中国民商法专题研究丛书

■梁慧星 主编

物权公示论
——以物权变动为中心

孙 鹏 著

法律出版社
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内容提要

本文共分为六章，第一、二章研究物权公示与物权变动的关系，第三、四章研究物权公示的方式，第五、六章研究物权公示的效力。

第一章讨论物权公示与物权变动的两种结合模式，公示对抗主义与公示要件主义。本章通过比较法国、日本与德国、奥地利、瑞士在物权变动与公示制度上的差异，描述了公示对抗主义与公示要件主义的二元立法对立。不过，这种二元立法对立的理论色彩超出实践意义，公示对抗主义与公示要件主义正呈现出不断融合之势。一方面，在公示对抗主义的立法上，出卖种类物、将来物或他人之物时，所有权并不随意思表示的一致而移转。立法还允许当事人就动产所有权的移转时间为特别约定，以排除意思主义规则的适用；另一方面，公示要件主义，作为物权变动要件的形式日益软化，特别是在动产物权变动，由于间接占有、观念交付等概念的引入，其“形式”已不成其为形式，其法律效果与公示对抗主义几乎不再有什么区别。尽管如此，也不能对二元立法间的差别全然不见，多角度地审视公示对抗主义与公示要件主义，判断二者在立法政策上孰优孰劣，仍有价值。公示对抗主义有助于交易的便捷，最大限度地尊重了当事人的交易自由，但在制度逻辑上却存在着一系列不可克服的矛盾，且难以实现与相关民法制度的协调，在法律适用上也陷入了极大的被动；公示要件主义充分顺应了近现代社会谋求交易安全的理想，在制度逻辑上连贯而自然，与相关法律制度密切配合。不仅如此，公示要件主义赋予公示方法以物权变动的形成力，相对于公示对抗主义下公示

方法的对抗力,也代表着对物权变动当事人特别是受动当事人更为充分的公示激励。公示要件主义不仅给物权交易的第三人提供"没有公示,物权就没有变动"的"消极信赖"保护,而且在公示错误的情况下,使公示方法具有公信力,从而也对第三人提供"只要存在公示,就可相信公示"的积极信赖保护,故公示要件主义比公示对抗主义具有更为完整的公示效果。从物权公示的历史流变过程而言,公示要件主义是为克服公示对抗主义之弊应运而生的制度,本就具有后发优势。如果在立法政策上选择公示要件主义,也不能对该主义牺牲交易迅捷、妨碍交易自由的缺陷熟视无睹,在设计具体制度时有必要扬公示对抗主义之所长避公示要件主义之所短,以实现公示要件主义的优化。为此,可以选择的方案为:一是在物权变动公示上总体坚持公示要件主义,但在个别物权变动采公示对抗主义;二是在动产物权变动上,将公示变动物权作为倡导性规范,允许交易当事人意思表示排除其适用。

第二章讨论物权公示与物权行为的关系。物权行为是物权变动的意思表示与公示方法相融合而成的法律行为,具有鲜明的"二象性"特征,从主观的角度看是物权变动的意思表示,从客观的角度看是物权公示的方法。意思表示与公示都是物权行为的成立条件。物权行为的概念、物权行为的独立性、物权行为的无因性共同构成了物权行为理论的整体,任何割裂三者联系的主张都反叛了物权行为理论的本源。对物权行为理论的评价应围绕着事实、价值与体系建构三方面来展开。在事实上,作为物权公示方法的交付与登记本身为一中性的事实行为,并不当然负载物权变动的意思表示内容,即使在公示方法作成时有某种意思,也未能逸出通常所谓"债权意思"之外而构成实在的行为。物权行为无因性的事实前提即债权行为无效、物权行为有效也几乎不存在,既然为法律行为,物权行为也必然受法律行为生效规则的约束,其与债权行为经常而不是例外地因"共同瑕疵"而无效。至于无因性相对化的主张,本质上并非对物权行为理论的修正,而是对该理论的全面否定,扮演了"掘墓人"的角色。在价值

