

The System Shaping and Standard Path of Easement Rights in Civil Property Code

ZHANG Yilu^{[a],*}

^[a]Civil and Economic Law School, China University of Political Science and Law, Beijing, China.

*Corresponding author.

Received 2 December 2019; accepted 20 January 2020
Published online 26 January 2020

Abstract

Easement Rights is a right designed to promote the use efficiency of Real Properties, but the meaning of land in different legal systems is not fully considered in Property Law of the People's Republic of China when it follows the Easement Rights system. Therefore, the adjustment scope of Easement Rights system in China is controversial. It is necessary to clarify this before the promulgation of the Easement Rights in Civil Property Code that is being compiled. In order to achieve the above goal, we can draw the following conclusions. First of all, we should change Easement Rights to Real Estate Easements while taking into account the factors such as the legal system of China and the flexibility for social changes, so as to solve the contradiction between the meaning and the system of the object of Easement Rights adjustment. Secondly, it insists that Easement Rights is the right to use the easement directly and specifically, and establishes that the scope of adjustment should not include Real Estate Rights. Moreover, it is necessary to expressly allow the usufructuary to set up easement and increase its own easement, so as to leave room for the easement to play under the current land system of China. Starting from the spirit of regulating civil relations in Property Law, Easement Rights is set up to promote the utilization efficiency of Real Estate, and it is concluded that in the future Property Right system, the Easement Rights system should not only be used for the sake of public interest, but also be used to adjust the situation of no easement.

Key words: Easement rights; Real estate easements; Civil code; Real right

Zhang, Y. L. (2020). The System Shaping and Standard Path of Easement Rights in Civil Property Code. *Canadian Social Science*, 16(1), 47-52. Available from: <http://www.cscanada.net/index.php/css/article/view/11527>
DOI: <http://dx.doi.org/10.3968/11527>

INTRODUCTION

Easement Rights is the right to use others' Real Estate for the convenience of their own Real Estate (Xie, 2011). The key point is that the restriction on the ownership of other people's Real Estate will promote the utilization of their own Real Estate. Easement Rights is an ancient and obscure "foreign product", with "Easement Rights" as the key word, there are only 1084 documents searched online in China, and few cases are used in disputes. Since the establishment of the Property Law of the People's Republic of China, there have been many discussions on whether to use the name of Easement Rights. Especially at the beginning of the formulation of the draft of the Property Law and the second review draft, the name of "Neighboring Land Use Right" has been tried to replace. Although in the third review draft of property law, taking the experience of other civil law countries as a reference and considering the long history of Easement Rights system, and the possible confusion caused by the replacement of new terms, the term of Easement Rights is still used in Property Law (Wang, 2016). The disputes that seem to be eliminated temporarily have started a new round of discussion on whether the title of Easement Rights should be changed with the compilation of the Chinese Civil Code recently. In order to make the future Property Right compilation meet the needs of the development of the times, this paper puts forward the view that the term of "Easement Rights" should be replaced by the term of "Real Estate Easements".

It can be seen that the above-mentioned problems seem to be the discussion of Easement Rights terms, but

what is actually reflected behind them is the trust of the adjustment object of Easement Rights and the function of the whole Easement Rights system. That is to say, both the legislators and the law circle hope to promote the effective use of resources through the Easement Rights system, which is also consistent with the legislative purpose of the Property Law. If we want to promote the purpose of the effective use of Real Estate resources, we can not only study the adjustment object of Easement Rights through the analysis of terms, but also discuss how to promote the use of benefits. With reference to the provisions of the Property Law on Easement Rights, only the easer is entitled to use the Real Estate of others to improve the efficiency of Real Estate, but whether the Easement Rights can only be set on the premise of the existence of the Easement Rights, or whether the Easement Rights can be set for the public interest rather than the existence of the Easement Rights is necessary? Can we explain the use benefit from the flexibility of Easement Rights, so that it includes the situation of setting Easement Law only for the public interest? The author intends to reflect on the Easement Law system in the current Property Law through the above issues. The following will be divided into two parts for discussion. First, how to regulate the object of Easement Rights? Second, what is the extension of the content of Easement Rights, that is, how to explain the efficiency of promoting the use of Real Estate? If we want to respond to these two questions, we can only study the origin of Easement Rights system and the current situation of Easement Rights norms in other countries.

