriented circulation of the right to the use of residential house sites, in reality there are a host of facts that it is transferred clandestinely through black case work. Because the legislation does not adapt to the realistic demand of regulating the market-oriented circulation, the clandestine transfer in practice causes many social problems, such as insecurity of the circulation, breaking land use planning, and government unable to collect relevant taxes. Social reality requires legislature to bring the market-oriented circulation of the right to the use of residential house sites into an open and regulated track, and to entitle farmers to freely transfer their use right of collectively-owned residential house sites. Therefore, the market-oriented circulation should be channelized rather than blocked.

To sum up, China's current legislative restrictions on the market-oriented circulation of the right to the use of residential house sites neglect farmers' requirement of completing land property rights, and do not meet the demand of developing market economy and urbanization; while, permitting the market-oriented circulation will be conducive to increase farmers' property income, to realize the mutual complementation and rational utilization of urban and rural housing resources, and to promote the urban-rural integration. "Urban citizens leasing or purchasing rural houses to dwell and make leisure can not only bring along the rising level of consumption in countryside, but also disseminate the urban civilization and information to the rural areas....Both extraterritorial and domestic experiences have shown that the integrated residence of urban and rural population is an effective way to disseminate urban civilization and lifestyle and to enhance the quality of the rural population."⁴³⁸

4.2.2.3 The right to the use of newly added collective land for construction

⁴³⁸ See Han Jun, *Investigation on Issues of Chinese Rural Land*, Shanghai Far East Press, 2009, P.325.

To strengthen land administration, control the total amount of land for construction use, guide intensive use of land, earnestly protect cultivated land, and guarantee sustainable economic and social development, the state implements the administrative institution of overall land use planning and annual land use planning to newly added land for construction.⁴³⁹ To increase construction land need the quota of newly added land for construction, and the quota is the prerequisite of converting farmland into non-agricultural land. The quota of newly added land for construction comprises the planned quota and the quota beyond the plan. The annual planned quota is specifically arranged by the State.⁴⁴⁰ The quota beyond the plan refers to linking the increase in land used for urban construction with the decrease in land used for rural construction⁴⁴¹, and the balance between the occupation and supplement of arable land⁴⁴². Because the planned quota set by the State annually is difficult to meet the requirements of local economic development, the quota of construction land generated through land reclamation and land arrangement has become an important supplementary source of construction land

⁴³⁹ Overall plans for land utilization shall be drawn up in accordance with the following principles: (1) strictly protecting the capital farmland and keeping land for agriculture under control lest it should be occupied and used for non-agricultural construction; (2) increasing the land utilization ratio; (3) making overall plans for the use of land for different purposes and in different areas; (4) protecting and improving ecological environment and guaranteeing the sustainable use of land; and (5) maintaining balance between the area of cultivated land used for other purposes and the area of cultivated land developed and reclaimed. The overall plan for land utilization at a lower level shall be drawn up on the basis of such a plan drawn up at the next higher level. The total area of land for construction in the overall plan for land utilization drawn up by local people's governments at different levels shall not exceed the control norm set in such a plan by the people's government at the next higher level and the area of cultivated land reserved shall not be smaller than the control norm set in the overall plan for land utilization of the people's government at the next higher level. In drawing up their overall plans for land utilization, the people's governments of provinces, autonomous regions and municipalities directly under the Central Government shall see that the total area of the cultivated land within their own administrative regions is not reduced. See "Land Administration Law" art.18, 19. At present, "Outline of the National Overall Planning on Land Use (2006 - 2020)" (issued by the State Council) is effective. The "amount of newly increased construction land" includes the cultivated land and unutilized land occupied for the construction. See "Measures for the Administration of Annual Plans on the Utilization of Land" (issued by Ministry of Land and Resources, 2006) art.2.

⁴⁴⁰ See "Measures for the Administration of Annual Plans on the Utilization of Land" (issued by Ministry of Land and Resources, 2006) art.2.

⁴⁴¹ See "Measures for the Administration of the Trial Work of Linking the Increase in Land Used for Urban Construction with the Decrease in Land Used for Rural Construction" (issued by Ministry of Land and Resources, 2009) art.2. The activities put together several land blocks of land used for rural construction that are to be cleared up and reclaimed as arable land (land blocks where old buildings shall be dismantled), the land blocks to be used for urban construction (land blocks where new buildings shall be built) and other areas on the basis of the overall land use planning to compose a project area of dismantling old buildings and building new ones, to finally achieve the objective of increasing the effective area of arable land, improving the quality of arable land, economically and intensively using the construction land, and implementing a more reasonable layout of the urban and rural land use through such measures as dismantling old buildings and building new ones, land clear-up and reclamation, and on the basis of ensuring the balance of areas of all kinds of land in the project area.

⁴⁴² Maintain balance between the area of cultivated land used for other purposes and the area of cultivated land developed and reclaimed. See "Land Administration Law" art.19 (5).

resources. Thus, as for the newly added collective land for construction which is determined in the overall land use planning and township (town) and village planning, and is examined and approved according to law, the right to the use of these lands should be allowed to be circulated in market.

4.2.2.4 Conditions for the market-oriented circulation of the right to the use of collective land for construction

(1) The collective construction land which could be circulated should be approved according to law or be obtained through contract. Newly added collective construction land which has to occupy the arable land should be complete in examination and approval formalities of arable land converting into non-agricultural land before the circulation. After the registration pursuant to law, the right to the use of collective land for construction becomes independent usufruct, which should be on the same legal status with the right to the use of state-owned land for construction, and the right holder should be entitled to transfer, release and mortgage the right, etc.

(2) The collective construction land should be in conformity with the overall plans for land utilization⁴⁴³, and township (town) and village construction planning⁴⁴⁴, which is the prerequisite and the essential condition of the reasonable and orderly circulation of urban and rural construction land.

(3) There should be not any dispute on the ownership and the boundary of the

⁴⁴³ The State applies a system of control over the purposes of use of land. All units and individuals shall use land in strict compliance with the purposes of use defined in the overall plans for land utilization. See “Land Administration Law” art.4.

⁴⁴⁴ In making and implementing urban and rural plans, attention shall be paid to following the principles of overall planning for urban and rural areas, rational layout, conservation of land, intensive development and planning before construction, to improving the ecological environment, promoting conservation and comprehensive utilization of resources and energy, to preserving cultivated land and other natural resources and historical and cultural heritage, to maintaining the local and ethnic features and traditional cityscape, to preventing pollution and other public hazards, and to meeting the need of regional population development, national defense construction, disaster prevention and alleviation, and public health and safety. All units and individuals shall keep to the urban and rural plans which are published upon approval according to law and submit to administration of the plans, and they shall have the right to inquire of the department in charge of urban and rural planning about whether a construction activity which involves their interests is in compliance with the requirements of planning. See “Law of the People's Republic of China on Urban and Rural Planning” art.4, 9.

collective land. If the judicial or administrative organ rules or decides to seal up the right to the land or confine it in any other form, the right to the use of collectively-owned land for construction may not be circulated.

(4) The selling, leasing or mortgage of the right to the use of collectively-owned land for construction purposes shall be subject to the consent of 2/3 or more members of the villagers' congress of that collective economic organization or 2/3 or more of villagers' representatives.

(5) If anyone intends to use the collective construction land through Initial Circulation for commercial purposes such as constructing shopping malls, hotels, restaurants, tourism sites or entertainment projects, such Initial Circulation must be conducted by reference to the land granting procedures applicable to the state-owned land with the same purpose of use (i.e., through a public invitation for bid, auction or quotation procedure).

(6) The circulation should be examined and approved by the government. Because the State applies a strict system of control over the purposes of use of land, the process of setting the right to the use of land for construct involves the approval of land use, land use control and planning permission. Farmers do not have the land development rights, and cannot independently decide the type of collective land use pursuant to law. Therefore, the initial circulation of collective construction land should be examined and approved by the government. As for the issue of whether the secondary circulation should go through the approval, provisions in different pilot regions are different.⁴⁴⁵ The author holds that, under the land use planning and land use control, the initial circulation achieving the approval of the

⁴⁴⁵ Relevant regulations in Provinces of Guangdong, Hebei, Hubei, etc. elaborate the secondary circulation does not need to go through the approval of land administrative department of local people's governments, while it is obligatory to go registration. But "Trial Measures of Anhui Province for the Paid Use of Collectively-owned Land for Construction and the Circulation of Right to the Use of Collectively-owned Land for Construction" art.22, 23 and 24, and "Trial Measures of the City of Huzhou for Administrating the Use of Collectively-owned Land for Construction" art.20 elaborate that the contract and other documents of the secondary circulation should be submitted to land administrative departments of the local people's government for approval.

government means the right to the use of collective land for construction can be independently disposed of by the right holder; the secondary circulation of the right to the use of collective land for construction which is already set in its first circulation should be free and does not need to go through government's approval again, unless it changes the purpose of land use; as for transferring the right to the use of collective land for its construction and other circulation altering the property rights, the alteration of its registration shall be handled according to an effective contract; as for mortgage and other circulation setting burden on the right, the mortgage registration shall be made according to law; as for lease and other circulation non-altering the property rights, the lease registration is necessary to meet the requirement of administrative management.

4.2.3 The purposes of the use of collective land for construction

Rural collective construction land shall be allowed to be used for business operation purposes. Except the two distinct kinds of ownerships, there is no essential difference between urban and rural land for construction utilization, but the legislation limits the utilization of collective construction land and definitely prohibits it in the use of real estate development⁴⁴⁶. The main reasons of proscribing real estate development on collectively owned land are to prevent the development taking up a substantial scale of arable land driven by interests, to maintain the State's regulation, control and monopoly on the primary market of real estate⁴⁴⁷, and to avoid urban real estate to be affected negatively. In current reformational practices, strictly abiding by law, all the pilot regions do not break through the

⁴⁴⁶ See "Urban Real Estate Administration Law" art.2 par.3: "'Development of real estate' as used in this Law means acts of building infrastructure and houses on the State-owned land, the land-use right for which has been obtained in accordance with this Law." "Land Administration Law" art.63: "No right to the use of land owned by peasants' collectives may be assigned, transferred or leased for non-agricultural construction, with the exception of enterprises that have lawfully obtained land for construction in conformity with the overall plan for land utilization but have to transfer, according to law, their land-use right because of bankruptcy or merging or for other reasons."

⁴⁴⁷ Such as "Measures of the City of Jingdezhen for Administrating the Right to the Use of State-owned Land in Urban Planning Area" art.1 provides that for the purposes of strengthening the administration of the right to the use of state-owned land, preventing the loss of state-owned assets, ensuring that the government monopolize the primary land market, these Measures are formulated in accordance with relevant laws and regulations and the actual situation in this city.

relevant provisions and prohibit real estate development on collective land. But there are large numbers of scholars think that permitting development of real estate on collective construction land rather than changing the collective land ownership is conducive to protect the interests of collective land rights holders, to reduce social tensions and to improve the efficiency of land use.⁴⁴⁸ The author consents to that it should be allowed to develop real estate on collective construction land.

First of all, it should be planned and adjusted under the urban and rural integrated planning and the land use planning to determine whether or not permitting commercial housing construction on a particular parcel of collective land. The control measures of urban and rural land use planning shall be conducive to achieve coordinated development within the urban and rural areas. Making different policies for construction separately on collectively-owned and state-owned construction lands is not necessary, and land policy making shall unhook connections with the nature of land ownership. In the social context of commodity economy, land use can achieve the highest economic value in commerce or industry, and other land uses in the descending order of achieving economic value are as follows: residential land, arable land, ranch, grazing land and forests.⁴⁴⁹ Indeed, if the use-pattern is not controlled, the nature of commodity economy will urge the use of land resource to gradually flow, by means of the circulation of land for construction use, from the agricultural land which generates low profit margin to the realty industry with high profit margin. But, there is not justifiable and legitimate basis for the restriction of developing real estate in the rural area only because of rural land's collective ownership. The socialization of ownership means the exercise of ownership should be restricted, by the public law or the private law, on the basis of the purpose to achieve public interest, rather than on the basis of the status of the ownership holder. Meanwhile, if, like what is operated in the urban area, the development and construction of commercial housing on collective land is

⁴⁴⁸ See Tao Ran and Wang Hui, *China's Unfinished Land System Reform: Challenges and Solutions*, International Economic Review, No.2, 2010.

⁴⁴⁹ See Liu Jun, *Legal Issues on Usufruct of Allotted Land*, Jiangxi Social Sciences, No.1, 2007.

brought into the normative management process, including project approval, construction, sale, taxes and fees collection and property management, etc., current fever of blindly developing commercial residential housing in cities and illegally constructing rural houses with limited property rights⁴⁵⁰ on collective land can also tend to cool down.

Secondly, legislative discriminatory restrictions on the right to the use of collective construction land are contrary to the principle of guaranteeing the equal legal status and the right to development of all the mainstays of the market.⁴⁵¹ The reform of construction land system shall allow the right to the use of collective land for construction to be circulated in market, to achieve “the same land-use type with equal rights” for the right to the use of state-owned and collectively-owned land for construction, and to gradually improve the market-oriented institution.

Thirdly, allowing the real estate development on collective construction land, to sell or rent the developed buildings, can make farmers’ collectives gain property income beyond agriculture, achieve the rapid appreciation of collective land properties, be conducive to the development of rural economy, and raise the standard of farmers’ welfare and living. Meanwhile, it offers a variety of investment opportunities for individual farmer, which is conducive to the realization of farmers’ enrichment.

All in all, on the background of the market-oriented reform of the circulation of collective construction land, it should be allowed to develop real estate on collective land in conformity with the land use planning and urban and rural planning. At the same time, the development of real estate on collective land has to combine with harnessing the existing houses with limited property rights on

⁴⁵⁰ In China, the area of rural houses with limited property rights owned by citizens of urban household registration has reached more than 20% of a total construction area of residential houses, 33 billion square meters, in villages and small towns. See Cheng Hao, *Houses with Limited Property Rights in China— Current Situation, Causes and Problems*, *Journal of the Party School of the Central Committee of the C.P.C.*, vol.13, No.2, Apr. 2009. According to an internet survey data, 69% voters supported that, rural houses with limited property rights should not be prohibited, because it can resolve residential problems to a large number of low-income persons in cities. At <http://house.ifeng.com/special/xiaochanquanfang/>, visiting date 2013.08.17.

⁴⁵¹ The State maintains a socialist market economy and guarantees the equal legal status and the right to development of all the mainstays of the market. See “Property Law” art.3 par.3.

collective land.⁴⁵² In the author's opinion, as for the built-up houses with limited property rights locating within the urban planning area which are in a certain scale, according with the urban planning, they can be reserved, and pursuant to relevant provisions, the collective land on which the aforementioned houses were built could be converted into state-owned land after completing the formalities and repaying land assignment fees and other taxes and fees, and the houses holders could get the legal house property ownership certificate from the immovable property registration authority; as for those built-up on collective land which is approved for the use of construction locating without the urban planning area, the collective land ownership do not have to be converted, and after repaying relevant taxes and fees, the ownership certificate with complete property rights of the houses built on collectively-owned construction land should be legitimate; and those severely against land use planning and illegally occupying cultivated land should be resolutely demolished, and the illegal developers and builders should be subject to certain penalties. The relevant provisions shall be changed, which have to follow the rules of market economy and open up the bidirectional route of circulating urban and rural capital and land resources, to resolve the problems of integrating the rural collectively-owned and urban state-owned real estate market through law amendment and policy making.

4.3 The methods of circulating the right to use collective land for construction

There are six characteristics to an ideal system of land circulation: security, simplicity, accuracy, cheapness, expedition and suitability to its circumstances.⁴⁵³ The land circulation complying with the six foresaid standards can be more efficient and equitable in practice. To circulate the right to the use of collective land for construction in land market, and to make it with the equal status and same function of the right to the use of state-owned construction land, it can be achieved

⁴⁵² At present, the Chinese State Council still prohibits building and selling rural houses with limited property rights, but there is not unified policy to harness those existed.

⁴⁵³ See Charles Fortescue Brickdale, *Methods of Land Transfer: Being Eight Lectures Delivered at the London School of Economics, in the Months of May and June, 1913*, p.2.

through the unified circulating methods of selling, leasing, transfer and mortgage, or other circulating means complying with the characteristics of collective construction land.

4.3.1 The initial circulation of the right to use collective land for construction

The initial circulation of land for construction purpose, in the context of Chinese Property Law, is the creation of the right to the use of land for construction. The institutions of creation, alteration, transfer and extinction of property rights have the core value in the property right system. According to the “Property Law”, the right to the use of [state-owned] land for construction may be created by assignment, allocation or other means.⁴⁵⁴ The initial circulation of the right to the use of collective land for construction can refer to the initial circulation of the right to the use of state-owned land for construction, to implement paid assignment which should be the principle, and gratuitous allocation which should be the exception.

4.3.1.1 Paid assignment of the right to the use of collectively-owned land for construction

The assignment of the right to the use of state-owned land refers to the State, which is the owner of the land, within the term of a certain number of years, assigns the right to the use of state-owned land to land users, who shall in turn pay fees for the assignment thereof to the State⁴⁵⁵; an assignment contract shall be signed for assigning the right to the use of the land.⁴⁵⁶ It originates from the institution of land grant and lease in Hong Kong region, namely, the Hong Kong government does not take the ownership of the land in Hong Kong region (owned by the Britannic Majesty before 1997.07.01, and from then on owned by China), but can lease and

⁴⁵⁴ See “Property Law” art.137, par.1.

⁴⁵⁵ “The nature of land assignment fees is the price of the right to the use of land within a certain period and is a reflection of the commodity attribute of the right to the use of land, which is subject to market factors.” See Liu Jun, *On Practical Way to Use State-owned Land with Pay*, Modern Law Science, Vol.4, 1990.

⁴⁵⁶ See Interim Regulations of the People's Republic of China Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas (promulgated by Decree No. 55 of the State Council of the People's Republic of China on May 19, 1990 and effective as of the date of promulgation), art.8.

grant the right to the use of land to land users within a certain number of years and with restrictions in land use; upon expiration of the term of use, the land user may apply for its renewal.⁴⁵⁷ The right to the use of land in Hong Kong, which is leased or granted, can be transferred, mortgaged and inherited; within the lease term, the assignee is entitled to use and operate the land, and get the land revenues; the assignee have to pay for the lease to the government.⁴⁵⁸ The right to the use of land in Hong Kong region can be obtained by bid invitation, by auction, by reaching an agreement through consultations, or by short term tenancy.⁴⁵⁹ The advantages of government assigning the right to the use of the land are as follows: (1) the government can control the opportunistic practice in land market and gain land incremental revenue; (2) the government can make sound planning in city development, and easily construct public facilities; (3) the government can well

⁴⁵⁷ According to the Treaty of Nanking (or Nanjing), which was signed on the 29th of August 1842, marking the end of the First Opium War (1839–42) between the United Kingdom of Great Britain and Ireland and the Qing Dynasty of China, and was the first of what the Chinese called the unequal treaties because Britain had no obligations in return, the Island of Hong Kong was possessed in perpetuity by Her Britannic Majesty, Her Heirs and Successors, and was governed by such Laws and Regulations as Her Majesty the Queen of Great Britain. From then on, through a series of wars and unequal treaties between UK and the Qing Dynasty of China, the colony of Hong Kong area (including Hong Kong Island, Kowloon and New Territories) was much larger than the original area. All the land in Hong Kong area, except a very few pieces of farmland, was owned by the Britannic Majesty, and the British government in Hong Kong exercised the land ownership. The British government in Hong Kong area leased and granted land to land developers and land users; the land developers and land users obtained the right to the use of land within the prescribed period by paying. In the early days, leases were for terms of 75, 99 or 999 years, subsequently standardized in the urban areas of Hong Kong Island and Kowloon to a term of 75 years, renewable at a re-assessed annual rent under the provisions of the old Crown Leases Ordinance. Leases for land in the New Territories and New Kowloon were normally sold for the residue of a term of 99 years less three days from 1 July, 1898.

The Sino-British Joint Declaration was signed by the Prime Ministers of the People's Republic of China and the United Kingdom governments on 19 December 1984 in Beijing. The Declaration entered into force with the exchange of instruments of ratification on 27 May 1985 and was registered by the People's Republic of China and United Kingdom governments at the United Nations on 12 June 1985. In the Joint Declaration, the People's Republic of China Government stated that it had decided to resume the exercise of sovereignty over Hong Kong (including Hong Kong Island, Kowloon, and the New Territories) with effect from 1 July 1997 and the United Kingdom Government declared that it would restore Hong Kong to the PRC with effect from 1 July 1997. From 27 May, 1985 (the date of entry into the Joint Declaration) to 30 June, 1997, the policy with regard to land grants and leases accorded with the provisions of Annex III to the Joint Declaration. Normal land grants throughout the whole of the territory were made for terms expiring not later than 30 June, 2047. They were granted at a premium and nominal rental until 30 June, 1997, after which date an annual rent equivalent to three percent of ratable value of the property would be charged. Leases expiring before 30 June 1997, with the exception of short term tenancies and leases for special purposes, might also be extended to 2047 under the provisions of the Joint Declaration.

After the handover to China, according to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (promulgated in 1990), art.7, "the land and natural resources within the Hong Kong Special Administrative Region shall be State property; the Government of the Hong Kong Special Administrative Region shall be responsible for their management, use and development and for their lease or grant to individuals, legal persons or organizations for use or development; the revenues derived therefrom shall be exclusively at the disposal of the government of the Region. On 15th July 1997, the Hong Kong Executive Council endorsed various provisions covering land leases and related matters under the Hong Kong Special Administrative Region Government (HKSARG).

⁴⁵⁸ See Zhang Xueren, *Introduction to Hong Kong Laws*, Wuhan University Press, 1992, pp.170-176.

⁴⁵⁹ *Ibid.*

regulate and control the land price.

The market-oriented circulation of the right to the use of collective construction land is based on the separation of the land-use right from the collective land ownership and is the essential condition to make it as a kind of independent usufruct. The institution of paid assignment can open the way for separating the right to use land from the land ownership and for reforming the right to the use of collective land for construction as usufruct, which makes the right to use collective land for construction exclusive and antagonistic, able to resist infringements from others, even from the collective land owner. As for the nature of the right to the use of collective land for construction, because the right holder should be entitled to possess, use, benefit from and, pursuant to the contract, dispose of the collective land for construction, it is usufruct, a kind of property right, but not creditor's right. Therefore, introducing the institution of assigning the right to the use of land which is initially designed for state-owned land assignment into the field of circulating collective land for construction can be “a sound institutional design with low cost and high efficiency”, and should be the inevitable choice for the reform of collective construction land circulation.⁴⁶⁰

As for those collective construction land meeting conditions for the market-oriented circulation, the right to the use of collective land for construction can be initially circulated referring to the procedure for the creation of the right to use state-owned land, and should be allowed to transfer, lease and mortgage with equal status and effect to the assigned right to use state-owned land for construction. The detailed manners to assign the right to use collective construction land can be as follows: (1) as for the villagers building residential houses and the collective economic organizations building township or town enterprises, the assignment may be carried out by reaching an agreement through consultations; (2) with respect to the

⁴⁶⁰ See Yu Wenli and Chen Ligen, *Dilemma and Choice: Research on the Transferring System of the Right to Use the Collective Construction Land under the Urbanization Background*, Contemporary Law Review, No.2, 2008.

collective land for industry, commerce, tourism, entertainment, commercial housing or other business operations, or on which there are two or more intending land users, the assignment thereof shall be conducted through bid invitation, auction or quotation.⁴⁶¹

4.3.1.2 Gratuitous allocation of the right to the use of collectively-owned land for construction

The allocated right to the use of the land refers to the right to the use of the land which the land user acquires in accordance with the law, by various means, and without compensation.⁴⁶² Allocating the right to the use of land for construction has the following characteristics: for public interest purposes, free of charge, without time limit, connected with administration, and restricted in transfer.⁴⁶³

After China carried out reform on the institution of the right to the use of state-owned land for construction, the legislation severely restricts the scope of allocating the use right of state-owned land. The “Urban Real Estate Administration Law” and the “Land Administration Law” all prescribe the scope of construction projects in which the land may be allocated, mainly including: land to be used for State organs or military purposes, for urban infrastructure projects or public welfare undertakings, for major energy, communications, water conservancy and other infrastructure projects supported by the State, and other purposes as provided for by laws or administrative regulations.⁴⁶⁴ In the year 2001, the Ministry of Land and Resources of the PRC issued the “List of Land Allocation” which elaborates that land to be used for 19 special purposes may be allocated with the lawful approval of a people’s government.

According to the Interim Regulations of the People's Republic of China Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the

⁴⁶¹ No.2 refers to “Provisions on the Assignment of State-owned Construction Land Use Right through Bid Invitation, Auction and Quotation” art.4.

⁴⁶² See Interim Regulations of the People's Republic of China Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas, art.43.

