

The Theoretical Analysis on “Same Right & Same Price”

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Abstract

China's private property system contains its own defects, especially on collective land private property. Collective land property is severely restricted by land administrative management. The land development right was deprived and the capitalization of land is limited. Basing on this reality, government has to rely on levy to acquire the land of urbanization. On the other side, the capitalization and development of land brings the adding-benefits. Current distribution modes of adding-benefits provoke government to levy. The large scales levy on peasants' and collection's land exceeds the rational extension of levy system. To enhance private property and achieve rights equally will be the final solution.

Key words: Theoretical analysis; Same right & same price; Private land rights

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INTRODUCTION

“Same right & same price” is essential policy of the new turn China's land revolution. The “same right & same price” means rural lands have the same right and same price in the market with urban lands during lands transaction. It is described as “establishing a unified constructive land market, allowing rural collective profitable constructive lands transferred, leased, shared

and implementing the policy of same market, same right, and same price as the same as state-owned lands under the premise of conforming to the planning and using regulations” in the document of Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform. This policy is considered as the symbol of “secondary separation of land rights”, which provides the clear direction for China's future development of mainland's land rights. Therefore the policy needs further analysis in both the theory and practice. This paper is trying to restate the policy by solving following problems: What is the relationship between the incompleteness of rural private land rights and rural land expropriation? Why China appears abusing land expropriation for rural lands? Why the policy of “same right and same price” is the wise measure to solve the dilemma of land system in mainland China?

1. THE DEFECTS OF LAND RIGHT SYSTEM IN CHINA

Constitution of People's Republic of China (hereinafter refers to as *the Constitution*) has set rules for dual ownership systems of urban and rural lands. Specifically, urban land is owned by the state and rural land is owned by the group. Moreover, buying and selling of land ownership is definitely prohibited, and only legal rights can be transferred according to law. Following the construction of constitutional system, *the Property Law* adopted the “usufructuary right” concept in the traditional continental law system, created private right system including land contracted management rights and the right to use state-owned land for construction. But over the private land rights, it meanwhile exists the public rights-led land administration system, such a land management system has set many restrictions for the exerting of private land rights. This phenomenon stems from the

unique development process of Chinese mainland private rights. The first version *1954 Constitution* recognized the private ownership of lands, but this recognition will be abolished soon, whose sign was the beginning of the socialist transformation and the collectivization campaign carried out in the countryside of the 1850s. In the planned economy era, civil society based on private rights has become an integral part of political state and in the reform and opening up period after the end of the Cultural Revolution, the State and people began to accept the idea of private rights again. Therefore, the civil society is developed from the political state at the present stage, and this process has had a profound impact on China Land rights: The land rights developed from national management and control did not completely get rid of binding from the administrative system, and the private land rights still remained quite a few limitations from land management system. Specific right types of dual land system have produced differential impacts: private rights on collective lands got more limitations, while the private rights of state-owned lands got relatively fewer restrictions.

1.1 The Uniqueness of the Usufructuary Right Concept

China's land rights adopted the concept of usufruct. The so-called usufruct is intended to refer to "other property rights for the subject of using earnings, namely the entity of things those rights to acquire for the purpose of using values" (Shi, 2000, p.15). But in our law system, the concept of usufruct has slight differences with the traditional civil law, and in traditional continental civil law, the distinguish of specific rights in usufructuary rights are generally based on the specific nature of the property rights. For example, in *the German Civil Code*, the usufructuary rights are divided into usufruct, easement and restrictive personal servitude (Bauer, 2004). The standard of this distinction is based on the right sizes of usufructuary people compared to the owners. While the Chinese mainland usufructuary system mainly divides land usufructuary rights by the use of lands. For example, the Chinese mainland state-owned lands mainly exist using rights of construction lands, while the collective lands exist the land contracted management rights, using homestead rights and so on. For different types of land using rights, there is a corresponding system of land management, which greatly limits the exerting of private land rights.

