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## Social Obligations of Land Rights on Chinese Collective-Owned Land

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# SOCIAL OBLIGATIONS OF LAND RIGHTS ON CHINESE COLLECTIVE-OWNED LAND

Zhe Huang\*

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## ABSTRACT

*This article critically examines social obligations on Chinese collective-owned land. Current social responsibilities on Chinese collective-owned land are inadequate, ineffective, and distorted. Rural property right holders do not owe sufficient social burdens to society. As rural land regulators, rural collectives should have the authority to regulate and manage agricultural land use. Because of the vague and weak identity of rural collectives, collectives have limited authority and resources in restricting and regulating rural land use rights. As rural landowners, collectives violate their social responsibilities by misusing agricultural land and harming society. This article argues that for agricultural land, where physical characteristics of the land are better used in farming, the use restriction serves as a social obligation that conforms to the physical characters of the land. Thus, it is justifiable for collectives or the state to impose restrictions upon the land use rights of agricultural land, especially basic agricultural land—land that is most suitable for farming. The restrictions, however, must be imposed according to physical characteristics of the land, not according to the identity of landowners.*

Keyword: social obligations of property rights in China, collective-owned land, social obligations

## I. INTRODUCTION

Traditional libertarians argue that private property's social function is to shield it from the power of the public, and to promote personal autonomy, liberty, security, and economic efficiency.<sup>1</sup> A social norm of private property, as an alternative, views property as a social institution, which can and should contribute to society.<sup>2</sup> It

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1. HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 40 (2011). JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 3 (2000). Qinglan Long, *Reinterpreting Chinese Property Law*, 19 S. CAL. INTERDISC. L.J. 55, 57 (2009).

2. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 746 (2009).

contrasts with the notion that private property ordinarily triggers individual rights, not social obligations.<sup>3</sup>

A social norm of private property does not come from a particular theory. It can be found in many property ideas that do not necessarily promote social norms. For example, even the strictest libertarians acknowledge that property should not be used in a way that harms neighbors or community.<sup>4</sup> From the classical liberal view, social responsibility plays a necessary role in property rights. However, this role often only comes into play if something bad happens. The law and economics version of this obligation, for example, views owners as having responsibilities to their community to solve or cure problems like market failures, free riders, and holdouts.<sup>5</sup> A negative social responsibility of libertarians is demonstrated in Anglo-American common law to avoid committing a nuisance.<sup>6</sup> Anti-nuisance doctrine asks the owner not to commit a noxious use on his property, and the state could abate such use without paying compensation.<sup>7</sup> Libertarians also acknowledged there might be “certain intrinsic constraints operating within property rights as a result of the limitations on permissible appropriation from the commons.”<sup>8</sup> John Locke, for example, believed that the law of nature entails both negative obligations and affirmative obligations, which include leaving available resource to others, and making surplus resources available for others subsistence when they cannot provide for themselves.<sup>9</sup>

What are the social obligations of land rights on collective-owned land in China? What roles do Chinese agricultural collectives play in regulating and enforcing social obligations of property rights on collective-owned land? Do these social obligations counter

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3. *Id.*

4. *Id.*

5. GREGORY S. ALEXANDER & EDUARDO PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 114 (2012).

6. Alexander, *supra* note 2.

7. GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE 225 (2006).

8. ALEXANDER & PEÑALVER, *supra* note 5.

9. *Id.* at 39.

harms or problems and serve the public welfare of society? What prevents rural collectives to exercise their regulatory authority? What are the problems associated with the social obligations of Chinese property rights in the countryside?

As rural landowners, Chinese agricultural collectives have authority in regulating land use rights on rural land, such as cultivated land preservation, supervising farmers for reasonable use and protection of the property, and monitoring farmers' rights to transfer their land use rights. However, social obligations imposed upon collective-owned land are inadequate and distorted. Historically, few social obligations were imposed on collective-owned land. The collective system created boundless property rights, eliminating property users' basic negative social responsibilities, *i.e.*, that they should not use their property in a way that harms their neighbors or community. Social duties imposed on collective-owned land were distorted. For example, mandatory quotas and fees demonstrated that Chinese rural property rights mainly served the state's interests. Land use restrictions imposed on collective-owned land by the state turns on the question of who owns the land regardless of the physical characteristics, nature of the property, and public welfare.

Although rural collectives play an essential role in regulating agricultural land use, their regulatory authorities are abrogated by the state. As land regulators, collectives do not adequately exercise their regulatory responsibilities on collective-owned land. As landowners, collectives violate their social responsibilities when they use agricultural land for non-agricultural purposes. The state violates its social obligations by abandoning its regulatory responsibilities as higher land regulators in China. The state also violates social responsibilities on collective-owned land by initiating, transferring, or contracting agricultural land for non-agricultural purposes. In the context of China, this article argues that it is justifiable for collectives to regulate the agricultural land use and impose social obligations on farmers to avoid negative externalities. The state, as a

higher entity of landowner and regulator, is justifiable to restrict agricultural land for agricultural use.

## II. HISTORICAL SOCIAL OBLIGATIONS ON COLLECTIVE-OWNED LAND

### A. *Social Obligations on Collective-Owned Land from the 1950s to 1980s*

When the People's Republic of China was founded in 1949, the new government confiscated landlords' lands and houses and allocated them to individual peasants.<sup>10</sup> During the brief period of private ownership from 1950 to 1952 in rural areas, peasants began to exercise independent decision-making about production and sales.<sup>11</sup> In many regions, farmers sold their surpluses not to the state but to private parties, who usually would pay up to 40% higher than the state.<sup>12</sup> This situation occurred out of the expectancy of the Chinese Communist Party (or the CCP).<sup>13</sup> From that time on, the state authorities started to impose mandatory quotas on the farmers and fixed the purchase prices.<sup>14</sup>

Before long, agricultural resources were pooled to support the state economic development. In 1953, the CCP decided to start the collectivization of rural land.<sup>15</sup> Under the flag of the "Proletarian Socialist Revolution," three movements were launched. They were Mutual Aid Teams, Elementary Agricultural Producers' Cooperatives, and Advanced Agricultural Producers' Cooperatives.

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10. JURGEN DOMES, *SOCIALISM IN CHINESE COUNTRYSIDE, RURAL SOCIETAL POLICIES IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1979* 10-11 (1980).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 12.

The movements gradually eliminated peasants' private rural land ownership.<sup>16</sup> The movement that formed "Socialist Advanced People's Cooperatives" finally completed the collectivization of rural land ownership.<sup>17</sup>

At the same time, the first Five-Year Plan was designed for economic development for the period of 1953 to 1957.<sup>18</sup> Industry and heavy industry were paramount to the plan. Peasants had to produce a surplus to enable the creation of an industry base "while consumption was to take [the] last place."<sup>19</sup> For example, under the "Socialist Advanced People's Cooperatives" system, mandatory quotas were imposed. The income of Cooperatives came from mandatory sales to the "public procurement and supply organization."<sup>20</sup> Until the early 1980s, the state still "imposed near state monopoly over the purchase and marketing of grain, cotton, and other main agricultural products and permitted a quasi-segregation system between urban and rural residents."<sup>21</sup>

The collectivization of rural landownership served the dual purpose of both producing revenue for urban economic development and national socialist development, at the expense of "sacrificing rural development and exploiting the peasantry."<sup>22</sup> Agriculture became the primary source of capital when China lacked funds for industry construction. Agricultural products were exported to exchange for construction equipment.<sup>23</sup>

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16. LINA WANG, ZHONGGUO CHENGSHI TUDI CHANQUAN ZHIDU YANJIU [STUDIES ON CHINA URBAN LAND PROPERTY RIGHTS] 66-68 (2006).

17. PATRICK A. RANDOLPH JR. & LOU JIANBO, CHINESE REAL ESTATE LAW 78 (2000).

18. *First Five Year Plan (1953-1957)*, CHINESE POSTERS, <https://perma.cc/AA2D-T844> (last visited Aug. 8, 2016). See also CONTEMPORARY CHINA 1955 (E. Stuart Kirby ed. 1956).

19. *Id.*

20. RANDOLPH & JIANBO, *supra* note 17.

21. CHUN LIN, THE TRANSFORMATION OF CHINESE SOCIALISM 67 (2006).

22. *Id.* at 66.

23. CONTEMPORARY CHINA, *supra* note 18.

After the success of the first Five Year Plan, in 1957, Mao advocated a more aggressive mobilization of masses, and “greater, faster, better, and more economic results.”<sup>24</sup> The plan was supposed to instill “a sense of communal thinking and value rather than an individualistic one.”<sup>25</sup> The government promoted an even greater scale of agricultural production to make up for the shortage of capital so that the limited funds could be used for industries, such as state defense industry and nuclear capability development.<sup>26</sup> This developmental policy generated three movements, also termed “Three Red Banners.”<sup>27</sup> They were the “General Line of Socialist Construction,”<sup>28</sup> the “Great Leap Forward,”<sup>29</sup> and the “Establishment of People’s Communes.”