⁴⁶³ See Liang Huixing and Chen Huabin, *Property Law*, Beijing, Law Press, 2007, P.274.

⁴⁶⁴ See “Urban Real Estate Administration Law” art.24 and the “Land Administration Law” art.54.

Urban Areas (1990), the allocated right to the use of state-owned land may not be transferred, leased, or mortgaged, with the exception of cases as specified in these Regulations; any units or individuals that transfer, lease or mortgage the allocated right to the use of the land without authorization shall have their illegal incomes thus secured confiscated by the land administration departments under the people's governments at the municipal and county levels and shall be fined in accordance with the seriousness of the case; if the land user who has acquired the allocated right to the use of the land without compensation stops the use thereof as a result of moving to another site, dissolution, disbandment, or bankruptcy or for other reasons, the municipal or county people's government shall withdraw the allocated right to the use of the land without compensation and may assign it in accordance with the relevant provisions of these Regulations; the municipal or county people's government may, based on the needs of urban construction and development and the requirements of urban planning, withdraw the allocated right to the use of the land without compensation and may assign it in accordance with the relevant provisions of these Regulations; when the allocated right to the use of the land is withdrawn without compensation, the municipal or county people's government shall, in the light of the actual state of affairs, give due compensation for the above-ground buildings and other attached objects thereon.⁴⁶⁵

With regard to the scope of allocating the right to the use of collective land for construction, it should be rigidly restricted referring to that of state-owned land. To build public utilities or public welfare undertakings of a township (town) or village, the right to the use of collective land for construction may be allocated and should be strictly administrated. Except that, it should be restricted to gratuitously allocate the right to the use of collective land for construction. On the basis of unifying the initial circulation of urban and rural construction land-use right, the methods of circulating urban and rural construction land-use right should as well be gradually unified.

⁴⁶⁵ See Interim Regulations of the People's Republic of China Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas, art.44-47.

4.3.2 The lease of the right to the use of collective land for construction

The lease of the right to the use of the state-owned land refers to the act of the land user as the lessor to lease the right to the use of the land together with the above-ground buildings and other attached objects to the lessee for use who shall in turn pay lease rentals to the lessor.⁴⁶⁶ If the state-owned land has not been developed and utilized in accordance with the period of time specified in the land assignment contract and the conditions therein, the right to the use thereof may not be leased.⁴⁶⁷ The “Land Administration Law” severely restricts the lease of the right to the use of collective land,⁴⁶⁸ while in pilot regions it is broken through⁴⁶⁹. In reformational pilot practices, leasing is one of the main forms of circulating the right to the use of collective construction land. The collective of a village leases the right to the use of the construction land to non-rural enterprises or individuals to attract investment; the village-run enterprises lease a parcel of land to collect rent; the farmers lease their rural residential houses which also indirectly lease the collective land-use right. In practice, it is obvious that both the owner of the collective land and the holder of the right to use collective land for construction can lease out the land-use right, which is broader than the scope of the meaning of leasing state-owned land-use right. Therefore, because of the successful practice from the pilot experience, the legislation should allow the collective construction land to be leased to non-rural members.

From the perspective of market efficiency, investors of all production factors require that the use of non-agricultural land should be on the prerequisite of clear

⁴⁶⁶ See Interim Regulations of the People's Republic of China Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas, art.28.

⁴⁶⁷ Ibid.

⁴⁶⁸ No right to the use of land owned by peasants' collectives may be leased for non-agricultural construction, with the exception of enterprises that have lawfully obtained land for construction in conformity with the overall plan for land utilization but have to transfer, according to law, their land-use right because of bankruptcy or merging or for other reasons. See Land Administration Law art.63.

⁴⁶⁹ Such as the Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes, which allow the owner of the collective land or the holder of the right to use collective land for construction to lease the right to the use of collective land for commerce, tourism, entertainment, and other business operations.

property right relations of the enterprise and explicit interest relations among the enterprise, the collective organization and farmers.⁴⁷⁰ Meanwhile, due to farmers' lack of management experience and funds, they are always no longer willing to run enterprises themselves, but would rather rent out the collective construction land or factory buildings after getting the quota of farmland conversion and derive rents, which have relatively low risks and can earn stable rental proceeds. In pilot regions, on one hand, collective organizations rent out the collective construction land, or, after arranging and developing the land, construct factory buildings and commercial buildings, and then rent out these buildings to collect rents, which avoid the disadvantages that most collective enterprises are not good at management, and guarantee to maintain and increase the value of the collective land. On the other hand, it greatly reduces the cost of land for investors to run enterprises through leasing collective land,⁴⁷¹ which is conducive to accelerate the process of industrialization in rural areas and to develop the private economy.

The essential difference between the lease and assignment of construction land-use right is that leasehold is a kind of creditor's right. But with respect to the use of construction land, generally due to a long lease term, the actual difference between lease and assignment is not so large. Thus we can say that, although the legal natures of the two manners are different, their contents of the rights are comparable. A land owner who wishes to grant the right to the use of land to others and benefit from the land can, according to his own best interest, choose more appropriate way either in usufructuary right or in creditor's right.⁴⁷² Because much less taxes and administrative fees are obligatory through leasing collective land and rent is far below the assignment fees of state-owned land, enterprises can save a great of cost,

⁴⁷⁰ In fact, many village-run enterprises and township (town) enterprises cannot resolve this problem well.

⁴⁷¹ For example, in the Pearl River Delta economic circle (in Guangdong Province, south China), the government charges one-time payment of state-owned land assignment fees from enterprises. The prices are 150,000~400,000 Yuan per Mu (a unit of area =0.0667 hectares) for industrial land (maximum 50 years) and 400,000~1,500,000 Yuan per Mu for commercial land (maximum 40 years). But the average price for enterprises to lease collective construction land is only 500 Yuan per Mu each month, and they can pay rent quarterly or annually, which is conducive to the run of enterprises. The rental period is generally in accordance with the enterprise operation period. See Liu Shouying, *the Same Land with the Same Price and Equal Right*, at <http://www.cpqgtj.com/A/?C-1-540.Html>, visiting date 2013.08.18.

⁴⁷² See Li Shuming, *Civil Law: Property*, Taipei, Angle Publishing Co. Ltd., 2007, P.224.

meanwhile, enterprises can be more flexible to adjust the lease term according to the business conditions, and reduce the economic pressure. With regard to the sublease of collective construction land, the sublease contract should not violate the agreements in the contract of land-use right assignment.

Leasing the right to the use of collective land for construction should both meet the basic requirements for market-oriented circulation of the land-use right and comply with the lease term provided for by law. According to Contract Law of the People's Republic of China, "the lease term may not exceed twenty years. If it exceeds twenty years, the period in excess shall be invalid. When the lease term expires, the parties may renew the lease contract, however, the contracted lease term may not exceed twenty years from the date of renewal of the contract."⁴⁷³ The lease term of collective construction land relates to the interests of collective land owners and land users and the social benefits. If a lease term is too short, the land user can not foresee the safety of the inputs and the cost of land use; if a lease term is too long, it may lead to the loss of the owner's land revenue and government's tax revenue. Taking account of land owners' interests, land users rights and social benefits, the assignment term of the right to use state-owned land for construction is regulated respectively by the legislation according to different land uses.⁴⁷⁴ But the determination of the lease term of collective construction land is different from that of assignment term, which is proposed to be determined by both parties through agreement, but should not exceed the maximum term stated in the Chinese "Contract Law" to prevent "land lease instead of expropriation"⁴⁷⁵ which infringes

⁴⁷³ See Contract Law of the People's Republic of China, art.214.

⁴⁷⁴ According to Interim Regulations of the People's Republic of China Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas, art.12, the maximum term with respect to the assigned right to the use of the land shall be determined respectively in the light of the purposes listed below: (1) 70 years for residential purposes; (2) 50 years for industrial purposes; (3) 50 years for the purposes of education, science, culture, public health and physical education; (4) 40 years for commercial, tourist and recreational purposes; and (5) 50 years for comprehensive utilization or other purposes.

⁴⁷⁵ "Land lease instead of expropriation" refers to leasing farmland for non-agricultural construction which expands the scale of land for construction without authorization. It violates the land use planning, circumvents the approval of the conversion of farmland and land expropriation, circumvents to pay for the use of newly added construction land, and circumvents the legal obligation of the balance between the occupation and supplement of arable land. Driven by interests, a lot of farmers, villagers committees and even local governments at basic level are involved. "Land lease instead of expropriation" seriously works against not only the order of land management, but also the effective implementation of the State macroscopic readjustment and control policies and the achievement of arable land protection goals.

interests of peasants' collectives and the State.

4.3.3 The transfer of the right to the use of collective land for construction

Compared with the assignment, the transfer of the right to the use of land for construction means the construction land user transfers the right to others through contracts without changing the objects and contents of the right. The Interim Regulations of the People's Republic of China Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas, art.19 elaborates that “the transfer of the right to the use of the land refers to the land user's act of re-assigning the right to the use of the land, including the sale, exchange, and donation thereof; if the land has not been developed and utilized in accordance with the period of time specified in the contract and the conditions therein, the right to the use thereof may not be transferred.” It can be treated as the broad sense. While, in the “Property Law” art.143 and 144, “transfer” is juxtaposed with exchange, mortgage and other circulation manners,⁴⁷⁶ which is in the narrow sense. Distinguishing the assigned land and the allocated land, the current Chinese legislation respectively regulates the transfer of the right to the use of state-owned land for construction. After the separation of the right to the use of collective land for construction from collective land ownership, it becomes an independent usufruct and has the independent value as a kind of property right. Therefore, the legislation should, through allowing the transfer of the right to use collective land for construction, promote it to combine with other essential productive factors to produce the most profits.

4.3.3.1 The transfer of the assigned right to the use of collective land for construction

The assigned right to use collective land for construction should be with the equal status to the right to use state-owned land for construction, and the holder should

⁴⁷⁶ See “Property Law” art.143, 144.

enjoy the complete and independent right to use and benefit from the collective land. As long as the collective construction land user does not harm the public interest and other's rights, he can either develop and utilize the land, or transfer it to another user.

The assigned right to use collective land for construction which is transferable should meet the following conditions: (1) there is the certificate for the right to the use of collective land for construction; (2) there is the examination and approval of the competent government for its assignment; (3) there should not be any dispute on the ownership and the boundary of the collective land, and there should not be judicial or administrative organ rules or decides to seal up the right to the land or confine it in any other form.

“Urban Real Estate Administration Law” art.39 elaborates two situations restricting the transfer of the urban real estate where the land-use right has been obtained by means of assignment: (1) having paid all the fees for the assignment of the land-use right as agreed upon in the assignment contract and obtained the certificate of the land-use right; (2) having invested for development as agreed upon in the assignment contract and having fulfilled twenty-five percent or more of the total investment for development in the case of housing projects, or having constituted conditions of land-use for industrial purposes or other construction projects in the case of developing tracts of land.⁴⁷⁷ However, in the foresaid article, the (2) provision restricting on the transfer of the assigned land-use right through setting conditions on relevant investment amount is not compliant with the actual situation and unable to work effectively in regulating the secondary land market, because (1) if the holder of the land-use right, due to some reasons, lacks of funds, unable to carry out the development and cannot reach the conditions of transferring the land-use right prescribed by law, it, in theory, will result in that the right holder may never transfer the land-use right, which can lead to the idleness and waste of land

⁴⁷⁷ See “Urban Real Estate Administration Law of the People's Republic of China” art.39.

resources⁴⁷⁸; (2) the land-use right holder may circumvent the law to trade illegally and clandestinely with the transferee through black box operation, which may result in dispute on the attribution of the land-use right and the loss of relevant taxes to the State; (3) even if the developer transfers the land-use right on the prerequisite of having completed “twenty-five percent or more of the total investment for development”, the transfer of construction project in process involves the transferor, the transferee and the construction company signed contract with the transferor, and the legal relationship is more complicated. Setting the restriction of investment on the assigned state-owned land before transfer is mainly for the sake of preventing the power rent-seeking in the procedure of assigning the right to use state-owned land for construction which may disorder the land market. However, according to current relevant provisions, with respect to the land for industry, commerce, tourism, entertainment, commercial housing or other business operations, or on which there are two or more intending land users, the assignment thereof shall be conducted through open and transparent procedures: bid invitation, auction or quotation.⁴⁷⁹ Thus the space of power rent-seeking has been greatly compressed, and the foresaid institutional design of restrictions has almost lost its original value. Moreover, the Interim Regulations of the People's Republic of China Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas art. 26 elaborates that when the transfer of the right to the use of the land is priced at a level obviously lower than the prevailing market price, the people's governments at the municipal and county levels shall have the priority of the purchase thereof; when the market price for the transfer of the right to the use of the land rises to an unreasonable extent, the people's governments at the municipal and county levels

⁴⁷⁸ However, according to the “Urban Real Estate Administration Law” art.26, where the land-use right has been obtained by means of assigning for development of real estate, the land must be developed according to the land-use purpose and the time limit for starting the development as agreed upon in the contract for assigning the land-use right; where one year has elapsed from the date for starting the development as agreed upon in the assigning contract and the land is not yet developed, fees for idle land which is equivalent to twenty percent or less of the fees for assigning the land-use right shall be collected; where two years have elapsed and the land is still not developed, the land-use right may be reclaimed without compensation, however, the circumstances wherein the delay in starting the development is caused by force majeure or acts of governments or their departments concerned or by the early preparations necessary for starting the development shall be excepted.

⁴⁷⁹ See Provisions on the Assignment of State-owned Construction Land Use Right through Bid Invitation, Auction and Quotation, art.4, par.1.

may take necessary measures to cope with it.⁴⁸⁰ Therefore, the legislature should annul the foresaid irrational provisions restricting the transfer of state-owned land use right and there is not necessity for the transfer of the assigned right to the use of collective land for construction to follow these restrictive provisions. Public law is allowed to interfere in the private right, but such interference must be prudential and modest, because “market economies depend upon such changes of attribution to facilitate the optimal use of assets by consumers and especially professional market participants.”⁴⁸¹

4.3.3.2 The transfer of the allocated right to the use of collective land for construction

Because allocated land which can be obtained gratuitously shall not be freely transferred and its use purpose shall not be freely changed, the transfer of the right to the use of allocated land for construction shall be reported for examination and approval to the people's government that has the authority for approval. Law of the People's Republic of China on the Administration of the Urban Real Estate, art.40 provides for two means of transferring the real estate on allocated state-owned land: (1) upon approval of the transfer by the people's government with the authority for approval, the transferee shall go through the formalities for the granting of the land-use right and pay the fees therefore according to the relevant regulations of the State; (2) when the transfer of the real estate is reported for approval, and the people's government that has the authority for approval decides in accordance with the regulations of the State Council that the formalities for granting the land-use right need not be gone through, the transferor shall, pursuant to the regulations of the State Council, turn over to the State the proceeds obtained from land in the transfer of the real estate or dispose of such proceeds otherwise.⁴⁸² The essence of transferring allocated land-use right is that the government resumes the right to the

⁴⁸⁰ See Interim Regulations of the People's Republic of China Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas art. 26.

⁴⁸¹ See Ulrich Drobnig, *Transfer of Property*, SSRN Working Paper, January, 2010, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1537164, visiting date 2013.08.19.

⁴⁸² See Law of the People's Republic of China on the Administration of the Urban Real Estate, art.40.

use of allocated land and then assigns it to the transferee; transferee obtains the land-use right from the government rather than from the original land user; the repaid land assignment fees is also to the government rather than the original land user.

At present, the institution of transferring the right to the use of allocated land established in the “Urban Real Estate Administration Law” has been incompatible with the current bidding system which requires that trading the right to the use of the previously allocated land shall be brought into the uniform land supply channels of the government.⁴⁸³ According to the “Property Law”, where land is used for industrial, commercial, tourist or entertaining purposes, as commodity residences, or for other profit-making purposes, or there are two or more persons who are willing to use the same piece of land, the right to the use of land for construction shall be assigned through bid invitation, auction or other open bidding.⁴⁸⁴ In practice, if the original allocated land will be used for profit-making purposes after transfer, what can be approved by the government shall only be to put this parcel of land to be traded in land market through bidding method, and land transferees willing to get the land-use right shall not obtain it by reaching an agreement through consultations with the government. Therefore, transferring the allocated land for profit-making purposes should be completed by the means of bid invitation, auction and quotation. As for collective construction land, because the allocated land which is gratuitously acquired pursuant to state policies shall be used for public interests, the transfer of the allocated right to the use of collective land changing the original land-use purpose requires the agreement of the collective land owner and according with the land use planning, and can be carried out after going through the permissions of market-oriented trade and the formalities of assigning

⁴⁸³ “The development of the real estate that makes use of the land previously allocated shall be brought into the uniform land supply channels of the government. Private transactions shall be strictly prohibited.” See Circular of the State Council on Promoting the Continuous and Healthy Development of the Real Estate Markets (2003), art.17, at http://209.200.107.14/english/law2_disp.asp?sublawcode=SUB24124451215141311&lawcode=LAW486112671113915&country=China, visiting date 2013.08.19.

⁴⁸⁴ See “Property Law” art.137, par.2. It can also be seen in Provisions on the Assignment of State-owned Construction Land Use Right through Bid Invitation, Auction and Quotation (issued by Ministry of Land and Resources), art.4, par.1.

the right to use collective land for construction. The transferee should repay land assignment fees to the farmers' collective. Without the agreement of the collective land owner and the approval of the government which has the authority for approval, the contract transferring the previously allocated right to the use of collective land for construction signed by the initial land user and the transferee shall be treated invalid.

4.3.4 Other measures to dispose of the right to the use of collective land for construction

In principle, all the means of circulating the right to the use of state-owned land for construction provided for in the "Property Law" art.143⁴⁸⁵ should be able to be applied to the collective construction land, and the holder of the right to use collective land for construction shall be entitled to transfer, exchange, offer as equity contributions, donate and mortgage such right.

4.3.4.1 To exchange the right

To exchange the right to the use of collective land for construction means that one holder of the right exchanges his right with other's same kind of land-use right, such as farmers exchanging the right to the use of residential house sites and so on. Under current legal framework, in rural area, the exchange is mainly manifested in that: (1) in order to intensively use rural land, the farmer return his right to the use of residential house sites to the collective organization and the collective organization exchanges another house site for the farmer; (2) all the parties which can exchange the right are the members in the same collective organization. However, guided by the institution of market economy and the principle of property rights on equal status, to exchange the right to the use of collective land for construction should break through the boundary of rural collective organizations.

⁴⁸⁵ "A person who enjoys the right to the use of land for construction shall have the right to transfer, exchange, offer as equity contributions, donate or mortgage such right, except where otherwise provided for by law."

4.3.4.2 To offer the right as equity contributions

To offer the land right as equity contributions means that the right holder evaluates the right to the use of land for construction on the basis of currency and invests it, as equity contributions, into enterprise or does so with other units or individuals to set up enterprise through joint operation. In essence, the land-use right is transferred from the right holder to the enterprise.

Company Law of the People's Republic of China provides for that a shareholder may make his equity contributions in land-use rights that can be evaluated in currency and can be transferred according to law.⁴⁸⁶ The “Property Law” elaborates that “the collective may, in accordance with law, invest to establish companies with limited liability, companies limited by shares or other enterprises; where the immovables or movables owned by the collective are invested in enterprises, the investor shall have such rights as receiving benefits derived from the assets, making major decisions and selecting managers, and shall perform its duties, in accordance with what is agreed upon or in proportion to the amount of investment.”⁴⁸⁷ A rural collective economic organization that wishes to set up enterprises by contributing the right to use collective land for construction, designated as such in the township (town) overall plan for land utilization, or does so with other units or individuals by investing its land-use right as shares or through joint operation shall, by presenting the relevant documents of approval, submit an application to the land administration department of the local people’s government at or above the county level, and the matter shall be subject to approval by the said people’s government within the limits of its approval authority as defined by the province, autonomous region or municipality directly under the Central Government.⁴⁸⁸ However, if land for agriculture is to be used for the purpose, the matter shall be subject to examination and approval in accordance with relevant

⁴⁸⁶ See Company Law of the People's Republic of China art.27. But according to the relevant judicial interpretation, the land use right refers only to the right to the use of state-owned land.

⁴⁸⁷ See “Property Law” art.67.

⁴⁸⁸ See “Land Administration Law”, art.60.

provisions in “Land Administration Law”.⁴⁸⁹ According to the “Company Law”, where a shareholder makes capital contributions with non-currency property, he shall, according to law, go through the formalities for the transfer of his property rights.⁴⁹⁰

In some cases of making the right to use state-owned land as equity contributions to cooperatively develop real estate, there are behaviours in the name of offering the land-use right as equity contributions but actually in means of transfer, trade, loan, and lease, to cooperatively develop. “Interpretation on the Application of Law for the Trial of Cases of Disputes on Contracts Involving the Right to Use State-owned Land” promulgated by the Chinese Supreme People's Court respectively defines these situations. Such as, “if a contract on cooperative development of real estate states that the party that provides the land-use right obtains fixed profits only without bearing any risk of business operation, such contract shall be deemed as a contract on transfer of the land use right.”⁴⁹¹ With respect to the right to the use of collective land for construction, similar situations may come forth, which should be noted and respectively regulated.

4.3.4.3 To donate the right

To donate the right refers to the behaviours that the right holder gratuitously hands over his right to the use of collective land for construction to the counterpart and the counterpart accepts. To donate the right is just a special form of transferring the right, thus it should be in accordance with the legal conditions of the transfer. In practice, the means of circulating the right to the use of collective land for construction which is in the name of donating but in fact transferring the right to circumvent the relevant taxes and fees should be severely prohibited.

4.3.4.4 To mortgage the right

⁴⁸⁹ Ibid.

⁴⁹⁰ See Chinese “Company Law”, art.28.

⁴⁹¹ See “Interpretation of the Supreme People's Court on the Application of Law for the Trial of Cases of Disputes on Contracts Involving the Right to Use State-owned Land” art.24-27.

Where a debtor or a third party, for guaranteeing the payment of debts, mortgages the right to the use of collective land for construction to a creditor instead of transferring of the possession of the right, if the debtor defaults or the conditions for enforcement of the interest, as agreed upon by the parties concerned, arise, the creditor shall have priority in having his claim paid with the land-use right. The foresaid debtor or the third party is the mortgagor, the creditor specified is the mortgagee, and the right to use collective land used as security is mortgaged property. According to provisions in “Urban Real Estate Administration Law” and “Guarantee Law of the People's Republic of China”, land ownership shall not be mortgaged, but both assigned and allocated rights to use state-owned land can be mortgaged.⁴⁹² With respect to mortgaging the right to use collective land for construction, “Property Law” and “Guarantee Law” elaborate that (1) the right to the use of the land for construction enjoyed by a town (township) or village enterprise may not be mortgaged separately; (2) where workshops and other buildings of a town (township) or village enterprise are mortgaged, the right to the use of the land for construction within the area occupied by the workshops or other buildings shall be mortgaged along with the workshops and other buildings.⁴⁹³ As usufruct, as a kind of property right, the right to the use of collective land for construction, in principle, shall be able to be freely disposed by the right holder, and of course able to be mortgaged. Based on “good wishes”, to avoid that the realization of the mortgage rights may lead to farmers homeless, which will negatively impact on social stability and violate the macropolicy of the State and to prevent the loss of collective land,⁴⁹⁴ the “Property Law” prohibits mortgaging farmers’ houses and farmers’ rights to use residential house sites, but all of which in fact set a blockade on the financing function of the right to the use of collective land for construction that should have been naturally guaranteed, and actually harm

⁴⁹² Land ownership, and educational facilities, medical and health facilities of schools, kindergartens, hospitals and other institutions or public organizations established in the interest of the public and other facilities in the service of public welfare shall not be mortgaged (“Guarantee Law of the People's Republic of China” art.37) . The mortgagee shall be entitled to the priority of having his claim satisfied with the proceeds from auction of the land-use right to the allocated State-owned land after payment of the amount equal to the land assignment fees for the land-use right (Art.56).

⁴⁹³ See “Property Law” art.183.

⁴⁹⁴ See Gao Shengping, *Property Law and Guarantee Law: Comparative Analysis and Application*, Beijing, Court Press, 2010, p.133.

farmers' fundamental interests.

In practice, many reformational rules and regulations in pilot regions break through the legislative restrictions on the narrow scope of mortgaging the right to use collective land for construction.⁴⁹⁵ According to law, the mortgage of immovables shall be registered, and registration authority may not handle the registration of mortgage against law; even if such mortgage against law is registered, it is invalid. Thus facing the problems of mortgaging the right to the use of collective land for construction, it is in conflict for registration authorities, financial institutions and courts to decide to apply the policy or the law. However, permitting the market-oriented circulation of the right to the use of collective land for construction signifies, through the market-oriented circulation, to rehabilitate the property rights functions of the collective land, including its financing function. Therefore, the relevant provisions of creating, changing, transferring and extinguishing a right to mortgage should be equally applied to use rights of urban and rural construction land, and meanwhile, it should be clarified that the mortgage of the right to use collective land for construction becomes valid upon registration.

