From benign unconstitutionality to delegated legislation: Analysis on the ways for legal reform of China rural collective construction land circulation

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ABSTRACT

During the construction of China's society ruled by law, in order to cope with the long-lasting conflict between legal norm and social reality, two different reform models “benign unconstitutionality” and “delegated legislation” have appeared successively. In virtue of the transition process of reform model, this paper relatively systematically reviews research documents and combs through governmental documents aiming at the problem of legal restrictions faced by right circulation of collective construction land usage. The basic research conclusion of this paper proves that, the strict restriction of existing legal norms on collective construction land circulation has induced invisible circulation of collective construction land. Facing widely existing problem of invisible circulation, some local governments have launched the “co-equal market” model to break through the restriction of existing law by means of benign unconstitutionality; under the “delegated legislation” model, “co-equal market” model has been promoted in pilot areas of reform. In the section of collective construction land usage right transfer, “same right for same land” with state-owned construction land has been preliminarily realized, but in the sections of usage right leading, transfer and mortgage, etc., there is still the problem of lack of follow-up management system.

1. Introduction

Legal norm and social reality do not always develop synchronously, and legal norm usually lags behind social reality during the development, so how to coordinate the conflict and contradiction between legal norm and social reality has become a topic always disputed in the academic circle (MacCormick & Weinberger, 1992). Scholars sticking to legal realism consider that, when legal norm conflicts with social reality, we shall not compulsively require that social reality must meet legal framework, but instead, we shall emphasize the priority of reality over norm, self-examine and analyze the intrinsic problems of legal norm (Ponser, 2006). However, law legalist and proceduralist consider that, respecting the value system of legal norm and preventing the impact of social reality on legal norm is the first important task of the society ruled by law. Unilaterally emphasizing the priority of social reality and disregarding the restriction of legal norm will destroy the cultivation of people's legal belief fundamentally and make people accustomed to that norm abdicates to reality. This will leak to the weakness of legal norm in practical life, and thus greatly impact the national legal order (Bodenheimer, 1975).

Actually, all countries with code law face the long-lasting conflict between the stability of legal norm and the mobility of social reality, and this is nearly a normal state of societies ruled by law. Countries with relatively perfect legal system usually strive to mediate the conflicts between the two factors within the framework of system of rule by law by multiple means like legal interpretation, judicial precedent, and discretion of the court, etc. At present, the fundamental principle generally accepted and approved by the jurisprudential circle is that: The value of social reality and that of legal norm are of the same importance. Social reality takes being admitted by legal system as bottom line, and social reality behaviors surpassing the bottom line shall be completely denied (Kelly, 1972). However, in undeveloped countries or transition economies like China, the tradition of culture of rule by law is weak, legal system is not perfect enough, and it's difficult to give concurrent consideration to and balance the two values of “maintaining the authority of legal norm” and “adapting to the demand of social
development”. In the face of rapidly changing social reality, legal norm will lag behind the requirements of social development, or the restrictions of legal norm will be disregarded for aspiring after the effects of reform development, and various reform behaviors violating constituting or law will appear (Heilmann, 2008), and law makers will usually be caught in a dilemma and kept in the air.

This circumstance is especially highlighted in rural collective construction land circulation in China. In accordance with China’s existing Land Administration Law, Law on Administration of Urban Real Estates, Property Law, Guaranty Law, and Mortgage Law, rural collective construction land use right shall not be remised, transferred or leased for non-agricultural construction, and such lands must be levied as state-owned and then enter into market for transaction; the land use right of township (town) and village enterprises shall not be mortgaged separately. It’s a pity that, the strict circulation restriction rule in legal system forms a strong contrast to the real flourishing demand on collective construction land usage right circulation. Along with the constant expansion of cities and the sustained development of industries, more and more construction lands are demanded. Coupled with that the supply of state-owned construction lands is always on the tight side, and driven by the intrinsic huge incremental income of lands, plentiful rural collective construction lands have come into the market in an invisible way through multiple transaction methods such as transfer, leasing, investment in capital, and “substituting expropriation with leasing”, etc., forming invisible circulation market dissociating outside legal norm (Zou, Zhao, & Mason, 2014). According to the results of measurement of Qian and Mu (2012), the marketization level of agricultural lands used for non-agricultural purposes, from 2003 to 2008, around 18.5% of newly increased construction lands nationwide entered into land market in the form of peasants’ spontaneous transaction. It’s discovered from the investigation of Chang (2013), on 315 sample villages of 6 provinces (cities) nationwide that, from 2007 to 2011, total 775.62 hectares rural collective construction lands were circulated invisibly in the sample villages, namely 0.49 hectares annually in every village in average, and 0.53 hectares, 0.35 hectares and 0.52 hectares in the eastern, middle, and western areas respectively. What’s more, among the 315 sample villages, total 444.87 hectares lands were converted illegally from agricultural lands to non-agricultural lands, accounting for up to 57.4%, and up to 330.75 hectares self-possessed construction lands were circulated by means of private leasing and sale, private mortgage, construction of houses with informal property rights, etc., accounting for 42.6%.

