

A Study on the Legal Regulation of Property Rights in Promoting Social Development By Social Entrepreneurship

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湖北省社会科学基金项目成果

公益创业推动社会发展的 产权法律规制研究

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范锐敏◎著

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摘要

当前，公益已成为社会生活中的一个重要组成部分。然而它并非一蹴而成，而是历史发展到一定阶段的产物。它由社会的政治、经济、伦理多方面原因相互作用、相互影响而成。公益形成的政治因素可从政府创设的目的、政府的重要经济社会职能和政府合法性的基本依据中得出肯定性的答案。公益产生的经济土壤，主要体现在财产占有的私有制结构形成社会财富分配的不均等状态，一些人失去了基本生活保障；而社会化大生产和专业化分工又进一步加强了人们对公共体系的依赖。在公益形成的社会条件之中，人的社会依赖性和社会和谐发展的客观需要是主要因素。此外，公益的形成还有着伦理道德的推动因素。人性因素的始动作用、欲望情感的驱动作用和意志信念的推动作用公益形成的根本伦理动因；义务感、良心和荣誉感共同构成了公益产生的具体伦理动因条件。公益作为社会现象之一种，有其自身发展的过程。从自发性的公益阶段到制度化的公益阶段，公益经历了漫长的发展历程。

“公益”是深刻影响人们生活的概念，但公益本质为何，却是制度与理论中的一个未定稿。在我们称之为语境的生活场景、社会条件、理论思潮中，公益具有了生动性与多样性。但同时也带来了公益本质识别上的模糊性与不定性。在忠实公益英文原意的基础上，公益是一个产权界定和利益分配导向十分清晰的法律概念。所谓公益是指不以营利为目的，不向投资者、经营者分配收益，社会公众普遍受益的事业与行为。公益的本质具体表现为非营利性与社会有益性两大根本属性。非营利性是指公益事业经营不得以向投资者和经营者分配收益为目的。其具体体现在公益投入不得以营利为目的、公益绩效不以利润或经济利益的多寡来评价、公益财产及收益禁止分配、对特定受益人的公益收费被允许并由此形成公益收入。社会有益性是指以公益形式提供的产品和服务有利于社会进步和福利改善，社会个体能从中分享到明显的好处与益处。它具体包括公益须有益于社会、公益受益主体既具有普遍性又具有条件性、公益用途须符合法定和指定要求、公益需求具有不饱和性的内容。在公益法律界定的基础上，对公益与公共利益、公共产品、社会福利、慈善这四个最易混淆的概念作出区分。

登记作为法律程序中最重要的一种制度，它不仅是理论上公益事业法律认可的首要问题，而且也是实践中中国公益事业发展所面临的瓶颈。公益事业设立登记制度，不仅具有私法意义上的公示目的，而且也具有公法意义上的监管目的。在私法意义上，公益法律人格的获得是公益登记的首要目的；公益法律行为产生变动效果是公益登记的重要目的。在公法意义上，公益登记可实现公益事业免税目的；同时有利于国家对公益事业的监管。要实现公益登记的目的，就必须在公益登记的立法中制定符合其目的的规定。在有关公益设立登记方式的规定方面，我国公益组织的“双重许可”登记方式弊大于利。该方式扼杀了公益组织的多元性和打击了民众从事公益的积极性；造成大量法外公益组织的存在；增加了公益组织设立审查的程序和成本；导致业务主管机关的权力滥用。我国应尽快改变公益组织设立的双重许可登记方式，变公益组织设立的“双重许可”登记方式为“准则制”，由民政部履行公益组织审查登记职责。在有关公益登记条件和程序的规定方面，通过对美国、加拿大、日本、英国等国家相关规定的考察，指出我国公益组织的设立登记条件较高，建议逐渐将这些高标准转变为低标准；同时，我国公益组织设立登记的程序明确性不够，建议在立法中予以进一步明确。

产权是公益事业经营过程中的核心权利。产权的实质是对基于财产上人与人之间的行为关系进行界定和规范。当前，产权的核心内容是“剩余索取权”和“剩余控制权”。公益事业的产权具有自身特点。