上，物权行为理论实现交易明晰的功能只是一个幻觉，实际的情形是交易生活因该理论的介入而繁琐得喘不过气来。增进交易便捷的功能也是建立在对登记实质审查主义不切实际的批评和对交易自由的狂热渴求的基础上，对物权变动的全过程进行实质审查是将自由交易纳入法律视野，使交易行为符合法律行为有效要件的必要手段。至于物权行为理论的交易安全保护功能，虽不能从根本上给予否定，但其对恶意第三人也提供保护，超越了交易安全的合理界限，何况，在不存在物权变动的情形下，交易安全还不能通过物权行为理论保护，故所谓交易安全保护也是不充分的。非但物权行为理论所期待的功能都不能实现或不能完全实现，而且该理论将买卖无效时，出卖人的所有权请求权转化为不当得利请求权，严重牺牲了交易公平。近些年来，主张物权行为理论者以利益衡量的方法，证成物权行为理论并不违反交易公平的要求，但却不当地扩大了利益衡量的范围，其结论不能成立。在体系建构上，物权行为理论与民事法律行为制度、民法总则、无权处分、善意取得制度、不当得利制度、所有权保留制度、他物权的设定等民法制度之间并不存在必然的联系，物权行为理论并非一种逻辑的自然律，离开物权行为理论，上述制度也能完美而精确地设计，并更为和谐有序地运行。就物权行为理论与物权公示的关系而言，物权公示的方法为物权行为的一项成立要件，若承认物权行为理论，则物权变动之公示即为对物权行为的公示。但物权公示与物权行为之间没有任何内在的必然联系，事实上，无论是否承认物权行为，对物权的公示问题都不发生任何影响，只不过在不同的立法体例下，物权公示与物权移转（创设）的关系有所不同。在意思主义下，物权公示与物权移转（创设）发生分离，而在形式主义下，二者发生融合，但在物权形式主义和债权形式主义下融合的程度又有所区别，在物权形式主义下，二者完全融合，物权变动行为一经公示就发生物权变动的后果，依物权行为即发生物权变动的效力，公示为物权变动的充分条件，原因行为无效时产生不当得利请求权；而在债权形式主义下，物权公示仅仅为物权变动的必要条件，还需与原因行为

结合才能发生物权变动的效力。但是,无论公示方法为物权变动的充分条件或必要条件,都是物权变动的生效条件。既然,物权行为并非物权公示的理论基础,加之物权行为理论存在种种缺陷,我们完全可以在无视该理论的情况下构建完整的、科学的物权公示制度。而事实上,无论我国现行的民事立法,或者正在进行的相关民事立法,也的确倾向于这样的选择。

第三章讨论不动产物权的公示方法登记。登记是将不动产物权的得失变更,依法定程序记载于国家的专门簿册上,其虽然也反映国家对不动产交易的宏观调节和监控,但在本质上为一私法性制度。我国现行的不动产登记制度,介于托伦斯登记制与权利登记制之间,一方面,登记是不动产权属变动的生效要件;另一方面,实行不动产的登记发证制度。未来完善不动产登记制度时不必完全照搬某种模式,而应从我国国情出发,从不同模式中借鉴和吸收有益成分,最终形成具有我国特色的不动产登记制度。按照这种思路,我国不动产登记制度的建设应立足于以下几个基点:1.坚持将登记作为不动产物权变动的条件,以与形式主义的物权变动模式选择保持一致;2.继续登记发证制度,以补强不动产登记的公示效果,并方便不动产交易的进行;3.在登记簿的编制上,采物的编成主义,以清晰地反映同一不动产上的所有的权利关系;4.规定登记能力,法定的不动产物权原则上都有登记能力,并且凡是涉及到第三人利益或对抗世人的权利都应有登记能力;5.由专门性的行政机关统一办理不动产登记事务;6.确立登记请求权以及对登记请求权的法律救济手段;7.明确赋予登记以公信力,并为此完善相关制度,如对登记申请的实质审查、对不实申请和登记的罚则、对错误登记的国家赔偿责任等,以确保登记公信力不至于过度伤害真正权利人的权利。在登记类型上,我国目前的制度表现得并不完整,在预备登记方面法律规定几乎一片空白。未来的登记制度应明确规定顺位登记、宣示登记、异议登记、预告登记及其法律后果,特别是明确规定预告登记的适用范围、预告登记的发生和预告登记的效力。