During these processes, rural collectives became more and more centralized under state control. They became production tools for the state.<sup>30</sup> Although collectives had formal rural land ownership, they had no right to use it according to their wills. The state determined how collectives should use the agricultural land, what and how much the collectives should produce. The state claimed all farm

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24. DOMES, *supra* note 10, at 22.

25. ADRIAN CHAN, CHINESE MARXISM 161 (2003). The policy was counterproductive and ran afoul of the reality. Peasants were already living a hard-working and thrifty life; most of them worked 12 to 16 hours per day in the field, but still had low living standards. For example, the working conditions were inhumane; because of retardation of the textiles industry, many communes lacked winter cloth. Peasants started to resist communes. They despised the common welfare of the communes as work units in the villages, and they divided harvested grain among them. DOMES, *supra* note 10, at 18. JUNE TEUFEL DREYER, CHINA’S POLITICAL SYSTEM, MODERNIZATION AND TRADITION 102 (7th ed. 2010). LIN, *supra* note 21, at 70.

26. CHAN, *supra* note 25, at 152. This policy demonstrated that a historical theme of conflicts between China and the world community dominated Mao and his close associates’ agenda, as the conflicts between peasants and landlords had been eliminated in the early 1950s.

27. DOMES, *supra* note 10, at 24.

28. *Id.*

29. *Id.*

30. Within the People’s Communes system, collectives became production tools for the state. In the beginning, the “production guarantees” were determined before harvest. When communes found it impossible to deliver the quantity from the surplus, they had to limit the supply of their members to reach the guaranteed quota. Margo Rosato-Stevens, *Peasant Land Tenure Security in China’s Transitional Economy*, 26 B.U. INTL. L.J. 97, 105 (2008). DOMES, *supra* note 10, at 18.



surpluses, “squeezing residual harvest out of villages through the state monopoly for purchasing and marketing agricultural products, planned low purchase prices, encouraging ‘over quota sales,’ and so on.”<sup>31</sup>

Besides serving the state’s interests, rural collectives played little role in land management and regulating rural land use. Few social obligations were imposed on collective-owned land. The system focused on the totality of production, but ignored the means and individuality.<sup>32</sup> This resulted in the total exhaustion of public property and the elimination of millions of peasants’ property.<sup>33</sup> For example, on the eve of land collectivization, many incidents of wasting agricultural land occurred. There was a rush of building residential houses on collective-owned land, even on scarce and good agricultural land.<sup>34</sup>

The extreme public ownership resulted in severe negative externalities, creating boundless property rights, diminishing society members’ basic negative duty not to interfere with others and causing calamities to public goods.<sup>35</sup> Without property boundaries, nobody owed any duty to the neighbors, communities, or society. This system was a great contradiction to the socialist ideology, whose aim was to promote a greater good of the community. As scholar Adrian Chan pointed out:

[The] Great Leap Forward shows the innate weakness of [Mao Zedong Thought] and Chinese Marxism, and proves that it was simplistic and utopian to place extreme faith in

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31. Xiaolin Pei, *Collective Landownership and Its Role in Rural Industrialization*, in DEVELOPMENTAL DILEMMAS: LAND REFORM AND INSTITUTIONAL CHANGE IN CHINA 237 (Peter Ho ed. 2005) [hereinafter DEVELOPMENTAL DILEMMAS].

32. The “tragedy of the commons” destroyed both promises and expectations. Peasants did not have any incentive or energy to respect collective-owned property. They were exhausted and still longing for private land ownership. Collectives did not have any extra energy to enforce social obligations.

33. WANG, *supra* note 16, at 68. Under the People’s Commune regime, almost all personal property became collectivized. Peasants only retained clothes, a few domestic animals, and some household utensils. DOMES, *supra* note 10, at 34.

34. DOMES, *supra* note 10.

35. ALEXANDER & PEÑALVER, *supra* note 5, at 32.

the powers of human consciousness to effect social and economic changes without scientific or realistic bases, and that the CCP leaders were Marxist in rhetoric only.<sup>36</sup>

*B. Analysis of the Peasants' Social Obligations*

Historically, massive social burdens imposed on peasants were not directly related to their property rights on collective-owned land. Peasants had to sell a quota of their output to the state, pay a share of agricultural taxes to the state, and meet their monetary obligations to villages' public accumulation and welfare funds.<sup>37</sup> Peasants owed financial obligations to various levels of governments, from rural villages to state governments.<sup>38</sup> The term *tiliu* referred to the peasants' financial burdens towards village governments.<sup>39</sup> In addition to official *tiliu*, other social charges, including labor corvées, were also added to the peasants' burdens.<sup>40</sup> Under many circumstances, peasants would gain nothing from sales of quotas; they may even be in debt when sales of quota were not enough to pay the whole contracted sum.<sup>41</sup>

These burdens imposed on peasants were derived from their memberships in the collectives.<sup>42</sup> In most rural areas of China, whether or not peasants fulfilled these burdens decided whether or not they were still members in the collectives, and memberships in

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36. CHAN, *supra* note 25, at 138. The years from 1959 to 1961 was known as "Three Lean Years." Official figures estimated that around 8 million people died during the famine after the Great Leap Forward. DREYER, *supra* note 25, at 103. DOMES, *supra* note 10, at 18.

37. Pei, *supra* note 31.

38. *Id.*

39. Xiande Li, *Rethinking the Peasant Burden: Evidence from a Chinese Village*, in RURAL DEVELOPMENT IN TRANSITIONAL CHINA: THE NEW AGRICULTURE 47 (2d ed., Jacob Eyferth, Peter Ho & Eduard B. Vermeer eds. 2004). In the village level, the farmers pay three *tiliu*; in the township level, the farmers pay "five *tongchou*." Three *tiliu* and five *tongchou* cannot exceed 5% of a farmer's net income. In fact, the required payments are larger than 5%.

40. *Id.* at 53.

41. *Id.* at 59.

42. SHUQING WANG, ZHONGGUO TUDI ZHENGSHOU FALV ZHIDU YANJIU [LEGAL RESEARCH ON LAND ACQUISITIONS OF CHINA] 24 (2012). Valerie Jaffee Washburn, *Regular Takings or Regulatory Takings?: Land Expropriation in Rural China*, 20 PAC. RIM L. & POLICY J. 71, 78 (2011).

turn determined whether they were entitled to obtain any property rights.<sup>43</sup> Most of these burdens had an indirect relationship with peasants' property rights on collective-owned land and most of these obligations served the government's needs. Although agricultural tax might be related to property, the weight of the tax was hefty and it had little to do with peasants' actual farming income.<sup>44</sup> All other burdens, including water and electricity fees, public accumulation funds, and other social charges such as insurance costs, fines in family planning, administrative expenses, and education fees, were not related to peasants' property rights on collective-owned land.

The shortage of funding sources significantly restricted rural government's ability to regulate any property-related activities.<sup>45</sup> Towns and villages were responsible for providing public services, social welfare, and necessary infrastructure for rural economic development. The three *tiliu* collected by village committees were assigned to local institutions for public accumulation funds, public welfare funds, and administrative fees.<sup>46</sup> However, due to weak financial statuses, rural governments could not accomplish these roles. The overstaffing problem among all three levels of governments drained financial resources. Ultimately, the burdens fell on farmers to pay salaries of these staffs.<sup>47</sup>

On the other hand, state governments did not take responsibility for their role in developing the rural economy, but further drained

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43. Nongcun Tudi Chengbao Fa (农村土地承包法) [Rural Land Contract Law] (amended by the Tenth Meeting of the Standing Committee of the 11th National People's Congress of the People's Republic of China on August 27, 2009, effective March 1, 2003) [hereinafter Rural Land Contract Law]. Article 15: "The party undertaking the contracting by households shall be a farmer of the economic organizations of the said collectives." National People's Congress, *Law of the People's Republic of China on Land Contract in Rural Areas*, available at <https://perma.cc/QP2Y-6U2V>.

44. Eventually, the agricultural tax was repealed in 2006. HAN GAO, JITI CHANQUAN XIA DE ZHONGGUO NONGDI ZHENGSHOU WENTI YANJIU [STUDIES ON CHINESE FARMLAND EXPROPRIATION UNDER THE COLLECTIVE PROPERTY RIGHTS] 55 (2009).

45. Li, *supra* note 39, at 64.

46. *Id.* at 52.

47. *Id.*

rural financial resources.<sup>48</sup> More critically, the redistribution of resources and wealth was moving backward; the regime imposed intentional and unfair redistributions of wealth from poor peasants and collectives to city dwellers and state governments.<sup>49</sup> Although traditional law and economics oppose redistribution of wealth for the sake of equality of welfare, a more progressive regime expands property owners' social obligations concerning contributing to an equal social welfare.<sup>50</sup> Chinese state governments, as the highest landowners, were profiting at the expense of agricultural collectives by taking rural land and transferring it to third parties for much higher prices.<sup>51</sup> The profits extracted from agricultural collectives were not used in rural areas to develop rural economies, but instead, were used to fund state government's operations that primarily benefited urban cores.<sup>52</sup> This further exacerbated the dire financial situations in rural areas and the gap between rural and urban areas since rural resources were constantly taken away without any return.

