

The Infeasibility of Establishing Land Development Rights in China Based on the Path of Real Rights

Jingshen DU, Ping LUO*

1. Shenzhen Research Centre of Digital City Engineering, Shenzhen 518034, China; 2. Key Laboratory of Urban land Monitoring and Simulation, Ministry of Land and Resources of the People's Republic of China, Shenzhen 518034, China

Abstract Using comparative analysis and documentation method, this paper reveals infeasibility of establishing land development rights in China based on the path of real rights, in the hope of providing recommendations for improving the research route on localization of land development rights. Results indicate that at the level of legislative techniques, the land development rights rooted from property right paradigm do not contain possess the elements of object of real rights and conflict with the principle of statutory real rights and single ownership. At the level of legal logic, individual case of TDR conflicts with real right in rem. In conclusion, it is infeasible to introduce land development rights based on the path of real rights. In future, it is required to discard the concept of mechanical transplantation and explore feasible path and seek feasible way for establishing land development rights along with the direction of quasi-property and improving regulation efficiency.

Key words Land law, Land development rights, Reviews, Real rights, Property rights

1 Introduction

As an incentive plan, the land development rights originated from zoning. As a way of government exercising the police power, the legitimacy of zoning lies in the fact that it excludes the improper obstruction of land ownership which leads to windfall-wipeout dilemma, but it is free from assuming liability for compensation due to value impairment of property right. The transfer of development rights (TDR) arose in response to the movement of private property right with constitutional government and justice as value orientation. As a non-financial compensation, TDR programs compensate economic losses of land owners in areas with development limitation, while agricultural land, vulnerable ecological regions, and open space will get permanent protection due to these owners losing corresponding land development rights. Since New York initially introduced the density transfer mechanism in 1968, TDR propagated on a large scale benefiting from constitutionality judgment of the court (Penn Central Transp. Co. v. New York City, 438 U. S. 104(1978)). By 2007, about 181 TDR Programs had been implemented in 33 states of America, and the area of protected agricultural land, nature reserve area and open space was up to 300000 acres^[1]. In recent years, some European countries start studying and attempting to introduce this policy tool^[2]. In view of sharp shrinkage of farmland in the process of rapid industrialization and urbanization, as well as encroachment of farmers' land rights and interests, the practice and theory of TDR in foreign countries arouse deep interest of Chinese scholars. At present, a prevailing idea is that land development right is a property right in

foreign countries. If introducing land development right to China, it should be planted into China's property legal system as property right, or even included into the real right law as a usufruct^[3-6]. Logic basis of demonstration is the separability of property right power. It's believed that accelerated urbanization and large scale land development of countries since the 20th century is the condition of separating land development right from ownership. China should adapt to this trend by establishing land development right to regulating land development relationship of space dimension. This opinion proposes establishing land development right through revising *Real Right Law* or *Land Administration Law*, by specifying ownership, operating rules and procedure, and also proposes three operating models of state-owned development right: compensatory transfer, free grant, and market transaction. However, is this proposal feasible? Central government of China calls for comprehensively implementing the rule of law and accelerating legislation of key fields, to protect property rights of citizens. Solving this question concerns selection of legislation path and allocation of legislation resources, so it is of great realistic significance. Here, we will discuss the infeasibility of establishing land development right in China based on the path of real rights at the level of legislative techniques and at the level of legal logic.

2 Infeasibility at the level of legislative techniques

2.1 Two basic paradigms of legislation on property right

At present, legislation on property right in the world mainly includes two paradigms: property right paradigm and real right paradigm. In Anglo-American law system, property law is a legal division parallel to contract law and tort law. Property right legislation follows the logic of property paradigm, which considers property right is a bundle of rights with potential economic value. As to which rights forming the bundle of rights, there are different answers according to different criteria. According to right nature, the

Received: May 10, 2015 Accepted: July 14, 2015

Supported by Special Fund for Scientific Research of Public Welfare Industry of Ministry of Land and Resources of the People's Republic of China (201411014-4).