第四章讨论动产物权的公示方法占有(交付)。动产物权的公示方法从静的角度而言是占有,从动的角度而言是交付。占有并非一种法律上的权利,而仅仅是具备一定法律意义的、受法律保护的事实。占有的构成需要客观的占有状态以及主观上抽象的"持有"意思,但该意思不必具体到为某种物权而占有的程度。在占有的确定上,适用着日渐虚化的标准。从实际的持有到在一定时间和空间范围内的控制到通过一定的法律关系来控制,占有也因此被区分为直接占有和间接占有,与此相对应,交付也区分为现实交付和观念交付。无论是间接占有或者观念交付,都缺乏客观的物质形态,并不具有物权公示的效果。特别是,在观念交付如占有改定之下,物权的变动因当事人意思的一致而发生,不仅不能将物权变动公示于外,而且在事实上也使得公示要件主义和公示对抗主义的差别不复存在,甚至于使公示要件主义反不及公示对抗主义的效果。实际上,间接占有与观念交付这些似是而非的概念,本是为缓和公示要件主义的僵硬性而设,其将公示要件主义所要求的形式作无限广义地解释,以至于最终不成其为形式,造成了法律概念、法律逻辑乃至于法律制度的混乱,我国物权立法不妨放弃间接占有与观念交付的概念,而从正面直接为公示要件主义设置例外,在部分物权变动,径采公示对抗主义。

第五章讨论公示的对抗力。公示的对抗力表现为"非经公示,不能对抗;已经公示,可以对抗",其在公示对抗主义法制下作用突出,在公示要件主义上也有表现。所谓不得对抗,并非不发生效力,而系指未经登记之物权变动,在当事人间业已完全有效成立,在对第三人之关系上,亦非绝对无效,仅当事人不得对第三人主张物权变动之效力而已。第三人仍可承认未经登记的物权变动之效力,从而非经登记,不能对抗之法律效果,必须有第三人出现并经该第三人主张时,始能发生。关于第三人的范围,在奉行公示对抗主义的日本,判例与学说上经历了由无限制说到限制说的转变。限制第三人范围的标准有所谓"正当利益说"、"有效交易说"、"或者吃掉或者被吃说"等。具

体而言,未经登记,不得对抗的第三人包括各种物权取得者、不动产租赁人、因扣押、分配、加入、申请等原因直接取得对不动产支配关系的债权人;而虽未登记,也可对抗的第三人包括与争议不动产并无直接交易关系的不法行为人、不法占有人、一般债权人,以及实质上无权利的登记名义人及其受让人、转得者和违背诚实信用的恶意的第三人。在公示对抗主义法制中,公示的对抗力主要放在不动产二重买卖的情况下讨论,为了对公示对抗力的作用机制有更深刻的认识并进一步证明公示要件主义优于公示对抗主义的结论,本章还特别检视了公示对抗主义与公示要件主义立法对不动产二重买卖的不同规制模式。认为,公示要件主义的制度设计逻辑一贯,环环相扣,制度之间相互照应,相得益彰。而在公示对抗主义,却在理论上难以自圆其说,在实践中难以操作。故此,公示对抗主义对不动产二重买卖的法律规制是失败的,以此为起点,公示对抗主义之物权变动与公示模式,其科学性是值得怀疑的。

第六章讨论物权公示的公信力。公示的公信力是指对于因信赖虚假公示而为物权变动的主体,将公示的权利关系按真实的权利关系处理,使形式与真实的权利关系相分离,并发生独立的效力。公示的公信力可以治愈物权变动中的权利瑕疵,打破事实上存在的物权关系,使物权的取得无中生有,从而充分保护交易安全,但对于真正权利人的利益则是一种牺牲。由于登记是较为完整的公示方法,赋予登记以公信力具有广泛的合理性,而占有作为一种并不完全的公示方法,使其都有公信力的合理性则值得怀疑。无论是主张登记或者占有的公信力保护,都必须具备一定的条件,并给真正权利人一定的事后救济,使其利益的牺牲不至于过分残酷。对公信力这一交易安全保护手段,在解释上应与无权处分行为的效力、善意取得制度作一体的把握。无权处分是公信力发生作用和善意取得制度得以适用的事实前提,善意取得制度是贯彻(占有)公信原则的必然的逻辑结论。基于这样的认识,法律上应将无权处分行为认定为效力未定,同时规定其效力未定的后果不得对抗善意第三人,即按公信原则保护

第三人善意的交易预期。如果善意第三人已经具备了物权变动的公示手段，则当然地依据有效的交易行为取得相应的物权。如此一来，善意取得实际上是法律行为的效力和物权变动公示规则相结合的一项法律制度，在性质上属于物权的继受取得。而传统民法理论一方面无视善意取得与公示公信力的逻辑联系，另一方面将善意取得作原始取得看待，致其有关善意取得构成要件的表述发生了某种程度的偏离，本章在详细评介传统理论有关表述的同时，力图对其偏离内容予以扶正。

Abstract

This article contains six chapters. Chapter 1 and chapter 2 elaborate the two legislative modes about property publication. Chapter 3 and chapter 4 elaborate the means of property publication. Chapter 5 and chapter 6 elaborate the validity of property publication.