1.2 Performances of the Limited Private Land Rights

First, owners cannot change using patterns of lands. Private land institutional system itself is to be set up in accordance with the land use, which means private land rights cannot exist if changing the use of land. Therefore, the owners cannot change the use of land, but use lands according to the use rights.

Second, the current land management system has set limitations on developing collective lands. According to Article 43 *Land Management Laws* "any entity or individual must apply the state-owned lands by law when needs lands to construct" and Article 63 of the this law provides "the land use rights owned by peasant collective can not be sold, transferred and leased for non-agricultural construction", explicitly prohibiting farmland used as construction lands.

Third, the limitation of land management system manifests as the limitation of transferring and mortgaging. According to Article 44 *Interim Regulations of Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas* provides that prohibiting transferring, leasing, and mortgaging in principle. According to Article 184 *Property Laws* provides "the use rights of collective lands such as farmlands, homesteads, private lands and mountains" should not be mortgaged in principle, but leaving a breaking point that "unless mortgaged according to law".

1.3 The Different Private Land Right Powers Between State-Owned Lands and Collective Lands

From the view of horizontal comparison, the state-owned and collective lands do not have equal limitations on land management system. Generally speaking, the privacy rights of collective lands are more confined with obvious nature of land administration management and less private rights, while state-owned lands with more privacy rights get fewer limitations. Compared with private land right nature between these two kinds of lands, collective lands are mainly confined to the two following restrictions:

First, there are restrictions on the aspect of developing and constructing. The Articles 43 and 63 *Land Management Law* explicitly prohibits collective lands using as non-agricultural construction, and we must use state-owned lands when we do constructions.

Second, there are restrictions on transferring and mortgaging, which mainly are reflected in the aspect of dividing the use rights of construction lands. However, the homestead use rights in collective lands are explicitly prohibited to mortgage and are confined in transformation. Although the land contracted management rights are recognized to be transferred, we still have questions whether they can be mortgaged on the level of law and practice. All in all, the right power of collective lands is less than state-owned lands on the aspects of transferring and mortgaging.

2. CONSEQUENCES OF LIMITATIONS OF THE LAND RIGHTS

Because of the restrictions of land rights and the unequal rights of urban and rural, collective lands are in a

condition of “collapse”, which produce two kinds of real consequences: the relatively inadequate capitalization of collective lands and collective lands deprived of developing rights.

2.1 Inadequate Capitalization of Collective Lands

“The capitalization means the process that converts the assets into the capital current market conversion value relies on profit” (Zhang, 2003). From the view of capitalization, the use right of collective lands is a kind of property right with inadequate capitalization, while state-owned land use rights have relatively adequate capitalization.

The reason why collective lands have inadequate capitalization lies in lack of transaction attributes, and the key of capitalization is to build a corresponding modern property right system. Therefore, the process of capitalization is the process of establishing modern property rights. However, collective land use rights cannot be regarded as modern property rights of capitalization because of the strict restrictions on transferring and mortgaging. One of the important reasons for modern society to realize rational allocation of resources by trade is the maintenance of modern property right system for the trade orders. According to views of institutional economists, the most important reason for western countries’ successes is formulating an ownership system to realize the rational allocation of resources during their developing process, namely “arranging and establishing ownership rights in order to produce a kind of stimulation, transferring individual economic efforts into private earnings rate which is close to social earnings rate” (North, 2009). But it is hard to establish formal property right system conforming to the request of capitalization in developing countries, and a large number of assets cannot transfer to free capital used for social development. “In developing countries, quite a number of ownership system is unable to create assets, because they do not have the awareness that the ownership rights can exist by surpassing the position of owners, while they only considered these systems as contracts and documents instead of assets without considering only by some extra mechanisms to build a relational network can produce parallel capital from the assets” (Desoto, 2007). The right over collective lands exists as a fossil right that cannot be transferred into capital. And with the view of rights, whether the right realizes the standard of capitalization is decided in whether it can be transferred freely under the protection of Property Law. Only by transferring freely can the rights create the necessary capital of the market economy development. For the use of right of collective lands, due to lack of transferring ways, is an inadequate capitalization right. The inadequate capitalization not only wastes resources but also makes the price of collective land use rights hard to be fixed or undervalued in the market.