To sum up, the diversiform means of circulating the right to the use of collective land for construction can be highlighted as the follows: (1) the land-use rights are directly assigned, allocated, transferred, leased, and mortgaged; (2) where buildings, fixtures and their affiliated facilities are transferred, exchanged, or donated, the land-use rights of the land occupied by the aforesaid buildings, fixtures and their affiliated facilities are disposed of concurrently; (3) the transfer and lease of land-use rights are implied in mergers, acquisitions and shareholding reforms of township (town) enterprises; (4) rural collective organizations set up enterprises by using land for construction or do so with other units or individuals by investing the land-use right as shares or through joint operation; (5) the circulation in the means

⁴⁹⁵ Such as “Administrative Measures of Guangdong Province for the Circulation of the Right to the Use of Collectively-owned Land for Construction Purposes” art.7 elaborates that, through the consent of 2/3 or more members of the villagers' congress of that collective economic organization or 2/3 or more of villagers' representatives, the use of collectively-owned land for construction purposes may be mortgaged.

of using the land-use right to cooperate with the constructing party of infrastructure and other projects; (6) to be converted into state-owned land and then going through formalities to be circulated; (7) the land-use rights are transferred due to the bankruptcy or debt reasons of enterprises that have lawfully obtained collective land for construction. The aforementioned circulation means are based on the need of practical choices, some of which have special rural collective characteristics. What should be mentioned are that (1) where the right to the use of collective land for construction is transferred, exchanged, offered as equity contributions, donated or mortgaged, the parties shall enter into a contract in written form accordingly; (2) where the right to the use of collective land for construction is to be transferred, exchanged, offered as equity contributions, or donated, an application for alteration of immovable property right registration shall be made to the registration authority.

4.4 Distribution of the revenue in circulation of the right to use collective land for construction

In the process of circulating the right to the use of collective land for construction, the collision in how to distribute land incremental revenue among farmers, farmers' collectives, collective land users and local governments is prominent. To clearly define the right boundary and interest boundary among these right subjects is an important issue. Therefore, a reasonable mechanism which should guarantee the rational distribution of the collective land incremental revenue among the State, collective land owners and land users is the key point to build the system of integrated circulation of rural and urban construction land. The imbalance of land revenue distribution will cause the dissipation of the intrinsic motivation of market-oriented collective construction land circulation, and will impact on the reform efforts.

4.4.1 The connotation of land revenue in the circulation of the right to use collective land for construction

Revenue in collective construction land circulation refers to, on the basis of the bearing function and the resource attribute of land, the incremental revenue generates through the owners and users of collective construction land alienating the land-use right,⁴⁹⁶ in which the main portion is the land assignment fees paid by the assignee, usually including: (1) the revenue due to farmers' collective's land ownership, i.e. Absolute Ground Rent, (2) Differential Rent I depending on the economic location of the collective land, such as its geographical position, the population density, and so on, (3) Differential Rent II depending on the improvement of the infrastructure construction and other economic conditions due to the successive and intensive investment from the government and the society⁴⁹⁷. Theoretically, the Absolute Rent should be enjoyed by the owner of the collective land; Differential Rent I, which is affected by the natural condition and the existed original economic conditions, should be shared by the owner, the user and the developer of the collective land; Differential Rent II should be distributed to the investors according to the principle of "the party who invests benefits from it".

⁴⁹⁶ See Wang Quandian, *On Legal Issues Related to the Circulation of the Right to the Use of Collectively-owned Land for Construction—An Exploration Based on the Practice in Guangdong Province*, Journal of South China Agricultural University (Social Science Edition), Vol.5, No.1, 2006.

⁴⁹⁷ Karl Marx thought that, "whatever the specific form of rent may be, all types have this in common: the appropriation of rent is that economic form in which landed property is realized." In his land rent theory, there are two main types of the rent. (1) Absolute Ground Rent is explained as the rent which landowners can extract because they monopolize the access to or supply of land. It arises due to the difference between the product-values and prices of production of output in agriculture, because of a lower than average organic composition of capital in agriculture as compared with industry. (2) Differential Rent. Under capitalism, additional profit which arises as the result of the expenditure of labor on the average and better portions of land or as a result of increasing productivity of supplementary capital investments and which is appropriated by the landowner; one of the forms of land rent generated by the monopoly in land as a factor of the capitalist economy. Its source is the amount by which surplus value created by the labor of hired agricultural laborers exceeds average profit; this surplus arises as a result of higher productivity of labor on comparatively superior plots of land (more fertile land, lands closer to the place of sale, or lands in which additional capital has been invested). There are two forms of differential rent. Differential Rent I shows how extra profit is transformed into rent by equal quantities of capital being invested on different lands of the fertility and location, while Differential Rent II refers to the difference in profitability resulting from unequal amounts of capital being invested successively and intensively on different plots of land of the same type. Differential Rent II implies the appropriation of surplus profits created by temporary differences in yield, which are due to the application of unequal capitals to the same type of lands. "Wherever rent exists at all, differential rent appears at all times and is governed by the same laws, as agricultural differential rent.... as concerns land for building purposes, that the basis of its rent, like that of all non-agricultural land, is regulated by agricultural rent proper." See Karl Marx, Capital Volume III, The Process of Capitalist Production as a Whole, Part VI Transformation of Surplus-Profit into Ground-Rent, at <http://www.marxists.org/archive/marx/works/1894-c3/index.htm>, visiting date 2013.08.21.

In the process of circulating the right to the use of collective land for construction, factors resulting in land incremental revenue (the growth of land price) are various. In accordance with the reasons causing land increment, it can be divided into that due to investment, due to the relationship between market supply and demand and due to converting the land use, or automatic increment and man-made increment. (1) Land increment due to investment can be separated into that due to direct investment and due to radiative effect of external investment. Hereinto, land increment due to direct investment refers to the increment because of the investor investing in and developing the land owned or used by him. Meanwhile, the increment because of radiative effect of external investment can be further divided into two types. One type is that the government invests in the administrative area to construct public infrastructure, to improve the regional investment environment and ecological environment, resulting in the growth of the land price and land increment in this administrative area; the other type is that private investor invests in and develops a particular area or plot, resulting in the appreciation of the adjoining plots by radiative effect. (2) Land increment due to the relationship between supply and demand refers to that, influenced by economic and social development, the growth of population, urbanization, the change of land system, land speculation and other factors, the demand for land increases and the scarcity of land resource becomes more obvious, which leads to the growth of land price. (3) Land increment due to converting the land use refers to that land use converts from low profit use into high profit use or the intensity of land use enhances, which raise the level of the land revenue and result in land appreciation. (4) In the aforesaid types of land increment, increment due to direct investment can be classified as man-made increment, while, increments due to radiative effect of external investment, due to the relationship between supply and demand, and due to converting the land use fall into the category of automatic increment.⁴⁹⁸ In practice, to separate land increment in the light of different causes and, in what proportions, to distribute the appreciation to the government, investors and land users are very

⁴⁹⁸ See Zhou Cheng, *On Land Increment and the Orientation of the Policy*, Economic Research Journal, Vol.11, 1994.

complex.⁴⁹⁹

4.4.2 The institution of distributing collective land incremental revenue in current Chinese legislation

In simple cases, land revenue should belong to the landowner, but, because the circumstances causing land increment are diverse, dividing land revenue according to the sources of land increment is scientific and rational. Based on the current institutions of urban and rural dualistic land ownership and of separating the right to use land from land ownership, through expropriating collective land and assigning the right to the use of state-owned land in China, the State achieves the institutional arrangement of “land increment belonging to the State”⁵⁰⁰.

The price of collective agricultural land is lower than that of construction land. Dualistic land administration and the mandatory prohibition on market-oriented circulation of collective land for construction causing its property rights without transferability result in that the price of collective land is much lower than state-owned construction land. After the approval of converting agricultural land into non-agricultural land by the government according to law, the land price will be raised to the price level of construction land. This type of land increment due to the price difference of land use purpose is also because of the scarcity of construction land which is in association with governmental regulation. The State expropriates collective land⁵⁰¹ and then assigns the right to the use of state-owned land for construction; all units and individuals that need land for construction purposes shall apply for the use of State-owned land⁵⁰². The State monopolizes the buyer's market of collective land and the primary market of land assignment, which

⁴⁹⁹ See Tian Li, *Betterment and Compensation under the Land Use Rights System of China—A Perspective of Property Rights*, Beijing, China Architecture & Building Press, 2008, p.36.

⁵⁰⁰ It is explained as sharing increments with the people in common. But because the financial system of the government is neither transparent nor open, it is hard to say that the increment is really shared by the people in common.

⁵⁰¹ Land for agriculture shall be expropriated after conversion of use of the land is examined and approved in accordance with the provisions in Article 44 of Land Administration Law.

⁵⁰² As for the exceptions, see “Land Administration Law” art.43.

makes the collective land increment owned by the State.

It could be said that the current institution of “land increment belonging to the State” in Chinese legislation making the State monopolize the Differential Rent and land incremental revenue was in the arrangement of giving priority to the development of city on the background of planned economy, which ever made a significant contribution in lifting China from the situation of “poverty and blankness” and in China's social and economic development. But with the strategy transition of integrating the urban and rural development and developing market economy in China, the institution of “land increment belonging to the State” reveals its outdated characteristics and theoretical defects.

Theoretically, peasants' collective, as the owner of collective land, has the right to benefit from the land and should enjoy the Absolute Ground Rent. Based on the rational function of land market and the realization of collective land property rights, these portions of collective land increment should belong to peasants' collective. However, in the process of urbanization, local government improves the infrastructure construction and the environment for economic development in peripheral areas of the city, which also leads to the rural land increment. Specifically, the government can extract a portion from collective land increment through the method of collecting tax (such as increment tax on collective land value) to cover the cost of promoting urbanization and to prevent distortions of economic activity, which is a kind of administrative regulation. Generally, “land increment belonging to the State” confuses the boundary of government's administrative actions and market activities, which results in that the government, as the owner of expropriated collective land, through “expropriation in low price and sell in high price”, directly obtains the collective land incremental revenue that should have been originally enjoyed by farmers' collective.⁵⁰³ In practice, satisfying some officials' rent-seeking of power, a lot of real estate developers and units who

⁵⁰³ See Zhang Qichen and Hu Zhiping, *On Ownership of Expropriated Rural Land's Incremental Benefit*, Journal of Zhongnan University of Economics and Law, No.6, 2010.

demand land for construction carve up collective land incremental revenue with the government and snatch huge profits without rationale in the process of collective land expropriation and state-owned land assignment. Currently, the widespread poverty of peasants and the retarding economic development in rural areas have shown the institutional defects of the distribution of collective land incremental revenue. The clandestine market of collective construction land existing and failures in prohibiting the construction of houses with limited property rights in the rural area, to a great extent, reflect that farmers revolt against “land increment belonging to the State”.

Rational and efficient distribution of collective land increment is conducive to resolve issues concerning agriculture, countryside and farmers and to build a harmonious society in China. But at present, a rational mechanism to distribute collective construction land revenue has not been established, and, in the process of distributing the revenue, the relations among farmers’ collective, members of rural collective, collective land users and local government have not yet been straightened out in China. Moreover, rural land property relations are in interlace and confusion, and democratic governance structures in rural collective organizations are imperfect, all of which make it difficult to effectively guarantee rural collective and peasants to enjoy collective construction land incremental revenue.⁵⁰⁴

4.4.3 The distribution of collective construction land revenue to the State

The distribution of collective construction land revenue should be implemented in two levels. On the first level, it has to determine the basis of distributing the revenue to the collective land owner, users and the State. Specifically, the owner obtains revenue due to the ownership; the holder of the right to use collective land

⁵⁰⁴ See Department of Land and Resources of Sichuan Province, *Research Report on the Management of Rural Land and the Reform of Land Use Institution in Pilot Regions of Integrating Urban and Rural Reform*, SICHUAN GAIGE (journal), No.3, 2009.

for construction obtains corresponding revenue; government obtains revenue due to administration; and all parties obtain revenue due to relevant investments. On the second level, it has to determine the distribution of the revenue and the directions for using the revenue within rural collective organizations.

With respect to the basis of the State obtaining a portion of collective construction land increment, there are two main kinds of opinions in China. One opinion supports that, due to its contribution to collective land increment, the State can directly participate in the distribution of land incremental revenue. Such as scholar Li Kaiguo's opinion, differential rent of construction land is generated because of the infrastructure construction, public transportation facilities, public welfare undertakings, as well as economic development, and other social factors, and it is unfair that only the stratum of farmers possesses the differential rent of construction land.⁵⁰⁵ Another kind of opinion advocates that collective construction land increment shall be distributed among the State, rural collective organizations and other investors, but the State can only participate in the distribution through collecting taxes. Such as that "to adjust distribution relations of collective land increment in the process of converting agricultural land into construction land and to ensure the State to obtain rational benefit from the land increment, it can take the means of collecting increment tax on collective land value."⁵⁰⁶

In the process of market-oriented circulation of the right to the use of collective land for construction, the role of the State should be specific and its status should be clear, i.e., the regulator in the market-oriented circulation of collective land,⁵⁰⁷ rather than the bargainer. On account of this role, it seems that the State should not

⁵⁰⁵ See Li Kaiguo, "Expropriation first and use second" for Urban Construction Land: A Perspective of Justice and Efficiency, Modern Law Science, No.4, 2007.

⁵⁰⁶ Liu Xiaoling, 2005. Scholars holding this kind of view are in majority. Similar views such as, To reasonably regulate of collective land increment, it should, through the leverage function of land taxation, regulate the distribution of interests among the State, rural collectives and farmers, to achieve Pareto Improvement, and based on taking reference of tax revenue collection and management on state-owned land, to establish the integrated urban and rural land tax systems.(Liu Xiangqi, Chen Yaodong, 2010)

⁵⁰⁷ Relevant governmental functions include: guiding and coordinating the actions of the parties participating in the circulation, performing governmental duties to restrain and supervise the land transaction, to promote sustainable use of land, and to prevent land transactions damaging the interests of the State and the society.

directly participate in the distribution of collective land increment. But from another angle of view, the huge financial resources devoted into urban and rural infrastructure construction makes the price of rural collective construction land in the suburban higher than that in outer suburbs. Due to the locational advantages, the increment of rural collective construction land in the suburban is obvious. Thus, according to the theory of appreciation on investments, the State should take the profit distribution generated by its investment. Nevertheless, either as the regulator or as the investor, it is beyond all doubt that the State should participate in the distribution, while the key point of which is whether directly participating in the distribution through sharing a proportion of collective construction land incremental revenue or indirectly participating in the distribution through tax collection. It is necessary to take overall considerations of the source of collective land increment and the rights of interested parties.

As for state-owned land, there are two ways for the State to obtain land revenue in the circulation of the right to the use of state-owned land. One way is that, as the owner of state-owned land, the State collects “land rent” which includes land assignment fees, lease rental, stock dividend due to evaluating state-owned land rights into shares, and other forms. The other way is that, as the regulator, the State charges land tax and other administrative fees.⁵⁰⁸ Therefore, comparing with the state-owned land, in the circulation of the right to use collective land for construction, the State can indirectly participate in the distribution of collective land incremental revenue mainly through collecting taxes and fees; meanwhile, if the government invests directly to collective land development project, it can obtain profits in return of investment. Here are the reasons:

⁵⁰⁸ Land tax is the taxation paid by land users in the steps of land acquisition, holding, and transfer to the State, which mainly includes tax on using land in the urban and town, tax on occupation of cultivated land, increment tax on land value, building tax, and contract tax. These taxes are regulated by the State Council, not the national legislature, National People’s Congress, and local governments make the detailed rules for the implementation of the regulations. Such as “Interim Regulation of the People's Republic of China on Farmland Occupation and Use Tax” and “Measures of Beijing Municipality for Implementing the Interim Regulation of the People's Republic of China on Farmland Occupation and Use Tax”.

Administrative fees mainly include registration fee. Besides that, there are some kinds of punitive fees. Such as fees for idle land which is provided for by Urban Real Estate Administration Law, art.26.

Generally speaking, in China, land taxes and fees are mixed; so many kinds of fees are heavier than the taxes and out of date. Lots of relevant provisions are the product of planned economy.

First of all, although the State invests to construct infrastructure and to improve investment climate, which is an important reason to collective land increment, as the subject of administration, the State assumes obligation to promote economic development on national scale, and its inputs which causes collective land increment are in the scope of State's duties. Especially in China, under the background of giving priority to the development of the industry and urban economy, for decades, the state has nationalized the collective land increment through expropriating collective land and assigning the right to the use of state-owned land for construction, but it has devoted the main portion of financial investment into urban development and construction. In state-owned land assignment, the government charges assignment fees, because the State is the owner and has the right to take rent. However, in the assignment of the right to use collectively land for construction, farmers' collective, as the land owner, should equally have the right to take the land assignment fees. Government cannot gain the claim right of distributing land revenue because of public law relations (the input with public nature to the land), but can only participate in the distribution of land revenue through tax allocation.⁵⁰⁹ Therefore, in the distribution of collective construction land revenue, the State, as the regulator, the party rendering public service and the investor of infrastructure construction, indirectly obtaining a portion of land revenue through collecting taxes and administrative fees is equipped for sufficient theoretical basis, and the main proportion of collective land incremental revenue can favor other civil subjects, so that farmers are able to share the interests of urbanization and industrialization to a greater extent. Moreover, only when the government is the investor of a specific development and construction project on collective land, it shall certainly obtain the proceeds according to the proportion of its investment in the whole project.

Secondly, the market-oriented circulation of collective construction land will not

⁵⁰⁹ See Zhang Wei, *Study of the Legal System Related to Collective Land Ownership*, China Geology and Mining Economics (Journal), No.4, 2003.

make the government able to expand financial incomes through “expropriation first and use second”, but, from the angle of the whole social benefit, the state reserving the main portion of collective construction land revenue for farmers’ collective is conducive to the autonomous development of rural economy which will promote the urbanization from the interior of the rural. On the prerequisite of keeping the collective ownership of rural land unchanged, in line with the urban and rural planning context, farmers’ collective on one hand, through commoditizing and capitalizing the collective construction land, can obtain the rental and other land benefits, to develop collective enterprises and to make villages prosperous; on the other hand, farmers’ collective can develop the secondary and tertiary industry on rural collective construction land (including that converted from farmland) to promote industrialization and urbanization.⁵¹⁰ These will achieve a better social and economic effect.

Thirdly, the State participating in the distribution of collective construction land revenue mainly through collecting taxes can regularize the current “land-based finance”⁵¹¹ and the consequent social problems. In order to maintain the fairness and impartiality of tax collection, the category and system of current Chinese land tax should be adjusted as soon as possible, to prevent heavy land taxes, in disguise form, carving up collective land revenue, and to avoid the insufficient tax resulting in the loss of state-owned asset and being prejudicial to government in implementing administrative functions. The government should focus on making, implementing and supervising land use planning, improving land use control system, as well as regulating the circulation of collective construction land, but should not actively involves in the circulation and the distribution driven by benefit division.

⁵¹⁰ See Liu Shouying, *Land Capitalization and Rural Areas' Path to Urbanization*, China Opening Herald (Journal), No.2, 2011.

⁵¹¹ Land-based finance refers to that local governments rely on the revenue from assigning state-owned land use right to sustain local fiscal expenditure, which is extra-budgetary revenue, also called governmental secondary finance. China's “land-based finance” generates financial revenue relying mainly on increment state-owned land, i.e. through the state-owned land assignment fees to meet local governments’ fiscal requirement. According to “Land Administration Law” art.55, 30 percent of the compensation paid for the use of additional land for construction shall go to the Central Government and 70 percent to the local people’s governments concerned.

4.4.4 The distribution of collective construction land revenue to land rights holders

The ownership and use right of collective land are independent property rights, and equally have the function of benefitting. In the process of circulating the right to the use of collective land for construction, owners and users of collective land, on the basis of their respective rights, can gain the corresponding revenue from land circulation.

4.4.4.1 Farmers' collective gains corresponding revenue due to land ownership

Ground rent is the form of economic achievement to landowners, and thus, farmers' collective is the absolute subject who can directly participate in the distribution of collective construction land revenue. As for the assignment of the right to use collective land for construction, the assignment fees paid for land-use right by assignee, after deducting the cost of collective land development (mainly including the investment of the collective organization), taxes and administrative fees, is all the revenue belonging to landowner - the collective organization.

With respect to the revenue obtained by rural collective, firstly, the collective organization should handle social security for farmers within the collective⁵¹²; secondly, rural collectives should retain sufficient fund to guarantee that the development of collective economy can provide farmers with a long-term source of revenue; thirdly, the collective should retain a certain construction fund for rural communal facilities; last but not the least, rural collectives should retain the necessary portion for daily operations of collective organizations and for handling public affairs within the collective.

⁵¹² The Chinese social security system is urban-rural dualistic, and the social security for farmers is far from perfect. In China, farmers holding rural registered residences cannot enjoy the comparatively sound social security system for citizens holding urban registered residences. For individual farmers engaged in agricultural production, the function of social security assumed by collective land is so important. Imprudently carrying out the market-oriented circulation of collective land without considering the social security function assumed by collective land will only causes damage to farmers' rights.

4.4.4.2 Land user gains the revenue due to land use right

In the situation that land ownership and land use right are divided, land use right holders and other relevant obligee who invest on the land should, on the basis of the principle of fairness, gain the revenue of circulating land use right according to the proportion of their investment. In the process of transferring the right to the use of collective construction land, the transfer proceeds deducting land assignment compensation, the obligee's relevant inputs, as well as related taxes and fees is the revenue for land users.

Farmers whose right to use collective land for construction or right to agricultural land contractual management are reclaimed to be arranged and then to be assigned out in unification by the collective organization can, as independent usufructuary right holders, participate in the distribution of assignment fees according to the proportion of his contribution in the whole.

If the construction land is converted from agricultural land pursuant to law and through competent government's examination and approval, the land incremental revenue due to the conversion of land-use purpose is the reflection of the value of land development right. The premium price of the land increment should be shared by all the members of the collective organization, in order to guarantee the interests of the farmers who lose the opportunity to convert their possessed farmland due to farmland preservation and consequently cannot enjoy the incremental revenue of the converted land. Only in this way, can the huge interest differences between converting farmland and maintaining farmland be balanced, which is able to actually realize farmers' interests.

Chapter V The creation of development rights on collective land

The reform of collective land expropriation lays the foundation for the market-oriented circulation of the right to the use of collective land for construction, and the reform of market-oriented circulation of collective construction land creates favorable conditions for promoting unified circulation of the right to equally use urban and rural land for construction. However, the circulation of collective land for construction relates to the choice of converting agricultural land and conserving arable land in rural area. China should not only improve the legislation of marketizing and equalizing collective land rights to promote the market-oriented circulation of collective construction land, to guarantee farmers' rights of participating in urbanization with rural collective land as the capital, and to resolve practical problems of the structural shortage of land for construction and the integrated development of urban and rural areas, but also rationally restrict the non-agricultural conversion of collective farmland through legislation to control the total amount of land for construction use, to earnestly protect cultivated land, and to ensure national food security, ecological security and some other significant security issues. But the Chinese practices simply relying on administrative power to control the non-agricultural conversion of collective farmland and to restrict the free transaction of collective land rights lack corresponding measures to balance different parties' interests and fail to reach the anticipated result. Chinese farmers who are stuck tenaciously to the arable have made great contributions to the national food security, but have not gotten the institutional incentive, thus, with the expansion of urban-rural gap in recent years and driven by comparative economic interests, the process of unlawful non-agricultural conversion of farmland has been excessively accelerated.⁵¹³ Therefore, taking the system of land development rights from occidental countries for reference, in allusion to the government's land-use planning and land control system, creating collective land development rights

⁵¹³ See Wu Cifang and Yang Zhirong, *Comparatively Study on Land Conversion Driving Factor: Theory and Empirical Analysis*, Journal of Zhejiang University (Humanities and Social Sciences), Vol.38, No.2, Mar., 2008.

enjoyed by farmers' collective and building the system of transferring land development rights with Chinese characteristics, can make farmers gain reasonable proceeds through the transfer of such rights to conserve cultivated land, to prevent the nonlicit non-agricultural conversion of farmland, and can achieve the rational allocation of land resources and the goal of sustainable developing and using land.