Chapter 1 discusses the two legislative modes of property publication-the defensible mode of publication and the creation mode of publication. This chapter describes the antagonism between the two modes by comparing the difference in systems of transference and property publication among France, Japan, Germany, Austria and Swiss. However, the theoretic significance of the antagonism is beyond its practical significance. The defensible mode of publication and the creation mode of publication are blending continuously. On one hand, on the legislation of the defensible mode of publication, the ownership does not transfer with the agreement on the declaration of will when the genus, future, good or other's goods are sold. The legislation also permits the parties making special agreement on the transference time if the ownership of personal property to exclude the application of the rules about autonomy of the will; on the other hand, the creation mode of property publication is softening as the form of requirements of the transference of property, especially the transference of personal property. Because the concepts of indirect possession and notional delivery are

introduced into the theory, the form is not the form again. Its validity of law has no difference with that of the defensible mode of publication. Even though, we can't overlook the difference between the two legislative policies. The defensible mode of publication is helpful to the convenience in transaction, respecting the freedom in transaction of the parties in maximum scope. But it has much obstructionism in the logic system and can't coordinate with relative legal systems, also involving in passive position in application of law. The creation mode of publication complies with the ideal of the security in transaction and coordinates with relative legal systems. Moreover, the creation mode of publication gives the methods of publication formation validity of property transference. Opposite to the defensible effect of the defensible mode of publication, it also delegates more sufficient inspiration of publication to the parties especially the passive party. The creation mode of publication provides not only such passive protection as no publication, no transaction of property for the third party in transaction, but also such positive protection as if there is publication, believe it for the third party in the case of wrong publication. So the creation mode of publication has more integrated effect of publication than the defensible mode of publication has. According to the history of property publication, the creation mode of publication is a system to overcome the shortcomings of the defensible mode of publication. It itself has superiority. If we select the creation mode of publication in legislative policy, we can't overlook its shortcomings of such as no rapidity, convenience and freedom in transaction. So we should develop the advantages of the defensible mode of publication in designing concrete system to better the creation mode of publication. So we can choose these plans: (a) insisting on the creation mode of publication in the publication of property transference, but adopting the defensible mode of publication in specific

transference of property; and (b) In the transference of personal property, putting the publication of property transference as suggestive rules, permitting the parties excluding its application by will declaration.

Chapter 2 elaborates the relation between the publication of property and the juristic act of real right. The juristic act of real right is a juristic act mixed together by declaration will of the transference and the means of publication. It has apparent character of duality. It is declaration of the will of transference in subjective angle and the means of publication in objective angle. Both declaration of the will and publication are the creation requirements of the juristic act of real right. The whole theory of the juristic act of real right consists of the concept of the juristic act of real right, independence of the juristic act of real right and abstraction of the juristic act of real right. Any claim departing the relation of the three parts violates the origin of the theory of the juristic act of real right. The evaluation about the theory should develop with fact, value and constitution of institution. In fact, as means of property publication, delivery and registration are neutral juristic acts and have no content of declaration of the will of transference. Even they have some meaning on the creation of the methods of publication, they can't be real acts by avoiding the sense of credit. There is almost no case as valid the juristic act of real right. As a juristic act, the juristic act of real right must be bounded by the valid rules of juristic act. The juristic act of real right and act of credit are invalid by no reason of joint flaws. The claim of relativity of abstraction isn't amendment to the theory of the juristic act of real right in nature, but the total negation of the theory. It acts as a gravedigger. That the theory of the juristic act of real right can realize the transaction of distinctness is an illusion. The fact is that the transaction life can't breathe for the inter-

posal of the theory. The function of proving transaction of convenience is also bases on the impractical criticism to the essential examination pattern of registration and the crazy thirst for freedom in transaction. That the essential examination to the whole course of property transference makes transaction of freedom involved in legal field of vision and makes the act of transaction tally with essential means of valid requirements of juristic act. We can't totally negate the protective function of security in transaction in the theory, but it also protects the third party with ill will. Thus it is beyond the reasonable limit about the security in transaction. However, without the transference, the security in transaction can't get protection from the theory. So the so-called security in transaction is insufficient. The theory not only can't or can't wholly realize its function that it is longing for, but also has no transaction of justice as it stipulates that the claim of ownership of the seller should turn into the claim of ill-gotten gains when the transaction is invalid. For yeas, the theorists who support the theory prove that this theory doesn't violate the requirements of transaction of justice in the method of weighing up the benefits, but enlarge the scope of it improperly, so the conclusion is untenable. On the constitution of institution, there is no positive connection between this theory and system of civil legal act, general principles of civil law, disposal without authority, bona fide acquisition, ill-gotten gains, retention of ownership and establishment over the property of another, the theory is not a logical law of nature. The aforesaid systems can also be designed perfectly and operated harmoniously without the theory of the juristic act of real right. On the relation between the theory and property publication, the means of property publication are creation requirements of the juristic act of real right. If we admit the theory, the publication of property transference becomes the publication of the juristic act of real