2.2 The Developing Rights of Collective Land Are Deprived

The articles 43 and 63 of Land Management Law have deprived the developing rights of collective lands. The developing rights of land mean the landowners have the right to develop and construct on the land according to the geological conditions of lands. In the theory of traditional civil law, the ownership is considered to have the feature of completeness. “The ownership means the complete rights whose objects are generally controlled, namely general controlling rights of the objects for occupying, managing, deposing, using and earning” (Shi, 2000, p.61). Therefore, although the land ownership includes the rights to develop and construct on lands, actually the rights cannot be used in the development of collective lands because of the restrictions by *Land Management Law*.

3. THE DEFECTS OF PRIVATE RIGHTS AND LAND EXPROPRIATION ABUSE

In this part of the article, we will discuss why and how the defects of private rights lead to land expropriation abuse issues in public law. Here, we will analyze how the lack of the right system conducted the abuse of public rights, bringing difficulties and challenges to the entire society.

3.1 The Abuse of Land Expropriation

Land expropriation is “to transfer the individual or group property to the nation by exerting rights on the premise of giving compensation according to law based on public profits” (Wang, 2010). The premise of land expropriation is for a public welfare, because “land expropriation means countries force to buy personal property, which is the restriction of private property” (Liang, 2004). We need to consider the public welfare as the base of legality, thus *Constitution*, *Property Right Law*, and *Land Management Law* all provide that public welfare is the premise of land expropriation. But in fact, the land expropriation for public welfare such as national defense and education only take an extremely small part, and a large number of collective lands are collected for commercial development. The scholar sighs: “the land expropriation designed for satisfying the needs of public profits now are differently used as the main ways to solve the problems of using lands in urban development” (Wu, 2011). During this period, the construction of urbanization acquires rural land resources mainly by collecting rural lands, and anyone who uses rural lands to construct no matter whether it is on the bases of public profits should be collected except groups. After land expropriation, the nation never possesses or uses the lands, but get use rights of state-owned lands on the collected lands, thus supporting land resources for industries, residences, and business. Nowadays, the country collects lands not for

acquiring the ownership of land and realizing public profits directly but for realizing the transformation of land use rights.

3.2 The Changes of Land Right System and the Abuse of Land Expropriation

The abuse of land expropriation in China appears along with the changes of land right system, "the establishment and use of land expropriation have extremely close relations with the means of production ownership especially the land system" (Ibid.). We hold the views that the country can only maintain the rural land orders by relying on administrative land management system, because of lack of privacy rights in the process of transferring the rural economic structure. After the construction of private right system, this kind of land management system is still attaching to the private right system, which makes land expropriation become the only way to acquire collective land resources because of these restrictions.

The first part of 1954 Constitution after 1949 recognized the private ownership of lands. According to Article 13 of 1954 version Constitution provides the land expropriation: "the country can requisition by purchase, expropriating and nationalizing the urban and rural lands, and the means of production according to the conditions provided by law for the purpose of satisfying public profits"¹. We do not need land expropriation to support construction lands under this system because the existence of the private land system and free transformation of land ownership.

Along with the agricultural collectivization movement, we merged the private lands of peasants into the artel, and then the land collective ownership took place of peasant private ownership in reality², while the state-led planned economy controlled all the economic activities. Under this condition, land expropriation was just a way for the state to acquire the collective land resources, and was a manner to control the economy mode, however, the legitimacy of this mode was not restricted by public profits. Therefore, the Government Administration Council gave up the wording of public profits in *Land Expropriation Methods for State Construction Land*. The second item of the "methods" provides that "the lands used for constructing national defense projects, factories and mines, railways, transportation, irrigation works, public projects and economic, cultural constructions are all collected according to the methods". The 3rd item of the methods provides the basic principle of collecting lands for national construction is to guarantee the lands needed

¹ Although the word of "land expropriation" is not used directly here, the word of "expropriation" should be understood as land expropriation. See Wang Xingyun: *The Study of Land Land expropriation and Compensation System*, China Legal Science, No. 3, 2005.