### III. CURRENT SOCIAL OBLIGATIONS ON RURAL COLLECTIVES

#### *A. The Identity of Rural Collectives Determines Their Limited Regulatory Roles*

After the failure of the Great Leap Forward and the tragic "Three Year Natural Disasters," the central leadership started to rebuild rural collectives. Considering that China could not regress back to the farmers' private landownership, Mao and the center administration drafted the "Sixty Rules" and decentralized collectives to three levels: People's Commune, Production Brigade, and Production Team.<sup>53</sup> Production teams were the most important collectives and

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48. *Id.*

49. *Id.*

50. ALEXANDER & PEÑALVER, *supra* note 5.

51. Gregory M. Stein, *Acquiring Land Use Rights in Today's China: A Snapshot from on the Ground*, 24 UCLA PAC. BASIN L.J. 1, 36 (2006).

52. *Id.* at 38.

53. Jacob Eyferth, Peter Ho & Eduard B. Vermeer, *The Opening-Up of China's Countryside*, in RURAL DEVELOPMENT IN TRANSITIONAL CHINA: THE

were the principal owners and managers of accounting units of agricultural land.<sup>54</sup>

Although the “Sixty Rules” decentralized rural collectives, the state and the party still firmly controlled agricultural collectives and enforced the state and the party’s policies. For example, state governments appointed team leaders of production teams who made decisions regarding farm operations.<sup>55</sup> Every production brigade was stationed an administrative office and a communist party branch, representing “the state in executing government policies such as grain procurement.”<sup>56</sup> Under the “Sixty Rules,” although the central leadership did grant some freedom to farmers, allowing them to own and manage some small parcels of “household plots,” and “homesteads,” state governments still controlled the transfer of land rights and made decisions regarding crop cultivation and their prices.

The “Sixty Rules” almost governed for two decades. Agricultural collectives in modern China are the remnant of People’s Communes, which were established in 1958 and disbanded in the mid-1980s.<sup>57</sup> After further de-collectivization, people’s communes became townships or towns, and production brigades were changed

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NEW AGRICULTURE, *supra* note 39. Peter Ho, *Introduction: The Chicken of Institutions or the Egg of Reforms?*, in DEVELOPMENTAL DILEMMAS, *supra* note 31, at 27. Geoffrey Korff, *The Village, and the City: Law, Property, and Economic Development in Rural China*, 35 SYRACUSE J. INTL. L. & COM. 399, 407 (2008). Mao preferred the ownership vested in production brigades. However, moderate members of the party suggested that ownership should be vested in production teams because farmers were more responsible for the land under the direct supervision of production teams. In September 1962, the National People’s Congress issued the Sixty Rules and identified production teams as the primary responsibility units and owners of the land.

54. RANDOLPH & JIANBO, *supra* note 17, at 76. Rosato-Stevens, *supra* note 30.

55. For example, team leaders of “production team[s]” made decisions about farm production and state governments appointed rural community members. Xiaobo Zhan et al., *Local Governance and Public Goods Provision in Rural China* (International Food Policy Research Institute, EPTD Discussion Paper No. 93, 2002).

56. *Id.*

57. Eyferth, Ho & Vermeer, *supra* note 53, at 1. PETER HO, INSTITUTIONS IN TRANSITION: LAND OWNERSHIP, PROPERTY RIGHTS AND SOCIAL CONFLICT IN CHINA 28 (2005).

into administrative villages, and production teams turned into natural villages or villagers' groups.<sup>58</sup>

Article 10 of the Land Administration Law provides the following:

Land owned by peasant collectives that belong lawfully to peasant 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 peasant 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 peasant collective of a township (town) shall be operated and managed by the rural collective economic organization of the township (town).<sup>59</sup>

However, it is unclear if these entities that manage and administer collective-owned land are equal to collectives that own land. In 2007, article 60 of the Property Rights Law further provided that these entities that manage and administer collective-owned land should exercise the ownership on behalf of collectives.

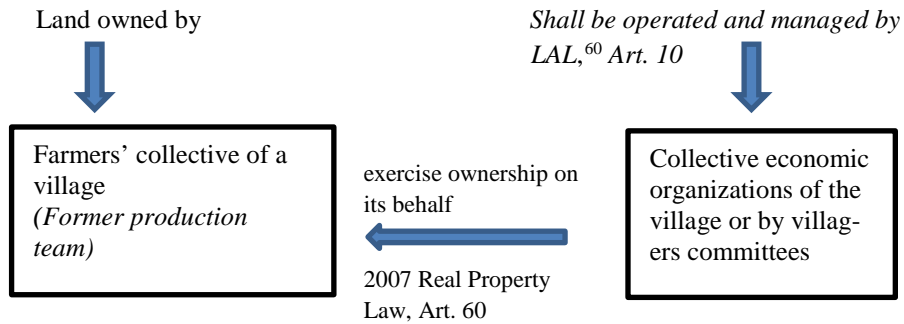
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58. *Id.*

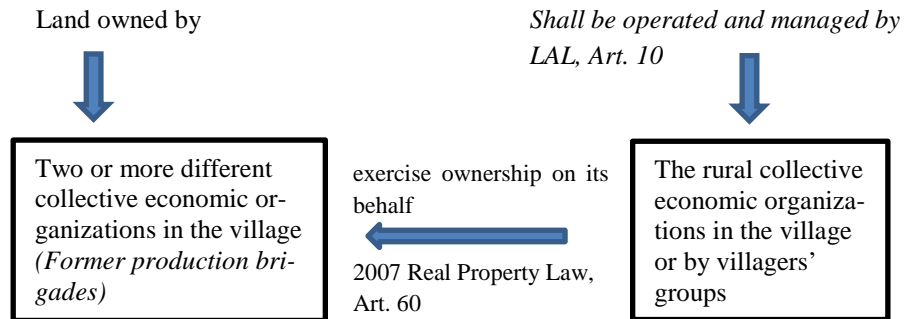
59. Tudi Guanli Fa (土地管理法) [Land Administration Law] (amended by 11th Meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China, August 28, 2004, effective Jan. 1, 1999). National People's Congress, *Land Administration Law of the People's Republic of China*, available at <https://perma.cc/F3JA-NYZN> [hereinafter Land Administration Law].

The diagrams of collectives and entities that represent collectives are as follows:

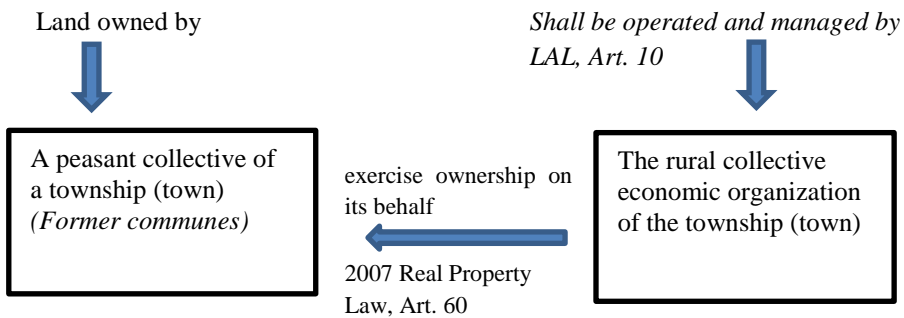
**Table 1.**



**Table 2.**



**Table 3.**



60. In this article, LAL is the abbreviation of the Land Administration Law.

Although rural collectives are important institutions in Chinese society, the vagueness of rural collectives has resulted in their limited role in regulating rural land use and problematic boundaries of rural land use rights. Collectives can mean old production teams, which are essentially natural villages, or old brigades, which are administrative villages, or old people's communes, which are townships.<sup>61</sup> Even local officials are often unclear as to which level collectives are the right owners.<sup>62</sup>

The results of this ambiguity are at least two-fold: one, because of this deliberate ambiguity, collectives can hardly establish or exercise their authority to regulate or manage the agricultural land as owners and regulators. Two, no valid legal entity can represent the interests of collectives. Collectives cannot adequately defend their ownership when the state expropriates collective-owned land. This result is what the state has intended, which further demonstrates that the state is the highest owner and arbiter of the land.<sup>63</sup>

For example, in a small town named Nanhai, neither the county government nor the town government was ready to take the responsibilities to regulate and manage a small rural river within its area. Although the county-level government agencies had authority to monitor and administer the use of the river, they did not take their responsibilities. The town government, as a grassroots bureaucracy of the local government, did not have the resources to manage the river. In fact, nine rivers within the town over an area of 171.3 square kilometers were left unmanaged and unregulated.<sup>64</sup>

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61. Peter Ho, *Introduction to DEVELOPMENTAL DILEMMAS*, *supra* note 31, at 27. Korff, *supra* note 53, at 407. Congressional-Executive Commission on China, *Property Seizure in China: Politics, Law and Protest* 24 (Jun. 21, 2004), available at <https://perma.cc/8HE9-Z3RU>.