在公益事业形成阶段，政府、营利性组织、以第三部门为主体的自愿性组织的多元主体均可提供公益。但在这些多元主体中，政府投资公益事业的产权法律问题与营利性组织、以第三部门为主体的自愿性组织投资公益事业的产权法律问题具有不同之处。对于国家政府而言，国家政府投资公益事业，是国家政府的积极给付义务，与其相对应的是公民的公益受益请求权。国家政府积极给付义务的特点在于：国家政府的公益给付义务的主要承担者是行政机关；国家政府的公益给付义务的内容是向公民提供公益；国家政府的公益给付义务是一种积极义务。公民的公益受益请求权的特点在于：公益受益请求权的权利主体公民具有个体性与公共性的统一；公益受益请求权的权利内容包括经济、政治、社会和文化等多方面的权利，是一个完整的不可分割的体系；公益受益请求权的权利客体具有不断扩展性和可持续性。私人主要通过捐赠方式来参与投资公益事业，其产权关系问题主要体现在公益捐赠的法律效力和公益捐赠行为与诈害债权行为的法律冲突两个问题。

在公益事业运营阶段，公益事业产权的特性具体包括：第一，在公益事业组织中不存在同时享有剩余利益索取权和经营控制权的所有人。第二，公益事业受

益权主体虚拟化。公益事业的投资、经营者及其成员不能成为公益事业剩余财产索取权的主体。第三,公益事业的经营控制权受到公益事业公益性的限制。公益事业产权的特点,使其既不同于所有权明晰的私有产权,也不同于所有权主体为国家、由代理人行使使用权的国有产权。除此之外,公益事业产权的公益性特性也不同于营利性组织产权的营利性特性。针对运营阶段公益事业的产权特点,如何构建适应该特点的公益事业组织形态,以保证公益事业目的的实现,是公益事业运营阶段最突出的法律问题。纵观世界各国,目前适合公益产权特点的公益事业组织形态有“公益法人、公益非法人组织、公益信托”三种。这三种组织形态各有特点,其相关的当事人之间基于公益财产的权利义务关系也各不相同。

公益事业完结阶段,产权的主要法律问题是剩余财产的归属。公益事业剩余财产的归属,决定于公益的法律本质。公益事业组织终止后剩余财产归属的特点,形成了公益事业财产的“近似原则”。由罗马法创立的“近似原则”在大陆法系国家与英美法系国家表现为不同的形态。在大陆法系国家,偏重将“近似原则”的传统内涵运用到公益事业法人制度中;而英美法系国家则倚重于公益信托制度与“近似原则”的结合。目前我国关于公益事业剩余财产归属的法律规定,主要有两部法规:一部是《基金会管理条例》,另一部是《信托法》。《基金会管理条例》第33条的规定既有先进之处,也存在不足。我国《信托法》第72条规定的不足之处在于体现了突出的公权力介入作用,并且“近似原则”适用范围较窄。

要发展公益事业,制度性的激励机制构建非常重要。公益的法律本质决定了公益需要用法律制度去激励,以满足社会民众对公益日益增长的需求。而法律具有激励功能,公益法律制度作为当前逐渐受到重视的法律制度内容,应充分发挥这一主要功能,来促进公益供给规模的扩大。公益法律激励机制的理想目标是促进公益事业的科学发展。这一目标主要包含公益事业发展具有可持续性、公益事业发展始终以“人”为本、公益事业发展应与国情相适应的内容。公益事业科学发展这一理想目标的实现,是多种因素促成的结果,其中法律因素是最重要的制度保障。公益法律作为法律体系中重要的组成部分,对公益事业的发展有最直接的激励作用。当前,我国在公益的税收法律激励机制、公益的荣誉法律激励机制、公益的声誉法律激励机制和公益的公共行政法律激励机制方面存在不足,亟须完善。公益法律的激励作用反映在公益法律运行的整个过程,其实现要经过若干环节。

公益事业质量的提升,需要约束规制。构建科学合理的公益产权约束规制体系,能有效促进公益事业的健康发展。在对“约束机制”进行界定的基础上,进

一步分析公益约束规制的特点，阐释公益约束规制对公益的意义。同时，分析公益产权内部治理结构的特殊性，通过比较国内外公益产权内部治理结构规制的不同规定，针对我国制度规定存在的问题提出完善建议。最后从公益产权行政监管约束规制与公益产权社会监督约束规制两个方面展开论述。

关键词：公益；产权；法律规制

Abstract

At present, Public welfare has become one of the important components of social life. The public welfare is not built in one day, while it is the product of the history developed to a certain stage. It attributes to various aspects, such as social, political, economic, ethical factors, which interact to each other and has mutual influence on each other. The political factors can be found from the purpose of creation of the government, the economic and social functions of the government, and the basis of the legality of the government. The economic factors mainly are that the private ownership of property has led to social inequality in the distribution of wealth state, some people lost their basic life safeguard; and the socialized production and specialized division of labor further strengthen people's dependence to the public system. In the social factors, people's social dependence and the objective need of the harmonious development of the society are the two main factors. In addition, the formation of the public welfare also has the ethics factors. The passion, the demand and the will of the human are the fundamental ethics causes; Compulsory feeling, conscience and sense of honor was composed of the specific ethical reasons of public welfare. As one of the social phenomenon, the public welfare also has its own development process. From the spontaneous stage to the institutionalized stage, the development of the public welfare has a long history.