5.1 A general analysis of land development rights

5.1.1 The formation and connotation of land development rights

5.1.1.1 The formation of land development rights

In the era of agricultural civilization and early industrial society, the development and utilization of land was mainly on the surface of ground. Thus the law only had to demarcate the boundary of lands on land surface, can the attribution of a parcel of land be clear. The form dividing land resources in planar dimension reflected in property right framework is land ownership, and land ownership can entitle landowner to dominate land resources in a range area. However, with the development of modern society and economy, industrial and commercial land development and utilization has become important types of land use activities. On construction land, land rights holders use the space of land within a certain range to engage in economic development. However, constrained by the framework of land use planning and urban and rural planning, the space which is available to be developed to each land rights holder is limited. The spatial constraint of land development and utilization signifies that, in a certain urban or rural planning area, if a land rights holder breaks the upper density limit of land development and increases the extent of spatial utilization of land, it will result in that, in the same planning area, other land rights holders reduce the upper density limit of land development and decreases the extent of spatial utilization.⁵¹⁴ Thus, in dominating

⁵¹⁴ See Measures for the Administration of the Trial Work of Linking the Increase in Land Used for Urban Construction with the Decrease in Land Used for Rural Construction. The activities put together several land blocks of land used for rural construction that are to be cleared up and reclaimed as arable land (land blocks where old buildings shall be dismantled), the land blocks to be used for urban construction (land blocks where

and using land space within a certain area, it forms the relation of land resource competition among different land rights holders. Land development capacity indicated by land development density has become a kind of scarce resource.

To resolve the problem of resource contention in spatial utilization of land among land rights holders, it requires enduing the scarce land development capacity with the nature of property rights. Although land ownership inherently contains the attribution of land development capacity, but because that the function of “settling disputes” of land ownership is based on defining the land scale, the market-oriented allocation of land development capacity within a certain scope of land is not able to be achieved simply through the way of transferring land ownership. Therefore, law has to regularize the transferrable land development capacity through particular entitlement mechanism. The definition of this entitlement is determined by allotting the transferrable land development capacity that can be dominated by land rights holders, not like land ownership that clarifies the bound of land. If land ownership can be treated as the legal tool defining the attribution of land resources to different market subjects in planar dimension, the legal tool defining the land development capacity under land-use planning and land control system and dominated by different land rights holders in spatial dimension is land development rights. To create the institution of land development right, which is the requirement of exquisitely allocating land resources, can improve the traditional system of land resources allocation.

new buildings shall be built) and other areas on the basis of the overall land use planning to compose a project area of dismantling old buildings and building new ones, to finally achieve the objective of increasing the effective area of arable land, improving the quality of arable land, economically and intensively using the construction land, and implementing a more reasonable layout of the urban and rural land use through such measures as dismantling old buildings and building new ones, land clear-up and reclamation, and on the basis of ensuring the balance of areas of all kinds of land in the project area.

See as well “Land Administration Law” art 31. The State protects cultivated land and strictly restricts conversion of cultivated land to non-cultivated land. The State applies the system of compensation for use of cultivated land for other purposes. The principle of “reclaiming the same area of land as is used” shall be applied to any unit that, with approval, uses cultivated land for construction of non-agricultural projects, that is, the unit shall be responsible for reclaiming the same area and quality of the cultivated land it uses. If conditions for such reclamation do not exist or if the reclaimed land fails to meet the requirements, the unit shall pay expenses for reclamation in accordance with the regulations set by people’s governments of provinces, autonomous regions and municipalities directly under the Central Government, and the money shall exclusively be used for reclamation.

Under the current land law framework in China, the system of land resources allocation is indeed still on the demarcation of land boundary. For example, the right to agricultural land contractual management regulated by “Property Law” and “Law on Land Contract in Rural Areas” determines the attribution of land development interests on the basis of the scale of the rural land⁵¹⁵; the right to the use of land for construction regulated by “Property Law” and “Urban Real Estate Administration Law” also determine the attribution of land development interests based on the scale of the urban land⁵¹⁶. Such framework of land resource allocation cannot achieve the incentive of intensive land use, because land rights holders freely developing land in the spatial dimension will be free from the constraints of market pricing mechanism.

The problem of inefficient allocation of urban and rural land resources in current China relates closely with the lack of allocation of land development capacity. With regards to urban construction land, the poor efficiency of land resource allocation is mainly manifested in low-density of urban construction land development and the eager and huge demand of incremental construction land. The crucial reasons of the aforesaid phenomena are that: land users cannot realize the low-cost expansion of land development capacity in the spatial dimension through market transaction,⁵¹⁷ which results in that the development and utilization scale of construction land turns from “spatial expansion” to “planar expansion”; in the process of converting rural collective land into urban construction land, the intensive extent of land allocation is low, too, and the scale of land conversion is in disorder expansion, which leads to the rapid loss of a great deal of agricultural land; when the land

⁵¹⁵ The contract-undertaking party shall enjoy the right to the use of, and profits and interests from the contracted land, and to the circulation of the operation of the contracted land; enjoying the decision-making power to organize production operation and dispose his products.

⁵¹⁶ Such as the assignment compensation of the right to use state-owned land for construction.

⁵¹⁷ In land development practices in China, if the land user needs to expand the land development density in spatial dimension, the user must, in accordance with the procedure of changing planning provided for by the “Urban and Rural Planning Law”, file an application therefor with the competent department of urban and rural planning for changing the detailed planning parameters of construction. The administrative attribute of the examination and approval power of planning change makes the expansion of land development density subject to the administrative will of the competent department of urban and rural planning, but not depend on the market demand of land development. The insufficient information for government’s decision-making and government’s self-interests-oriented trend cause the high cost and low efficiency of the administrative allocation of resources.

development capacity of agricultural land gets extended in spatial dimension, collective land owners cannot share the market value of land development interests. To comprehensively improve the intensive development and utilization of land resources in China, it has to promote the allocation of land resources in spatial dimension on the basis of the existing land property rights system, has to entitle subjects in land market with land development rights, and has to guide the exquisite allocation of land resources through market mechanism.

5.1.1.2 The connotation of land development rights

Land development rights are derived from the Town and Country Planning Act of the United Kingdom (1947).⁵¹⁸ The 1990 amendments of British Town and Country Planning Act defines “development” as the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.⁵¹⁹ In the United States, the Transfer of Development Rights was first completed in New York City in 1968, under the city’s Landmarks Preservation Law, and the development rights were transferred between adjacent properties to protect historic landmarks. In the U.S., the common view of transferrable development rights is that, transferrable development rights are separated from land ownership which is commonly described as consisting of a bundle of different rights,⁵²⁰ and are a flexible market-based tool that allows land planners to overcome many of the shortcomings associated with traditional zoning practices⁵²¹. These countries entitle landowners with land development rights which transfer under the market mechanism to make

⁵¹⁸ The Act established that planning permission was required for land development; ownership alone no longer conferred the right to develop the land. To control this, the Act reorganised the planning system from the 1,400 existing planning authorities to 145 (formed from county and borough councils), and required them all to prepare a comprehensive development plan. These local authorities were given wide-ranging powers in addition to approval of planning proposals; they could carry out redevelopment of land themselves, or use compulsory purchase orders to buy land and lease it to private developers. They were also given powers to control outdoor advertising, and to preserve woodland or buildings of architectural or historic interest - the latter the beginning of the modern listed building system.

⁵¹⁹ See Town and Country Planning Act 1990, part III, 55(1).

⁵²⁰ See Noelle Higgins, *Transfer of Development Rights*, accessed at http://depts.washington.edu/open2100/pdf/3_OpenSpaceImplement/Implementation_Mechanisms/transfer_development_rights.pdf, visiting date 2013.08.22.

⁵²¹ See Andrew J. Miller, *Transferable Development Rights in the Constitutional Landscape: Has Penn Central Failed to Weather the Storm?* Natural Resources Journal, Vol.39, 1999.

the land get well developed and protected. Although institutions of land development rights are various in different countries, there are some common connotational characteristics shared by these institutions.

(1) The object of land development rights is land development capacity

As previously mentioned, land development rights are the tool that law adjusts land development capacity among different land rights holders. Thus, land development capacity is the object of land development rights. “Land development capacity” describes the limit on land users developing and using land resources in spatial dimension.

Land development capacity, as the object dominated by private rights, has been completed in a historical process of institutional transition. In the era of agricultural civilization and early industrial society, the development and utilization of land was mainly on the surface of ground and the demand of construction land was not as eager as that in modern society, so the concept of land development capacity did not arise at that time. With human’s enhancing demand and ability of intensively developing and using land space, land rights holders’ income level through spatial development and utilization of land is also rising, and land development capacity, with its own characteristic, gradually becomes a kind of scarce resource. With respect to a same parcel of land dominated by a land rights holder, if land development capacities on the land parcel are different, the titleholder would gain differently from the land. Meanwhile, under market subjects’ competition, market-oriented circulation of the scarce land development capacity needs to be realized on the basis of a certain property right relations. Because the basis for land ownership to settle interest disputes of land parcel is the boundary of a scale of land, the circulation of land development capacity between landowners cannot be achieved through the way of simply transferring land ownership, and it must rely on the mechanism of granting land development rights to landowners to dominate the scarce land development capacity. In this situation, land development capacity

is no longer the restrictive conditions limiting land landowners to freely develop land, but the right's object that can be freely disposed of by land owners.

In the practice of land development, the standard to estimate the quantity of land development capacity dominated by land development rights holder is the plot ratio of land development. The process of land development rights holders dominating land development capacity can be reflected from that the rights holders using or transferring the plot ratio. When a landowner receives land development rights from others, it means that he can raise the development capacity of his land. He can either utilize the additional land development capacity to carry out land development activities in a larger scale, or transfer the capacity to obtain the exchange value of the land development rights in market.

Compared with the technical term of "land development capacity", "land development density" is the standard of measuring land development capacity, and "plot ratio" is a detailed data, neither of which can be the object of land development rights. In order to precisely define the object of land development rights, the author puts forward the concept of "land development capacity". It should be noted that the scarcity of "capacity" is not a unique phenomenon solely for land resources allocation. In the field of law on environment and resources, with increasing human demand of energy resources and with environmental deterioration, the scarcity of resources "capacity" has been fully demonstrated. Chinese scholar, Lv Zhongmei, defines the object of pollutant emission rights as that "the self-regulation of environmental resources or the environmental capacity itself is a kind of resource, which should be accepted by Property Law."⁵²² And as for mineral resources, the exploitable capacity manifests the characteristic of scarcity.

(2) Land development capacity separates from the land

⁵²² See Lv Zhongmei, *On Trade System of Right to Use Environment*, Tribune of Political Science and Law (Journal of China University of Political Science and Law), No.4, 2000.

In Property Law, “land” has specific legal connotation that registered in Land Registry, which cannot be equated with the part of the earth's surface that is clearly identified in the nature. The separation of land development capacity and land itself achieves the mechanism of granting land development rights. The phenomenon that land development capacity is chased by market subjects indicates that land development capacity, like land itself to some extent, has the independent market value. Thus, it becomes possible to separate land development capacity from land and to dispose of it. And, to guarantee the independent trade of a certain land development capacity in legal dimension can be the cogent reason of creating land development rights.

Although separating land development capacity from land is the performance of landowner exercising the dominant weight, once they are separated, the landowner, relying on land ownership, will obtain another type of right relating to land resources allocation, i.e. land development rights. It should be noted that the separation of land development capacity and the land could not be completely separated. After all, land development capacity exists as the purpose of land development at quantification in spatial dimension, and, if they are completely separated, it ignores the land’s basic function in development, which is obviously inconsistent with the intention of efficiently allocating land resources. Although, with regard to a particular landowner, the land development capacity dominated by him may be separated from his land and be transferred to others, in term of the result of land resources allocation in a certain area, the relation that land development capacity finally combines with the land will not be changed. Landowners transfer the land development capacity that cannot be fully utilized by themselves to those who have stronger ability in further developing land, to achieve the intensive use of land, which is the primary cause of granting land development rights.

(3) The initial subject of land development rights is the land owner

Because of the separation of land development capacity and the land, through entitlement, land development rights obtain independent legal status. However, the independent legal status of land development rights to land ownership should not make the negation of the relations of their functions. The system of land development rights should be used to promote land owner to better dominate the land, rather than weaken the power and function of land ownership. The statutory initial allocation of land development capacity should be based on the ownership of land. Within the total allocated sum of land development capacity in a particular area, enabling the land owner to achieve land development rights and reallocating the land development rights are the significant functions of constructing the system of land development rights.

(4) The restrictions imposed on the land development rights

Land development rights are restricted by the regional land-use planning⁵²³, which is manifested in two aspects. Firstly, the land development capacity dominated by holders of land development rights should be controlled within the maximum limitation pursuant to the regional planning. If the land development capacity is beyond the limitation, interests of the excess part shall not be protected by law, and the development rights holder shall be subjected to administrative penalty. Secondly, disposing of land development rights should be restricted by regional planning. The sending area of land development rights and the receiving area of such rights should be in the same economic area, so that the market-oriented allocation of land development capacity resource can be achieved.

In conclusion, land development rights shall be created as a kind of property right enjoyed by land owner, which can change land development capacity on a unit area

⁵²³ The government, through exercising the power of land-use planning and control, makes the decision of the total sum of land development capacity, rather than determines the quantity of land development capacity dominated by market individuals. When governments make the decision, they should consider both the maximum capacity of land use efficiency and the maximum capacity constraints of protecting ecological environment and farmland and so on, to guarantee the reasonability of regional land resource allocation. It should be pointed that in some situations of reallocating land development capacity, the reallocation will simultaneously lead to the change of total capacity limitation due to land-use conversion, so that the application of land development rights norms shall be on the prerequisite of permission in planning changes made by the competent department of urban and rural planning.

of land in accordance with law through transferring such rights or converting land use type. In china, land development rights include state-owned and collectively-owned land development rights. Collectively-owned land development rights can be divided into agricultural land and non-agricultural land development rights. Hereinto, agricultural land development rights are the rights to convert agricultural land into non-agricultural land; non-agricultural land development rights refer to the rights to develop and construct on the collective construction land in a certain density, taking the precondition of according with land use planning and urban-rural planning. State-owned land development rights solely include non-agricultural land development rights, i.e. the rights to develop and build on the state-owned land in a certain density according with land use planning and urban-rural planning. The conversion of land use type and the rising of land development density have to be all in line with land use planning.

5.1.2 Brief introduction of land development rights in the UK

The UK is the first country practicing the system of land development rights. In the UK, the institutional conception of land development right was put forward to solve problems of the disorderly expansion of urban areas and the exorbitant concentration of urban layout in the process of industrialization.

In 1937, Royal Commission on the Distribution of the Industrial Population was appointed by Royal Warrant under the Chairmanship of the Rt. Hon. Sir Montague Barlow (later known as Sir Anderson Montague-Barlow) to investigate the causes of the existing distribution of the industrial population, future trends and the social, economic and strategic disadvantages of concentration and to propose remedies.⁵²⁴

In 1940, the Barlow Report recommended the decentralisation of industry from congested areas, and indicated that the problems were of national urgency and proposed a central national authority, a board for industrial location responsible to

⁵²⁴ See *Royal Commission on the Distribution of the Industrial Population (Barlow Commission): Minutes and Papers*, Reference: HLG 27, The National Archives, Kew, Richmond, England.

the Board of Trade, to deal with them.⁵²⁵ Although because of the impact of World War II, the report did not get wide response immediately, the trend of reforming the system of controlling urban land development in Britain had been unstoppable.

In 1942, Expert Committee on Compensation and Betterment, Chaired by J. Uthwatt, made another report. The main feature of the Uthwatt Report was an examination of the problem of compensation and betterment. In so doing it identified the twin concepts of shifting value and floating value. “The idea behind the concept of shifting value was that planning control did not reduce the total sum of land values, but merely redistributes them by increasing the value of some land whilst decreasing the value of other land.... The idea behind the concept of floating values was that potential value is by nature speculative. Development may take place on parcel A or parcel B. The prospect floats over both parcels. The value of any parcel of land is obtained by estimating whether the development is likely to take place on one parcel of land or on some other.”⁵²⁶ Uthwatt recommended that national development should be in the hands of a Minister for National Development. “The schemes of development would then be executed by the relevant departments. The day to day administration of the development rights scheme would be in the hands of a Commission, but it would be subject to Parliamentary control by giving the Minister a power of direction.”⁵²⁷

The Barlow Report, the Uthwatt Report and the Scott Report⁵²⁸ contributed significantly to the system of land use control established by the Town and Country Planning Act 1947. In order to strengthen the power of government controlling land use, the Planning Act provided for the nationalization of land development rights. There are two main features reflecting the nationalization of land development

⁵²⁵ Ibid.

⁵²⁶ See Victor Moore, *A Practical Approach to Planning Law*, 9th Edition, Oxford University Press, p.3.

⁵²⁷ See David Brock, The Uthwatt Report—Briefing Note, accessed at http://www.mills-reeve.com/files/Publication/b9a8fa0d-730e-41fe-bca3-70eec7eb047f/Presentation/PublicationAttachment/c813a1c2-5a71-43e1-a537-758be697ce6f/The_Uthwatt_Report_Jul_10.pdf, visiting date 2013.08.25.

⁵²⁸ This was a report of a Committee on Land Utilization in Rural Areas. The Committee was asked to consider the problems of piecemeal development of agricultural land and the unrestricted development of the coastline.

rights. (1) Any development of land should subject to planning permission. The Planning Act created local planning authorities and required each authority to prepare a development plan for their area indicating the manner in which they proposed land in their area should be used, whether by development or otherwise, and the ways by which any such development should be carried out. All land was made subject to planning control, not just land within a scheme prepared by the authority. As a result, apart from minor development, any person wishing to develop land had first to obtain express planning permission to do so from the local planning authority. In deciding whether to grant or refuse permission, the authority was to be guided by the provisions of the development plan. (2) Land development rights shall be obtained by paying development charges. If a person was granted planning permission for any development falling outside the existing use of his land, he had to pay a development charge to the State equal to the value of that permission. Thus, the previous state-owned development rights, within the scope of land use permitted by the planning, transferred to individuals and became private property through paying development charges.⁵²⁹

The system of nationalizing land development rights that established by the Town and Country Planning Act actually divided up land owner's rights to benefit from and dispose of the land. Private land ownership was no longer the comprehensive dominant right to the land, and the private domination of land resources was confined only to the existing value of the land and the buildings and structures attached to the said land. The expected appreciation of land increment existed in the form of land development rights and was nationalized. From another perspective, land development rights in the UK were actually the rights to change the original land-use purpose, to improve the intensive use of land, and were a new concept and a new system balancing interests arising from land development which were running through comprehensive land use planning by the British government.

⁵²⁹ See Victor Moore, *A Practical Approach to Planning Law*, 9th Edition, Oxford University Press, p.4.

However, Friedrich A. Hayek was highly critical of the nationalization of land development rights. He thought that the planning system that rationally controlled the use and development of land was necessary.⁵³⁰ But, from the perspective of the costs of economic development and the incentive of gains, he considered that setting individual's freedom of developing land under government's approval and depending on political decision-making process to deal with the efficiency of industrial development was incredible. He pointed out, "the Board (Central Land Board, the author's note) has in effect been given 'a monopoly in the development rights' not only in land, but, in so far as any development requires some land and since the Board controls all land, it has a monopoly of all industrial development of the kind.... Far from introducing a rational element into the decisions about the use of land, it introduces a completely meaningless factor and falsifies the data on which the developer will have to base his decisions. The costs he will have to take into account will correspond less to the true social costs than ever before....The direction of industrial progress will more than ever become dependent on the powers of persuasion, the accidents of contacts, and the vicissitudes of official procedure where the most careful calculation ought to decide. The most efficient and conscientious civil service cannot prevent this where no clear direction can be laid down for its actions."⁵³¹ With regard to the system of paying for land development rights, he thought it set up huge investment risk for land development and industrial development, which would greatly inhibit the land investment and industrial development. He held that "the developer must be willing to stake an amount equal to the hoped-for gain, certain that he will lose if his hopes are not fulfilled, but without any prospect of advantage if his expectations prove correct. A grosser form of penalizing risk can hardly be imagined. Wherever there is

⁵³⁰ "The framework of rules within which the decisions of the private owner are likely to agree with the public interest will therefore in this case have to be more detailed and more adjusted to particular local circumstances than is necessary with other kinds of property. Such town planning, which operates largely through its effects on the market and through the establishing of general conditions to which all developments of a district or neighborhood must conform but which, within these conditions, leaves the decisions to the individual owner, is part of the effort to make the market mechanism more effective." See Friedrich A. Hayek, *The Constitution of Liberty* (Chapter 22 Housing and Town Planning), The University of Chicago Press, 1978, P350.

⁵³¹ See Friedrich A. Hayek, *The Economics of Development Charges*, F. A. Hayek – Studies in Philosophy, Politics and Economics, pp.325-330, at <http://direitasja.files.wordpress.com/2012/05/studies-in-philosophy-and-economics-friedrich-a-hayek.pdf>, visiting date 2013.08.26.

uncertainty about the outcome it will become much safer to stay put than to sink capital in buying a permission which may prove of little value....Can there be much doubt that if this principle is carried out as now announced, it cannot but prove to be one of the most serious blows administered to the prospects of increasing the efficiency of British industry?"⁵³²

The system of nationalized land development rights which was constructed in the Town and Country Planning Act 1947 strengthened governmental control of land use and established a reasonable order on land development activities. But the establishment of this system was at the expense of depressing the investment market of land development. Through subsequent reforms, most of the financial provisions of the 1947 Act have now been dismantled. In particular, the Town and Country Planning Act 1953 abolished the development charge. Although further attempts were made by the Land Commission Act 1967 and the Development Land Tax Act 1976 to recoup for the community part of the development value of land which would otherwise accrue to the owner, no special tax on development value now exists, although an owner may be liable to pay capital gains tax on such value if he realizes a capital gain on the disposal of his land.⁵³³

With regard to the non-financial provisions of the 1947 Act however, the elements of the system established at that time have withstood the passage of time. Although numerous changes and improvements have been made to the statutory provisions since that date, the basic scheme of the legislation remains the same. The British land development rights system makes a meaningful practical model for rationally allocating land development gains and strengthening the governmental control and administration on land development and utilization.

⁵³² See Friedrich A. Hayek, *The Economics of Development Charges*, F. A. Hayek – *Studies in Philosophy, Politics and Economics*, pp.327-328, at <http://direitasja.files.wordpress.com/2012/05/studies-in-philosophy-and-economics-friedrich-a-hayek.pdf>, visiting date 2013.08.26.

⁵³³ See Victor Moore, *A Practical Approach to Planning Law*, 9th Edition, Oxford University Press, pp.4-5.

5.1.3 Brief introduction of Transferable Development Rights in the US

In the US, the Transferable Development Rights (TDR) is a land use planning technique. It is a method to redirect development away from one site, presumably not well suited for development, to some other more suitable site.⁵³⁴ Specifically, TDR refers to programs that transfer development rights from parcels in a designated “sending area” to non-adjacent tracts in different ownership in a designated “receiving area” across local boundaries.⁵³⁵ TDR grew out of the understanding that some properties are not suitable for development without serious unintended social consequences, but that public acquisition of the property was not desired. TDR is a means for property to remain in its present condition while providing the owner of that property an alternative route to the achievement of an economic return. In the minds of many, a TDR program is a means of compensating property owners for the loss of their development rights.⁵³⁶

5.1.3.1 The purpose of establishing the system of Transferable Development Rights

On one hand, land development extracts a heavy toll on the natural environment, and resource protection frequently requires low density land use; on the other hand, development also hints economic growth which often requires high density use.⁵³⁷ Ordinarily, the result is an almost continuous conflict between the protection of resource and economic growth.⁵³⁸ Conflicts between economic growth and resource protection are the result of market failures. Private market decision-makers also often ignore the environmental impacts of their actions, such as resource depletion and pollution.⁵³⁹

⁵³⁴ See Robert D. Yaro, Robert N. Lane, Robert Pirani, James Nicholas, H. James Brown, and Dr. Rosalind Greenstein, *Transfer of Development Rights for Balanced Development*, Final Report of A Conference Sponsored by the Lincoln Institute of Land Policy and Regional Plan Association, May, 1998.

⁵³⁵ Ibid.

⁵³⁶ Ibid. The things to be called Transferable Development Rights herein go by many different names. In the New Jersey Pinelands they are Pinelands Development Credits (PDC). In Dade County, Florida, they are Severable Use Rights (SUR). In Suffolk County, New York, they are known as Pine Barrens Credits (PBC) while in Montgomery County, Maryland, they are just plain old TDR. Regardless of what they are called, these rights share the common characteristic of facilitating the transfer of development from one place to another.

⁵³⁷ See John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, Yale Law Journal, Vol. 83, No. 1, Nov., 1973.

⁵³⁸ See Dana Clark and David Dowries, *What Price Biodiversity? Economic Incentives and Biodiversity Conversion in the United States*, Journal of Environmental Law and Litigation, Vol.11, 1996.

⁵³⁹ See, Richard B. Stewart, *Models for Environmental Regulation: Central Planning Versus Market-Based*

To resolve the foresaid problems, the US government, acting on behalf of the public interest, can, through taxes or restrictions, force individual landowners to account for their impacts on public resources.⁵⁴⁰ With regard to land use, traditional zoning⁵⁴¹ has been the historical choice for controlling negative externalities in economic growth by setting utter limits on land use and development.