62. *Id.*

63. *Id.*

64. Shitong Qiao, *Governing the Post-Socialist Transitional Commons: A Case from Rural China*, YALE LAW SCHOOL STUDENT SCHOLARSHIP PAPERS, 2012, <https://perma.cc/NH9F-7K39>.



Rural collectives have been weak and submissive to the state and the party.<sup>65</sup> In Maoist China, the state and the party firmly controlled the personnel of rural collectives; they appointed a party branch and team leaders for every collective. For example, in the past, production teams were the most influential collectives. However, they were too weak of an institution to represent their members' interests.<sup>66</sup> Although they had formal land ownership, they lacked real power over land, and they frequently lost their rights against local governments and higher collectives.<sup>67</sup>

After decollectivization, the situation is the same. Natural villages are not independent and are subordinate to state governments. Their ownership rests in higher administrative levels such as administrative villages, towns, or county governments and above. For example, a 1997 survey of the Central Policy Research Office revealed that administrative villages through villagers' committees and villagers' delegates (rather than natural villages) leased 60.5% of the land.<sup>68</sup>

No strong institutions represent the interests of villagers or farmers. The villagers committee, as the legal representative for a farmers' collective of a village exercising collective landownership and manage collective-owned land, has become "an extension of state governance."<sup>69</sup> This reality is no surprise because local governments and party authorities control these village committees and their leaders, although they are supposed to be elected by villagers or farmers.<sup>70</sup> Township or town governments, as a grassroots bureaucracy,

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65. Eva Pils, *Waste No Land: Property, Dignity and Growth in Urbanizing China*, 11 APLJP 1, 12 (2010).

66. Ho, *supra* note 61, at 17.

67. Daniel W. Bromley, *Property Rights and Land in Ex-Socialist States: Lessons of Transition for China*, in DEVELOPMENTAL DILEMMAS, *supra* note 31, at 45.

68. *Id.*

69. YAN ZHANG, GOVERNING THE COMMONS IN CHINA (2017).

70. Nick R. Smith, *Negotiating the Power to Plan: Spatial Planning and Property Rights in Peri-Urban China* (Apr. 15, 2015) (unpublished Ph.D. paper, Harvard University), <https://perma.cc/D42L-CU49>. Rosato-Stevens, *supra* note 30.

primarily function as an extension of local governments. Township officials are primarily state cadres.<sup>71</sup>

*B. Current Social Obligations on Rural Collectives Are Subordinate to the State Government's Authority*

*1. Registration*

Chinese laws require rural collectives to register their land ownership within county governments.<sup>72</sup> Registration is a prerogative power of state governments because it creates land ownership as well as land use rights.<sup>73</sup> In reality, however, state governments do not properly implement registration.<sup>74</sup>

Registration power clearly demonstrates the instrumentality of rural property rights in China: serving the state's interests. State governments can choose not to register some property rights and refuse to issue certificates. For example, the law does not protect the "small property room," which occurs when farmers or collectives build commercial residential houses on the collective-owned land and sell to nonmembers of collectives.<sup>75</sup>

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71. Emily T. Yeh, *Property Relations in Tibet Since De-Collectivisation and the Question of "Fuzziness,"* 2 CONSERV. SOC. 108-31 (2004).

72. RANDOLPH & JIANBO, *supra* note 17, at 81, 159. Joyce Palomar, *Land Tenure as a Market Stimulator in China,* 12 DUKE J. COMP. & INTL. L. 7, 18 (2002). According to the 1989 Land Registration Rules, "[a]gricultural collectives must apply to local land administration at the county level for the registration of their land ownership." The 2007 Land Registration Rules have now replaced the 1989 Rules. Tudi Dengji Banfa (土地登记办法) [Land Registration Rules] (promulgated by the Ministry of Land Resources, Dec. 30, 2007, effective Feb. 1, 2008). Land Administration Law, *supra* note 59, Art. 11: "Land owned by peasant collectives shall be registered with and recorded by people's governments at the county level, which shall, upon verification, issue certificates to confirm the ownership of such land."

73. Land Administration Law, *supra* note 59.

74. Palomar, *supra* note 72, at 18. Wuquan Fa Art. 10 (物权法) [Property Rights Law] (promulgated by the Fifth Session of the Tenth National People's Congress of the People's Republic of China, March 16, 2007, effective Oct. 1, 2007). The Property Rights Law reiterated to unify the registration system.

75. According to the Ministry of Housing and Urban Development, "small property room" (or Xiao Chan Quan Fang refers) to commodity housing that is built upon collective-owned land. The small property room does not have housing certificate that is issued by the state government; rather, township or town government issues the certificate. Wang, *infra* note 76.

Central state governments employ many mechanisms to abolish this phenomenon, including refusing to register land rights or refusing to issue land rights certificate.<sup>76</sup> In 2008, the central government issued a directive irritating the policy prohibiting urban residents from buying houses built on collective-owned land.<sup>77</sup> Although townships (or towns) issue ownership certificate for small property room, the state government does not issue ownership certificate on small property room.<sup>78</sup> Because the “small property room” potentially violates the nature of agricultural land and leads to misuse, it is reasonable for central governments to prohibit such use. However, serious doubts arise because the use restriction is imposed when collectives own the land and such restriction is not imposed when the state becomes the landowner. This phenomenon apparently protects the state’s monopoly over rural land, keeping the value of rural residential land cheap and enjoying the profits of non-agricultural land uses.<sup>79</sup>

## 2. Dispute Resolution

The Land Administration Law provides that towns or townships have authority in resolving disputes.<sup>80</sup> However, this law hardly

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76. The small property room does not have any housing certificate issued by the state government. Rather, the township or the town government issues the certificate. The law does not protect registration by town or village governments. It is very crucial for farmers or collectives to register their land rights in the state governments. Qi Wang, *zhujianbu: xiao chan quan fang bu keneng hefahua zhili jiang yuelaiyue yanli* [The Ministry of Housing and Urban Development: Small Property Room Cannot Be Legalized—It Should Be Treated Harsher], SHANGHAI SECURITY NEWSPAPER, May 24, 2010, <https://perma.cc/AP2Z-BQEB>.

77. Kai Wang, *Whatever-ism with Chinese Characteristics: China’s Nascent Recognition of Private Property Rights and Its Political Ramifications*, 6 E. ASIA L. REV. 43, 88 (2011).

78. Wang, *supra* note 76.

79. Central governments are in the same shoes with local governments when it comes to maintaining the state’s monopoly upon land benefits. Kai Wang, *Whatever-ism with Chinese Characteristics: China’s Nascent Recognition of Private Property Rights and Its Political Ramifications*, 6 E. ASIA L. REV. 43, 88 (2011).

80. “Disputes between individuals or between individuals and units shall be handled by people’s governments at [all levels, including] the township level or at or above the county level.” Land Administration Law, *supra* note 59, Art. 16.

grants any actual authority to rural collectives. In the first place, town (or township level) government officials are mainly state cadres. Besides, the authority of the town is mostly advisory; according to the law, state governments are the final entities in resolving disputes between parties.<sup>81</sup>

### 3. Land Regulations

Compared to regulating collective land ownership, agricultural collectives have more authority in land use rights on collective-owned land. However, most of the authorities are subordinate to or abrogated by state governments.

#### a) Land Use Planning

Land use planning is a power and tool that belongs to state governments. In more developed rural areas, different local state governments compete to control the rural village's planning process to expand their territories.<sup>82</sup> According to the Land Administration Law, local governments shall make both comprehensive and annual land use plans.<sup>83</sup> Lower-level government land use plans must be reviewed and approved by higher-level governments.<sup>84</sup>

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81. Land Administration Law, *supra* note 59, Art. 16: "Disputes over ownership of land or the right to the use of land shall be solved through consultation between the parties. If such consultation fails, the disputes shall be handled by the people's government."

82. Smith, *supra* note 70.

83. RANDOLPH & JIANBO, *supra* note 17, at 328. Land Administration Law, *supra* note 59. The annual land use plan is the method "through which decisions are made as to the release of land for land use rights in the next following year." Article 17 of Land Administration Law provides that people's governments at all levels shall manage to compile comprehensive plans for land uses following "the national economic and social development program, requirements of national land consolidation and resources and environmental protection, land supply capacity and the requirements of various construction projects." The State Council shall determine the validity term of the comprehensive plans for land use. The implementation rules set the duration of the comprehensive plan for 15 years. Tudi Guanli Fa Shishi Tiaoli Art. 13 (土地管理法实施条例) [The Implementation Rules of Land Administration Law] (amended by the State Council, Dec. 27, 1998, effective Jan. 1, 1999).