1. THE PRESENT SITUATION OF EASEMENT RIGHTS SYSTEM IN CHINA AND THE PROPOSAL OF ITS PERFECTION

In the fourteenth chapter of the Property Law, there are fourteen articles about the system of Easement Rights in China. In addition to the provisions on the meaning of Easement Rights, the establishment of Easement Rights, the rights and obligations of Easement Rights and other basic contents, there are also provisions on the contracted management right of land, the right to use construction land on the Easement Rights, and how the Easement Rights will be if such rights are to be transferred. In terms of form, China's Easement Rights provisions in terms of the number of provisions, it seems that there is not much difference with the legislation of other Civil Law countries. The understanding of the legal system should certainly focus on the substantive purpose. For the current Easement Rights system of our country, it depends on whether the current provisions of Easement Rights can help to achieve the goal of "promoting the use efficiency of Real Estate" mentioned in the articles. To achieve this goal, we need to clarify

two parts of the content. One is what "Real Estate" refers to in the Property Law of our country. The essence of this problem is the adjustment object of Easement Rights. The second is how to understand the "utilization efficiency" in Chinese law.

2. THE NAME OF EASEMENT RIGHTS SHOULD BE CHANGED TO REAL ESTATE EASEMENTS

2.1 The Concept of Land is not Fully Considered in the Legal System

From the meaning of Article 156 of Property Law in China, we can know intuitively that the adjustment object of Easement Rights is Real Estate, but the name of Easement Rights is easy to misunderstand that the adjustment object is only land, so we should replace easement with "Real Estate Easement". At last, the legislators found that the land we talked about does not include the fixed objects above and below the land. Unlike most European countries since Roman law, we regard buildings as an important part of the land. As a result, the Easement Rights transplanted is less than half of the function of the Easement Rights of others, so we replaced Easement Rights with Real Estate Easements, and immediately added three new types: land to building, building to land, building Object to building(Su, 2014). Through the above discussion on the origin of the dispute over the name of Easement Rights, the author believes that the title of Easement Rights stipulated in the Property Law of China is misleading, which is caused by the fact that the concept of Easement Rights in succession does not take into account the different understandings of the scope of Real Estate between different legislations. In fact, the use of Easement Rights in Roman Law and even German Civil Code seems to limit the object of adjustment to land and exclude the application of other Real Estate, but it can not simply understand the meaning of land. Because it regards the buildings on the land as an integral part of the land, even if the name of Easement Rights is used, the object of adjustment is still the buildings. In order to avoid the limitation of the object of Easement Rights adjustment because of the principle of distinguishing land from buildings, the Swiss Civil Code has set up another Real Estate Easement besides Easement Rights. It can be seen from this that when the principle of integrating land and buildings is adopted, Real Estate refers to land, and there is no difference in the name of Real Estate Easement or Easement Rights. However, when the principle of distinguishing land from buildings is adopted, Real Estate refers to not only land, but also buildings. Therefore, the adjustment object of the name of Easement Rights cannot reach the Real Estate beyond

the land. This kind of “mistake” that the concept of succession has not been fully clarified has the experience of Civil Law in Taiwan for reference. It also adopts the principle of distinguishing land from buildings. Before the revision of Property Right in 2010, the judgment clearly denied that buildings can be the adjustment object of easement. It was thought that Easement Rights only refers to the right to use others’ land for their own land cheaply. When the buildings owned by others are used for their own land cheaply, they are not within the scope of Easement Rights adjustment¹. However, the adjustment object of Easement Rights is revised to Real Estate after realizing the actual needs. Since the adjustment object of Easement Rights is Real Estate in fact, and the name of Easement Rights is easy to be misunderstood, then in the legal system, the name of Easement Rights should be changed to “Real Estate Easements” according to the correctly understood concept of land. Adopting a clear concept can make private interests and even social interests better realized.