* Corresponding author. E-mail: 271913502@qq.com

bundle of rights generally includes exclusive right, assignment right, and right of possession and use^[7]. In fact, no one can make an exhaustive list of contents of rights, because theoretically it is possible to freely establish rights through a contract. Such idea of defining property as sum of rights actually acknowledges the potential independence of each right in the bundle or rights and the possibility of separating independent transfer and circulation. The bundle of rights is a concept of general quantity. Rather than enumeration, it is a general definition of property. Such peculiar property law mechanism started from feudatory system in the 11th century. Due to enfeoffment hierarchy, there gradually established "one *res*, many rights" and the dual ownership pattern. However, court adjudicates disputes on the basis of comparative advantage^[8]. Therefore, on the basis of the segregation of property and right, Anglo-American property law does not stress integrity and logic of legislation. It explains objects that can bring economic benefits as property and includes it into scope of property law. Civil law system takes bifurcated approach of personal right and property right, and dual structure of real right and obligatory right as pillar, and builds a complete property right system adjusting static possession and dynamic circulation relationship of *res*. Thereinto real right is a specific eminent domain of specified subject over specified *res*^[9]. Obligation law regulates dynamic circulation relationship of *res*, but should not violate mandatory provision on static possession relationship stipulated by real right law. In other words, real right law in civil law system is penetrated into obligation law, and therefore obligation law becomes precondition and means for transference of property right^[10]. This property law mechanism is the product of Pandekten Jurisprudence in rational logic. Pandekten Jurisprudence abstracts general concept using method of "extracting common factors", makes the code become an interconnected logic system through level of level deduction, and reaches "only accepting logic certainty of abstract concept" on the basis of syllogistic application of laws. Along this path, it forms real right system with absolute ownership as center, and usufruct rights and collateral rights as basic content, and abandons the concept of property right. These show that there are significant differences in legislative techniques on property right between Anglo-American law system and civil law system. Therefore, studying the infeasibility of establishing land development right based on the path of real right can be equivalently transformed into studying the infeasibility of land development right being expressed as real right in civil law system. However, on this question some scholars have not clearly explained the specific nature of land development right. We judge the land development right is real right through internal logic of demonstration.

2.2 Infeasibility I: object of land development right's non-corporality According to foreign practice, land development right is the right of owner to build or develop his own land within the zoning act or other local laws. As an abstract concept, land development right is often measured by dwelling unit per acres, and plot ratio^[11]. In logic, any thing that can characterize poten-

tial economic value of land development can be measurement form or object of development right. According to Article 261 (a) of *Town Law of New York State*, land development rights shall be quantitated and allocated by any reasonable and consistent criteria that can effectively measure the value of land development right, such as land area, floorage, plot ratio, dwelling unit per acres, height restrictions and so on, which are the technical indicators of development capacity regulation. Therefore, we take development capacity as the superordinate concept to characterize space limitation and freedom of land owner in developing land. However, if the development capacity can be a *res* in civil law system? In civil law system, the object of real right must be a *res* corporeal and shall meet two conditions: certainty and independence. Real right is an absolute domination over *res*, so the object of real right must be corporeal and specific, not abstract, in which way can make the legal relation clear and definite, and as a result it can be convenient for publicity and guarantee transaction security. Therefore, there goes the proverb "one property, one right" in *jus romanum*, and also in German civil code, there goes the certain principle for object of real right. The other principle is independence. The object should be independent individual and complete according to social, economic or legal concept. The criterion is whether it can satisfy living demands of people on its own. Partial *res* is difficult to realize actual benefit and also difficult to publicize ownership. As to development capacity can be essential elements of certainty and independence is doubtful. Firstly, for certainty, as a product of quantity control, development capacity is subject to architectural form thus as a result varies in actual spatial form. In other words, before construction, the development capacity on land only possesses certainty in quality, not in spatial, not to mention the exclusive control over space. Secondly, as for independence, only combining with land, may the unused development capacity have economic value; once separated from land, there exists no possibility of utilization value or functioning independently. That is to say, land owner's utilization of development capacity depends on land. In conclusion, development capacity fails to satisfy living demands of people. As a part of land, development capacity cannot become a *res* corporeal. According to Paragraph 2 of Article 2 in the *Real Right Law of the People's Republic of China*, the term "*res*" as mentioned in the present law means realties and chattels. If considers land development right as real right, here comes the question that as object of land development right should we take development capacity as realty or chattel? In Anglo-American law system, realty refers to land and its attachments, and the benefits, interests and rights within the ownership of real property. On these grounds, American courts usually consider TDR as right of real property^[13]. In the case of Mitsui Fudosam, the court considered TDR as part of rights in the bundle of land rights and thus constitutes a taxable real right on immovable property. Collier County considered the land development right as the sum of rights and interests in real right on immovable property. Dade County defined the severable use rights as lawfully permitted right of use