84. Land Administration Law, *supra* note 59, Art. 21.

The Land Administration Law regulates three different types of land: agricultural land, construction land, and unused land.<sup>85</sup> Agricultural land protection is the primary purpose of making general land use plans.<sup>86</sup> According to article 6 of the 1998 Basic Farmland Protection Regulations, state governments bear the responsibility of protecting agricultural land.<sup>87</sup> The State Council and its agricultural administrative department shall be responsible for the management and protection of basic farmland throughout the country. According to the provisions of this regulation, local governments at or above the county level and agricultural administrative departments shall be responsible for the protection of basic farmland management work in their respective administrative areas. However, when state governments are burdened with the responsibility of protecting farmland, they have more leeway not to enforce it.

The regulations describe the authorities of agricultural collectives in very few articles, and all of these few powers are granted to town or township governments—the grass-root level governments whose fundamental duty is to serve state governments.<sup>88</sup>

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85. *Id.*, Art. 4.

86. The overall land use plan is employed to balance agricultural and non-agricultural land use. Mark T. Kremzner, *Managing Urban Land in China: The Emerging Legal Framework and Its Role in Development*, 7 PAC. RIM L. & POLICY J. 611, 644 (1998). The average area of farmland in China per capita is only a third of the world average. Ho, *supra* note 61, at 8. HO, *supra* note 57, at 8. RANDOLPH & JIANBO, *supra* note 17, at 26.

87. This function is carried out by state governments, or township (town) governments, which are subordinate to state governments. Land Administration Law, *supra* note 59, Art. 31. Jiben Tong Tian Baohu Tiaoli (基本农田保护条例) [Basic Farmland Protection Regulations] (promulgated by the State Council, Dec. 27, 1998, effective Jan. 1, 1999) [hereinafter Basic Farmland Protection Regulations].

88. For example, Article 11 of the Basic Farmland Protection Regulation provides that farmland protection zones should be established within towns. The County level government land administration department and its agricultural department should draw the boundaries of agricultural protection zones. Townships (or towns) should be responsible for the protection of basic farmland within their respective administrative areas. Also, article 18 states that townships (or towns) can reclaim the farmland when the party under agricultural contract abandons the land for two years. Basic Farmland Protection Regulations, *supra* note 87, Arts. 11, 18.

*b) Granting Contractual Land Use Rights on Agricultural Land*

In present-day China, most agricultural collective-owned land is used under the Agricultural Contract Responsibility System. According to article 12 of the 2009 Rural Land Contract Law, collectives have the right to grant contractual land use rights for agricultural purposes.<sup>89</sup> Farmers who are members of the collectives have the right to undertake rural land contracts with their collectives.<sup>90</sup> While agricultural collectives still hold the ownership of the land, farmers have a land use right for thirty years under the contract.<sup>91</sup> State governments exercise their supervisory power upon transfer of land use rights on agricultural land through their registration authority.<sup>92</sup> Although the contractual land use right becomes effective since the signing date of a contract, when farmers do not register the contract, the land use right to agricultural land does not become effective to third parties with good faith.<sup>93</sup>

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89. Rural Land Contract Law, *supra* note 43, Art. 12. The entities of collectives that exercise the right to grant contractual land use rights follow the Land Administration Law.

90. *Id.*, Art. 5; *see also* Art. 19. The contractual process is like this: members of collectives must elect a group in charge of the contract work. The group, then, must publish the projected contract by laws and regulations. Then, village members pass the contract project through discussion. Two-thirds or more of the members of the collective must approve the contract plan. Then, the contract is concluded and publicly implemented. Stein, *supra* note 51, at 46. *See also* Gregory M. Stein, *Commercial Leasing in China: An Overview*, 8 CORNELL REAL EST. REV. 26 (2010);

91. RANDOLPH & JIANBO, *supra* note 17, at 117.

92. Rural Land Contract Law, *supra* note 43, Art. 23. Thus, when farmers transfer land use rights to farmland, they shall apply to county level governments for registration.

93. *Id.*, Arts. 22, 38. Nongcun Tudi Chengbao Jingyingquan Zheng Guanli Banfa (农村土地承包经营权证管理办法) [Measures of the People's Republic of China for the Administration of the Certificates of the Right to Contracted Management of Rural Land (2003)], *reprinted in* LAND LAWS AND REGULATIONS 277 (Law Press China 2011).

*c) Supervisory Authority of Collectives under the Agricultural Contract*

Agricultural agreements regulate farm uses and serve as a rudimentary form of zoning. The Rural Land Contract Law obligates the contract holder to use the contracted land for agricultural or other similarly prescribed purposes and not to commit waste. Farmers under agricultural contract must bear three burdens: first, they must sustain the agricultural use of the contracted land and not use the land for nonagricultural purposes without approval;<sup>94</sup> second, they must use the land rationally and protect the land, and not cause permanent damage to the land; third, they must conform to other laws and regulations. These restrictions are crucial upon the scope of collective land ownership, as well as farmers' rights in the land when they enter into agricultural contracts.<sup>95</sup>

Collectives serve a limited supervisory role to ensure that farmers use the land for agricultural purposes.<sup>96</sup> According to the law, collectives should exercise supervision over the reasonable use and protection of the land by the farmers.<sup>97</sup> Collectives have the authority to supervise and ensure that the agricultural land is used for farming and cultivating purposes.<sup>98</sup> The law requires collectives to:

[provide] the contractor services in respect of production, technology, and information, etc. as agreed upon in the contract; [and carry] out the overall plan for land use worked out by the people's government of the county or township (town) and [make] arrangements for the construction of agricultural infrastructure within its own collective economic

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94. Rural Land Contract Law, *supra* note 43, Arts. 8, 17, 60.

95. *Id.*, Art. 18.

96. Korff, *supra* note 53, at 416.

97. Rural Land Contract Law, *supra* note 43, Arts. 13, 19.

98. Benjamin W. James, *Expanding the Gap: How the Rural Property System Exacerbates China's Urban-Rural Gap*, 20 COLUM. J. ASIAN L. 451, 468 (2007). Land Administration Law, *supra* note 59, Art. 14: "Land collectively owned by farmers shall be contracted out to be run by members of the collective economic organizations for use in crop farming, forestry, animal husbandry, and fisheries production under a term of 30 years" (emphasis added). Robin Dean & Tobias Damm-Luhr, *A Current Review of Chinese Land-Use Law and Policy: A "Breakthrough" in Rural Reform?*, 19 PAC. RIM L. & POLICY J. 121, 129 (2010).

organization.<sup>99</sup>

Collectives are empowered to stop “the contractor from damaging the contracted land and agricultural resources.”<sup>100</sup> Collectives can terminate the contract and take back the land if the contractor leaves the cultivated land lay waste for two years.<sup>101</sup> Collectives have limited authority to supervise a farmer’s right to circulate his or her land use right. When a farmer transfers his or her rights to a third party, he or she must get approval from the collective.<sup>102</sup>

Even under the agricultural lease system, rural collectives are under the control of the state. Administrative villages are the lessors of the majority of the agricultural land under the supervision of the township or town.<sup>103</sup> The law reserves administrative villages (or villagers’ committees) and villagers’ delegates the rights to redistribute land according to changes in household size,<sup>104</sup> but state governments control these institutions.

Although both collectives and state governments have the power to stop illegal land use, collectives do not have robust measures to impose particular punishments upon contractors who harm the farmland. Only state governments have the authority to punish illegal actions.<sup>105</sup> Collectives have the right to compensation when the contract undertaking party permanently damages the land.<sup>106</sup> Collectives do not have an independent right to reclaim their agricultural

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99. Rural Land Contract Law, *supra* note 43, Art. 14.

100. *Id.* Arts. 13, 60.

101. Land Administration Law, *supra* note 59, Art. 37.

102. Rural Land Contract Law, *supra* note 43, Art. 37: “Where a transfer is adopted for circulation, the matter shall be subject to *consent* by the party giving out the contract; and where subcontract, lease, exchange or other means is adopted for circulation, the matter shall be reported to the party giving out the contract for the record.”

103. Ho, *supra* note 61, at 31.

104. *Id.*

105. Rural Land Contract Law, *supra* note 43, Art. 60. County level governments (not collectives) shall impose punishment when the contractors use the agricultural land for non-agricultural purposes. Land Administration Law, *supra* note 59, Art. 67.

106. Rural Land Contract Law, *supra* note 43, Art. 60. “The party that lets the contract has right to compensation when the contract undertaking party permanently damages the agricultural land.”



land when the state condemns the land for non-agricultural construction projects and the land is left unused or wasted.<sup>107</sup>

For example, article 37 of the Land Administration Law provides that state governments are empowered to revoke land use rights when the construction unit fails to start construction for two successive years. When the land used to belong to peasant collectives, state governments should return the land to the original rural collectives for re-cultivation.<sup>108</sup> However, the article does not mandatorily require the state to reclaim the appropriated rural land, and it does not grant petition rights to farmers. For example, in Zhejiang Province, the local government condemned a piece of agricultural land and granted land use rights to a local company. The company wasted the land. Three years passed and no construction work was completed. The local government did not take any action to stop such wasteful action. A group of farmers sued the government, requesting the wasted agricultural land be returned to them. The government argued these farmers did not have any right to sue them because they were no longer the right-holder of the land; only the original rural collectives had such right. The local intermediate court took the case. However, it held that farmers did not have the right to sue.<sup>109</sup>

The Rural Land Contract Law removes many of the collectives' restriction powers regarding the circulation of land. The law gives much freedom to farmers' right to dispose of the land.<sup>110</sup> The law requires only notification to collectives when farmers subcontract,

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107. Land Administration Law, *supra* note 59, Art. 37.