² The mainland China recognized the collective land ownership system from the level of constitution is in 1982 constitution.

for national construction according to its real needs, or collecting if only the state needs. We consider that this kind of "land expropriation" is much different from the land expropriation under the modern law, because our understandings on the concept of land expropriation are based on public and private right dual opposition, and we believe that land expropriation is a kind of restriction for public rights to private rights. It is insignificant to discuss land expropriation in the era of planned economy when private rights were restricted strictly, because the private itself did not exist. The peasant private land system had been dispelled at that time, and the land expropriation for peasants was just transferring collective lands to state lands, which would surely not be opposed by peasants. In addition, the state controlled all resources for social development and meanwhile undertook all the obligations for each individual in society. Therefore, the process of this land expropriation would even be welcome by peasants, because it provided a chance for them to transfer their identities. "Under the condition of planned economy, governments would change peasants' household registrations, transfer agriculture account to non-agriculture account, provide commodity grains, housings and jobs if collected their lands, then peasants at that time were exultant to the land expropriation" (Chen, 2004).

In the beginning of 1980s, China gradually reduced controlling on economy. In rural areas, the implementing of household contract responsibility system took place of the commune system, lands as the means of production were directly returned to peasants. But the change for controlling the means of production in reality did not reflect timely on the level of law. Although 1982 Constitution very explicitly comes up the collective ownership system of lands on the level of constitution, laws at that time were extremely incomplete, and the collective ownership of lands did not have the function to guarantee the rights of peasants. The collective ownership of lands itself was a way for the state to control rural areas under the condition of a planned economy (Li, 2010), and it as the subject of ownership rights was uncertain³. Although community owns the lands of rural areas, what on earth the rights of peasants

³ The 7th of "1975 Constitution" provides that "the economy of collective ownership system in rural people's commune at the present stage usually is divided into three levels, namely the commune whose basic accounting unit is the production team, production brigade, and production team, and among them, team is the basic unit." But this regulation did not come up the single subject of ownership rights. Although "1982 Constitution" explicitly provides collective ownership, the community "is not the legal organization but a gather of all peasants and an abstract gathering group without legal personality." See Yu Jianrong: *System Analysis on the Unpractical Collective Ownership Rights of Lands in Rural Areas*, Cai Jiming, Kuang Mei: *On Chinese Land system Revolution*, Beijing: China Financial Economic Press, 2009, quoted from Li Fengzhang: "Anti-rights" by "Dead rights": *the Essence and Revolution of Collective Ownership of Lands, Law and Social Development*, No. 5, 2010.

to lands are was still uncertain or it is to say the rights of peasants to lands were still in bud⁴. For a kind of right, if its subject is in a vague state, then this right is a “dead” right in fact. Because of the uncertainty of ownership right subject and no establishing of use right system, the land rights in rural areas were still in a state of uncertainty. With the expansion of enterprises’ own management rights and the development of economy, the enterprises urgently require rural lands. If we do not limit the transformation of rural lands by administrative methods under this condition, it easily makes the rural lands become rent-seeking tools for a few basic officials in township government or leaders of the community. Consequently, peasants’ land rights will be deprived and the rural stability will be under threat. Moreover it is a kind of threat of grain safety in China if we transfer a large number of agricultural lands into non-agricultural lands. Based on this consideration, the state prohibits collective lands enter into the market of construction lands on their own by legislation, restricts the collective lands to be dealt with freely, realizes the transformation of land productive rights only by land expropriation, prevents the land productive rights from changing out of order by government’s supervision and control. In order to “control the constructive scales of non-agricultural and prevent the units using the lands from directly trading with rural collective economic organization (Wang & Li, 2009), according to Article 2 *The Regulations Concerning Land Requisition* in 1982 provides that “when the state needs to collect collective lands for economic, cultural, national defense construction and building social public affairs must accord to this regulation, and prohibiting any unit buy, rent or in another to buy and rent from the rural commune and brigade, which can not join management of any enterprise or public institution in the form of share based on lands”. And this item was maintained in Article 63 *Land Management Law* taking effect in 1986. And the 43rd item of *Land Management Law* provides that we must apply the use rights of the state-owned lands if we want to use construction lands, thus the selling or transferring of the state construction land use right has been the only supplying method for construction lands, while only by land expropriation can collective lands transfer to state lands. When the development of urbanization needed to collect rural land resources, land expropriation became the necessary step. And this condition makes land expropriation hard to conform to the premise of public profits. Although land expropriation must be based on public profits according to law, it is hard to be carried