"Public welfare" is a concept which has a deep influence on people's life, but its nature is ambiguous both in theory and practice. In the context of life, social, thought, public welfare has diversified. At the same time the content of public welfare is so complicated that it is a big challenge to define and analyze it. According to the original meaning in English, public welfare is a legally clear concept which has huge effect on property right and interest distribution. Public welfare is the career and behavior which is of non-profit, and does not distribute

interest to investors or managers, while the public get benefits from it. The two basic natures of public welfare are non-profit and beneficial to social. The public welfare is non-profit means that its purpose is not to distribute income to investors or business operators, which show that public investments are not for profit, the performance of the public welfare is not evaluated according to the amount of benefit, the property and income of public welfare are not allowed to distributed, the charge to particular beneficiary is allowed and has formed public interest income. The public welfare is beneficial to society refers to that its products and services are good to the social progress and welfare improvement, the social individual can share the apparent benefits. Specifically, it includes that the one who gets benefits from the public welfare is universal and conditional, the purposes of the public welfare must comply with the legal and designated requirements, and the demand of the public welfare is not saturated. On the basis of the definition of public welfare, the paper distinguishes the public welfare from public interests, the public products, social welfare and charity, which are four concepts most easily confused to each other.

Registration as a legal process in the most important of a system, it is not only theoretically public welfare undertakings by law the primary issue, but also is the practice of China's public welfare undertakings development facing the biggest bottleneck. Public welfare undertakings establishment registration system, not only has the meaning of the private law on public purpose, but also has the purpose of public law supervision. In private law sense, the acquisition of the public welfare law personality is the primary purpose of public registration; Public welfare law behavior produce change is the important effect public registration purposes. In public law, public welfare registration may realize the public welfare undertakings duty-free purpose; and it is helpful to the state of public welfare regulation. To achieve the purpose of public registration, we will have to register for the public in accordance with the legislation in the provisions of purpose. In the relevant public establishment registration of the provisions of the way, Chinese public welfare organizations "dual licensing" registration way more harm than good. The way killed the diversity of the public organization and hit the people engaged in public enthusiasm, caused a lot of method of the existence of the public organization, increased public welfare organization examination procedures and cost, increased the executive authorities in the power of the abuse. Our country should change

public organization set up the double license registration way as soon as possible, become public organization established by the “double license” to “criterion system”, and the ministry of civil affairs perform public organization review registration duties. In the relevant provisions in conditions and procedures of public welfare registration, through the investigation of the relevant provisions to the United States, Canada, Japan, Britain and other countries. It was pointed out that the registration requirements of public welfare organizations establishment was the higher, suggested the high standard to change gradually low standards; Our country public welfare organizations registration procedures clarity is not enough, suggested to make clear further in the legislation.

Property right is the core in the process of public welfare undertakings. The essence of property right is delimitate and regulate the relationship between individuals, which based upon the concept of “property”. At present, the essence of property right includes “residual claims” and “surplus control”. Public welfare property right has its own characteristics.

In the stage of public welfare undertakings formation, the government and the profit organization, along with the third department mainly formed by the volunteer organization all can provide public welfare. But in these multiple subjects, there exists differences among the government investment of public welfare property, profit organization, and the third department on the level of legal issues. As for the national government, the government investment public welfare undertakings are the obligation of national government's active duty payment, and correspondingly public benefit is a citizen's claim. The national government payment obligations have positive features; the main undertaker is administrative agencies; the content is to provide welfares to the citizens; this kind of obligations is active. The features of citizens' claim right in public welfare include: citizens with public welfare benefit claims right is unity in the individuality and public; this kind of claims, which includes economic, political, social and cultural rights, and so on, is a integral system; the object has the characteristics of constantly expansibility and sustainability. The individuals participate in public welfare undertakings mainly through private donations, and its property relationship problems exist in the legal effect of public welfare donations and the conflict between public welfare donations and cheat against the behavior of the creditor's rights.