108. *Id.*

109. Yan Xu, *Zhejiang Haining Shiwuhu Nongmi Zhuanggao Zhengfu Wei Shouhui Xianzhi Tudi, X* [Government Does Not Reclaim Wasted Land, Zhejiang Haining City Fifteen Farmers Sued The Government], CHINESE YOUTH NEWSPAPER (Aug. 8, 2006), <https://perma.cc/3SXX-LBHE>.

110. Rural Land Contract Law, *supra* note 43, Art. 34: "The contractor shall have the right to make his own decision, according to law, on whether to circulate the right to land contractual management and on the means by which to circulate the right."

lease, or exchange land whereas it requires the agreement of collectives when farmers transfer land.<sup>111</sup> This policy creates loopholes because farmers can simply subcontract, lease, or exchange land use right whereas they keep the land use right.<sup>112</sup>

During the term of a contract, the adjustment of rural contract by collectives is very limited. Collectives may not take back the contracted land during the term of a contract.<sup>113</sup> They have the authority to adjust the management of agricultural contract, but their authority is limited and subject to the approval of the township governments and county governments. When a farmer's family moves and settles down in a small town, the farmer can reserve his or her land use right or circulate the right.<sup>114</sup> Collectives can legally adjust the management of a contract in particular circumstances such as natural disasters and when farmers move to an urban area and become city residents. The readjustment matter must be approved by no less than two-thirds of the collectives' members, and villagers' representative must report to relevant administrative agencies of town governments and county governments for approval.<sup>115</sup>

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111. Rural Land Contract Law, *supra* note 43, Art. 37.

112. According to the National People's Congress Standing Committee, the Land Administration Law was revised because (1) it reiterates the policy that "guarantees a land lease of 30 years no change;" and (2) "it curtails the power of the villagers' committee through the stipulation that leased land can be redistributed only if the approval of two-thirds of the villagers' congress or delegates has been obtained." Daniel W. Bromley, *Property Rights and Land in Ex-Socialist States: Lessons of Transition for China*, in DEVELOPMENTAL DILEMMAS, *supra* note 31, at 41.

113. Rural Land Contract Law, *supra* note 43, Art. 26.

114. *Id.*

115. *Id.*, Art. 27:

When during the term of contract, such special circumstances as natural calamities that seriously damaged the contracted land make it necessary to properly readjust the arable land or grasslands contracted by individual peasant households, the matter shall be subject to consent by not less than two-thirds of the members of the villagers assembly of the collective economic organization concerned or of the villagers' representatives and shall be reported for approval to the competent administrative departments for agriculture, etc. under the relevant township (town) people's government and the people's government at the county level . . . .

Land Administration Law, *supra* note 59, Art. 14.

However, collectives should have more authority to adjust rural land contract during the term of a contract. From the collectives' perspective, farmland adjustment is another aspect of regulating rural land use rights. Reasonable land adjustments allow collectives to either rearrange land that is returned willingly by farmers under the contract or reclaim back land when farmers cannot do the farming.<sup>116</sup> Under either circumstance, collectives can allocate land to other farmers who are able to manage farms more efficiently.<sup>117</sup>

Land adjustment due to the migration of rural labors has been a practical issue in China.<sup>118</sup> Because the agricultural reforms have freed a substantial portion of rural labor from farmland, millions of farmers have left their allocated agricultural land and look for non-agricultural employment opportunities.<sup>119</sup> A 1997 survey revealed that about 9.7% of 214 million active rural households were employed entirely outside the agricultural sector.<sup>120</sup> In 2001, 220,000 people left their farmlands in Jianli County, Hubei Province, which

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116. Rural Land Contract Law, *supra* note 43, Art. 26:

If during the term of the contract, the whole family of the contractor moves into a city divided into districts and his rural residence registration is changed to non-rural residence registration, he shall turn his contracted arable land or grassland back to the party giving out the contract. If the contractor fails to turn it back, the party giving out the contract may take back the contracted arable land or grassland.

Although the Land Administration Law provides that collectives can take back contracted farmland that is wasted by contractors, they must wait for two years. Land Administration Law, *supra* note 59, Art. 37.

117. *Id.*

118. Even fewer younger farmers are willing to continue farming. Because the profit of agriculture is low, many younger farmers have abandoned farming—their older generations employment—and look for a better life in urban areas. Roughly 7.3% of farmers' children born in the 1980s are willing to farm, whereas only 3.8% of farmers' children born in the 1990s are ready to plant. In this situation, coupled with a premature and incomplete rural land rental market, insufficiency has emerged, as these households cannot adjust such changes between land and labor. Zhang Xiaoge, *Zhengdi Chaiqian Boji Quanguo Baifenzi Shiliu Jiating*, [16% of Chinese Households are Involved in Condemnation and Demolition], RADIO FREE ASIA (Oct. 28, 2013), <https://perma.cc/AFV2-VMTB>. Scott Rozelle, Loren Brandt, Li Guo & Jikun Huang, *Land Tenure in China: Facts, Fictions and Issues*, in DEVELOPMENTAL DILEMMAS, *supra* note 31, at 134.

119. Eyferth, Ho & Vermeer, *supra* note 53, at 4. Wang, *supra* note 79, at 66.

120. *Id.*

accounted 49% of the total rural force.<sup>121</sup> They vacated around a third of the county's total arable land.<sup>122</sup> However, these farmers did not give away their land use rights; instead, they kept the land "as security in case of unemployment, disability, or retirement," or sub-lease to other farmers.<sup>123</sup> The current law permits farmers to retain their contractual land use right if they move to a small town.<sup>124</sup> On the one hand, this reality might cause a higher scale of agricultural use of the land "when the subcontracted land is leased to fewer farmers and the promotion of agricultural efficiency."<sup>125</sup> On the other hand, it has an adverse impact because it is common that these farmers would rather let the land go wasted or unpopulated than give it back to the collectives.<sup>126</sup> It is evident that this will harm society as a whole, in which case both the state and the collectives should impose a certain amount of social responsibility on the farmers. Under these circumstances, collectives should readjust the land to other farmers who would efficiently farm the land.

Because rural China has a long-term egalitarian culture, collectives face intense social pressure from the rural community to promote an equal allocation of land, which causes frequent readjustments of cropland.<sup>127</sup> Collective ownership with periodic reallocations of land ensures relatively equitable household access to land resources.<sup>128</sup> In reality, adjustments have been found most frequently and comprehensively in those regions where land is rela-

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121. *Id.*

122. *Id.*

123. *Id.* WANG, *supra* note 16, at 79.

124. Rural Land Contract Law, *supra* note 43, Art. 26.

125. Wang, *supra* note 79, at 66.

126. WANG, *supra* note 16, at 77.

127. HO, *supra* note 57, at 10.

128. Tony Banks, *Property Rights Reform in Pastoral Areas: Dilemmas on the Road to the Household Ranch*, in DEVELOPMENTAL DILEMMAS, *supra* note 31, at 264.

tively scarce, and off-farm work opportunities are limited, thus confirming the role of social insurance.<sup>129</sup> Research based on Sichuan Province showed that regions with high population pressure demand an equal distribution of resources, stringent land regulations, and a stronger commitment to shared interests.<sup>130</sup> Despite the central authorities and the liberal economist belief that land tenure security is critical to China's economic growth, it is unexpected that the majority of farmers supported redistributions of cropland because of changes in family size. In a 1997 survey conducted on 271 villagers, about 80% of them had been readjusted since the introduction of the lease system, within which 66% had been readjusted twice.<sup>131</sup> The survey revealed that 62.8% of the sample villages still supported redistribution of farmland.<sup>132</sup> Another study of 800 households showed that 62% of the participants were in favor of a policy that reassigned land among families "in response to changes in the composition of their families."<sup>133</sup>

The real force behind decisions of readjustment of land use rights comes from the state.<sup>134</sup> While most decisions are rooted in villages, townships or higher-level state governments are the final decision makers. More significantly, because of the hierarchical nature of the governmental system in China, collectives are subordinate and under the control of state governments. As the state appoints most leaders of collectives, these leaders number one concern is to satisfy their higher-level officials because this affects their "prospect for promotion."<sup>135</sup> The primary responsibilities of village leaders include: first, "collecting taxes and levying fees;" second,

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129. *Id.* The reality in the China rural area is that over 70% of registered rural residents represent a hidden unemployment in the countryside. Eyferth, Ho & Vermeer, *supra* note 53, at 14. Banks, *supra* note 31, at 264.

130. HO, *supra* note 57, at 10.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Emily T. Yeh, Kevin J. O'Brien & Jingzhong Ye, *Rural Politics in Contemporary China*, 40 J. PEASANT STUD. 915-928 (2013).