out by law when facing the pressure of needing a large number of lands for the development of industrialization and urbanization. The promulgation of *Property Right Law* marked that the China had established collective land right system, but the system still did not solve the problems of supporting lands for urban areas during the process of urbanization. Then, land expropriation had been the only way to support land resources for urbanization under the present land management system, and the normalization, generalization, failing to strictly accord to public profit standards of land expropriation was not difficult to happen. The limitation of private rights of collective lands led to the dependent on land expropriation in the process of urban expansion, which made we cannot strictly accord to the public profit standards when collecting in reality, causing the abuse of land expropriation.

3.3 Economic Development Mode and the Abuse of Land Expropriation

The unique development mode of collective land right system in China has explained why there is the land expropriation, but the abuse of land expropriation at present in China has close relations with the achievement of land incremental benefits. Local governments have the motivation to collect lands because it can bring the land incremental benefits for them, which can also alleviate the financial stress of local governments under the system of tax distribution. And then why can the local governments acquire the land incremental benefits by land expropriation? Because the so-called land incremental benefits mean the price difference of the use rights of state-owned lands compared to those of collective lands. We have mentioned that the use rights of collective lands got more restrictions on land management system compared to the use rights of state-owned lands, and it is reflected in the two following aspects: the restrictions of land developing rights and capitalization. The local governments transfer the collective lands into state-owned lands by land expropriation, surmounting the restrictions of land management system to the use rights of collective lands, realizing the transformation of use rights. The same land can be developed, used, transferred and mortgaged just due to the change of land right nature. Land expropriation improves the land value, and it will certainly bring the rise of land price, so-called land incremental benefits. The local governments will naturally and heavily collect the lands of peasants in order to acquire the land incremental benefits and make up the non-equivalence between the property rights and financial rights under the system of tax distribution.

⁴ There were still existing an argument on whether the land contracted management right is property right or obligatory right in the law field of mainland China until until the property law was issued. See Wang, L. M. (2001). *Discussing on some problems about Land Contracted Management Rights in Rural Areas*, *The Academic Journal in Renmin University of China*, (6).

CONCLUSION

For development of land, on one hand, social development needs capitalized lands as the base of urbanization; on the other hand, this process can not be realized by

marketization methods such as private trade but only by local government-led land expropriation procedures due to the binding of land management system, which puts us in the situation of dilemma. The original purpose of land expropriation procedures is not to guarantee the land supplying during urbanization, while the extensive land expropriation of peasants' lands in real life goes against the original purpose of land expropriation, also bringing harm to peasant and collective benefits. To go out of the dilemma, we need to prescribe the right remedy for the root of this system. And the so-called "root" is just the unreasonable restriction for overly strict management system on private land rights especially privacy rights of collective lands. Because of this restriction, collective lands can hardly be transferred and lack of the possibility of capitalization, and cannot be used for non-agricultural construction deprived of developing rights. Also, it causes that a same piece of land once collected by the state, the price will go up, while the land is only firmly limited to use as rural production without being collected. Now the large difference between "peasants" and "citizens" are just lying in the above phenomenon. Only by eliminating unreasonable restrictions on collective private rights and realizing the free transformation of land resources by market disposition we could break the restrictions of the present system on the development of peasants and rural areas and realize a real sense of everyone equally. That is the value of the "same right, same price".

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