In the United States, zoning has been accepted as a valid exercise of the government's police power⁵⁴², and few deny its necessity.⁵⁴³ However, zoning is a form of coercion and it infringes upon the freedom of private landowners. Under traditional zoning, when government, through local land planning agencies and courts, decides the private landowner has a stronger legal or moral right, the private right prevails at the expense of the public. On the contrary, the public right prevails at the expense of the private landowner. The result is an either/or dichotomy with little room for compromise.⁵⁴⁴ Traditional zoning has had little success in finding alternatives to deal with this either/or dichotomy.

Although successful in separating incompatible land uses, zoning sets rigid, stagnant, and inflexible limits on development.⁵⁴⁵ Thus, land planners have to seek

Approaches, Boston College Environmental Affairs Law Review, Vol.19, 1992.

⁵⁴⁰ See Garrett Hardin, *The Tragedy of the Commons*, Science, Vol.162, December 1968, at <http://www.sciencemag.org/content/162/3859/1243.full>, visiting date 2013.08.27

⁵⁴¹ Zoning is a device of land-use planning used by local governments in most developed countries. The word is derived from the practice of designating permitted uses of land based on mapped zones which separate one set of land uses from another. Zoning may be use-based (regulating the uses to which land may be put, also called functional zoning), or it may regulate building height, lot coverage (density), and similar characteristics, or some combination of these. In the United States, under the police power rights, state governments may exercise over private real property. With this power, special laws and regulations have long been made restricting the places where particular types of business can be carried on. Zoning becomes an increasing legal force as it continues to expand in its geographical range through its introduction in other urban centres and use in larger political and geographical boundaries. See "Zoning" in Wikipedia, at <http://en.wikipedia.org/wiki/Zoning#U.S.>, visiting date 2013.08.27.

⁵⁴² In United States constitutional law, police power is the capacity of the states to regulate behavior and enforce order within their territory for the betterment of the health, safety, morals, and general welfare of their inhabitants. See "police power" in Wikipedia, at http://en.wikipedia.org/wiki/Police_power, visiting date 2013.08.28.

⁵⁴³ See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). *Euclid v. Ambler* was a United States Supreme Court landmark case argued in 1926. It was the first significant case regarding the relatively new practice of zoning, and served to substantially bolster zoning ordinances in towns nationwide in the United States and in other countries of the world including Canada.

⁵⁴⁴ See Andrew J. Miller, *Transferable Development Rights in the Constitutional Landscape: Has Penn Central Failed to Weather the Storm?* Natural Resources Journal, Vol.39, 1999.

⁵⁴⁵ See Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental*

proper mechanisms to provide safety valves to strict zoning regulations. Another problem associated with zoning practices is the lack of compensation provided to landowners whose development rights are negatively affected. According to Andrew J. Miller, “TDRs are a flexible market-based tool that can help land planners overcome many of the shortcomings associated with traditional zoning practices.”⁵⁴⁶ TDR uses the “economic engine” of new growth to conserve lands with public benefits, such as working lands (farms and forests), environmentally sensitive areas, or open space. It is also sometimes used to further a community’s goals for historic preservation and/or housing affordability.⁵⁴⁷

The original discussions about TDR addressed the inequities of zoning between areas of very low or greatly reduced intensity and those with high intensities. This can be described as “windfalls and wipeouts”, i.e. the land owner who was zoned to protect a resource suffered a value wipe out comparing to the land owner who received zoning for high residential densities or commercial development. This remains an accurate way to describe the differences in value between the different zoning districts. This is not to say that the very low density zoning is illegal. The terms windfall and wipeout are comparative descriptions of the way land owners feel about the differences. TDR was proposed by some as a means of balancing the inequities. The land owner zoned for agricultural would be able to sell development rights to the person with the higher density zoning, thus reducing the difference in values by requiring the purchase of development rights by the land owner with high density zoning. Thus, the one land owner who otherwise would suffer from a wipeout would gain value through the sale of development rights. The owner receiving the windfall would get less because TDRs would have to be purchased to

and *Land Use Techniques in the United States*, Boston College Environmental Affairs Law Review, Vol.19, 1992.

⁵⁴⁶ See Andrew J. Miller, *Transferable Development Rights in the Constitutional Landscape: Has Penn Central Failed to Weather the Storm?* Natural Resources Journal, Vol.39, 1999.

⁵⁴⁷ See Jeff Aken, Jeremy Eckert, Nancy Fox, and Skip Swenson, *Transfer of Development Rights (TDR) in Washington State: Overview, Benefits, and Challenges*, prepared by the Cascade Land Conservancy for consideration by the Washington State Department of Community, Trade and Economic Development and the Regional TDR Advisory Committee, March 2008, accessed at http://www.forterra.org/files/resources/TDR_in_WA_State_1.pdf, visiting date 2013.08.31.

achieve maximum density.⁵⁴⁸

From this point of view, Chinese farmers' collectives are the counterparts of the land owners suffering from wipeout, while the Chinese local governments enjoying urban state-owned land are as the owner receiving the windfall, so that the TDR institution has referential significance to China.

5.1.3.2 How TDR system works

Property, under the bundle of rights (rights sticks) theory, consists of numerous components⁵⁴⁹ that may be individually severed and marketed. The development rights to its fullest potential are some of these sticks. The TDR system simply takes the development right stick for a piece of property and allows it to be transferred or relocated to another piece of property.⁵⁵⁰ Typically this is done by selling some defined development rights of one piece of land, the sending area, to some other entity for use at some other piece of land, the receiving area.⁵⁵¹

(1) Sending areas. The sending areas are those not to be developed in an identified manner, from which development rights can be sold. In establishing a sending area, the relevant jurisdiction would identify the areas not slated for development. To determine the sending area, size and location of sending areas, a number of factors must be considered: the number of development rights that could be transferred, prevailing land values, the extent to which existing zoning supports land conservation, and the relative priority of saving "close-in" sites subject to strong development pressure vs. lands further from urban centers with less development pressure.⁵⁵²

⁵⁴⁸ See *Transferable of Development Rights - City of Fitchburg*, Draft, August 14, 2008.

⁵⁴⁹ See Bryan A. Garner, *Black's Law Dictionary* (8th ed. 2004), p3841.

⁵⁵⁰ See James C. Nicholas, *Transferable Development Rights in the Rural Fringe Area*, Prepared for Collier County, Florida, September 22, 2003.

⁵⁵¹ See Robert D. Yaro, Robert N. Lane and Robert Pirani, etc., *Transfer of Development Rights for Balanced Development*, Final Report of A Conference Sponsored by the Lincoln Institute of Land Policy and Regional Plan Association, May, 1998.

⁵⁵² See Jeff Aken, Jeremy Eckert, Nancy Fox, and Skip Swenson, *Transfer of Development Rights (TDR) in Washington State: Overview, Benefits, and Challenges*, The Cascade Land Conservancy, March 2008.

(2) Receiving areas. Entitling viable receiving areas is one of the most critical and challenging aspects of a development program. All programs attempt to determine receiving areas that are able to have a capacity of an amount equal to or more than the probable supply of TDRs from sending areas. Crucial factors in the designation include market demand⁵⁵³ for development intensity greater than the existing intensity, availability of infrastructure and services to support development, and community support for or opposition to increased development.⁵⁵⁴ While a lot of programs establish both sending and receiving areas within a single jurisdiction, some larger programs have established cross jurisdictional exchanges through intergovernmental agreements. Receiving areas may be determined through an initial planning process, further through added designations over time.

(3) Development bonuses. Within receiving areas, developers are granted the rights to add density or other development bonuses in exchange for purchasing TDRs. While most TDR programs offer increased residential density (either single family or multi-family) as a bonus, other incentives can be offered, such as increased floor area, added height, increased lot coverage, or reduced limits on impervious surfaces.⁵⁵⁵

(4) Allocation and exchange rates. The value of TDRs is directly influenced by two important essentials: the allocation rate (or number of TDRs each sending area can potentially sell) and the exchange rate (the number of added units or other credits available to a developer who purchases a TDR). These rates should be carefully calibrated to make sure there are incentives for both sellers and buyers to participate. In some jurisdictions, allocation of TDRs to sending areas relies on how many units could be permitted under existing zoning; other programs allow extra TDRs (e.g., 2–5 times what zoning would allow) to provide an incentive for

⁵⁵³ The nature of the markets for the sending and receiving areas should be somewhat similar so that market values will be similar.

⁵⁵⁴ See Jeff Aken, Jeremy Eckert, Nancy Fox, and Skip Swenson, *Transfer of Development Rights (TDR) in Washington State: Overview, Benefits, and Challenges*, The Cascade Land Conservancy, March 2008.

⁵⁵⁵ *Ibid.*

landowners to sell their rights.⁵⁵⁶

(5) Transaction mechanisms. Lots of programs offer some types of forms to facilitate TDR transactions, such as providing an information clearinghouse to help link potential buyers and sellers. A nice example of this can be seen in the Long Island Pine Barrens TDR program, in Suffolk County, the New York State. In some programs, TDR banks have been created to promote private transactions and to act as the buyer or seller of last resort. Examples of such banks include the King County TDR bank and the Pinelands Development Credit Bank (New Jersey). In some cases, such as Malibu and San Luis Obispo, California, seed money has been provided to initiate a TDR bank and make initial purchases of TDR credits. In such cases, the credits are subsequently sold to developers, enabling the bank to create a revolving fund available for future TDR purchases.⁵⁵⁷

(6) Program administration. Certain staffing and administrative procedures are needed for smooth operation of a TDR program. These include outreach to landowners and developers, facilitation of transactions, recording of conservation easements, tracking of TDRs, and coordination of TDR transactions with a jurisdiction's zoning and permitting processes.⁵⁵⁸ TDR programs should also be evaluated and updated over time.

5.1.3.3 A case study of the Long Island Pine Barrens TDR program

In the United States, the TDR program of Long Island Pine Barrens is one of the successful cases. The Central Pine Barrens is a 100,000 acre area in Suffolk County, the eastern-most county on Long Island. Covering a portion of three towns - Brookhaven, Riverhead and Southampton, it consists mainly of pitch pine and pine-oak forests, coastal plain ponds, marshes and streams and is over one of the largest aquifers in New York State.

⁵⁵⁶ Ibid.

⁵⁵⁷ Ibid.

⁵⁵⁸ Ibid.

In 1980s, efforts of environmental preservation could not prevent sprawl development from continuing eastward. A number of local environmental groups pursued legal action, and one group, the Long Island Pine Barrens Society, sued the County and the three towns within the Pine Barrens. With the continuation of the conflict, developers and environmentalists alike realized that a compromise was needed to put an end both to excessive development and endless lawsuits. In 1995, the Central Pine Barrens Commission Land Use Plan⁵⁵⁹, which created a 52,500 acre Core Preservation Area and created also a 47,500 acre Compatible Growth Area, was formally adopted by the State, the County and the three towns. The preservation goals are accomplished both through direct government acquisition and through the TDR program to re-direct development from the preservation core area to the compatible growth area.

The Long Island TDR program works in conjunction with a land acquisition program targeted at purchasing about 10,000 acres⁵⁶⁰ of the 14,000 acres of land within the core area that were still undeveloped and privately held. Under the Program, environmentally sensitive lands are elected as sending areas, which are allocated transferable development rights called Pine Barrens Credits (PBCs). These rights or credits owned by property owners allow incremental development in certain chosen areas, i.e. receiving areas. Allocation formulas in sending area were established based on the size of the parcel, the zoning in effect at the time the Plan was adopted and any unique features on the parcel. The number of PBCs allocated to a particular parcel of land relies on the adopted allocation formula. Receiving areas capable of accommodating at least the estimated total number of PBCs have been determined in the Plan. Additional areas able to accommodate 2.5 times the estimated total number of PBCs which could be allocated were identified

⁵⁵⁹ In 1993, New York State's Long Island Pine Barrens Protection Act created a five member Central Pine Barrens Joint Planning and Policy Commission, an Advisory Committee, and mandated the production and implementation of the Central Pine Barrens Comprehensive Land Use Plan, adopted in June 1995.

⁵⁶⁰ See John Rather, *Open Space Plan Starts in Pine Area*, The New York Times, Published: January 19, 1997, accessed at <http://www.nytimes.com/1997/01/19/nyregion/open-space-plan-starts-in-pine-area.html?pagewanted=all&src=pm>, visiting date 2013.08.31.

by each of the three towns.

A Pine Barrens Credit Clearinghouse was established to facilitate the transfer of the development rights from the sending areas and to purchase those rights under certain circumstances from property owners who wish to sell them. The Clearinghouse is responsible for managing the Pine Barrens Credit Program by issuing, monitoring, purchasing and selling Pine Barren Credits. Five million dollars from the State Natural Resources Damages Account, which contains funds derived from a local natural resources damages settlement, served to initialize a revolving fund for purchases of PBCs by the Clearinghouse. The Clearinghouse may elect to allocate no less than 0.10 of a PBC for any parcel of land, regardless of its size or road accessibility.

There are figures showing that, since 1996 and up to 2013/01/01, 1904.839 acres, involving 806 parcels, had been protected through TDR transactions.⁵⁶¹ The total 771.12 sold credits⁵⁶² had, in fact, been used for a variety of housing types and commercial projects. As a result of total TDR value (\$34,644,662)⁵⁶³ divided by the sold credits, TDR value per credit was as high as \$44,927. Such a price was a matter of great relief to the framers of the program. The Commission is delighted with the achievement of the TDR program. A major administrative task has been keeping up communication among all the parties to the TDR transactions in each of the three towns. It is also likely that the program would work even better if transfers between towns were possible.

5.1.3.4 Conclusion

The great advantages of TDR are obvious: it uses the market mechanism to make fund to preserve working lands, environmentally sensitive areas, and other open space where further development is undesirable; it works with newly added

⁵⁶¹ See Pine Barrens Credit Clearinghouse Data, *Easement Protected Lands and Pine Barrens Credits As of January 1, 2013*, accessed at http://pb.state.ny.us/pbc/pbc_stats_wchgsinceJan.pdf, visiting date 2013.09.01.

⁵⁶² Ibid.

⁵⁶³ Ibid.

development to the community; and it runs without depriving landowners of a reasonable economic return to their property.

However, implementing TDR programs, which are administratively challenging, politically contentious, and requiring the local government to make a strong commitment to administering a potentially complicated program and educating its citizens and potential developers, cannot be oversimplified. For a TDR program to be successful, it must be combined with strong comprehensive planning, must be carefully administered, so that the exact situation of development rights on all parcels in sending and receiving areas will be clear all the time. The establishment of a development rights bank or clearinghouse is necessary to facilitate the transaction. The assessed value of real property in sending and receiving areas, the status of rights or credits in the bank, and the proceeds from the transaction must be kept track of. With efforts of multi-municipal planning, TDR programs might be more effective.

The record of some successful programs in the US suggests that TDR programs can work well and can be effective. With attention to designating sending and receiving areas, simplifying the use of the programs, and creating proper incentives for the use of TDR, there is hope that TDR will continue as an important and active tool in balancing resources conservation and development growth. And for China, much could be learnt from the extraterritorial experiences.

5.1.4 Relations between the creation of land development rights and restrictions on land rights

From the extraterritorial system of land development rights it can be seen that, as a new and burgeoning type of property rights, land development rights divided from land ownership are measures to reduce the adverse effect brought by land control and restrictions on land rights. Breaking the traditional methods of disposing of

land rights which is on the basis of land boundaries, the creation of land development rights enriches the content of land rights system, promotes the development of land rights theory, and provides solutions to the distribution of land development revenue due to the conversion of present land use type.

When exercising land rights, landowners should take public interest into account and assume obligation of tolerating public authority's action of guaranteeing public interest. Considering land resources' characters of finiteness, publicity and assuming important social functions, modern countries have adopted zoning, land control and other public administrative behaviours to restrict the free exercise of private land rights. While how to distinguish restrictive social obligations that "should be tolerated" and illegitimate interference that "should not be tolerated" shall follow relevant legal principles. If the government divides a parcel of land into construction area and non-building area based on necessity of environmental protection and public safety and other "public interest", landowners of the non-building area have to bear the obligation of tolerating the results (e.g. ban of construction) and may not exercise the right of claiming for compensation to the loss of development. The Planning Act cited herein has the constitutional effect. However, social constraints set on property rights should not be excessive, so that legislators put forward principles of proportionality and fairness and some other principles.

Land control restricts the free exercise of land rights, so, on one hand, government implementing public power to achieve public interest which limits private property rights should accord with the principle of proportionality to prevent private property rights being excessively infringed; on the other hand, some kinds of rights should be created to guarantee the liberty of private property rights and to balance the relation between private rights and social constraint. "Land development rights are created due to restrictions on land development. If there is not such restriction,

land development rights are unnecessary.”⁵⁶⁴

In the UK, at the beginning of setting development rights, they were nationalized to restrict land owners to develop and utilize the land. Anyone who would like to carry out building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land had to apply for the permission through the authority and pay development charges, from which the concept of transferable land development rights were derived. Within the planning permission, the authority transferred land development rights to private land owners, which achieved the combination of development rights and land ownership. With the continual reforms, the British system of development rights was gradually mature. The UK, through nationalization of land development rights, strengthens restrictions on the liberty of private rights and makes land use planning and control well implemented; meanwhile, through government's functions of public service, land increment can be returned to the society, which realizes the interest balance in land development and utilization.

In the United States, the establishment of transferable development rights system resulted from zoning control that leads to value variance of adjacent land parcels and severe restrictions on land use. Land development rights are allocated to land owners in sending areas where the development is undesirable, and land developers can purchase the development rights to carry out further development in receiving areas, which balances different parties' interests. There are scholars holding that land control based on police power makes rational restriction which prevents a harmful land use and is different from state taking by the power of eminent domain which is harmful to property owners.⁵⁶⁵ But in order to make up for land owners'

⁵⁶⁴ See Huang Zuhui and Wang Hui, *Land Expropriation for A Non-public Purpose and Compensation for Its Development Right*, *Economic Research (Journal)*, No.5, 2002.

⁵⁶⁵ “It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful.... From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not.” See Ernst Freund, *The Police Power: Public Policy and Constitutional Rights*, University of Chicago Press, pp.546-547. Also see Allison Dunham, *A Legal and Economic Basis for City Planning*, *Columbia Law Review*, May, Vol.58, No.5, 1958.

loss due to restrictions on land development, these land owners are allowed to access and transfer land development rights. There are also scholars putting forward that severe land control may reduce land value in a certain extent, which attacks “as an uncompensated taking”⁵⁶⁶. The creation of transferable development rights will substitute for this compensation.

In summary, many countries, on the purpose of guaranteeing public interests and through land control, set conserved areas including agricultural land and environmental sensitive areas, on which development is limited and the liberty of land property rights are restricted. To resolve the problem of interests imbalance due to land control and property restrictions, land development rights arise at the historic moment. The institution of land development rights entitlement and transfer guarantees property rights holders who are restricted by public powers to reduce or even avoid pecuniary loss. Consequently, agricultural lands, natural resources, historical structures, open spaces and environmental sensitive areas will be protected at low cost.

5.2 Land development rights and the integrated circulation of urban and rural construction land in China

Over the years, under the strict land control system in China, collectively-owned land ownership has not contained land development rights; collective land owners have the rights only to decide how to use collective land in agriculture and in rural construction; the conversion of land use type from agricultural land to non-agricultural land has to accord with the land use planning and conversion quota, and has to go through government’s examination and approval. Rural collective land owners’ rights of making self-decision on land development and utilization have been extremely depressed and there are no vigorous measures to recover

⁵⁶⁶ See John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, The Yale Law Journal, Vol.83, No.1, Nov., 1973.

farmers' losses under current Chinese rural land law system.

5.2.1 Land development rights and collective land rights in China

It is prescribed in Chinese "Property Law" that "the State maintains a socialist market economy and guarantees the equal legal status and the right to development of all the mainstays of the market."⁵⁶⁷ It signifies that land owners of collectively-owned land and state-owned land should enjoy equal legal status and same right to development. Farmers' development mainly relies on rural land under the circumstance of market economy. Entitling farmers' collective with land development rights can promote farmers taking collective land as capital to participate in market activities and to get better developed through their economic activities in land market. Thus land development rights contained in the bundle of collective land ownership are meaningful to farmers. Land development rights should be enjoyed by land owners of each piece of collective land, but they were ignored because of the previous thought of planned economy institution and severe land control. However, a right that has not been clearly defined in law shall not be presumed that it does not exist.

Under the system of urban-rural dualistic land management in China, the land control strictly limits the circulation of collectively-owned land. Collective land owners are neither entitled to convert use type of rural land according to their own will, which has to go through authority's approval, nor entitled to directly circulate collective land into the primary land market, which can only be accomplished through "expropriation first and use second". These provisions negate collective land owners' land development rights. In fact, through land control and collective land expropriation, the State forcibly seizes the development rights of collective land, which leads to the nationalization of collective land development rights and that farmers cannot rationally benefit from the development rights. Specifically, the

⁵⁶⁷ See "Property Law" art.3, par.3.

State expropriates collective land, and then assigns the right to the use of state-owned land for construction, in which process the superposition of the State's roles of administrative subject and land owner makes the State add development rights on state-owned land through land use planning and land control. Government expropriates collective land with compensation on the basis of its original purpose of use⁵⁶⁸, while collects land assignment charges at the market price when assigning the right to use state-owned land for construction. After deducting costs of government carrying out land arrangement for the preparation of land assignment and of primary land market development, the main portion contained in the difference between compensation for expropriation and land assignment charge is the land increment (i.e. the value of collective land development rights) due to the conversion of land use type. Land development rights which should be enjoyed by collective land owners are absorbed by government's administrative power, and are actually seized and exercised by the State. Therefore, it can be said that the right to the use of newly incremental state-owned land for construction derived from state-owned land ownership, in fact adding land development rights previously attributed to farmers' collective, is assigned to land users, but collective land owners themselves cannot transfer collective land development rights which are not adopted by law to land developers.

As the foregoing analysis in section 5.1.1, the ownership of land is the basis of the initial allocation of land development capacity; the significant function of constructing the system of land development rights is the reallocation of land development capacity; government's land-use planning and control are the legal form of the design of the total sum of land development capacity. There is obvious competition for the resource of collective land development capacity, which requires enduing the scarce development capacity of collective land with the nature of property rights. However, the market-oriented allocation of collective land development capacity cannot be simply realized through the transfer of land

⁵⁶⁸ See "Land Administration Law" art.47, par.1.

ownership or land use right. Thus, in order to achieve the refinement of land resources allocation and the incentive of intensive land use, the system of land development rights in China has its practical value. The creation of Chinese land development rights system is imperative, and collective land development rights should be separated from collective land ownership to become an independent and transferable type of property rights.

5.2.2 The necessity to create land development rights system in China

Generally, the reasons for the setting of entitlements can be highlighted as economic efficiency, distributional preferences, and other justice considerations.⁵⁶⁹ In China, to create land development rights system has a series of significance. It can use market mechanism, rather than absolute administrative controls to protect arable land, which will be more rational in carrying out land use planning and promoting intensive land use; it can improve the land rights system and break through the urban-rural dualistic land administration to achieve the integration of urban and rural land market; it can guarantee farmers' rights of benefitting from the land and promote the development of rural economics.

5.2.2.1 Creating a land-use mechanism based on rights operation to protect arable land and other land resources.

For individuals, chasing maximum economic benefits from land-use is land rights holders' goal; while for the society, to rationally allocate land resources, to promote efficiency and fairness in land use, and to guarantee social public interests are the targets. Conflicts due to the pursuit of personal interests and social objectives in land use are inevitable. With regard to the use of rural collective land in current China, agricultural earnings are far below the non-agricultural land revenues. The non-agricultural conversion of collective land driven by economic benefits is the

⁵⁶⁹ See Guido Calabresi, *The Cost of Accidents*, 1970, pp24-33, cited from Guido Calabresi and Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, Harvard Law Review, vol. 85, 1972.

spontaneous trend, so that there should be reasonable measures to coordinate individual interests and social aims in the use of rural collective land to achieve the basic national policy of “rational use of land and protection of cultivated land in real earnest”.

At present, the conversion of farmland to non-agricultural land is under the direct governmental intervention and peremptory administrative management through total quantity control and quota control on construction land. “The supply of construction land entirely conforming to plan that is made on the basis of the size of population, food security, the protection of ecological environment and other requirements can strictly control the quantity of farmland, especially the arable land that is more and more scarce. But, laying the issue of the rationality of quotas allocation aside for the moment, under the circumstance of imperfect administration system and the inadequate constraint of current law to local governments’ behaviors, the rigid methods of quotas allocation may not achieve the goal of farmland protection. The means of construction land supply and land use control under the aforesaid restrictive quotas distort the price of land and lead to the excessive demand of construction land. Stimulated by high demand of construction land and high land price, local governments have irresistible impulses of land assignment with charge, which, on the contrary results in the great loss of farmland.”⁵⁷⁰ From the year 1997 to 2011, the area of cultivated land in China had decreased by 8.2 million hectares.⁵⁷¹ Land use control based on the operation of public authority ignores the regulatory role of private law to collectively-owned land rights. The free exercise of collective land rights which has been repressed for long, under incentives, is easily to run against the control of public authority, so that the sole land control measure cannot effectively regulate the efficient use of land.