In the stage of public welfare undertakings operation, the characteristics of

public welfare undertakings of the property right include: First, in public welfare organization, there does not exist an ownership, which at the same time enjoys surplus interests and the right to control all business partners. Second, the subject of public welfare beneficiary is fictitious. Public welfare investors, operators and its members cannot become the subjects that enjoy the remaining property claims of public welfare undertakings. Third, in public welfare undertakings, the right to control as well as the right to manage should be confined by the ‘public’ factor. The characteristic of the property right of public welfare undertakings made it different from the private property ownership and the ownership of the country, the exercise of state-owned property right by the agent using. In addition, the characteristics of public welfare property are different from that of the profit organization, which focused on ‘profit’. According to the characteristics of public welfare property in the operation stage, how to construct the features public welfare organization form, to ensure the realization of the public welfare purposes, is the most important legal problems in public welfare operation stage. Throughout the world, we have three forms of organizations, which adapt to the characteristics of public property right: public legal person, public welfare unincorporated organization, the public trust. These three forms have different features, the parties based on public property rights and obligations are different.

In the accomplishment stage of public welfare undertakings, the legal problem of the property right is the ownership of the surplus property. The ownership of surplus property in public welfare undertakings is decided by the nature of public law. After the termination of public welfare organization, the characteristics of the surplus property’s ownership form the “approximation principle”. Founded by the Roman law, “nearly principle” in civil law system countries and common law systems countries has different forms. In civil law countries, they will apply particularly stress on nearly principle’s traditional connotation to the public welfare undertakings in the corporation system; whereas in common law countries, they incline to combine the public trust mechanism to the “approximate principle”. At present, in this field, our country basically has two regulations: one is “the foundation management regulation”, another is “the trust law”. Article 33 of “the foundation management regulation” has both advantages and insufficiencies. And article 72 of “the trust law” has an important shortage in the prominent role of public power intervention, and the limitation of the application scope of the

“approximation principle”.

To develop public welfare undertakings, institutional construction of incentive mechanism is very important. The legal nature of public welfare demands that we should motivate the legal system in legal mechanism, so as to meet the increasing demand of the public to public welfare. The law has inspiring function. Public welfare law system, which is paying more and more attention, should fulfill this main function, so as to promote the expansion of the scale of public welfare supply. The ideal goal of public welfare law incentive mechanism is promoting scientific development of public welfare undertakings. This goal mainly includes sustainable development of public welfare undertakings; public welfare undertakings development should be oriented to the individuals; and the public welfare undertakings development should be adapted to the country conditions. The realization of this ideal goal in public welfare undertakings needs to be contributed by several factors, among which legal factor is most important. As the most important part in the legal systems, public welfare law has the most direct stimulation in the development of public welfare undertakings. At present, in our country, the public welfare tax law incentive mechanism, the honor of public welfare law incentive mechanism, the reputation of public welfare law incentive mechanism, and of the administrative of public welfare law incentive mechanism are all deficient, which urgently need to perfect. The incentive effect on the public welfare law is reflected in the whole process of the operation of public welfare law, and its realization should pass through a number of sectors.

To enhance the quality of public undertakings requires regulation. Building a scientific and reasonable public welfare property rights restriction regulation system can effectively promote the healthy development of public welfare undertakings. On the basis of the definition of “constraint mechanism”, it further analyzes the characteristics of public constraint mechanism, and explains its meanings. The internal government structure of public welfare property rights has its particularity. It will analyze the defects in our internal governance structure by comparing the domestic and foreign public welfare property right regulation, and bring some constructive comments. Finally this paper mainly launches the elaboration from two aspects of the public welfare property administrative supervision regulations and social supervision regulations.