Under such circumstances, in order to seek the benign interaction between legal norm and social reality, and relieve the tight relationship between them, China has successively brought forward two different reform models, the first is “benign unconstitutionality” model and the second is “delegated legislation” model. Since 1999, the Ministry of Land and Resources has arranged more than 90 pilot places for reform of collective construction land circulation nationwide, and the reform models with distinctive characteristics have appeared, like “exchanging homestead for house” model in Binhai New District of Tianjin, the “two separation and two exchanges” (separation of homestead and contracted place, separation of move and land circulation; exchange of contracted lands for shares, for leasing and for guarantee) model in Jinxing of Zhejiang Province, the land ticket model in Chongqing, and the property transaction model in Wenzhou of Zhejiang Province, etc. However, it’s very difficult for the existing laws to provide sufficient lawful space for the above-mentioned reform pilots, so the reform is always in the embarrassing position that violation of law and innovation of system co-exist, and relatively successful reform pilots are usually realized by means of “benign unconstitutionality”. With the Measures of Guangdong Province for Management on Collective Construction Land Usage Right Circulation promulgated by Guangdong Provincial Government in 2005 as example, this Measures clearly allows the remising, leasing, transfer, subleasing and mortgage of collective construction land use right, laying a legal law basis for the market-oriented circulation of collective construction land use right. The Measures is considered by partial scholars as an revolutionary act for unifying the development of urban and rural land markets (Gao & Liu, 2007), but as a local rule, the Measures has actually broken through the restriction of the Land Administration Law (higher law) substantially, and could not escape from the accusation of formal violation of law. In order to put an end to the tension and conflict between legal texts and reform demands, and strive to guide the reform within the framework of rule by law and by means of rule by law, China has started to promote the reform pilot of collective construction land circulation by means of “delegated legislation”. In February 2015, the 13th Meeting of the Standing Committee of the National People’s Congress decided to authorize the State Council to temporarily adjust the implementation of provisions on the expropriation of rural lands, the entry-into-market of collective operating construction lands, and homestead management system in the Land Administration Law, and the Law on Administration of Urban Real Estates in 33 pilot counties (cities, districts) like Daxing District of Beijing, etc. Such “delegated legislation” model which temporarily adjusts the implementation of relevant national laws and endows the 33 pilot counties (cities, districts) of reform with special legislation right has effectively avoided the conflict between local reform test and existing laws, and guaranteed the promotion of local experiments on the track of rule by law. Analyzing the process of reform model’s transition from “benign unconstitutionality” to “delegated legislation” in combination with the concrete circumstances of the reform of rural collective construction land circulation could not only help us understand the legal restrictions faced by rural collective construction land circulation and the possible ways of reform in future, but also provide experiences and references for “first trial” of reform experiments in other fields.

Considering that the legal restraint in front of rural collective construction land transfer, and “benign breaching” mode and “delegated legislation” mode derived thereby are rooted in the inconsistency and internal conflicts between legal norm stability and social reality variability. To guarantee the completeness and uniformity of the overall article structure, the structure of this paper is arranged as follows: Except for “Introduction”, the second part will display the conflicts between legal norms and social reality. The article will generally describe the restriction mechanism of existing legal systems for rural collective construction land circulation, and the problem of invisible circulation arising from hereof; the third part will emphatically discuss “benign breaching” mode beyond legal norms for adapting social reality variability. The article will specifically discuss and analyze “delegated legislation” mode which can maintain a general balance and harmony between legal norm and social reality. Specifically, the article will epurate the basic characteristics of “delegated legislation” model, and with Deqing County of Zhejiang Province as example, introduce the achievements already obtained and the works to be improved by Deqing Pilot; and the final part is the conclusion and follow-up research

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1 According to relevant provisions of Land Management Law and the Urban and Rural Planning Law, collective construction land transfer has two aspects of meanings: one is the transfer of collective construction land ownership, i.e. rural collective construction land is levied by the government according to law as urban state-owned construction land, with the ownership owned by rural collective changed to be owned by the state; second is the transfer of the right to use rural construction land, i.e. the right to use will be transferred between different using subjects by different means such as lease, pledge, selling without changing collective construction land ownership. The collective construction land transfer stated in this article only refers to the transfer of the right to use collective construction land, involving no issues about collective construction land ownership transfer.

2 Refer to the Decision on Authorizing State Council to Temporarily Adjust the Implementation of Relevant Laws and Rules in Administrative Regions of 33 Pilot Counties (Cities, Districts) Like Daxing District, etc. of Beijing (Draft) [EB/OL]. http://www.npc.gov.cn/wxzl/gongbao/2015-05/07/content_1939066.htm.
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