⁵⁷⁰ See Tan Rong and Qu Futian, *The Non-agricultural Conversion of Farmland and Farmland Protection: From Dilemma to Win*, Management Word (Journal), No.12, 2006.

⁵⁷¹ According to NPC Agriculture and Rural Affairs Committee under the National People’s Congress of PRC, the area of cultivated land in China had decreased from 1949 million mu (130 million hectares) in 1997 to 1826 million mu (121.8 million hectares) in 2011 with the difference of 123 million mu (8.2 million hectares). (mu, a unit of area, 1 mu=0.0667 hectares) At http://news.xinhuanet.com/politics/2011-02/24/c_121119918.htm, visiting date 2013.09.03.

The transferable development rights system in the US is a flexible market-based tool cooperated with land control. Landowners can, according to their own free will, transfer land development rights to achieve land development gains without changing the current status of land utilization. The authority will promote the transfer of land development rights and collect taxes in the process of development rights transfer, which fully guarantees the operation of market mechanism and private rights' functions in the foresaid process and development, and effectively protects work lands and environmentally sensitive areas. Through the entire process, "what the authority intervenes in is the design of rights and institution structures, rather than bargains with certain land development planners. Various interest groups bargains mainly in the process of the initial configuration of development rights. After the initial configuration of rights, rights and obligations of land development will be allocated and adjusted following the rules of market economy."⁵⁷²

In China, due to the urban-rural dualistic household registration system, farmers which are fettered on cultivated land and other rural land that are prohibited to be converted into non-agricultural land in accordance with land use planning can only maintain the agricultural land use unchanged. If collective land development rights are created, farmers can transfer development rights of the agricultural land to other developable collective construction land or adjacent urban state-owned construction land. The earnings from development rights transfer can allow farmers, who are engaged in agricultural production, obtain property income besides gains from agricultural production, which better ease those farmers comparing with agricultural subsidies from government. As for the collective agricultural land which can be converted into non-agricultural land pursuant to land use planning and relevant authority's approval, farmers' collective may choose to continue with agricultural production without changing the current land use and obtain expectation interest through land development rights transfer, or choose to convert land-use type under the planning and approval to develop the land and even to

⁵⁷² See Sun Hong, *Research on Land Development Rights in China: The New Perspective of Land Development and Resource Protection*, China Renmin University Press, 2004, p93.

increase the intensity of land use through purchase of development rights from other sending areas. This rights operation mechanism, in which the authority creates land development rights based on land use planning and land control, and driven by market profits, collective land development rights are transferred, enable farmers' collective to adjust land-use purpose according to land use planning and proceeds derived from the transfer of collective land development rights. Collective land development rights system provides measures to enrich property rights system, to promote flexible administrative land management and market mechanism to work simultaneously, and can effectively protect arable land and other land resources on the basis of preserving farmers' land rights.

5.2.2.2 Rationally allocating collectively-owned land rights and effectively connecting rural collective land rights and urban state-owned land rights

From the economic point of view, the use of land demands rational allocation of land resources; from the legal perspective, the allocation of land rights is closely related to land use, and different situations of land rights allocation directly influence the fairness and efficiency of land use. In the process of land use, landowners, land users or developers, administrative authorities are involved. Different interest groups have various interest appeals, while the achievement and satisfaction of various interest appeals can only be accomplished through different allocation of land rights or powers. It should be considered of how to entitle each subject with land rights, and to clarify the attribution of each party's interest.

In China, the current setting of collective land rights system cannot completely satisfy all kinds of interest appeals to collectively-owned land. The collective land rights system, which takes collective land ownership as the core and includes the right to the use of collective land for construction, the right to agricultural land contractual management, easement, and security interest in property, is seemingly complete, but comparing with the state-owned land rights system, collective land rights boundaries are ambiguous and the system is fragmentary, due to the lack of

development rights.

(1) Collective land is owned by farmers' collective, but because of the lack of development rights, farmers' collective cannot make self-determination on the alteration of land-use type, so that agricultural land cannot be optionally used for construction.

(2) Through lawful approval, collective construction land can be used to build township or town enterprises, houses for villagers, and public utilities or public welfare undertakings of a township (town) or village. The right to the use of collective construction land cannot be traded in market, cannot be used for real estate development. Because of the vacancy of development rights, the scope of collective construction land rights is smaller than that of state-owned construction land.

(3) The lack of land development rights makes the rights bundle of collective land ownership incomplete and the right to benefit from the land severely restricted, which prevents farmers obtaining property income from collective land.

(4) Because development rights are not contained in the bundle of collective land rights and collectively-owned land rights are differentially treated, the right to use collective land for construction and the right to use state-owned land for construction cannot be equally exercised in combination, and the integrated urban-rural construction land market is not able to form. "The essence of the marketization of construction land is in the commercialization of rural land, of course, which means the recognition of farmers' land development rights; the integration of urban-rural construction land also means that rural and urban construction land use rights are equal in the nature and functions of the rights. Therefore, the recognition of commercial development rights of farmers' collective land is the prerequisite to assign and circulate rural construction land use right and

to combine urban and rural construction land use right.”⁵⁷³

It emerged that, in China, the exercise of collective land rights has been severely restricted by law and national policies, and the current types of land rights cannot cover and regulate all beneficial relations in land use. Therefore, land development rights that adjust the allocation of land resources and the distribution of land revenue need to be created and to be accepted in the bundle of collective land rights, which can overcome the shortcomings in the operation of collective land rights and promote the efficient circulation and rational use of collective land.

5.2.2.3 To promote reasonable distribution of construction land revenue

Public choice theory models government as made up of officials that, besides pursuing the public interest, might act to benefit themselves.⁵⁷⁴ In China, the institution of land expropriation objectively stimulates local governments and relevant interest groups to make rent-seeking behaviors, which, in the name of “public interest”, “brings some non-public interest projects using land for business operations into the scope of public interest, infringes farmers’ land property rights, and deprives farmers of land development rights.”⁵⁷⁵

According to “Land Administration Law”, land that is expropriated shall be compensated for on the basis of its original purpose of use, but the design of compensation according to multiple times the average annual output value which is calculated on the basis of three years preceding such expropriation⁵⁷⁶ neglects

⁵⁷³ See Gao Fuping, *Study on the Reform of Rural Construction Land System*, Journal of Shanghai University of Finance and Economics, vol.12, No.2, Apr. 2010.

⁵⁷⁴ By assuming that voters, politicians and bureaucrats are mainly self-interested, public choice uses economic tools to deal with the traditional problems of political science. Its findings revolve around the effects of voter ignorance, agenda control and the incentives facing bureaucrats in sacrificing the public interest to special interests. The design of improved governmental methods based on the positive information about how governments actually function has been an important part of public choice. Constitutional reforms advocated variously by public choice thinkers include direct voting, proportional representation, bicameral legislatures, reinforced majorities, competition between government departments, and contracting out government activities. See Gordon Tullock, *Public Choice*, The New Palgrave Dictionary of Economics, Second Edition. Eds. Steven N. Durlauf and Lawrence E. Blume. Palgrave Macmillan, 2008.

⁵⁷⁵ See Li Changjian, Jiang Shiyuan and Chen Zhike, *An Analysis of the Problem of Land Requisition System Based on the View of Law and Economics*, Journal of Taiyuan University, Vol.10, No.1, 2009.

⁵⁷⁶ See “Land Administration Law” art.47.

farmers' interests of collective land development rights. Through expropriation and assignment, the State obtains land increment due to the change of land-use type and land transaction, but as for farmers and their collectives assuming social responsibility to give up their land rights, they cannot at the same time share the land increment. If collective land development rights are created, whether on the condition of collective land expropriation, or collective construction land circulation in market, or agricultural land conservation, farmers' collective can obtain more appropriate profits distribution.

(1) If the compensation for collective land expropriation includes the value of original land use and the increment from land development rights, it will have the same value composition with the fair market price of the circulated land rights.

(2) If the collective land directly circulates in construction land market or farmers independently carry out commercial development of collective land, the revenue will include proceeds of land development rights and farmers' collective can obtain land increment.

(3) Farmers conserving agricultural land can transfer land development rights to gain development rights revenue, so farmers can share the achievement of economic development in developable areas, which completely guarantees the collective land rights.

In summary, the creation of collective land development rights can complete the bundle of collective land rights, can make up for farmers' loss due to the over-constrained collective land rights; it will also dispel the great inequitable value variance between agricultural and non-agricultural land which derives from strict land control and land use planning, and will be conducive to realize the sustainable economic and social development under the conditions that maintain it in harmony to develop economy and to conserve natural resources and ecological environment.

Meanwhile, the implementation of land development rights transfer will inevitably reallocate land rights among farmers, local governments and developers and demand the clear definition of proprietary interests, so creating land development rights will be helpful in improving the mechanism of land rights allocation and land interests' distribution and the perfection of property legislation in China.⁵⁷⁷ Therefore, it is necessary to create the system of land development rights in China.

5.2.3 The feasibility to create land development rights system in China

5.2.3.1 Chinese land rights system shall be open and extensible

With social and economic development, new types of rights will come out. Rights system is open and extensible, which can always accept new types of rights. In the United States and under the zoning control, transferable development rights are extracted from land property rights bundle and become a new and independent type of land rights, which enriches land rights system. The property rights in civil law system are relatively sophisticated, which set up various rights forms. With regard to the principle of statutory jus in rem⁵⁷⁸, the German scholar Ludwig Raiser thinks that the German Civil Code adopting the principle of statutory jus in rem does not mean to rigidify property rights into the existing pattern and to limit any development of the rights, but intends to strictly limit the scope of parties' autonomy in private rights (Pateiautonomie) through setting the types of property rights to prevent the parties from creating new legal relationship through agreement which has the effect against a third-party (Drittwirkung); while, it does not preclude, when necessary, by means of supplementary legislation (im Wege ergänzender Gesetzgebung) or judicial lawmaking (im Wege ichtedicher Rechtsfortbildung), to

⁵⁷⁷ See Ding Chengri, *The Transferable Development Rights in the USA and Its Implications to Cultivated Land Conservation in China*, China Land Science, Vol.22, No.3, 2008.

⁵⁷⁸ The principle of statutory jus in rem determines the essential nature and characteristics of law on jus in rem. It also strictly limits the parties' freedom of intention in creating new jus in rem or modifying the content of existing jus in rem. The connotations of the principle of statutory jus in rem mean that the categories, content, effects and means of public notice of jus in rem are designated by law and in principle cannot be stipulated by normative documents outside law. Nor are the parties concerned allowed to create categories of jus in rem and establish the contents, effects and means of public notice for jus in rem. See Wang Liming, *The Principle of Statutory Jus in Rem*, Journal of Northern Legal Science, No.1, 2007.

create new types of property rights.⁵⁷⁹ Law should keep pace with social development. If some of the contemporary property rights are not supported by traditional theory of civil rights, it can only be said that the traditional theory should be further developed and improved rather than exclude the new forms of property rights from the property rights system.

There are some basic conditions to develop land rights in China: the overall design of land rights should accord with the fundamental requirements of establishing market economy system; the creation of new types of land rights cannot violate the legal principles which have been accepted by Constitution and legal practice departments; land rights system must be in line with national conditions; land rights should closely connect with the immovable property system in the “Property Law”.⁵⁸⁰ Land development rights aim at promoting land use in spatial dimension, and meanwhile the exercise of land use right is mainly focused on a land scale in planar dimension. After the creation of collective land development rights, rights holders shall be able to self-determine how to dispose of the rights under land use planning.

5.2.3.2 Pilot reforms on collective land in local Chinese reformational regions provide favourable conditions to create land development rights

The value variance between commercial land and farmland is an objective phenomenon in land economics and seeking for higher profit is the guideline of land circulation, so it has practical significance to combine market mechanisms with governmental land control to administrate land use. Establishing urban-rural integrated land market is the inevitable requirement of developing market economy. Land reforms which keep promoting the market-oriented circulation of rural collective land as the central task have been discreetly carried out in some of Chinese provinces. Although in the pilot regions collective construction land is still forbidden for commodity housing development and cannot be absolutely circulated

⁵⁷⁹ See Ludwig Raiser, *Dingliche Anwartschaften*, J.C.B. Mohr Tübingen, 1961.

⁵⁸⁰ See Sun Xianzhong, *On Property Law*, Beijing, Law Press, 2008, p.368.

as the expression that “the same land-use type with equal rights” for the collectively-owned and state-owned construction land, the Communist Party of China, which is in power, and the State Council, which is the Chinese central government, have been cognizant of the defects in the current structure of collective land rights and the necessity of gradually abandoning the series of outdated institutions “competing for profits with the people”.⁵⁸¹ Farmers shall obtain collective land development proceeds deserved to them, and on the long and tough way of reform, the exploration should be ceaseless.

In an urban-rural integrated land market, both construction land use right and development rights should be able to circulate. For example, in the “Securitized Land Exchange”⁵⁸², a pilot reform implemented in Chongqing municipality directly under the Central Government, the quota of construction land can be circulated in the Exchange, which demonstrates the feasibility of the market-oriented circulation of land development rights. This market-oriented allocation of land development rights eases the rigid land control and land use planning, which can also achieve the fairness and efficiency of land development and utilization under the total sum control of construction land.

5.2.3.3 Overseas models of land development rights operation afford useful experiences and references for China

Overseas models of land development rights operation show that the mechanism of land development rights transfer which is in keeping with the actual conditions can effectively overcome lots of the shortcomings associated with land control, can help

⁵⁸¹ Such as the Decision of the CCCPC on Some Major Issues Concerning Comprehensively Deepening Reforms (adopted at the close of the Third Plenary Session of the 18th CPC Central Committee on November 12th, 2013), No.11 “to establish an integrated construction land market for both urban and rural areas”; Circular of the State Council on Intensifying the Land Control (2006); Measures for the Administration of the Trial Work of Linking the Increase in Land Used for Urban Construction with the Decrease in Land Used for Rural Construction (issued by Ministry of Land and Resources, 2008)

⁵⁸² “Securitized Land” in Chongqing municipality directly under the Central Government refers to the quota certificate of incremental construction land with equivalent area of cultivated land that is achieved through reclaiming and arranging the idle rural collective construction land including rural residential house sites, land for building township enterprises and land for building public utilities or public welfare undertakings of a township (town) or village, which is checked and issued by the department of land and resources under the municipal government. This reform model will be specifically introduced hereinafter.

interested parties whose land rights are restricted to achieve further development, and can conserve land resources and the vulnerable environment.

For example, some American survey data show that during the year 2000-2012, 141,392 acres of Rural and Resource lands had been protected in King County's TDR programs⁵⁸³; during 1983-2011, 52,052 acres of farmland had been preserved through TDR programs in Montgomery County⁵⁸⁴, and a total of \$115 Million had been involved in the "wealth transfer" of private sector investment⁵⁸⁵. According to Rick Pruetz and Noah Standridge's research, there are common factors in successful TDR programs⁵⁸⁶: (1) demand for bonus development; (2) receiving areas customized to the community; (3) strict sending-area development regulations; (4) few or no alternatives to TDR for achieving additional development; (5) market incentives: transfer ratios and conversion factors; (6) ensuring that developers will be able to use TDR; (7) strong public support for preservation; (8) simplicity; (9) TDR promotion and facilitation; (10) a TDR bank. Contrarily, there are also significant obstacles that appear to have limited TDR implementation⁵⁸⁷: (1) inadequate receiving areas; (2) lack of infrastructure and amenities to support increased density; (3) insufficient demand for development/density; (4) weak financial equation for buyers and/or sellers; (5) lack of program leadership and transaction support.

Overseas experiences can provide materials of empirical study for Chinese reform. The creation of transferable land development rights system in China can make up for collective land rights holders' loss due to restrictions on collective land and the

⁵⁸³ At

<http://www.kingcounty.gov/environment/stewardship/sustainable-building/transfer-development-rights/overview.aspx>, visiting date 2013.09.05.

⁵⁸⁴ See Montgomery County Farmland Preservation Certification Report FY1980 - FY2012, at http://www6.montgomerycountymd.gov/content/ded/ag/services/pdf/agpreservation/fy2012_prereportpdf.pdf, visiting date 2013.09.05.

⁵⁸⁵ Ibid.

⁵⁸⁶ See According to Rick Pruetz and Noah Standridge, *What Makes Transfer of Development Rights Work?* Journal of the American Planning Association, Vol.75, No.1, Winter 2009.

⁵⁸⁷ See Jeff Aken, Jeremy Eckert, Nancy Fox, and Skip Swenson, *Transfer of Development Rights (TDR) in Washington State: Overview, Benefits, and Challenges*, The Cascade Land Conservancy, March 2008, at http://www.forterra.org/files/resources/TDR_in_WA_State_1.pdf, visiting date 2013.09.05.

disability in land circulation, which will promote the supply and demand relation of land development from the balance of land control to return to market equilibrium. It has numerous advantages and has a broad scope in application and great prospects to be practiced, which has been proved by current situations of overseas land development rights operation.

5.3 The practical exploration of creating collective land development rights in China

5.3.1 The institutional background of creating land development rights in China

During the period of the 11th “Five-Year Guideline of the People’s Republic of China”⁵⁸⁸ (2006~2010), the demand for construction land each year was more than 12 million mu (approximately 800,400 hectares), but according to the overall land use planning (Outline of the National Overall Planning on Land Use, 2006~2020, made by the State Council), the quota of annual incremental construction land was only 6 million mu (400,200 hectares) with shortage by 50%.⁵⁸⁹ During the period of 12th “Five-Year Guideline” (2011~2015), the imbalance between supply and demand of construction land in china has been increasing.

In China, to manage the quota of incremental construction land within the overall land use planning is operated in the system of “gross amount control, allocation in a

⁵⁸⁸ The Five-Year Plans of People’s Republic of China are a series of social and economic development initiatives. The economy was shaped by the Communist Party of China (CPC) through the plenary sessions of the Central Committee and national congresses. The party plays a leading role in establishing the foundations and principles of Chinese socialism, mapping strategies for economic development, setting growth targets, and launching reforms. Planning is a key characteristic of centralized, socialist economies, and one plan established for the entire country normally contains detailed economic development guidelines for all its regions. In order to more accurately reflect China’s transition from a Soviet-style planned economy to a socialist market economy (socialism with Chinese characteristics), the name of the 11th five-year program was changed to “guideline” instead of “plan”.

⁵⁸⁹ See Ruan Yulin, *Xu Shaoshi: The Imbalance between Supply and Demand of Construction Land in China Will Increase* (Xu Shaoshi was the former minister of Chinese Ministry of Land and Resources), Chinanews, 2010/12/07, at <http://www.chinanews.com/estate/2010/12-07/2706715.shtml>, visiting date 2013.09.06.

unified way, divided at each administrative level, directive administration”⁵⁹⁰, i.e.: through working out the overall plan for land utilization, the Central Government determines the quota of gross amount of newly increased construction land nationwide in the planning period, and meanwhile determines the allocation of incremental construction land quota for each province, autonomous region and municipality directly under the Central Government in the planning period; from the Central Government to town, the quota will be divided by governments at each administrative level.⁵⁹¹ With regard to the quota of incremental urban construction land without the overall land use planning, it can be achieved by arranging and reclaiming the idle rural collective construction land into cultivated land, through which method the incremental urban construction land will not occupy the quota allocated by the government at the next higher level.⁵⁹² Through quota management, the control of construction land and the protection of agricultural land can be well implemented.

Land use control is the fundamental institutional guarantee to achieve the dynamic equilibrium of the total cultivated land area. According to Chinese “Land Administration Law”, the overall plan for land use at a lower level shall be drawn up on the basis of such a plan drawn up at the next higher level; the total area of land for construction in the overall plan for land use drawn up by local people’s governments at different levels shall not exceed the control norm set in such a plan by the people’s government at the next higher level and the area of cultivated land reserved shall not be smaller than the control norm set in the overall plan of the people’s government at the next higher level.⁵⁹³ In the overall plans for land use at the township (town) level, land shall be zoned and the purposes of use of each plot

⁵⁹⁰ See Jin Xiangmu and Shen Zilong, *The Cap and Trade Model of Incremental Construction Land Quota: An Analog with the Emission Permits System*, Journal of China Population, Resources and Environment, Vol.20, No.7, 2010.

⁵⁹¹ Chinese governments in 5 levels: State Council (Central Government), governments at the provincial level, at the municipal level, at the county level and at the town level.

⁵⁹² See “Measures for the Administration of the Trial Work of Linking the Increase in Land Used for Urban Construction with the Decrease in Land Used for Rural Construction” (No. 138 [2008] of the Ministry of Land and Resources) art.6.

⁵⁹³ See “Land Administration Law” art.18.

shall be defined in light of the condition of the land to be used.⁵⁹⁴

Within the annual land use planning, where land for agriculture is to be used for construction purposes, the formalities of examination and approval shall be gone through for the conversion of use. The “Land Administration Law” provides for that the principle of “reclaiming the same area of land as is used” shall be applied to any unit that, with approval, uses cultivated land for construction of non-agricultural projects, that is, the unit shall be responsible for reclaiming the same area and quality of the cultivated land it uses.⁵⁹⁵ Meanwhile, the State applies the system of protecting the basic farmland.⁵⁹⁶ Pursuant to “Regulations on the Protection of Basic Farmland”, the basic farmland delimited by the provinces, autonomous regions and municipalities directly under the Central Government should account for more than 80% of the total area of cultivated land within their respective administrative areas; no unit or individual shall change or occupy the basic farmland protection zone upon delimitation according to law; in the event of inability to move away from basic farmland protection zones in site selection for such major construction projects as state energy, communications, water conservancy and military installations that require occupation of basic farmland involving conversion of agricultural land into non-agricultural land or land expropriation, it must be subject to the approval of the State Council.⁵⁹⁷

Therefore, in order to achieve sufficient quota of construction land for regional economic development and protect cultivated land at the same time, local governments need to make up new cultivated land through the arrangement and

⁵⁹⁴ See “Land Administration Law” art.20.

⁵⁹⁵ See “Land Administration Law” art.31.

⁵⁹⁶ Cultivated land of the following categories are included in the protected basic farmland in accordance with the overall land use planning and are placed under strict control: (1) cultivated land within bases of grain, cotton and oil crops production, which are designated as such with the approval of the departments concerned under the State Council or of the people’s governments at or above the county level; (2) cultivated land with good irrigation and water and soil conservation facilities as well as medium- and low-yield fields that are under improvement according to plan or that can be improved; (3) vegetable production bases; (4) pilot fields for scientific research or teaching of agriculture; and (5) other cultivated land that should be included in the protected basic farmland according to regulations of the State Council. See “Land Administration Law” art.34.

⁵⁹⁷ See “Regulations on the Protection of Basic Farmland” (promulgated by the State Council of the People’s Republic of China on December 27, 1998) art.9, 15.

reclamation of non-agricultural land, and then achieve the quota of incremental urban construction land without the annual land use planning. In some pilot regions, through the transfer of construction land quota, orderly development and utilization of incremental construction land takes place, which, to a certain extent, resolves the conflict between protecting cultivated land and satisfying the demand of land for construction and development. Some of the reforms are logically similar to the operation of transferable development rights.

5.3.2 A typical reform model of land development rights – “Securitized Land Exchange” in Chongqing

In 2007, the State Council approved to establish a pilot comprehensive reform area for coordinating urban-rural development in Chongqing municipality directly under the Central Government (at the provincial administrative level). In accordance with “Measures for the Administration of the Trial Work of Linking the Increase in Land Used for Urban Construction with the Decrease in Land Used for Rural Construction” (No. 138 [2008] of the Ministry of Land and Resources), on Nov. 17th, 2008, the people’s government of Chongqing municipality enacted “Interim Measures for the Administration of the Rural Land Exchange in Chongqing Municipality” (hereinafter “Interim Measures”), and on Dec. 4th, 2008, the Rural Land Exchange was established, in which securitized land is traded⁵⁹⁸. Pursuant to the “Interim Measures”, “securitized land” essentially is the quota certificate linking the increase in land used for urban construction with the decrease in land used for rural construction, and “securitized land exchange” means the transaction of the quota certificate. The system of Securitized Land Exchange in Chongqing is the leading reformational tool of exploring how to improve the system of rural land administration under the national strategy that coordinating urban and rural

⁵⁹⁸ According to “Interim Measures for the Administration of the Rural Land Exchange in Chongqing Municipality” art.4, transactions in the Rural Land Exchange involve varieties of barter transaction which includes the transaction of the right to the use of rural collectively-owned land and the right to agricultural land contractual management and the transaction of the quota of increase in land used for urban construction linked with the decrease in land used for rural construction.

development.