2.2 Solve the Problem that the Object of Easement Rights Adjustment has Contradiction in the Meaning and System

In the sense of the text, there are contradictions in the adjustment objects of Easement Rights. First of all, Article 156 of the Property Law makes it clear that the adjustment object of Easement Rights is Real Estate, but from the meaning of articles 159, 161, 162, 163, 166 and 167, it can be seen that they are only applicable to one party of land, which is also adopted by judicial practice. The author thinks that this may be because there is no clear definition of the concept of Real Estate in the current law. According to the general theory of current academic circles, the concept of Real Estate in China should refer to land and its attachments. If it is taken as the concept of Real Estate in the future, there will be systematic contradictions between Article 156 and other provisions. In fact, the concept of Real Estate develops with the progress of the technology and way of using things. When the types of things that can be used for human beings and adjusted by law become more and more abundant, the corresponding types of Real Estate that can be adjusted by law will continue to increase. Therefore, the author believes that no matter what the current concept of Real Estate is, changing Easement Rights to Real Estate Easements can leave room for the new type of Real Estate. Part of the natural resources can be no different from the land in terms of economic value and through the application of current science and technology. Therefore, in order to promote the use of natural resources, the adjustment scope of Easement Rights should be expanded to include the mutual service between sea area and land, between sea area and above ground buildings, between sea area,

between sea buildings and sea area, between sea buildings and soil, and between sea area and sea area(Li, 2006). As a result, whether the scope of Real Estate can cover natural resources depends on technology and legislation, which is not a unique problem in Easement Rights system, but changing Easement Rights to Real Estate Easements can leave flexibility for the change of the scope of Real Estate in the future, and promote the effective use of those beyond the land and buildings.

3. EASEMENT RIGHTS IS THE RIGHT TO MAKE DIRECT USE OF THE CONCRETENESS OF THE SERVITUDE

Whether “Real Estate Rights” can be the object of Easement Rights adjustment in China is quite controversial. In the academic circles, it is believed that “Real Estate Rights” should be the object of Easement Rights adjustment in China. It is believed that the object of Easement Rights adjustment should include Real Estate Right. Easement Rights can be set up on the ownership of Real Estate of the state and the collective. This is because China adopts the public ownership of land, which leads to the ownership of land and the ownership of land use belong to different subjects(Wang, 2016). For example, land in China is divided into urban land and rural land. The former is owned by the state, while the latter is owned by the state or the collective according to the law. However, no matter which kind of land is above, individuals can only use land through the way of establishing usufructuary rights, such as obtaining the right of contracted management of land, the right of use of construction land, etc. Imagine that if there is a usufructuary right holder who wants to make the water source pass through the land B owned by the state or the collective to irrigate the land A for use (also owned by the state or the collective). Although the Property Law stipulates that the owner of the land A, that is, the state or the collective shall not interfere with the usufructuary right holder A’s possession, use and income of the land A, it does not stipulate that the property law Whether the usufructuary Party A may establish easement for the use of land A. Referring to the meaning of Article 156 of the property law, the easement has the right to use “the Real Estate of others” in accordance with the contract, so as to increase the use efficiency of “Own Real Estate”. From this point of view, land A is not the Real Estate of the usufructuary, so the owner of land a can only set the Easement Rights. In the case that both land A and land B are owned by the state or the collective, and there is no clear stipulation that the usufructuary has to set easement or its own easement in China, it seems to have practical significance to affirm the adjustment object of Easement Rights and the Real Estate Right.

¹ See No. 3108 judgment of Taiwan in 1927.