“implementing family planning;” and third, “fulfilling grain procurement quotas.”<sup>136</sup> The state or the party “has the power to remove cadres who do not succeed in fulfilling the state’s interest, and may be able to prevent fired officials from taking advantage of the perks and privileges that otherwise accrue to past and present village leadership.”<sup>137</sup>

*d) Social Obligations of Rural Homestead Housing Rights*

Rural homestead housing rights are “generally allocated [to farmers] without payment to households by village collectives.”<sup>138</sup> This is an exception to the default rule that collective-owned land must be used for agricultural use.<sup>139</sup> Thus, although the use of the land is for non-agricultural use, the land still belongs to agricultural collectives.<sup>140</sup> These rights have no time limitation.<sup>141</sup> The farmers can occupy and use their homestead without fees as long as they wish.<sup>142</sup> This right is also inheritable.<sup>143</sup> Rural homestead housing rights are of a social welfare character. Only members of economic collectives are entitled to apply to have such rights.<sup>144</sup> As early as 1963, the Central Committee of the CCP issued “A Supplement Notice about Members Homestead Problems,” which provided that: “[A homestead belonging to members of the people’s communes] belongs to production teams collectively, and the homestead is prohibited from being transferred. It shall be used by members for a

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136. *Id.*

137. Rozelle, Brandt, Guo & Huang, *supra* note 118, at 133.

138. Weiguo Wang, *Land Use Rights: Legal Perspectives and Pitfalls for Land Reform*, in DEVELOPMENTAL DILEMMAS, *supra* note 31, at 68.

139. Land Administration Law, *supra* note 59, Art. 43.

140. Jialin Zhang, *China’s Slow-motion Land Reform*, HOOVER INSTITUTION (Feb. 1, 2010), <https://perma.cc/9XH6-8XDT>.

141. RANDOLPH & JIANBO, *supra* note 17, at 118.

142. *Id.*

143. *Id.* at 119.

144. LAWS AND REGULATIONS ON LAND AND HOUSE EXPROPRIATION 8 (Law Press 2012) [hereinafter LAND AND HOUSE EXPROPRIATION]. Land Administration Law, *supra* note 72, Art. 62.

long term and unchanged. Production team should protect members' land use rights."<sup>145</sup>

The Land Administration Law provides that the land used for rural residents' homesteads must be planned for construction purposes under the general town or village land use plans.<sup>146</sup> Rural residents must apply to agricultural collectives and get approval from both villages or town and county or city governments.<sup>147</sup> The state also is strict about the "one household, one homestead" policy. Additionally, total homestead sizes applied should not exceed standards set by provinces, or cities.<sup>148</sup>

According to the language of the law, the social obligations of this land use right have two dimensions. First, the transferability of the right is limited: like any other collective-owned land, farmers cannot sell or lease the collective-owned land.<sup>149</sup> If they rent or sell their house on the land, they cannot apply for a new homestead afterward.<sup>150</sup> The purpose of this rule is to restrict farmers' speculation of homestead.<sup>151</sup> In addition, "[residents] must make good use of the original homestead or empty land" and must use the land for housing purposes.<sup>152</sup> Section 52 of the "1995 Provisions on Land Ownership and Land Use rights" provided that "if the family abandons the house for two successive years or fails to restore the house within

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145. WANG, *supra* note 16 at 100.

146. *Id.*

147. Land Administration Law, *supra* note 59, Arts. 44, 62. Guotu Ziyuanbu Guanyu Jiaqiang Nongcun Zhaijidi Guanli De Yijian (国土资源部关于加强农村宅基地管理的意见) [Land Resource Bureau's Suggestions about Strengthening Management of Rural Homestead] (promulgated by the Ministry of Land Resources, Nov. 2, 2004) [hereinafter Management of Rural Homestead]. If they want to use farmland for housing construction, they must also follow the procedure of farmland conversion.

148. Management of Rural Homestead, *supra* note 147. For violations of planning law or not through proper applications, the buildings must be demolished and the land will be restored. When homesteads exceed maximum space requirements, village collectives can make use of the extra housing. If more than one homestead is built, village collectives can confiscate the homesteads.

149. RANDOLPH & JIANBO, *supra* note 17, at 118.

150. Land Administration Law, *supra* note 59, Art. 62.

151. LAND AND HOUSE EXPROPRIATION, *supra* note 144, at 8.

152. RANDOLPH & JIANBO, *supra* note 17, at 117.

two years after its destruction, agricultural collectives may reclaim the property.”<sup>153</sup>

As a practical matter, many farmers have migrated to towns and cities and abandoned and deserted their housing land.<sup>154</sup> On the one hand, this housing land remains unproductive. On the other hand, other villages or collectives are in urgent demand for additional land for housing due to rapid population growth.<sup>155</sup> The next problem is that many homestead constructions violate both zoning laws and regulations and maximum space requirements. These buildings either occupy farmland that should be used for farming, or they exceed the maximum space requirements. Although central governments have realized this issue, it is hard to solve. For example, about 172,974 acres of cultivated land have been used to build houses since 1986, and the number is increasing rapidly.<sup>156</sup> In addition, it is common for farmers who have built houses on their homestead to sell them to urban dwellers, who cannot afford the urban homes during the housing boom but want to own real property.<sup>157</sup>

### *C. Social Obligations Imposed Upon Collective Land Ownership Are Distorted*

Collectives are legally restrained owners, and all of these restrictions come from the party and state governments. Collectives can only hold their landownership for agricultural purposes. Collectives cannot transfer, lease, or mortgage their land for non-agricultural uses.<sup>158</sup> With limited exceptions, collectives cannot

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153. *Id.* at 119. However, the Land Administration Law does not have similar articles.

154. Wang, *supra* note 138, at 69.

155. *Id.*

156. *Id.* Zhang, *supra* note 140. More than 1,800 million mu (296 million acres) of arable land of China have been used as the rural homestead.

157. *Id.*

158. Land Administration Law, *supra* note 59, Art. 63. The article prohibits the transfer of land use right of collective land for non-agricultural purposes, with the exception that the transfer of such interests in the context of bankruptcy proceedings, merger situations.



change agricultural use unless they surrender their landownership to the state.<sup>159</sup>

This land use restriction impinges entirely upon the question of who owns or who uses the land, regardless of the physical characteristics and nature of the land.<sup>160</sup> For instance, if farmers want to alter the utilization of collective-owned land, the change of use has to be approved by at least two-thirds of members of the agricultural economic group and then approved by county governments.<sup>161</sup> However, when state governments want to change agricultural land for non-agricultural purposes and eventually condemn the land, there is no such restriction.

Collective ownership has frequently been transferred into state ownership, almost at the will of the state. State governments do not regulate and impose social obligations on collective-owned land. On the contrary, the state initiates agricultural land conversion that enables the state to use agricultural land for any other purposes, as long as state governments condemn collective-owned land and then transfer collective ownership to the state.<sup>162</sup> This situation is far-reaching in the circumstance of governmental takings. This situation often happens when a suburban neighboring city has sprawled, creating a need or desire for rural land. Due to rapid urban expansion, local governments have expropriated many former collective-owned lands for public non-agricultural purposes and then sold the land use rights to third parties for a much higher price. The weakness of collectives is the central reason that they cannot fight against the state governmental takings. There are some legal restrictions to the condemnation procedures, but as a practical matter, these processes

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159. *Id.* Art. 45.

160. *Id.*

161. Rural Land Contract Law, *supra* note 43, Art. 27.

162. FENGZHEN XU, YANYING ZHANG & CUIFENG HE, JITI TUDI ZHENGSHOU ZHIDU CHUANGXIN YANJIU [NEW COLLECTIVE LAND CONDEMNATION SYSTEM RESEARCH] 130 (2012). Washburn, *supra* note 42, at 78. Land Administration Law, *supra* note 59, Arts. 43, 151.

will not prevent condemnation nor affect the legality of condemnation itself. These legal restrictions themselves clearly prove that collectives have no say when state governments decide to condemn their land.<sup>163</sup>

The three exceptions that do not need transferring of collective ownership to the state are: (1) using agricultural land for township and village enterprises, or using agricultural land use right as stock share with individuals or units to set up businesses or joint ventures,<sup>164</sup> (2) using agricultural land for public facilities and public welfare services,<sup>165</sup> (3) using the land for building houses for rural household.<sup>166</sup> Even under these limited exceptions, collectives still have to apply to local governments for approval.<sup>167</sup> This approval process is a significant barrier to rural economic development such as township and village enterprises.<sup>168</sup> The state has held hostility towards rural collectives for a long-time. China's top planners wanted to protect state-owned enterprises at the sacrifice of development of township and village enterprises.<sup>169</sup> The state thought that

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163. Vince Wong, *Land Policy Reform in China: Dealing with Forced Expropriation and the Dual Land Tenure System* (Center for Comparative and Public Law, University of Hong Kong, Occasional Paper No. 25, May 2014), <https://perma.cc/7LLX-JBKV>. GREGORY M. STEIN, MODERN CHINESE REAL ESTATE LAW: PROPERTY DEVELOPMENT IN AN EVOLVING LEGAL SYSTEM 3 (2013). The disagreements of collectives about the terms of compensation do not interfere with the process of acquisition. Even when dispute about compensation arises, the state government that approves the land condemnation resolving the issue, which is hardly partial because state government is the party that condemns the land. Implementation of the rules of the Land Administration Law, *supra* note 59, Arts. 25, 47. RANDOLPH & JIANBO, *supra* note 17, at 84.