of real property on immovable property. However, there is essential distinction between TDR and common real property transaction. In TDR, development capacity has been displaced. Obviously such characteristic is not consistent with the definition of real property in civil law system. In civil code of Germany, it uses the term "Unbewegliche Sache", which means immovable property. China's civil legislation follows this tradition and defines real property as land, structure and any attachment thereof^[9]. These show that there lies significant difference in definition of real property between Anglo-American law system and civil law system; the former focuses on property, while the latter focuses on res. If defining development capacity as movable property, it does not conform to traditional definition of chattel in civil law system and at the same time it is not consistent with the practice in publicizing and protection means of movable property. In sum, the object of land development right does not meet the condition of certainty and independence of res, and therefore cannot be recognized as res in *Real Right Law*. As a matter of fact, land development right exists only in concept. It is a type of right established by government as needed. Without detailed contents of right (such as criterion of right, allocation rate, and transfer ratio), it is impossible to embody the transaction object.

2.3 Infeasibility II: confliction between free creation of property right and the principle of statutory real right

Method of creation right is a fundamental distinction between two paradigms. In property right paradigm, a person can freely create rights through contract law. In contract law of Anglo-American law system, there is nearly no limitation on relationship created by the parties based on res. Only when such relationship involves other people of *acquisitum*, it may become content of property law. "If the right created by contract can be transferred, it will be legally deemed as a property^[14]." New property right established by contract is equally protected by property law. In this situation, types and content of property can be expanded infinitely, which caters to the demands in "rights explosion" society, and is highly adaptable and flexible. For example, when economic value in mineral deposits, the right holder can create a mining right and transfer to others as an independent property right. Water right, space right, and land development right are generated from this logic. However, real property paradigm in civil law system strictly implements the principle of statutory. In other words, types and content of real right are directly specified by laws, and should not be created freely by the parties through negotiation. Article 5 of the *Real Right Law of the People's Republic of China* stipulates that the varieties and contents of real rights shall be prescribed by law. For example, usufruct rights only includes land contractual management right, construction land use right, house site use right, and easement, and a usufruct right holder is entitled to possess, use, and seek proceeds from it. In China, owners of collective land should not establish rural land use right which has disposal power. If violating this principle, there will be three legal consequences: (i) real right will not be accepted; (ii) there will be no effect of real

right; (iii) the invalid juristal act of real right will be changed to other valid legal act. Therefore, land development right has a completely different logic of creation under the framework of real right paradigm and property right paradigm. At present, land development right is not included in *Real Right Law of the People's Republic of China*, and also has minimal likelihood to be included in future law amendment. Therefore, it is not feasible to control rural land circulation through establishing land development rights which refers to logic of property right paradigm

2.4 Infeasibility III: confliction between severability of rights bundle and the sole principle of ownership

The key difference between two paradigms lies in the concept of ownership. In property right paradigm, the term "ownership" is purely equal to possession and includes no more meaning than real right because laws provide equal protection for specific property rights freely established; the use and usufruct right derived from ownership are shared by many people, so it is improper to say the ownership belongs to any person^[14]. Establishing and dividing by demands and creativity, property rights bundle enjoys a severable characteristic. Such characteristic can be traced back to land tenure in England: the king gives land to tenants under the premises of tenants should offer certain labor, and tenants as feudal lords turn land to knights and hold the land in the name of knights. The land tenure denies the sole principle of ownership. If the ownership is severable between landlord and tenant, why can't it be severable between other people that have other connection with land?^[14] The severability is an essential characteristic of property rights^[15]. In real right paradigm, the concept of ownership is completely different. Ownership is an absolute dominating right of owner over a property and is manifested in several forms, namely, powers. Powers are various measures and means taken by owner for realizing exclusive benefit within the scope of legal regulations^[12]. Therefore, rights and powers are simply the relationship of essence and form, rather than entirety and part^[10]. Ownership cannot be deemed as the sum of possess, utilize, seek profit from and dispose of a res. The *jus in re aliena* is also not derived from ownership. Ownership and *jus in re aliena* are equal. For the sole principle of ownership, Shi Shangkuan^[16] once excellently discoursed that, the ownership enjoys unified domination over the corpore, it is not the sum of rights of utilizing, seeking profit from and disposing of the res; it has sole content of free use within the limitation of laws, just like the freedom right of personality; it is not the sum of powers of a res, but a sole right to do things freely within certain limitations. Therefore, even taking land development right as a power of ownership, it is impossible for the owner to separate land development right from ownership. Some scholars^[3,6] considered that based on the theory of property rights bundle, the development right is an independent property right that can be separated from land ownership, which obviously is inappropriate. Some scholars^[17-18] did not directly quote the theory of property rights bundle, but proposed a separation of powers theory, and believed that land development right is parallel to other