3.1 Affirming the Adjustment Object of Easement Rights and Including Real Estate Rights will Conflict with Easement Rights System

From the context of historical development, it can be seen that the Easement Rights system is transformed from the common system. In the early Roman Law, the power of the father was quite broad, including the right of domination, the right of husband, the right of property, the right of ownership of things, etc. But with the death of the father, the family became the son of the owner, which made the family split into several families. However, families and children usually continue to be unified in the so-called “community without inheritance”, and each member of the community has full right to dispose of the common property. From this point of view, assuming that the common property is land a, shared by three subsidiaries a, B and C and cultivated by them in three equal parts, for example, the land to be cultivated by B is sandwiched between a and C, and it is necessary to build pipelines from their land for water diversion and irrigation. At this time, although it is the same as the modern easement, the difference is that the land cultivated by these three subsidiaries is actually common, because the pipeline built by B can only be regarded as shared. Until land a is divided into three pieces of land with independent ownership, in this case, if it is the same as the above situation, the right B requests to draw water from the land owned by a is the easement in the modern sense. From this point of view, the rise of easement system can be said to be closely related to the private ownership of land and even personal ownership. When the land is owned by the same subject, it can not be taken for granted to set easement, otherwise it will damage the easement system.

3.2 It is Necessary to Maintain the System of Expressly Allowing Usufructuary to Set Easement Rights and Adding Its Own Easement Rights

The author believes that although it is justified to affirm that the adjustment object of Easement Rights should be the Real Estate Rights, in reality, it is not only the method of expanding the adjustment object of Easement Rights, but also the method of allowing the usufructuary to set easement or increase own Easement Rights will help to solve the problem. In the Civil Law of Taiwan, the usufructuary is allowed to establish Easement Rights, that is, when the owner of the real estate is not the actual user, the usufructuary or lessee, such as the superficies, is allowed to establish Easement Rights for the purpose of making full use of the Real Estate. Self-servitude refers to the right to use one’s Real Estate for the cheap use of other Real Estate. In short, the ownership of servile Real Estate and servile Real Estate belongs to one person. As long as there are two independent Real Estate, easement can be established to play the role of coordinating the

use of Real Estate (Yu, 2014). Article 733 of the Swiss Civil Code can be referred to as the stipulation of Self-servitude. The owner can set easement on his own land for the benefit of another piece of land belonging to him. The Civil Law of Taiwan also has its own provisions on servitude. Although the German Civil Code does not recognize its own servitude, but the German Supreme Court gradually recognized the owner’s servitude by way of case law. When the land is divided into small pieces by reclamation enterprises, the burden and interest can be set for each land once and for all in advance, and the building height, style, roof inclination, fence and other matters can be determined. In this way, we can create the whole interests of real estate, just like the land readjustment, which means to create the land readjustment function in public law with the legal effect of Civil Law(Zheng, 2010). Therefore, the provisions of their own servitude can reconcile the interests between Real Estate, create the function of land redrawing equivalent to public law in Civil Law with a kind of legislative technology, and create the overall interests of Real Estate.

When there are many kinds of proper means, and all of them are helpful to achieve the goal, we should also measure the benefit and the effect between the damage. If we choose the Real Estate right as the adjustment object of the extended Easement Rights as the means to solve the problem, we will destroy the stipulation that the principle takes the physical object as the object of the Real Right, and the exception allows the right as the object of the Real Right. Some scholars also pointed out that the object of Easement Rights established in the ownership is real estate, if the object of Easement Rights established in the usufruct is Real Estate Rights, it is to confuse the object of Easement Rights with the establishment of Easement Rights(Zhu, 2009). If the usufructuary or lessee chooses to increase the Easement Rights or confirm the establishment of Own Easement Rights, it will not conflict with the current provisions of the object of Real Right, but also has other significance for the part of Own Easement Rights. Some scholars pointed out that recognizing the significance of Easement Rights in practice can not only greatly reduce the transaction cost in the future, but also promote the efficiency of Real Estate utilization. For example, in order to establish the special features of the community, it is necessary to design the architectural style in advance, and plan all public facilities in a complete way(Wu, 2013). At this time, it will be presented in the form of setting Own Easement Rights, which will have a great impact on the protection of consumers of great significance. Therefore, although the author can understand the viewpoint that the adjustment object of Easement Rights should be expanded to the Real Estate Rights, in order to consider the integrity of the Property Law system, the adjustment object of Easement Rights should be limited to the Real Estate, that is, the real

