

ON THE LAND-USE RIGHT, CHARGE AND LAND RENTAL

by LÊ VĂN TÚ

To implement the Land Law issued in 1993, numerous sublaws have been promulgated (ordinance, decree, circular, decision...). However only within two years, the enforcement of the Land Law did not go smoothly. Many problems have arisen to make people and enterprises worried and caused a lot of public opinions. In economic activities, the real estate market is almost blocked, the revenue of the State budget concerning land goes down.

There are many different opinions. Some said that there are contrary points in legal documents, that is violation of the Constitution and law. Some mentioned the State lacked consistency in the issuing of legal documents which had bad effects on the economy and national budget. The Ninth National Assembly reviewed and discussed the implementation of the Land Law at the seventh session in April 1995. This shows the problem is pressing.

This article do not target at the whole enforcement of the Land Law,

it only centers on some most interesting issues, mainly understanding the economic content of some radical concepts in the land field of our country at present such as land-use right (LUR), land-use charge (LUC). What is really LUR, LUC? To comprehend clearly and unifiedly these concepts is ground for proper solution to the present land problem.

I. LAND-USE RIGHT

The term LUR has been popular in recent years although land is public property. This originated from the change to the market mechanism. The term has obvious meaning based on combined words but the troubles emerging in the enforcement of laws on land in the past need more profound thoughts about the reality of LUR as a concept, terminology.

What is LUR ?, Whose is it ? Why does it exist? Let's begin by concepts formed in the history, recognized and stipulated in law.

When land belongs to various owners, LUR is rarely mentioned. In the former times there was also this right. Then LUR was only one gener-

ated from the land ownership. The ownership of the land as well as other things, was the basic right expressing the relation between man and thing. The owner of a thing had full power over it. He or she could use or could not or rented it. The land rental was the transfer of LUR with certain conditions, of which are two important ones: rent and renting duration. The owner could use land as mortgage. He or she could transfer the ownership of the land in forms of selling, giving, donating, inheriting. These rights are called the right of determination. The owner had the right of determination over his or her land. The right of determination established the relation between people.

To have the land ownership without inheriting, being given or reclaiming wasteland, one has to buy land. So the land ownership must be the result of investment from energy, money or inheritance. If an organization, a person wants to own land they must have investment. Naturally, in a country there is a lot of land owned by no entity or person. This land is

regarded as national property determined by the State.

In short, in the regime of multi-owned land, land always has its owner and is his or her asset. LUR is one of the owner's rights of determination. This concept is recognized by the society and law.

What is the different point of the regime of the land owned by the whole people? The land has only one owner, that is the people. Nobody has the ownership of the land. Therefore whose is the right of determination? According to normal concept it belongs to the people whose representative is the State.

cordance with plan and law, secures proper and effective use. The State assigns land to organizations and individuals for stable, long-term use. The organization and individual have responsibility to preserve, fertilize, exploit reasonably, use economically, have the right of transferring LUR in compliance with law (Article 18).

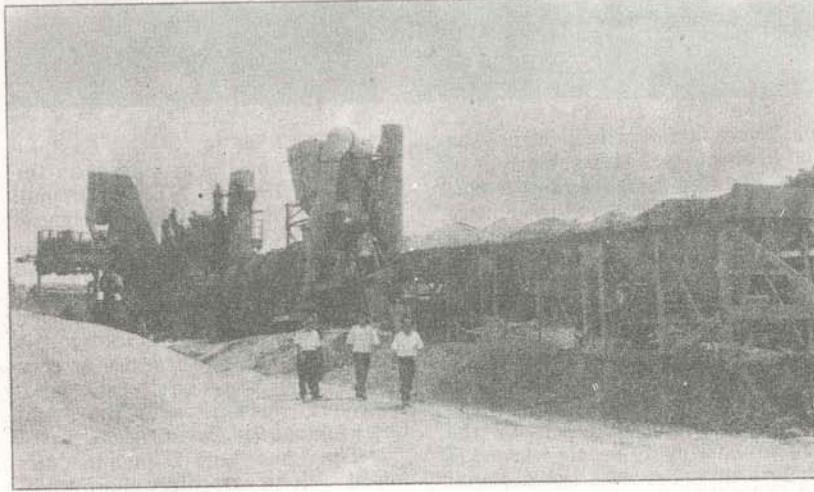
Thus the Constitution determines that land is owned by the whole people, but organizations and individuals have two basic rights of using land stably in a long term and transferring LUR. The right of determination was settled. The whole system of law on land must be prompted