right. But there is not any inner positive connective between property publication and this theory. In effect, whether we admit the juristic act of real right or not, there is no influence on the property publication and the transference or creation of property. Under autonomy of will, property publication separates from the transference or creation of property. Under formalism, they blend. But under formalism of property and formalism of credit, the course of blending has difference. To formalism of property, they blend completely. The act of property transference becomes valid for publication, which is the validity of property transference in the juristic act of real right. The publication is the sufficient condition to property transference. Once the act of cause is invalid, the claim of ill-gotten gains will emerge. To formalism of credit, property publication is only the essential requirement to property transference, and needs to be connected with the act of cause, thus can produce the validity of transference. However, no matter the means are sufficient requirements or essential requirements to property transference, they are valid requirements to property transference. Though the juristic act of real right isn't the theoretic foundation of real right and the theory exists many shortcomings, we can constitute the whole scientific system of property publication ignoring the theory. In fact, the prevailing civil legislation and the relative civil legislation are indeed inclined to such selection.

Chapter 3 elaborates the means of the publication of real property: registration. Registration records the acquisition, bereavement and transaction of real property in legal procedure on special registry of one country. Although registration makes known the country's macroscopic regulation and supervision on the transaction of real property, it is a private law system in the nature. The current registration system in China is between Torrens system of registration and title registration

system. On one hand, registration is the valid essential of real property transferences; on the other hand, certificate system of registration for real property is in practice in China. When improving the registration for real property in future, China needs not copy some mode of registration for real property completely. China should draw lessons and suck up the useful components from different modes according to her own conditions. Therefore, the construction of the registration system for real property in China should base on the following basis: (a) Persevere in that registration is requirement of the transference of real right in order to in accordance with the choice of creation mode about the transference of property; (b) maintain certificate system of registration so as to amplify the publication effect of registration for real property and make transaction of real property convenient; (c) chose property regimentation doctrine in the regimentation of registry establishment so as to make known clearly all right relationships on the identical real property; (d) regulate the capability for registration. Legal real property possesses the capability for registration in principle. Moreover rights that relate to third party's benefit possess the capability for registration so well as rights defensible people; (e) special administration agency conducts the real property registration routine; (f) establish registration claim right and remedy for it; and (g) registration is definitely entitled with the indication validity. Moreover, in order to improve related systems such as essence examination of application for registration, punishment rules for unreal application and registration and the state liability to pay compensation, etc. in order to ensure that indication validity of registration won't hurt the right of real right owner severely. System on the registration forms in China isn't integrated. There is few legislation of preliminary registration. Future registration system ought to clearly and definitely regulates gra-

dation registration, pronouncing registration, dissension registration and registration of advanced notice, as well as regulates their legal effect; particularly clearly and definitely regulates the scope of application, happening and validity of registration of advanced notice.

Chapter 4 exams the means of publication of personal property: possession (delivery) The means of publication of personal property is possession when discussed from static angle, while in dynamic angle it is delivery. Possession is not a right in law. Possession is just a fact having certain legal meaning and secured by law. The requirements of possession include objective possession and subjective abstract holding idea but this idea need not be concretized to a degree that possession is for a certain property. On the definition of possession continuously fading criteria is being applied. From holding in fact to controlling in certain scope of time and space and to controlling through certain legal relationship, possession is hence divided into direct possession and indirect possession. According with this, delivery is divided into subsistent delivery and notional possession. Either indirect possession or notional delivery lacks of objective substance forms and hasn't the validity of property publication. Particularly under the condition of notional delivery such as notional possession transform, the transference of property is caused by consent of the parties. This not only excludes the transference of property out of publication but also makes no difference between the creation mode of publication and the defensible mode of publication, as well as makes the effect of the creation mode of publication not good as the defensible mode of publication. In fact, the vague concepts of indirect possession and notional delivery are created to palliate the bluntness of the creation mode of publication. Those concepts interpret the forms required by the creation mode of publication so limitlessly and widely that they destroy the forms by themselves and make