thing. At present, from the point of view of the meaning of Article 156 of the Property Law of China, we can't explain the attitude of definitely setting our own servitude. The author believes that the function of allowing setting our own servitude in our country is not only to make the Real Estate owner have to make a pre decision on the way of use, so as to realize the effective and reasonable use of buildings or land and reduce the transaction cost. More importantly, the Easement Rights system can play its role. As mentioned before, the land system is owned by the state or the collective. Therefore, when the usufructuary has not stipulated that it is necessary to set the easement according to its own needs, the provisions of allowing its Own Easement Rights can solve the awkward situation when both the Easement Rights and the Easement Rights are owned by one person.

3.3 The Establishment of Easement Rights Should Focus on Promoting the Use Efficiency of Real Estate, not only for Public Welfare

The Legal Easement Rights is the traditional feature that the parties agree to arrange the content of the right in contrast to the Intended Easement Rights. It is based on the provisions of laws or administrative regulations. In the case of no need for Easement Rights, as long as the consideration of the public interest, it can limit the ownership of the owner of the Real Estate, so it is also called the Public Easement Rights. From the perspective of comparative law, the Legal Easement Rights system should be divided into public easement rights and public utilities easement according to the different subjects of rights(Geng, 2013). Public easement rights is to make the owner of Real Estate bear certain negative obligations for the purpose of successfully completing public utilities easement. By observing the contents of some separate laws, we can find that in fact, some expressions in some existing laws and regulations can be interpreted as the easement of public utilities, such as no unit or individual is allowed to build buildings or structures that may endanger the safety of electric power facilities in the protection zone of electric power facilities designated according to law, and no plants that may endanger the safety of electric power facilities are allowed to be planted It is necessary to pile up articles that may endanger the safety of electric power facilities, prohibit setting up obstacles, blasting and quarrying within the environmental protection scope of meteorological detection, prohibit building buildings that may discharge a large amount of smoke, dust, flame and exhaust gas in the air and affect the flight safety within the Civil Airport scope defined by law and the airport clearance protection area defined by the state or facilities. Public easement refers to the preservation easement system in American law as an example. For the purpose of specific scientific research or historical preservation, public welfare or charity organizations negotiate with the real

estate owners to restrict their specific behaviors on the Real Estate, such as construction. Those who advocate the introduction of the Legal Easement Rights think that the way of establishing the Legal Easement Rights is less than the cost of collecting specific Real Estate. Because the use of expropriation and other means is most vulnerable to two major obstacles, one is the need for a large amount of financial investment to achieve the purpose of expropriation, the other is the public's objection. However, this view is based on the cost and the public's objection, which is not enough to prove the necessity of establishing the Legal Easement Rights, because it can not be determined that the way of adopting the Legal Easement Rights is not to be objected, and the cost of adopting the Legal Easement Rights does not need to invest a lot of money, so the argument is not enough to be convincing. Taking the Real Estate planning of a district and a district for the use of public utilities as an example, in the Real Estate planning of public utilities, prior investigation and demonstration are required, which also costs considerable time and money. Moreover, because the Real Estate planning will involve the rights and interests of the Real Estate owners, even if it is not in the form of public hearing, it should at least be publicized, and provide relief opportunities for the Real Estate owners involved. In the process of implementation, it seems that the cost of adopting the Legal Easement Rights is not low. As for the preservation servitude which is negotiated by the public welfare or charity organization and the owner of the specific Real Estate to protect the Real Estate, it is also questioned, for example, the enthusiasm of the public welfare or charity organization cannot be guaranteed.