accordance with the Ordinance, for enterprises, the State shall assign land to them only in the case they do public works and business of agro-forestry-aquaculture, salt-making. The State shall rent land to them in other cases. Thus enterprises have right of using land only in some cases. Land used in businesses apart from agro-forestry-fishery, salt-making must be rented. The rights of the enterprise in using rented land are also limited. They have only the right of mortgaging in general, are entitled to use land as pooled capital in joint-venture, they must not exchange, transfer, rent land.

From stipulations of the Land Law and above-mentioned ordinance, the rights of using land can be understood as ones concerning land assigned to users by the State, the representative of the owner. The user can use it as an asset, that is, he or she can rent, transfer, mortgage, inherit it (family households, individuals), use it as stock in joint-venture, mortgage (enterprises).

The Land Law and Ordinance also stipulate obligations of people who are assigned land. As for finance, the user must pay charge of using land when assigned land, compensate the person whose land is recovered, pay tax on land-use. Therefore in order to have the land-use right, organizations, individuals have to invest in compensation and pay land-use charge. As for land-users, the land-use right becomes an asset resulting from investment. This is obvious when land users are family households, individuals. They have five rights, that is, they have full right of determination like owners. When their land-use right is transferred to others, their assets are not lost since they can sell their land-use right.

The land-use right of the enterprise, different from that of household, individual is restricted. But it should be seen as an asset. The reason is that the enterprise have to pay for and invest in the LUR. According to business practice, investment capital will become asset. Investment in land brings to the enterprise the LUR as its asset. Restricting the enterprise's LUR means restricting the right of using its asset, this will lead to troubles difficult to be settled. For example, an enterprise when disbanded, bankrupted or equitized, its LUR cannot be sold, therefore how can its capital be recovered? A household, individual can transfer LUR to each other. When they sell or contribute it to an enterprise, LUR will belong to the enterprise but in com-



But the State is public authorities. The State does not use land directly. The land user must be a person or an entity. Therefore in accordance with the defined concept, the State should transfer the right of use, that is land rental. But why do the people have to lease their own land? Moreover if the State rents land, it will become a civil entity and be no longer the State. As a result of this, the State should apply land rental to specific cases. The other rights of determination cannot be realized because if any they will deform the regime of the land owned by the whole people. Then the State, representing of the people's ownership, cannot carry out its determination. Land has the owner but determined by nobody. This contradiction is settled by the State in the Constitution.

The 1992 Constitution which expresses the line of renovation, keeps on affirming the regime of the land owned by the whole people (Article 17). But it stipulates clearly that the State unifiedly manages land in ac-

by that.

The Land Law 1993 defined the legal frame for legal documents on land. The law concretized land users including organizations, family households, individuals. The family household, individual has five rights of exchanging, transferring, renting, inheriting, mortgaging, that is, they are not owners but they also have right to determine as the owner. However the Land Law did not stipulate other rights of organizations yet and assigned the National Assembly Standing Committee to define them.

The Law also stipulates in addition to the assignment of land for long term use, the State rents land to organizations, family households, individuals. This article is not stated in the Constitution.

The National Assembly Standing Committee has issued Ordinance on rights and obligations of domestic organizations which are assigned, rented land by the State. This ordinance has concretized the land assignment, rental for organizations. In

pliance with law the right is limited in case of land for agro-forestry-aquaculture and in other cases the enterprise will lose the right and they have to lease the land from the State. As a result of this restricting LUR of enterprises means restricting five rights of using land of households, individuals, restricting the use of land in business, making less profit in exploiting land.

It is worth noting that the macro-management role of the State have to be effective. It should make every piece of land have its concrete owner who has close relation with his land and enough capability and conditions to use it effectively as stipulated by the Constitution.