powers of land ownership that can be separated from ownership. In essence, this is a variant of rights bundle theory. Land development right is not the power of ownership. If considering powers as independent right that can be separable from ownership will lead to the confliction in real right under civil law system. From the perspective of powers, building or developing in their own land is the use power of the ownership. Land development right is a kind of specific manifestation of owner exercising land use right, it is a due meaning of ownership. In the times of absolute ownership, the land use right is free from any legal limitation and its scope of validity is limitless. Nevertheless, with social development, there comes violent conflict between concept of ownership and public interest. Since the 20th century, more and more countries imposed limitation on absolute exclusive dominating right of private land with reference to legislation and case decisions. Accordingly, land use power of land ownership is strictly regulated by public law, mainly manifested in government specifies powers of land use right in such plot ratio, floor area or height development capacity indicators with the aid of land use and planning laws. However, probing into various development capacity indicators, they only differ in quantity, but not in quality. Therefore, land development right is transferred from sending area to land of receiving area, but its essence is not changed and also the merging and superposition of land development right of different land cannot be impeded. Besides, the unused development capacity belongs to space right, to which there is mature regulation system in civil law system. In Article 136 of *Real Right Law*, "the right to use land for construction may be established separately on the surface of or above or under the land. The newly-established right to use land for construction shall not damage the usufruct right that has already been established." Such provision establishes characteristic space right system of China.

3 Infeasibility at the level of legal logic

3.1 Conflict between individual case of TDR and jus in rem nature of real right According to decentralization's frame in US Constitution, decision-making power in land policy belongs to residual right of states. Thus, there is no centralized zoning policy at federal level in the United States. Instead, legislative organ of each state authorizes its counties and cities to carry out land management through district planning enabling act or similar enabling methods. As a result, in most cases, there is a great difference in land development policies between states or even in counties and cities of the same state^[19]. Taking TDR as an example, before implementing TDR programs, local government should obtain approval from state congress, so as to avoid the trouble of legal proceedings filed by the parties. By February 2005, 28 states of America had formulated or were drafting TDR related acts. In view of different enabling methods and local situations, different TDR programs differed in design elements, including protection objectives, benchmark zoning, land development right allocation proportion, density reward, transfer rate, and transfer process,

etc. These show that TDR is implemented in the form of programs in the United States and every TDR program is an individual case. Individual case means (i) outside the area that established programs by government, land owner should not separate TDR from the bundle of rights; (ii) even in the area of a program, the separation and transaction of TDR should be approved by planning authorities in advance, to reduce negative externalities of TDR. The real right in civil law system has *jus in rem* nature. The *jus in rem* is of such a nature as to be available over its subject without reference to one person more than another, or generally expressed, a right competent can go against all persons^[9]. If introducing land development right to China in the form of real right, according to legal logic of *jus in rem* nature, owner of right naturally has the complete dominating benefit of land development right and can generally, freely and willfully use and dispose. Obviously, this is not consistent with basic fact of implementation of TDR programs. The root source of individual case of TDR lies in spatial heterogeneity and temporal specificity of land development activities, as well as total amount regulation of government and stability of planning or zoning. In fact, overview the cases of land development right transactions in the United States, sometimes land development right is called development credits to stress the nature of commodity. In sum, the logic of dividing land development right in America lies not in establishing and improving specific property right structure, but lies in transfer and transaction practice of land development rights oriented towards protecting environment and natural resources, showing significant purpose and utility.

3.2 Logic conflict of other evidences In theoretical circle, other evidences on proving land development right is real right (property right) suffuse logical contradictions^[3]. Firstly, using double ownership theory to prove land development right is a state-owned independent property right. However, accepting double ownership of land is a characteristic of European feudal society. Change of European ownership concept in the 19th century is resulted from single ownership system and "one thing, one right" principle of Roman law system^[20]. At present, in the countries that follow Anglo-American law system, the double ownership has developed into coexistence of ownership of common law and ownership of law of equity. However, civil law countries follow principle of absolute real right, so they will not accept two ownerships on one *res*. Secondly, proving the land development right is state owned property right using provisions of *Town and Country Planning Act* (1947) of the UK^[5]. In compliance with Floating and Shifting Values, the *Town and Country Planning Act* (1947) stipulated that any land development activity must be approved by local planning authorities, and should pay all land appreciation incurred thereby in the form of development charges. This provision suffered violent attack due to a deadly blow to industrial efficiency and consequently was abolished in 1952. In addition, the UK did not take land development right back to the country without compensation. Thirdly, proving land development right is state-owned property using regulation that the state controls over the use of col-