Generally speaking, both the public easement and the public easement are actually a kind of public restriction or burden on the real estate, which is quite different from the traditional easement system in which one real estate is used for the convenience of the other real estate. Even though easement is a part of relative freedom under the principle of statutory property rights, it should not be ignored. The Real Right Law is the characteristic of regulating the civil relation of the ownership and utilization of the object. The meaning of Easement should be realized under the Real Right legal system. Based on the consideration of public interest, the Legal Easement Rights can be set up to restrict the Real Estate rights of the Real Estate easer, which seems to infringe the private interest. In practice, there is a real need for public interest in the fields of infrastructure construction, such as energy, water conservancy, transportation, environmental protection, historical and cultural relics protection, etc. However, in order to public interest can require individuals to transfer their rights in real estate, and to what extent they can limit their rights in real estate, it is impossible to completely cover the legal provisions in the

way of property law, and it must be applied to the level of easement. The scope and standard of public interest are very vague. By signing a contract through consultation with the Real Estate, agreeing on the scope of rights and obligations of both parties, and making compensation for the part of personal transfer rights, this problem can indeed be solved and the effective utilization of real estate resources can be promoted. This still needs a series of matching standards to achieve (Zhang, 2015). At the same time, we must always insist that even if we want to set up the legal easement, we should also set it for the purpose of promoting the use efficiency of real estate, not just for the public welfare.

CONCLUSION

At present, Civil Code compilation is in full swing. Scholars have conducted in-depth and rich research on the content of the future Civil Code Real Right compilation, and put great hopes on the function of the Real Right compilation. However, in addition to the enthusiasm mentioned above, we should also comprehensively consider individual systems, whether in terms of concept, connotation or function, from the theoretical reform to the practical needs, take into account the integrity of the legal system, and pay attention to the construction of the localization of law, so as to truly show the late development advantage of China in the compilation of Civil Code. The current academic discussion on Easement Rights system is very extensive and diverse, but we can't help but analyze the extension limits from the origin of Easement Rights. As mentioned above, the academic debate seems to be a discussion on the terms of Easement Rights, but what's more important is that it actually reflects the trust of the adjustment object and the whole system function of Easement Rights. That is to say, we hope to promote the effective use of resources through the Easement Rights system, which is also consistent with the legislative purpose of the Property Law: how

to promote the use of efficiency. Not only to ensure that the adjustment object of Easement Rights can keep pace with the times, but also to keep consistent with the current Civil Law general provisions on the definition of things; also to take into account the normative purpose of the real right part, the Easement Rights should always be in the context of private law relations, in order to conform to the Easement Rights system is always for the purpose of promoting the use of things. As the latest Civil Code in the world, the Civil Code that is being compiled in our country can't be separated from the original, but should be based on the basis of the system, grasp the essence of the concept, clarify the origin, and take the correct context as the premise, so as to be practical and give full play to the function of the system under the consideration of the perfection of the system.

REFERENCES

- Geng, Z. (2013). On the system of modern development of easement rights in China. *China Legal Science*, (03).
- Li, Y. J. (2006). Research on sea area use right (1st ed., pp317). China University of political science and Law Press.
- Su, Y. Q. (2014). *Looking for a new civil law* (1st ed., pp551). Peking University Press.
- Wang, L. M. (2016). *Research on property law* (Vol. II, pp.964). People's University of China Press.
- Wu, G. M. (2013). The reform and development of real estate easements. *The Taiwan Law Review*, (218).
- Xie, Z. Q. (2011). *The real right of civil law* (1st ed., pp.502). China University of political science and Law Press.
- Yu, F. R. (2014). On the structure of easement on one's own realty and its application. *China Land Science*, (08).
- Zhang, C. (2015). How to solve real property interest conflict of public easement. *Seeking Truth*, (42).
- Zheng, G. Y. (2010). Amendment and application of easement rights of real estate. *Cross-Strait Law Review*, (28).
- Zhu, G. X. (2009). The servitude rules in the property law. *Legal Science*, (07).