5.3.2.1 The main procedure in “Securitized Land Exchange”

(1) Reclamation. According to collective land rights holders’ application, the professional reclamation organ established by the government arranges and reclaims the idle rural collective construction land⁵⁹⁹, which includes rural residential house sites⁶⁰⁰, land for building township enterprises and land for building public utilities or public welfare undertakings of a township (town) or village, to make the foresaid land into cultivated land⁶⁰¹.

(2) Check and acceptance. The land and resources department of Chongqing municipality directly under the Central Government shall grant quota certificate of construction land with equivalent area of the reclaimed arable land, which has been checked and qualified by local land administration department at the county level, to rural collective economic organizations who are the collective land owners or individual farmers who are the holders of the rights to use collective land.

(3) Transaction. The securitized land (i.e. the quota certificate) should be traded in Rural Land Exchange of Chongqing municipality. All legal persons and natural persons with full capacity for civil conduct can bid for the quota certificate. On the basis of overall considering expenses on land reclamation, payment for the use of newly incremental urban construction land and other factors, the Government of Chongqing municipality sets integrated benchmark price of the quota certificate linking urban and rural construction land in Chongqing as transaction parties’

⁵⁹⁹ In the last decade, the growth of urbanization in China was rapid. During 2002~2013, the average annual growth of urbanization rate had been 1.33 percent, and the average annual growth of urban populations had been 20.817 million persons. In 2013, the proportion of urban residence was 53.73%, increased over the year 2002 by 14.64%; the urban populations were 731.11 million persons, increased over the year 2002 by 228.99 million persons; the rural populations were 629.61 million persons, decreased over the year 2002 by 152.80 million persons. (See China Statistical Yearbook 2014, 2-1 Population and Its Composition, compiled by National Bureau of Statistics of China.) Thousands of persons has left rural areas to cities to work and live, resulting in a large number of idle rural collective construction land.

⁶⁰⁰ Each farmer household can gratuitously obtain the right to use a piece of residential house site from the rural collective organization pursuant to law. Generally, each piece of residential house site occupies a larger area of collective land and the sites are scattered, which are non-intensively used.

⁶⁰¹ “Interim Measures” art.18.

reference.⁶⁰² The Government will regulate and control the amount of the quota certificate transaction, and the quantity of annual quota certificate transaction should be reasonably determined according to the annual land use plan, the scale of quota turnover and the demand for commercial use of land in Chongqing.⁶⁰³

(4) The use of the quota certificate. Under the framework of current Land Administration Law, all units and individuals that need land for construction purposes shall apply for the use of state-owned land with the exception in three conditions that collectively-owned land can be used for construction. Generally, the government may convert collective agricultural land with equivalent area of the total amount of the quota into collective construction land within the scope of urban planning area and in accord with the land use planning, and then the government can expropriate the converted land. Those private land users who purchase the quota certificate should combine the quota with specific parcels of land to obtain the right to use certain incremental urban construction land with equivalent area of the purchased quota certificate. If a land user obtains the right to the use of state-owned construction land through bid invitation, or auction, or quotation, his quota certificate may offset the portion of the payment for the use of incremental state-owned construction land and for land reclamation in the land assignment fee.⁶⁰⁴ The land reserve organ of the Chongqing government can also purchase quota certificate in Rural Land Exchange and use the quota certificate to reserve the expropriated and converted collective construction land.

5.3.2.2 The legal nexus in “Securitized Land Exchange”

(1) The subjects

Designed by “Interim Measures”, the subjects in “Securitized Land Exchange” include the concerned departments of the government, rural collective economic organizations, rural collective land users and purchasers of the quota certificate.

⁶⁰² “Interim Measures” art.25.

⁶⁰³ “Interim Measures” art.26.

⁶⁰⁴ “Interim Measures” art.27 (2).

Land administration departments at the county level are responsible to the implementation of annual land arrangement and reclamation program in their administrative regions, undertake demonstration, reporting, surveying and mapping, construction contract awarding, construction quality supervision, and managing database and files in land arrangement and reclamation programs, check the quality of reclaimed land, and issue certificates of the quota linking the increase in urban construction land with the decrease in rural construction land. Rural collective economic organization represents all peasant members in the collective to exercise the ownership of collective land. If the rural collective economic organization, or collective construction land users would like to apply for reclamation of the collective construction land, it shall be approved by at least 2/3 members of the villagers' conference (or 2/3 representatives of the villagers) of the collective economic organization.⁶⁰⁵ Peasant households who apply the reclamation of rural residential house sites should have other stable residences and stable jobs and income.⁶⁰⁶ In Rural Land Exchange, through transaction, all legal persons and natural persons with full capacity for civil conduct can purchase and then hold the quota certificate.

(2) The objects

According to the provision in “Interim Measures”, “securitized land exchange” means the transaction of the quota certificate linking the increase in urban construction land with the decrease in rural construction land. From a legal perspective, “quota” is a kind of authorized regulation by policy, which means that, if someone holds some kind of quota, he is eligible and has the right to do some kind of action. Pursuant to “Interim Measures”, the principal function of the quota certificate is to increase the equivalent area of urban construction land in incremental construction land planning, i.e. the qualification and right to increase urban construction land.⁶⁰⁷ However, purchaser holding the quota certificate does

⁶⁰⁵ “Interim Measures” art.21.

⁶⁰⁶ “Interim Measures” art.21.

⁶⁰⁷ “Interim Measures” art.27 (1).

not mean he has the right to use a specific piece of state-owned urban construction land. According to the current Chinese law, the increase in urban construction land must comply with the land use planning, and under the prerequisite of going through the approval, local government may expropriate the collective land within urban planning area and then assign the right to use incremental urban construction land.

(3) The right-obligation relationship

With regard to those collective economic organizations and previous users of collective construction land who obtain the quota certificates through land reclamation, their rights are in transfer of the quota certificates and they may gain the consideration of the quota certificates. Through market mechanism, the market price of the scarce quota certificate can be returned to the rural area that is far away from the urban area, which may support the rural development.⁶⁰⁸

As for the transferee of quota certificate, after achieving the quota certificate in Rural Land Exchange, he can put forward the proposal of expropriating the specific piece of collective land in line with the land use planning and urban planning to the government, rather than waits for the government assigning the right to use some appropriate piece of state-owned land for construction, which, comparing with the previous land supply model, provides more free space for land user to independently select the site of land to utilize. However, holding the quota certificate does not mean that the transferee can enjoy privilege in the market of state-owned construction land and has priority over other land demanders without such certificate in bidding for the right to use incremental urban construction land.

⁶⁰⁸ According to “Guiding Opinions of the Land and Resources Department under the People’s Government of Chongqing Municipality Directly under Central Government on Regulating the Use of the Remuneration of Land Quota Certificate and Promoting the Reclamation of Rural Collective Construction Land” (2010), the incremental benefit of land quota certificate refers to the remuneration after the transaction price of the quota certificate deducting the cost of reclaiming rural collective construction land. The incremental revenue from the reclamation of rural residential house sites should be all used to subsidize the farmers who are the previous users of the residential house sites. The incremental revenue from the reclamation of collective land for building township enterprises and for building public utilities or public welfare undertakings of a township (town) or village should be transferred into the special quota certificate account and be used by rural collective economic organizations mainly for farmers’ social security and rural development.

Such an institutional arrangement will lead to two kinds of results: (a) if the transferee of quota certificate successfully wins the bid for the selected land, the price of the quota certificate will be reckoned in the land assignment price to offset the portion of the payment for the use of incremental urban construction land and for land reclamation; (b) while, if the transferee loses the bid, he can request the return of the cost for the quota certificate but bears the loss of the interest, or can use the quota certificate to bid for other piece of construction land.

Because the Rural Land Exchange in Chongqing municipality directly under the Central Government provides an open market platform for transaction of securitized land, and quota certificate is transferrable right with market value, the holder of quota certificate can mortgage it to make financing after going through mortgage registration formalities.

5.3.2.3 The innovation and main problems in “Securitized Land Exchange” system

(1) The innovation

“Securitized Land Exchange” is a type of trading asset securitization which takes the quota certificate of construction land as the object, and is a tool to explore the establishment of integrated urban and rural construction land market within the current land system in China. In order to meet the demand of urban construction land for economic development and protect agricultural land, through the method of land reclamation, issuing and trading construction land quota certificate, the government of Chongqing municipality transfers collective land development rights from the reclaimed area which is far away from the urban area to urban planning area where the land has huge commercial value, which on one hand can ease the tension on the supply of urban construction land, on the other hand will make farmers share great land incremental revenue due to the industrialization and urbanization.⁶⁰⁹ Meanwhile, those who hold quota certificates can mortgage it to

⁶⁰⁹ According to report, up to Dec. 2013, 122,400 mu (8,164.08 hectares) of collective land was involved in the securitized land exchange and the trading volume was approximately 24.53 billion Yuan (RMB), in which, the quota certificate of 76800 mu (5,122.56 hectares) of the securitized land was combined with urban construction land, and the quota certificate of 3,859 mu (257.34 hectares) of the securitized land was used to loan totally

make financing, which activates the factor market in rural areas and is conducive for farmers to utilize financial capital to develop.⁶¹⁰ “Securitized Land Exchange” system uses market mechanisms to inspire the reform of rural land rights and the appreciation of land values, which will profoundly influence the land-use system in China.

(2) The main problems

(a) The quality of cultivated land achieved through reclamation need guarantee.

With regard to the reclamation, the local governments at county level have three identities: the payer of the cost at reclamation, the party in charge of the check and approval of the reclamation, and the beneficiary of the quota from the reclamation. The relation between the future use of the reclaimed land and the interest of local government is neither direct nor close, so what the local government consider more is likely the obtain of the quota of incremental construction land. If the government and the unit indeed implementing reclamation conspire to save costs but ignore the quality and quantity of the land reclamation, it inevitably infringes the interests of farmers who will use the reclaimed arable land in future. Therefore, in order to get off this dilemma, when designing the process of check and approval, based on the quality of reclamation, a mechanism of restraint among the parties whose interests are in conflict should be established, which can be that, the farmer who will use the reclaimed land in future should join in the process that the check and approval require both technical standard and relevant farmer’s consent.

(b) “Securitized Land Exchange”, the new reformational exploration in China, is still far from perfection, and from many aspects, the system seems not with entire market attributes of land development rights transfer. In order to obtain sufficient

about 522 million Yuan. The proportion of urban and rural construction land adjusted from 0.33:1 in 2007 to 0.43:1 in 2013. Securitized land exchange helped to achieve the property income of more than 20 billion Yuan in the rural area. Because almost 70 percent quota certificate was generated in the southeast and northeast of Chongqing administrative region, where the economy is comparatively lagging behind, the exchange promoted the coordinating development in Chongqing Region. At <http://www.ccle.cn/xwzx/xwsd/bsdt/html-1747/9509.html>. Visiting date 2014.12.13.

⁶¹⁰ Since the startup of securitized land exchange, the assessment of rural house in Chongqing Region raised from several thousand Yuan to more than 100,000 Yuan, which indeed endowed rural land with the function of mortgage and finance. At <http://www.ccle.cn/xwzx/xwsd/bsdt/html-1747/9509.html>. Visiting date 2014.12.13.

quota of incremental urban construction land, the government are more willing to actively promote land reclamation and quota certificate issuance, which sometimes is contrary to individual farmer's will. Essentially, the combination of quota certificates and specific plots is completed through administrative procedures, in which the government still achieves incremental urban construction land through expropriation in suburb. However, because quota certificate purchasers are generally real estate developers, industrial or commercial enterprises and land reserve organ of the government, and the proposed construction projects are non-public projects, the process of the increase of urban construction land are against the direction of expropriation reform in which the scope of expropriation should be severely limited for public interest, which is discussed in Chapter Three. However, the quota should also be used to increase rural collective construction land, which means that the land development rights transferred from the rural area which is far away from city should be able to directly combine with the collective farmland which is in suburb and has potential in commercial development, and the government should approve to convert the farmland with equivalent area of the quota into incremental collective construction land, and then the right to use the foresaid collective construction land should be allowed to be assigned directly to quota certificate holders, as what is discussed in Chapter Four. Only doing like that, the fairness and efficiency can be guaranteed.

(c) The step of combining land quota certificate with the land cannot effectively link up with the current system of construction land assignment. From the viewpoint of specific design of "Securitized Land Exchange" system, the right to increase urban construction land pursuant to quota certificate is enjoyed by the government, while the private quota certificate holder is only entitled with the "right" of proposing to the government to expropriate the selected parcel of collective land within urban planning area. The assignment of the use right of the expropriated land will be implemented through bid invitation, auction and quotation, and the quota certificate holder even does not have the priority over other land

demanders without such quota certificate in bidding for the “selected land” in state-owned construction land market, which means that the holder may lose the bid and suffer from interest loss due to the quota certificate transaction. Therefore, the impetus of land developer purchasing quota certificate will be reduced, and it is difficult to fully realize the value of “Securitized Land Exchange” system. The writer thinks that, because incremental construction land quota both within and without the overall land use planning shall follow the principle of the balance between the occupation and supplement of arable land, a better way to resolve the foresaid problem is the establishment of a privilege system to the assignment of construction land, in which situation, the market subject holding quota certificate has the priority in participating in the bid for construction land assignment. This design will devolve the fierce competition in the step of land assignment to the step of quota certificate transaction, which will raise the demand for quota certificate, will further raise the sale price of the certificate, and will more benefit low-income farmers in rural area far away from urban area through market mechanisms.

5.3.3 The comparison of “Securitized Land Exchange” model in Chongqing and TDR program in the United States

Under the guidance of the principle of balancing the occupation and supplement of arable land and the policy of linking the increase in urban construction land with the decrease in rural construction land, Chongqing municipality implements the “Securitized Land Exchange” reform⁶¹¹, in which process, quota certificate of incremental urban construction land is issued through arranging and reclaiming rural collective construction land, and, beyond the basic farmland protection areas, agricultural land with equivalent area of the reclaimed land, which is in suburb and has commercial development value, may be converted into construction land, and then the converted land can be assigned. In the special Chinese land system and

⁶¹¹ Nowadays in China, “Securitized Land Exchange” model has been operated in three pilot regions: Chongqing municipality directly under the Central Government, the city of Chengdu (the capital of Sichuan Province) and Guangzhou (the capital of Guangdong Province).

under the extraordinary method of construction land quota allocation, the quota of incremental construction land corresponds to the qualification of converting agricultural land into non-agricultural land, which is the product of State planning power's intervention and restriction on private rights. Meanwhile, the quota of incremental construction land actually plays a similar role as development rights of collective land. In this section, "Securitized Land Exchange" model in Chongqing Region will be compared with TDR program in the United States.

5.3.3.1 Common ground

(1) Both transferable development rights and the incremental construction land quota are created due to land use control that restricts land property rights

In the US, the practice of zoning designates permitted use type of land based on mapped zones that separate one set of land uses from another, which restricts land owners' liberty on developing and utilizing the land. On this background, development rights can be separated from land ownership and be transferred, by which way the land owners' loss due to the restriction of zoning can be made up. Through the adjustment of balancing interests, farmland and other environmentally sensitive areas can be effectively protected.

In China, the use of rural collective land is severely controlled by the State. On one hand, collective land owners and users almost have no rights to independently further develop the collective land; on the other hand, the problems that farmers circulate collective land clandestinely against the rules due to the temptation of economic interests and local governments expand the scope of land expropriation for sectional interests are serious, which results in the great loss of farmland. The "Securitized Land Exchange" system operates incremental construction land quota, i.e. the development rights of collective land, which meets farmers' and local governments' demand for economic interests and at the same time achieves the dynamic balance of farmland in a total area.

(2) Both development rights and the quota are transferred among different areas

The American TDR program includes the designation of sending and receiving areas, and within receiving areas, developers are granted the rights to add density or other development bonuses on the land. In Chongqing, creating and transferring incremental construction land quota also require the designation of the areas where the quota are created and realized. Development rights will be transferred from the reclaimed areas to suburb areas where the land has business development value.

(3) Both development rights and the quota have to combine with specific piece of land to realize the development value

In the US, development rights have to be transferred to the receiving area to combine with the specific land. If there is no appropriate receiving area, the development rights will not achieve the development value. In Chongqing, the quota is similar as a kind of right to convert the agricultural land to non-agricultural land, which is also needed to combine with a piece of collective farmland to complete the conversion of land-use type in receiving area.

(4) Both development rights and the quota are transferable property rights

In the US, land development rights can be freely traded in market. In Chongqing, demander of incremental construction land can purchase the quota in the Rural Land Exchange. Meanwhile, with the development of “Securitized Land Exchange” system, the quota certificate will be endued with more attribution of security interest in property and financial option.

5.3.3.2 The main differences

(1) The respective process in creating development rights in the US and the land quota in Chongqing is different from each other

In American property law, land ownership is commonly described as consisting of a bundle of different rights. Development rights are the component of the bundle of rights. Owning development rights means that someone owns the right to make

further development on his land. Development rights may be voluntarily separated and sold off from the land.⁶¹²

However in China, construction land quota within the overall land use planning are determined and allocated by the State Council on the basis of administrative power. While, the creation of incremental construction land quota without the overall planning, which links the increase in land used for urban construction with the decrease in land used for rural construction, does not take the land rights bundle of land ownership as the premise, but is an administrative tool adjusting land use. Nevertheless, collective land development rights that are represented in the form of incremental construction land quota shall be transformed in accordance with civil rights and return to the collective land ownership, and then can be transferred independently.

(2) The respective operational procedure of TDR program and “Securitized Land Exchange” system is different from each other

TDR program firstly designates special area as the sending area where farmland or other environmentally sensitive areas need to be protected and further development is undesirable. And then, receiving areas which can add a certain quantity of land development capacity will be set. Finally, land development rights from sending areas will be converted and quantified into development density and be transferred to the land owners of the receiving areas.

In China, the creation of the quota of incremental urban construction land is also in the purpose of protecting agricultural land, but the operational procedure does not firstly designate the area where the farm land has to be protected. Collective economic organizations or their members have to primarily apply for the reclamation of the collectively-owned construction land which is relatively far from

⁶¹² See Noelle Higgins, *Transfer Development Rights*, at http://depts.washington.edu/open2100/pdf/3_OpenSpaceImplement/Implementation_Mechanisms/transfer_development_rights.pdf, visiting date 2013.09.11.

urban area to achieve the quota. Generally, the quota will combine with the suburban area which has economic location advantage, and rural farmland in the foresaid suburban area will be finally converted into state-owned construction land. Although the total amount of arable land will be in homeostasis, under the requirement of rapid urban development and the situation of lacking interested party's supervision in the step of reclamation, problems, such as taking arable land with high quality while reclaiming the barren land and the reduction of the reclaimed land, may inevitably happen. Meanwhile, the trade of quota without the overall land use planning may weaken central government's macroscopic readjustment and control on the supply of urban construction land and relevant policies.

(3) Rights operating mechanisms in the US and in Chongqing are different

In the US, following the principle of democracy and openness, all interested parties can participate in the process of making zoning control and TDR programs. When designing a TDR program, it is obligatory to hold a public hearing in which the zoning and TDR program planning will be announced by the authority and be discussed by the public. Landowners in sending and receiving areas and land developers are all able to participate in the hearing, which respects interested parties' right to learn the information and right to make decision, and upholds the justice to a large extent. Government will mainly play a role on maintaining normal operation of the rights mechanism.

In China, the overall land use planning made through by authority power regulates the total amount of the incremental construction land in a long-term and local governments manage and implement the annual quota. The transaction of incremental construction land quota without the overall planning in Chongqing municipality directly under the Central Government is also led by Chongqing government's administrative power. In the process of "securitized land exchange", interested parties are not fully entitled with the rights to learn the information and to

make decision. When the government expropriates the collective land in the urban planning area, the administrative power may infringe collective land owners' rights, too.

(4) The methods benefitting rights holders are different.

In the US, except paying transaction tax and administration fee, the transferor will achieve almost all the consideration of the transferable development rights, and the transferee can further develop his land.

In Chongqing Region, the transfer of the incremental urban construction land quota involves farmers' collective and the collective members; the party who enjoys the quota through reclamation can be farmers' collective or collective construction land users. For example, the quota from reclaiming rural residential house sites shall be allocated to the individual farmers who use the residential house sites. Therefore, the distribution of the revenue from quota transaction should distinguish the reclamation of rural residential house sites and other types of collective construction land. However, a considerable part of a collective economic organization's revenue should benefit the members of this collective organization and be used for farmers' social security.⁶¹³ As for the collective land owners whose land are in the suburb and will be expropriated and be combined with the quota, they mainly obtain the just compensation for collective land expropriation. Meanwhile, the government will achieve state-owned land assignment fees through expropriating collective land and assigning the expropriated land.

5.3.3.3 Conclusion

Some scholars put forward that, in China, land development rights should be an innovative policy tool to adjust and better current system of land use control rather than a new type of civil right in legal framework; the main purpose of sinicizing land development rights is to design and improve the institution of incremental

⁶¹³ "Interim Measures for the Administration of the Rural Land Exchange in Chongqing Municipality" art.31 (5).

urban construction land quota that actually assumes the role of development rights and to achieve the more effective allocation of land resources through circulation of the quota.⁶¹⁴ However, the functions of collective land development rights are mainly in two aspects: one is to convert the rural agricultural land into non-agricultural land, and the other is to increase the density of construction and development on collective land. Structural innovations in management of farmland conversion on the policy-level cannot completely replace the functions of the independent operation of land development rights with the attribution of property rights; the circulation of incremental urban construction land quota is just a planning control of farmland conversion. The foresaid scholar's opinions cannot fundamentally resolve the problem of great interest imbalance between collectively-owned and state-owned land rights holders due to the strict land use control which severely restricts the development rights of collectively-owned land. Moreover, although the quota of incremental urban construction land can be freely traded in Rural Land Exchange in Chongqing, the creation and transfer of this kind of quota is more based on the government's administrative management and even planning control, which still has obvious difference comparing with the right operation mechanism of independent land development rights.

TDR programs have been run for more than 40 years in the US, and China can draw on the experience of their successful institutional design. Of course, any institution shall be established in its particular context. The collective land rights and land use control system in China are in the special institutional context and have the particular reformatory value orientation. Especially in the current period of the transition that urban-rural dualistic system changing to urban-rural integration, the reform of collective land rights should be in the same direction of the reform of marketizing the collective construction land. Chinese scholars should explore how to organically combine land development rights with the quota of incremental construction land to promote the integrated circulation of urban and rural

⁶¹⁴ See Shen Zilong, *The Path Choice of Land Development Rights in China*, a dissertation of post-graduate in Public Administration, Zhejiang University, 2009.

construction land and to maximally realize the institutional value of land development rights in China.

5.4 A reformational design of the system of development rights on collective land in China

5.4.1 The creation of collective land development rights

The legal order should reconcile the rights and interests that are urgently required to be recognized in society, and should confirm those legitimate rights by law. In the process of social development, new types of rights and various claims of property interests ceaselessly emerge, which on one hand brings pressures and challenges to the property law system and on the other hand will promote the continuous development and perfection of property law. Land development rights are this new type of right.

American property law is a rights system that consists of all dominating rights to specific properties, which regulates the legal nexus happened due to the acquisition, exercise and alteration of the foresaid rights. The American property law does not devote particular care to the format of the system, and the rights types in the rights bundle are luxuriant and can constantly expand.⁶¹⁵ Under the principle of statutory *jus in rem* in continental legal system, Chinese land rights system is tangible; the categories, content, effects of property rights are determined by law. There is not any property right type in Chinese land rights system to be corresponding to land development rights that independently exists in American legal framework. Therefore, to create land development rights in China, the nature and the structure of development rights in Chinese legal system must be firstly considered.

5.4.1.1 The nature of collective land development rights

⁶¹⁵ See Abraham Bell and Gideon Parchomovsky, *A Theory of Property*, Cornell Law Review, vol.90, 2005.

In the context of land use control by the authority, functions performed by land development rights cannot be achieved by any other current type of land rights, and the creation of independent land development rights will not overlap with other kinds of land rights in the legal framework. Land development rights should therefore be characterized as a type of usufruct which can be separated from land ownership and should be incorporated into property law system. Land development rights have the following features of property rights:

(1) Collective land development rights are rights of control

Manifestations of the interests of land development rights, whether the right to convert agricultural land into non-agricultural land, or the right to increase the density of land development and land use, are the domination to land development interests. With collective land development rights, the rights holders can directly dominate the land use and land development under the land-use planning. The development rights can combine with land ownership and be exercised by land owners; they can also be separated from land ownership and be exercised by other land users or developers independently. With regard to the object of land development rights, it is land development capacity, which is analyzed in the section 5.1.1.2.