Key Words: Public Welfare; Property Rights; Legal Regulation

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引言

一、研究意义

公益作为一种现实而存在，其存在的意义重大。它首先是社会公共水平的主要基准，公益水平的高低代表了社会公共水平的高低，是社会公共水平的主要标志；其次，公益是社会再分配的主要手段，它体现了社会的公平正义，是社会正义的彰显；再次，公益也是社会文明的基本尺度，它体现了社会财富增加后的物质文明，是社会财富溢出效应的体现；它还体现了社会的制度文明，它的存在为社会制度的完善提供了力量。最后，公益是人性道德水平提升的表现，它的存在意味着人在自我需求得到满足后的一种道德性反思，是人性利他主义的道德体现，是人性崇高品德的再现。

改革开放 30 多年，我国政府提出了以人为本的科学发展观，把实现人的全面发展作为核心，从而强化扩大就业、加强义务教育、公共安全和公共卫生等方面的各项方针和措施，增加政府的人文和社会指标。在公众层面上，近几年的“两会”召开，与民生有关的问题成为了两会代表、委员和民众关注和热议的话题，诸如环保、医疗、教育等涉及民众的公益问题占据了半壁江山。可见，公益在当前被提升到了全社会重点关注的高度。现今我国正处于经济社会转型期，在这样的时代背景下，事关我国民众根本利益的公益事业发展也正从规模型向质量与效益型转变。

与此同时，公益事业在社会法律治理的最高层面也发出了自己的声音。如我国相继颁布实施了《慈善法》《公益事业捐赠法》《基金会管理条例》等一系列相关公益的法规。

公益存在的意义如此重大，所涉及的范围如此广泛，受到了当今社会各界的普遍关注和国家法律制度的规范。但在中国，公益概念被公共利益概念严重误读，并与诸如福利、慈善等概念相互纠缠，混淆不清，导致人们对何为公益存在思想认识上的混乱。正是由于这种认识上的错误，导致公益在具体的产权制度设计上被错误理解，制度设计原则、设计内容、设计目标产生偏差。而这种制度设计思想意识上的误解，也进一步导致在公益产权的具体实施上产生了体制缺失、

供给不足、政府公共职能缺位等弊端，相应的公益产权法制建设也严重滞后。这种对公益的深层误解，不仅影响学术本身；而且还导致有关公益的学术理论无法为公益产权的制度设计提供学术支持；甚至进一步把公益产权的制度设计引向歧途，歪曲公益的真实内涵，危害公益产权制度的根本。公益究竟是什么、如何规制公益产权、公益产权应如何规范的运行，这正是我国当前公益产权法规建设急于厘清的根本问题。笔者正是在这样的背景下，展开了对公益产权这一重要论题的研究和探索。

目前，在公益理论研究上，学界关于公益理论的社会科学研究主要集中于三个方面：一是关于公益政治学的研究；二是关于公民公益行为的研究；三是关于公益伦理学的研究。在法学研究中，国内学者偏重从第三部门的角度研究公益行为，多关注于公益诉讼，而对公益创业发展的产权及其规制的研究不足。同时，从我国公益事业运作的现实状况来看，近年来频发的公益侵权事件，均暴露出公益产权不明晰、公益无形产权尚未明确界定等问题。公益产权法律规制的不完备，不仅在很大程度上将会损害公益主体的利益，而且也会降低公益组织的公信力，甚至成为制约我国公益事业健康发展的瓶颈。因此，对公益产权进行法律规制，既符合我国党的十八届三中全会决定、四中全会决定和《依法治国若干重大问题决定》中的“加快保障和改善民生、推进社会治理体制创新法律制度建设”、“健全产权保护制度”等相关规定，又是促进我国公益事业高质高效的可持续发展的重要保障。从这个意义上而言，对公益产权法律规制进行全面深入的研究，无疑会对社会法理论与公益理论的发展、公益产权规则的完善和公益事业实践的改进，发挥了不可忽视的积极作用。具体而言，研究公益产权法律规制有如下重要意义：

第一，从理论层面来看，加强公益产权法律规制的研究，有助于丰富社会法的基本理论研究，亦可以推动对公益理论的研究。现有对公益的社会法学研究，在内容上多是从公益社会组织法律制度的角度进行研究，并且偏重于公益诉讼研究。仅有对公益产权的法学研究，也主要是对公益产权的法律概念进行研究。而对于公益核心内容的公益产权，其公益产权主体、产权内容、产权运行、产权激励与约束等产权法律规制的系统研究相对匮乏。因而，本书以公益产权为研究中心，运用法经济学的产权理论和规制理论，将公益产权法律规制问题纳入整体研究框架，从而扩展中国法学对公益研究的内容和范围，为我国公益的社会法学研究做出有益的基础性探索。此外，本文也有利于公益理论研究的扩展。目前学界对公益理论的研究，主要集中在公益的政治学研究、伦理学研究和公民公益行为的研究，对公益从法经济学的角度进行研究的较少。因此，本书运用法经济学理论，对公益产权的法律规制进行系统研究，能够弥补现有公益理论研究的薄弱之处。