lective land^[21]. According to this opinion, land use regulation implies the precondition of land development right belongs to the state in China. However, land use regulation is the limitation of the state on the changes of land use according to land use planning, is public management of the state over urban and rural land as representative of public interests, and falls into the scope of adjustment of public laws. In logic, land use management is the characterization of the state exercising planning right, rather than the result of state exercising land development right. Planning right belongs to national public power, which is completely different from the nature of land development right. Fourthly, some scholars are aware of the potential conflict between land development right and the real right law and attempt to solve empowerment and transformation of land development right by formulating "methods for taking and managing agricultural land" and "methods for transfer and management of land development floor ratio", but they recognize land development right as a type of property right separable from land ownership at the same time^[22]. Obviously, these are contradictory in logic. According to Article 8 of *Legislation Law of the People's Republic of China*, in respect of matters relating to fundamental civil institutions about property right, only national laws may be enacted, land development right should not be established through administrative statute or local regulations.

4 Conclusions and discussions

We proved the idea of Geertz again, that law is local knowledge. Rooted in property right paradigm of Anglo-American law system, the land development right is not feasible in China through establishment within the framework of the real right paradigm, because there is a wide gap of legislative techniques between Anglo-American law system and civil law system. Otherwise, it will lead to disorder of existing concept and system of real rights. In fact, the idea of land development right being a real right is an idea mainly in jurisprudential circle. Many scholars do not offer their grounds. They are just based on simple judgment of analogy, obviously influenced by the concept of property rights in Law and Economics, reflecting dominating position of Anglo-American academic ideas. Local characteristic of laws cannot deny the universality of problem implied in systems, namely, how to balance the tension between public power and private rights when the state limits citizen's right for the benefit of public interests? The logic of land development right is to explore a market mechanism to alleviate rigid intervention of police power (zoning) against land property right, to realize equalization of public burdens, and stimulate the parties to reach the goal of management through economic incentive. From the perspective of jurisprudence, the essence of TDR is a new property right established by government to compensate economic loss of the party through market transaction^[23]. As a right with economic value, land development right is deemed as a quasi property because of its attribute of public right: (i) separation, creation and transaction of land development right need approval of government, promotion and confirmation by administrative permission; (ii) land development right may be transferred only to those

areas designated by government, and the quantity and price depend on parameter designing such as benchmark zoning, density incentive, transfer rate and so on. From the perspective of management science, TDR is a successful application of Coase Theorem in solving external problems. It introduces a management path based on right and introduces market mechanism to implementation of zoning. In other words, spatial allocation of land development activities is decided by market rather than government, which realizes elastic improvement of planning and management market and increase allocation efficiency of land resource. The universality of land development right issue reflects necessity of introducing land development right, while its local characteristic needs getting rid of mechanical institutional transplant idea, but should make local theoretical creation and institutional innovation. All civil countries introducing land development right have made constant adjustment according to their social, economic and legal environment. For example, Taiwan applies land development right in cultural asset protection, public facility reserve land acquisition and urban land use planning management through formulating *Cultural Heritage Protection Law*, and *Methods for Implementation of Transfer of Urban Planned Floor Area*, etc. Japan created comprehensive design system, group land comprehensive design system, and joint building design system through revising Building Standard Law, to realize the effect of plot area transfer. These indicate that it is completely possible for legal concept experiencing localization process to be conveyed in another legal form. Therefore, academic circle should shift idea, on the basis of absorbing quintessence of TDR system, and following measures with reference to change measurement method and technology in the field of electronics. Firstly, it is recommended to adapt to administrative goals and means following the direction of quasi real right, and change to providing service, guidance and cooperation from management mandatorily^[24], to explore conditions and procedures of separating, creating and transferring of land development right in the form of floor area ratio in *Land Administration Law* and *Urban and Rural Planning Law*. Secondly, along the direction of increasing regulation efficiency and adapting to the market orientation reform of agricultural land conversion mandatory planning and management, China should explore land development right expression form and specific improvement scheme within the framework of "agricultural land conversion-taking-supply".

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