(2) Collective land development rights are a kind of absolute right

Land development rights holders can control over their land development interests independently against others' unlawful interference and infringement, which means the land development rights are against all over the world. Development rights holders can exercise their rights to further develop the land or transfer the rights to others to achieve the consideration of the rights. Those persons who hold the rights to use collective land for construction or the rights to the contracted management of farmland and are entitled with collective land development rights shall exercise the development rights independently without collective land owners and the authority's illegitimate interference. If the exercise of the right to the use of land for

construction and land development rights infringes others' rights of adjacent, the exercise of the relevant land rights should be reasonably restricted.

(3) Collective land development rights can be publicized through registration

Separated from land ownership, the attribution of collective land development rights can be confirmed through the publicity by registration, and after the registration of development rights transfer, the alteration of the development rights will be legally effective. Registered contents mainly include: the name, the address and other statuses of the land development rights holders; the land area, the development density, and other specific contents of the land development rights; the basis for the acquisition of land development rights; the date of the establishment or transfer of the land development rights, etc.

5.4.1.2 The structure of collective land development rights

The creation of development rights on state-owned land and on collectively-owned land should be treated distinctively. Development rights on state-owned land can be directly separated from land ownership and be clearly manifested; with regard to collectively-owned land, development rights should be additionally created and then be endowed with the freedom of separation from land ownership and of independent transfer.

In China, the State in fact enjoys state-owned land development rights. When government on behalf of the State assigns the right to the use of state-owned land for construction with charge or gratuitously allocates such right, development rights on the state-owned land will be transferred to the land user through the permission of land use planning and the land user or developer will be able to further develop this state-owned land. On this situation, land development rights are with the manifestation of the development intensity on the assigned or allocated land according to the planning conditions stipulated in the assignment or allocation contract of the state-owned land use right. "Where the right to use of state-owned

land located within the area covered by the plan of a city or county is extended through assignment, before the said right is assigned, the department in charge of urban and rural planning under the people's government of the city or county shall, according to the detailed control plan, lay down the conditions for planning with respect to the location of the tract of land to be assigned, its nature of use, intensity of development, etc., which shall constitute the component part of the contract on assignment of the right to use of State-owned land.”⁶¹⁶ In recent years, when assigning the right to use state-owned land for construction through bid invitation, auction and quotation, lots of local governments directly attach the planning and design scheme within assignment contract⁶¹⁷, which makes the indicator items of planning control more specific. Making planning permission on the use of state-owned land for construction is actually the process of setting state-owned land development rights. Different planning conditions will lead to different standards for land assignment fee. Generally speaking, with regard to different plots in the same economic location, plots with high floor area ratio planning will be assigned in high price. Land assignment fees paid by land users or developers contain the consideration of the state-owned land development rights. Moreover, Chinese “Land Administration Law” art.56 and “Interim Regulations Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas” art.18 all provide for that, if the land user needs to alter the purposes of land use as stipulated in the contract for assigning the right to the use of state-owned land, he shall obtain the consent of the assigning party and the approval of the land administration department, which indicates that the land user who obtain the right to the use of state-owned land by assignment can only enjoy the right to use the land in accordance with the stipulated land-use purpose in the contract, but not the right to freely alter the purposes of land use or increase the plot

⁶¹⁶ See “Urban and Rural Planning Law” (2007) art.38, par.1.

⁶¹⁷ When assigning the right to use state-owned land, the attached planning and design scheme generally contain: the location and the area of the tract of land to be assigned, its nature of use, and planning indicators (planning plot ratio, planning building density, planning greening rate). Some other planning conditions can also be contained in assignment contract, such as building height, architectural style, and public service facilities. The assignment of state-owned land attached with planning and design scheme can prevent the practice that developers lead the planning and design scheme with excessive commercial development but insufficient supporting service facilities, will be conducive to standardizing the development, and prevent power rent-seeking and corruption.

ratio, and state-owned land development rights is owned by the State.

With respect to collectively-owned land, the collective land ownership should contain the right to the use of collective land (the right to the use of collective land for construction and the right to agricultural land contractual management), collective land development rights and easement on collective land. Collective land development rights can be divided into agricultural land development rights and non-agricultural land development rights. Thereinto, agricultural land development rights that can convert agricultural land into non-agricultural land to be developed and used for construction should be set and constrained by land use planning and be enjoyed by all farmers engaging in agricultural production within the collective economic organization. Non-agricultural land development rights are to further develop rural collective construction land in certain density according with the land use planning. The incremental construction land demanded in the process of urbanization is mainly from rural collective land, so how to deal with the collective land development rights is involved in the integrated circulation of urban and rural construction land.

5.4.2 The attribution of collective land development rights

The State that has powers on land-use planning and land resources management is the unique subject which can allocate land development rights and manage the circulation of such rights. However, whether the subject initially owning collective land development rights should of course be the State, which relates to the fair allocation of land rights and the reasonable distribution of land incremental value, needs to be discussed. The issue of the attribution of collective land development rights is complicated. The urban-rural dualistic land ownership and land management system have typical Chinese characteristics, and the foresaid issue cannot be concluded through the simple comparison with that in extraterritorial land rights system. The particular system of dualistic land rights subjects which

includes land ownership subject and land-use right subject leads to land-use right functions as quasi-ownership, so there is divarication whether land ownership subject or land-use right subject should be the attribution subject of land development rights in China. The vacancy of the specific subject of collective land ownership and the deformity of the powers and functions of collective land ownership can also cause great controversy on the attribution of collective land development rights.

Collective land development rights should be initially allocated to the collective land owner, i.e. farmers' collective. The definitude of the attribution of collective land development rights is an important arrangement in property rights, which determines the rules of the distribution of collective land incremental revenue and affects the well resolution of the current problem that rural collective land is nationalized in low price. Rural collective land development rights should be owned by farmers' collective. As members of a rural collective, farmers should have the rights to participate in the interest distribution and to gain basic social security from the transfer of collective land development rights, to share the achievements of social and economic development. Meanwhile it will make agricultural land better protected in certain extent because farmers will not excessively chase economic interests from the conversion of agricultural land-use type. Such arrangement in China is on the basis of comprehensively considering the characteristics of collective land development rights, of the legislative value orientation of transplanting land development rights system from extraterritoriality, and of the Chinese national conditions, etc. Hereafter is the analysis.

(1) The main purpose of creating collective land development rights in China is, through land development rights mechanism's function of interests adjustment and through market-oriented operation of the rights, to remedy the defects in land use control that unreasonably restrict the circulation of collective land. If the land development rights system is created in China, it will practically guarantee farmers'

land rights and economic interests, will control the illegal conversion of agricultural land into non-agricultural land, and will maintain the justice and effectiveness in land-use. Current Chinese land law system cannot institutionally support the favorable operation of land-use, because the State implements nationalization of collective land development rights through “expropriation first and use second”. In the US, land development rights belong to the land owner, and the exercise of private land development rights through market mechanism, which emphasizes the purpose of achieving the economic efficiency on the transfer and use of the rights, brings the development revenue of private land into the category regulated by market, which forms a superimposed effect of the original land revenue and land development revenue and realizes the maximum profit of land development. Land development rights can be separated from the bundle of land property rights but cannot be absent. There is not existing theory to support that the development rights separated from collective land ownership shall be attributed to the State. To achieve the reform goal that “the same land-use type with equal rights” for collectively-owned and state-owned construction land, it is compulsive that collective land ownership should contain land development rights. Without development rights, collective land property rights are incomplete and cannot be equalized with state-owned land rights. Therefore, the nationalization of collective land development rights does not meet the reformational orientation that should promote the integrated circulation of urban-rural construction land.

(2) The current Chinese land law system cannot provide the right basis for farmers to distribute collective land incremental revenue. In the US, “TDR grew out of the understanding that some properties are not suitable for development without serious unintended social consequences, but that public acquisition of the property was not desired. TDR is a means for property to remain in its present condition while providing the owner of that property an alternative route to the achievement of an economic return. In the minds of many, a TDR program is a means of compensating

property owners for the loss of their development rights.”⁶¹⁸ In China, the difference in price between agricultural land and construction land is increasing larger due to land-use planning and control, which exacerbates the illegal conversion of agricultural land into construction land driven by economic interest, leads to the clandestine circulation of rural land in a large scale, and even results in local governments’ expropriation in force. Allocating land development rights is undoubtedly the practical and favorable means to reduce the difference in price between agricultural land and non-agricultural land and to balance the interests benefitted from different land-use types. After the entitlement of land development rights to farmers’ collective, if the farmland can be converted into construction land pursuant to land use planning, farmers’ collective can do it; if the farmland has to be preserved, the rights holders can transfer the land development rights to achieve the consideration; meanwhile, because of the complete collective land rights system and the raise of land price which contains the consideration of land development rights, local government will reduce the fanaticism of land-based finance and regulate the expropriation of collective land due to a high cost. Farmers based on the rights of collective membership can share the interest of land development rights and land incremental revenue. Therefore, initially allocating collective land development rights to farmers’ collective can promote to establish the institutional mechanism for farmers to share the urbanization achievement, and has great significance in raising farmers’ income, in realizing urban-rural coordinated development and in building a harmonious society.

(3) The balance of interest distribution is the foundation of sustainable land use and land development, and the attribution of land development rights relates to the distribution of land incremental revenue among land owners, land users and government, etc. When considering the distribution of development interests of collective land in China, it cannot be neglected that the basic function of collective

⁶¹⁸ See Robert D. Yaro, Robert N. Lane, and Robert Pirani, *Transfer of Development Rights for balanced Development*, Final Report of A Conference Sponsored by the Lincoln Institute of Land Policy and Regional Plan Association, May 1998.

land to the ground rent and its contribution to land increment, and especially farmers' contribution in keeping agricultural production to achieve food security. For a long period after the foundation of the People's Republic of China, according to the Chinese Communist Party's policy, the rural area had to support the urban development in priority, and the domestic scissors difference between industrial and agricultural products had ensured the rapid development of the national economy, which led to that the development in rural areas was far behind of the urban areas in all aspects, such as the social security. Nowadays, to achieve the strategic goal of coordinating urban and rural development in China, it requires the rights of state-owned and collectively-owned land in equal status, while, to entitle farmers' collective with land development rights is the direct institutional support on rural development. Certainly, initially allocating collective land development rights to farmers' collective does not mean that the land owner is free to change the land use type; the exercise of collective land development rights should still be restricted by land use control. However, collective land owner's loss due to land use control can be offset through transferring land development rights to land developer beyond the collective organization. Land developer purchasing collective land development rights, in fact, switches the payment target from the State to farmers' collective. After the attribution of collective land development rights to farmers' collective, the State will be not able to directly take collective land incremental revenue through "expropriation first and use second", but charges taxes and administrative fees in the process of such rights transfer, which may actively promote the reform of market-oriented circulation of rural land. Therefore, market-oriented operation of collective land development rights will achieve a balance of all parties' interests.

In summary, land development rights should belong to the land owner. When assigning the right to use collective land for construction, farmers' collective can transfer the land development rights in accordance with land use planning to non-rural land user. If a construction land user, whether state-owned land or collective land, applies the alteration of land use planning to increase land

development capacity, he has to purchase corresponding land development rights in market. If government expropriates collective land, it should compensate for the collective land ownership, as well as collective land development rights and other usufructs.

5.4.3 The transfer of collective land development rights

According to American scholars' research, the factors, such as demand for bonus development, receiving areas customized to the community, strict sending-area development regulations, market incentives, strong public support for preservation, TDR promotion and facilitation, TDR bank, etc. are closely related to the success of TDR programs.⁶¹⁹ Aforementioned successful factors in American TDR programs can edify the design of Chinese land development rights system. In different countries, land systems are various, and institutional designs of land development rights have their own characteristics and situations. In China, the duality of land ownership subject and land-use right subject and other problems make it rather complex to design land development rights system, and inevitably, the programs will face significant hurdles in the effort to achieve effective and equitable land use regulation. Thus, an educational campaign is necessary to aid the affected parties in understanding the concept of land development rights; a public relations campaign is necessary to instill confidence in the public that the land development credits will have value; the drawing of districts must consider both political boundaries and the nature of the resource that the program serves to protect.⁶²⁰ Overall, land development rights system should be designed on the basis of combining public power that does restrict collective land rights through land use planning and land control with private rights in autonomy of will to achieve the balance between protecting arable land in order to guarantee food security and ensuring the supply of construction land to support economic development. It can be learnt from American

⁶¹⁹ See According to Rick Pruetz and Noah Standridge, *What Makes Transfer of Development Rights Work?* Journal of the American Planning Association, Winter 2009, Vol.75, No.1.

⁶²⁰ See Joseph D. Stinson, *Transferring Development Rights: Purpose, Problems, and Prospects in New York*, Pace Law review, vol.17, Issue 1, Fall/Winter, 1996.

models to design the operation mechanism of land development rights, and to establish an integrated and sound market of land development rights which should be led by government to boost the system of land development rights to advance in China.

5.4.3.1 To make a general scheme for the program of transferring collective land development rights

Local government should work out a scheme of transferring collective land development rights based on land use planning and constraint on development density.

First of all, according to land use planning and urban-rural economic development situation, government should clearly designate the sending area and receiving area of collective land development rights within the corresponding administrative division to operate development rights program.

Secondly, the program should particularly elaborate the allocation and valuation of the land development rights and the entire process of program operation, in order to facilitate all parties concerned to take action, to systematically promote the optimal allocation of land resources and to upgrade the level of economic development in the program area.

Thirdly, a sound collective land development rights program should guarantee the farmers' collective to have knowledge of the whole process of program operation and to have opportunity to participate in the procedure of decision-making in the program. Government, on behalf of the State, holds and exercises the power of land use planning, and in the process of determining the undevelopable area and developable area and even the land development density, it should allow interested parties or their representatives to participate in order to vindicate the overall interests of the community in democratic means.

Last but not least, in the process of program implementation, private land rights should be well respected and protected; collective land expropriation for non-public interest purpose must be forbidden; the transaction of collective land development rights should follow market rules.

5.4.3.2 To designate the sending area and the receiving area

According to land use planning and urban and rural planning, local government designates the sending area and receiving area of collective land development rights and through the transfer of development rights “allows increased development in places where a community wants more growth in return for reduced development in places where it wants less.”⁶²¹

The sending area can be the rural area where agricultural land has to be conserved, such as the Basic Farmland area, which is in suburb and has huge commercial development value, but the commercial development is absolutely forbidden due to the strict protection of Basic Farmland, also as the agricultural land obtained through arrangement and reclamation of previous collective construction land, whether this area is far from or near to the urban area, where the quota of incremental construction land is generated and has commercial value to construction land demanders. The owners of the foresaid agricultural land should enjoy collective land development rights. Thereinto, the owner of the farmland obtained through collective construction land arrangement and reclamation shall of course enjoy agricultural land development rights because this land owner holds the quota that enables him to convert agricultural land into construction land to develop; while, the owner, whose land is designated as basic farmland by government, shall enjoy non-agricultural land development rights through allocation by government, because this farmland cannot generate the quota of incremental construction land and government allocates development rights to the owner to make up for the his

⁶²¹ See Rick Pruetz, FAICP, and Erica Pruetz, *Transfer of Development Rights Turns 40*, American planning Association, Planning & Environment Law, vol.59, No.6, P3, June 2007.

economic loss due to the restricted land rights.

According to law and land use planning, the agricultural land in this sending area is forbidden to be developed for construction use, but the collective land development rights should be able to be transferred. The agricultural land owner in this area must maintain the agricultural use of the land, but can, by his will, transfer the development rights to other land users to achieve economic profits. Rural land owner, whose land development rights are transferred, will still hold the ownership of the land. If government expropriates the rural land for the purpose of public interest, the compensation should be determined according with the consideration of whether the collective land ownership still contains development rights. The compensation for the rural land whose owner does not transfer the development rights should include the value of the development rights; while, if the development rights have been transferred, the price should be a remainder value without the consideration of land development rights.

The receiving area shall be a developable area complying with land use planning and urban and rural planning, and generally, according to the situation of land-use in China, it may most probably locate on collective land in suburb where the land has economic location advantage and the development density on the land could be increased. Under this circumstance, construction land user should, in the market, purchase land development rights derived from sending areas to increase the land development capacity in the receiving area and to further utilize the developable land. If the developable land in receiving area is collective construction land, the non-rural construction land demander with purchased non-agricultural land development rights should be able to directly negotiate with the farmers' collective to purchase the use right of the collective construction land, and then combine the two kinds of land rights to implement further land development. Farmers' collective in this receiving area further developing its collective construction land should also purchase the non-agricultural land development rights. If the developable land in

receiving area is agricultural land that can be converted into construction land, after the examination and approval of farmland conversion by the competent land administration department, non-rural construction land user with purchased agricultural land development rights can, through negotiation with the land owner, compensate for the use right of this rural land, and then can develop this previous farmland as construction land. Farmers' collective in this receiving area, as the owner of the agricultural land that can be converted into construction land according to land-use planning, can also purchase agricultural land development rights in the market, and after the conversion of land-use type, the collective organization can assign the right to use this collective land for construction to satisfy construction land demander in market.

Through the designation of sending and receiving areas of collective land development rights, the capital from government, farmers' collectives and private land-use units will be all involved in the operation of land development rights, which will benefit these areas and accelerate the urbanization. However, it has to be said that the design which sets rural area as receiving area of land development rights and allows the commercial development and construction on rural land breaks the provision in current Land Administration Law which provides for that "all units and individuals that need land for construction purposes shall, in accordance with law, apply for the use of State-owned land"⁶²², but this design is in line with the direction of the reform of Chinese rural land law system.

5.4.3.3 To allocate collective land development rights

Allocating land development rights means distributing wealth. Successful program of development rights transfer requires the reasonable allocation of development rights. The ideal standard is that the social total revenue of the land development rights allocation that will be achieved equals to the total economic loss due to the restriction on land rights under land use control. With respect to the agricultural

⁶²² See "Land Administration Law" art.43, par.1.

land area that is far from urban area and does not have economic location advantage, because the land does not have commercial development value and the land price is always comparatively low, government does not need to allocate collective development rights to the owner of this agricultural land, and this land owner will not suffer huge economic loss even if keeping the land for agricultural use.

In fact, the allocation will be extremely difficult and complicated, which demands higher programming capability, superior management level and clear definition on interest-balance. Theoretically, the programming department should synthetically consider the land value and economic development situations in sending area and receiving area, should quantify the land development rights into floor area ratio allowed by the permission of land-use planning and at last initially allocates the development rights. The allocated land development rights should include the following two types: basic agricultural land development rights (i.e. the quota of incremental construction land for the demand of converting farmland use type in China) and basic non-agricultural land development rights (i.e. the basic development density for intensive land-use). After initial allocation of land development rights, transfer of the development rights manifests as the form of the addition of building floor area ratio in the receiving area, which can satisfy different land users' demands on land development.

5.4.3.4 The value of land development rights

The value of land development rights is mainly determined by four factors: the economic location of the land, the land-use purpose, the floor area ratio of the land and the market situation of land supply and demand relationship, all of which act together, and in form it is manifested as the value difference due to the conversion of land use type, due to the change of development density and due to the various land locations. Under current Chinese land use system, the value of collective land development rights is intensively manifested as the price difference between the price of collective land ownership and the price of the use right of state-owned land,

where the two kinds of lands are in the same economic location.

Relevant land department under people's government holds the whole information of land use in such an administrative division. Based on the information, appraisal institution should assess and publish the benchmark price of the independent land development rights to guide the transaction in market.

5.4.3.5 To establish the Exchange of land development rights

In order to operate program of land development rights transfer, government should set up the Exchange of land development rights, where the rights can be traded and reserved, to balance the supply and demand of land development rights in market, to facilitate the transaction, to stabilize the price and to prevent speculative transaction. The Exchange can also make land development rights certificate into securities to provide the citizen with diversified investment channels. The market-oriented circulation of land development rights will make the rigid land management system with a strong flexibility, can effectively ease the conflict in interest distribution because of strict land use control, and promote regional economic development.

To sum up, through land use control, the State restricts the conversion of agricultural land into non-agricultural land and limits rural land owner's free exercise of land rights, which leads to great social injustice. However, to create collective land development rights and to permit the transfer of such rights, through the operation of land rights mechanism, it can guarantee the economic interests of the farmers engaging in agricultural production, and can prevent illegal conversion of agricultural land driven by economic interests to achieve farmland preservation. Meanwhile, the creation of collective land development rights can boost to realize the goal of "the same land-use type with equal rights" between state-owned and collectively-owned land. The transfer of collective land development rights can advance the formation of unified urban-rural land market and further stimulate the

rapid integration of urban-rural economic development.

Chapter VI Conclusion

Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform (November, 2013), Section Three (subtitle: Accelerating the Improvement of the Modern Market System), No.11, required to establish an integrated construction land market for both urban and rural areas in China. Owing to the earlier policy that agriculture should support the development of industry in priority and the rigid system of planned economy in history, Chinese land legislation severely restricts the circulation of collective land rights, which is mainly based on the “collective” status of rural land. Therefore, rural land rights are incomplete property rights, and Chinese farmers, as members of farmers’ collective, can neither fully exercise the rights to dispose of rural construction land and benefit from the land, nor amply share the achievement of urbanization and industrialization without the support of land capital. The penury of rural land rights leads to farmers’ impoverished destitution. At present, in the context of urban-rural development in integration, to make farmers’ land property rights complete and to promote the integrated circulation of urban and rural land rights in a unified land market are the fundamental measures in coordinating the allocation of urban and rural land resources, in solving the problem of the structural shortage of construction land and in protecting farmers’ legitimate rights and interests.

Through a general observation over diversified extraterritorial land rights systems, in view of public interests and social functions burdened by land resources, lots of countries lawfully restrict the free exercise of private land rights through public powers as well, such as zoning and land use planning. However, they all have their special institutional tools to make up for private loss due to the restricted exercise of property rights, through which, both the purposes of preserving public interest and protecting private property rights could be well achieved. Some of these

institutional designs can be taken for significant reference to current Chinese reform of rural land law system.

In this dissertation, the following three main points can be concluded through the discussion on the reform of rural land law system and on the establishment of integrated construction land market:

(1) The reform of collective land expropriation. The expropriation of collective land should be limited into the scope of public interest purpose, which will make way for the free circulation of the non-public-interest use of rural construction land. The dissertation discusses the definition of public interest from substantive and procedural aspects and emphasizes that “implementation of city planning” and “plan of economic development” could not be sweepingly deemed as “public interest”. With respect to the compensation for expropriated rural land, it should be in replacement value of the deprived collective land rights. Moreover, due processes of expropriation should include the procedure of negotiation, public hearing, and the procedure of revoking expropriation.

(2) The feasible reform of market-oriented circulation of collective construction land. Under the prerequisite of compliance with land use planning and urban and rural planning, the use right of collective construction land should be able to directly circulate in land market, which will realize “the same land-use type with equal rights” between state-owned and collectively-owned land for construction. Especially, the right to use rural residential house site shall be allowed to get in the land market, and real estate development on collective construction land shall be permitted. Within urban planning area, government could purchase collective land ownership. However, the market-oriented circulation of the right to the use of collective construction land shall be the main way for farmers to participate in the urbanization with land capital, and is the basis to integrate the circulation of urban-rural construction land and to form the unified construction land market. The

revenue from the circulation of collective land use right should be reasonably distributed among landowners, land users and the State.

(3) The creation of collective land development rights can complete collective land rights system, and will provide interest-balance mechanism between the conservation of agricultural land and the circulation of collective construction land. To protect farmland and to guarantee the national food security, through land-use planning and land control, the State restricts the conversion of agricultural land into construction land, and at the meantime, restricts the free development of collective land. The allocation and transfer of collective land development rights can make up for farmers' loss caused by the limitation on the development of rural land, can, in a certain extent, solve the problem of social interests imbalance due to the difference of land-use type, and may suppress illegal conversion of agricultural land driven by comparative economic interest.

The reform of collective land expropriation, the reform of market-oriented circulation of rural construction land and the creation of collective land development rights will, from various angles, promote the equalization of urban and rural land rights and the integrated market-oriented circulation of urban and rural land, and will complete the rural land rights system in China. Chinese land legislation should annul unreasonable limitations on collective land rights and control the arbitrariness of public power infringing rural land rights. Institutional justice ensures justice in private rights.

The design of property rights system depends on a state's basic economic system and even the state's basic political system, reflects the state's national traditions and conditions, and is the manifestation of the social realities and economic relations, so various property rights systems in different countries have diversified characteristics. The reform of property rights system in China has just been started, thus it is in exploration and in development. Reformation means exploration and

development, which are significant to legislation. To some extent, it can be said like that, these new types of rural land rights beyond the current legal framework arising with the reform of rural land law system and with the further promotion of market economy in China, is the development of Chinese property law system, and is the social advancement.

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