164. Land Administration Law, *supra* note 59, Art. 60.

165. *Id.* Art 60: "Whereas the occupation of agricultural land is involved, the examination and approval procedures provided for in Article 44 of this law are required." *See also* Art. 44; article 44 refers to the process of the conversion of agricultural land into land for construction purposes, or the procedure of conversion of collective land ownership to state land ownership.

166. *Id.* Art. 62.

167. *Id.* Art. 65.

168. Pei, *supra* note 31.

169. *Id.* at 237. The state used to have the policy of restricting rural industry development: "it was illegal for rural collectives industry to buy raw materials and energy controlled by the planned system." Deng once admitted the upsurge of township and village enterprises were completely unexpected and called them "a new force suddenly coming to the fore."

only state industries could efficiently use the limited resources in China, not township and village enterprises.<sup>170</sup>

However, township and village enterprises offer substantial financial resources to villages and towns. They take advantage of the abundance of cheap labor in the countryside, make more affordable products, and significantly decrease the burdens of farmers. With the support of township and village enterprises, villages and towns can operate more efficiently; they can provide more public services and general welfare to farmers.<sup>171</sup> The statuses of villages and townships would be strengthened because they would have more money and incentive to protect themselves against the state governments.<sup>172</sup> In reality, however, because of the lack of financial resources, almost all the financial burdens fall upon the farmers, which makes poor rural areas poorer, causing social unrest and a disincentive to farming.<sup>173</sup>

#### IV. SOCIAL OBLIGATIONS SHOULD BE IMPOSED ON COLLECTIVE-OWNED LAND

As land regulators, rural collectives should have the authority to regulate and manage agricultural land use. Collectives should impose restrictions to curb or counter the negative social impact of property. It is justified for collectives or the state to impose restrictions upon the land use rights of farmland, especially basic agricultural land—the land that is most suitable for farming. The use restrictions must be imposed according to the physical characteristics of the land, not according to the owner of the land.

For example, in some less developed areas, village or township authorities frequently surcharge farmers when agricultural land use rights are transferred, and this has provoked substantial controversy.

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170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* The major responsibility of town officials was to collect taxes and fees from villagers, which created excessive burdens over villagers and sparked intense protests across rural China. Yeh, O'Brien & Ye, *supra* note 135.

Yet if the fees are used to counter the negative impact of transferring land use rights, it is justifiable. The imposed fees are legitimate under two circumstances: first, when the purchase price would be too low or unreasonable between private parties; second, when land use rights are transferred to outsiders without any knowledge of or ability to farm, or if a farmer transfers land use rights without cultivating the land. The fees is reasonable as a fine to deter current farmers from randomly transferring their land use rights.

In reality, however, the inadequacy of both social obligations and their enforcement create severe concerns for rural development, in particular for the environment. Farmers and collectives violate their social responsibility by not using land according to its nature and by putting the environment at risk. In reality, it is common for farmers to use the agricultural land irrationally. The land use restrictions are blurred, and no restrictions exist at the local level to control agricultural production.<sup>174</sup> Neither collectives nor local governments have the incentive, time, or resources to enforce legal restrictions on the agricultural activities of farmers. On the contrary, they want farmers to produce as many products as possible, as this will increase revenue.<sup>175</sup> As a result, farmers with livestock are allowed to overgraze, which significantly diminishes the quality of land in rural areas.<sup>176</sup> Significant amounts of chemical fertilizers are used, and water is polluted.<sup>177</sup> Farmers are given no immediate directions about how to greenly and efficiently use their land and not pollute the environment.<sup>178</sup>

Collectives violate their social obligations in rural areas and waste agricultural land. Since the entity of collective is vague or vacant, cadres of collectives often replace members of collectives and

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174. Korff, *supra* note 53, at 408.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

make contract decisions.<sup>179</sup> Cadres, who are also members of collectives, would either conveniently sign agricultural contracts with collectives or would forcibly occupy or buy land contracts from current farmers. As the value of farmland use is low, both the cadres and contracting farmers have incentives not to use agricultural land for agricultural purposes.

For example, in the Shuangfeng village of Guangdong province, cadres of the village illegally and secretly converted more than 3,292 acres of collective-owned forestlands, including other villagers' contracted agricultural lands, into luxury cemeteries.<sup>180</sup> Trees were cut down, and lands were cleared and cut into squares according to different bosses.<sup>181</sup> Disguised as a buyer, a journalist interviewed one "boss."<sup>182</sup> When told by the manager that each square meter cost 100 *yuan* and that the journalist could buy as many square meters as desired, the reporter asked, "Will the government examine this [illegal land use of collective-owned land]?" The boss replied, "You don't need to worry about this. There is no problem with it. The village [cadre] has solutions." The journalist then asked how the bosses got the land, and the manager told him that the community collective contracted the land to them.<sup>183</sup> Every year, these managers paid fees to the village and then they sold these properties as cemeteries.<sup>184</sup> Then, the journalist interviewed the cadre of the community, but the cadre denied all allegations, saying the collective did not sell land to people to build cemeteries.<sup>185</sup> When the journalist asked why there were so many cemeteries found, the cadres said: "the forest is too far away from the village and is hard to walk from

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179. Pei, *supra* note 31, at 237.

180. Dan Zhang, *Guangdong Puningshi Shanlin Bei Sizi Chengbao Jianmuyuan*, [Trees and Forest in Puning City, Guangdong Province, Are Contracted Privately for Cemeteries Construction], GUANGZHOU DAILY (Oct. 18, 2013), <https://perma.cc/TNR3-B6AZ>.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

here, and it is very hard to manage.”<sup>186</sup> The journalist also interviewed the city department of civil affairs, but the staff told the reporter that they did not know about this.<sup>187</sup> He told the reporter that a few individual villagers might have built these so-called cemeteries.<sup>188</sup> The reporter questioned him about his brother who managed one of the cemeteries (as tipped off by one villager).<sup>189</sup> The cadre replied that his brother was not managing the cemeteries, just one temple.<sup>190</sup> However, during the journalist’s interview, there was no visible temple found.<sup>191</sup>

In another example, in Tongzhou City, Yongshun town, Jiaowang village, a cadre illegally occupied agricultural land for residential purposes.<sup>192</sup> He also was breeding Tibetan Mastiff dogs for commercial purposes.<sup>193</sup> The cadre received the lease of the land from one villager and paid over 1 million *yuan*.<sup>194</sup> The agricultural land belonged to the village collective and should have been used for apple planting.<sup>195</sup> After the cadre had started construction, villagers made complaints to the town government.<sup>196</sup> The town government planned to have a tractor demolish the construction, but it stopped after only destroying part of the building.<sup>197</sup> Then, the cadre resumed construction.<sup>198</sup>

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186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. Haocheng Wang, *Beijing Cunguan Weijian Haohua Zangaoyuan Cengbei Leling Chaichu You Fujian* [Beijing Village Cadre’s Illegally Built Luxury Tibetan Mastiff Park Has Been Ordered to Be Demolished but Is Re-Built Again], FAZHI WANBAO [LEGAL EVENING NEWSPAPER] (Oct. 17, 2013), <https://perma.cc/48L8-AXKV>.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

## V. CONCLUSION

Chinese rural collectives as both landowners and land regulators should bear certain social obligations. In reality, however, Chinese rural land rights are devoid of social obligations. Current social obligations on collective-owned land are inadequate, ineffective, and distorted. The collective system creates boundless property rights, eliminating property users' minimum negative social responsibilities that they should not use their property in a way that harms neighbors or community. The vague and weak status of rural collectives explains their limited roles in regulating rural property rights on the collective-owned land. The land use restrictions on collective-owned land impinge entirely upon the question of who owns the land rather than physical characteristics of the land.

As higher-level regulators, the state should impose restrictions on rural right-holders to use the agricultural land properly and reasonably to accommodate agricultural land's physical characteristics, such as its nature and location and to serve social welfare. As regulators, the state does not fulfill its regulatory responsibilities in enforcing social obligations on collective-owned land. As higher-level landowners, the state violates its social responsibilities by harming agricultural land. Lack of boundaries of the state powers causes the state to be extremely flexible in encroaching upon rural property rights whenever it wants to.

This article argues that for agricultural land, where physical characteristics of the land are better used for farming, the use restriction serves as a social obligation that conforms to physical characteristics of the land. It is justifiable for collectives or state governments to impose social obligations on rural land because collective-owned land is predominately suitable for agricultural use. The restrictions, however, must be imposed according to physical characteristics of the land, not according to the identity of owners of the land.