In short, LUR is the one the State, representing the land owner - the whole people - shall assign to organizations, households, individuals to use land stably in a long term provided that the assignees have to compensate and pay land-use charge. Consequently, LUR is also an asset of the land user.

II. LAND-USE CHARGE

As stated above, LUR is not granted free of charge. According to the Land Law, the land user have to pay land-use charge and for compensation. In reality, he or she also pays other costs: building infrastructure, supporting the locality, not to mention bribes. The cost of building infrastructure is a must to make land appropriate to utilities. It increases the value of the land, so it is reasonable, lawful and depends upon the user's decision. The other costs are though inevitable but not accepted in compliance with law.

What is the payment for compensation? This is a sum of money the land assignee has to pay to the current land user. Why do he or she have to pay? This means that the payee has LUR now and he or she transfers it to the payer. If the land is encroached on, there will be no compensation. Therefore the compensation is really the payment for LUR. As a matter of fact compensation stated in official documents is land trading. The rate of compensation is not stipulated yet, so it is the market price of land. Paying for land compensation is mainly buying LUR.

What is land-use charge? In compliance with the Land Law, it is the money the land assignee must pay to the State as stipulated. In principle, the price is defined as the market one. So paying land-use charge is also buying LUR from the State. This is fit to the market economy and against subsidy. But it is right only in the case the assigned land is the firsthand



one. There is naturally no compensation in this case. The trouble appears when the land assignee have to both compensate and pay land-use charge, that is, he or she pays double land-use charge. Investment cost in land will increase sharply. Nobody dares to receive LUR with such a high price because it will make the price of land unacceptable to the market. As a result, the real estate market comes to a standstill. No one values the negative effect of this standstill on the economy, but many people warned of the loss of revenue of the national budget by this reason.

From the above mention, the cost of compensation and land-use charge can be seen as payments for buying land. The difference is that the cost of compensation is paid for buying LUR of someone, and the land-use charge for buying unused land. Therefore if one pays for compensation, one will not have to pay land-use charge and vice versa. This is law of the market economy. The problems in implementing the Land Law result from vaguely knowing the similarity and difference of these payments.

Certainly when LUR is transferred, the State still has revenue from tax on land-use right transfer. This is a tool to regulate income in land trading. Besides the State has full right to determine tax on land-use as stated in the Land Law for land used by enterprises, uses this tax as a management tool, at the same time creates source of revenue, and does not face troubles arising when the State began applying the regime of land rental for businesses not engaging in agro-forestry-aquaculture.

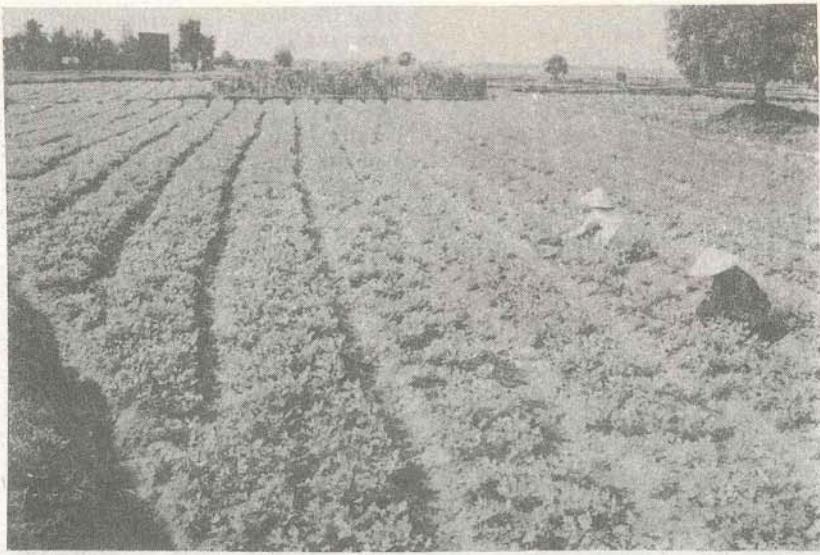
III. LAND RENTAL

Land rental is stipulated in the Land Law 1993 as "The State shall rent land to organizations, households, individuals". The Land Law is the first document stipulating land rental. The Constitution 1992 only stipulates that the State shall assign land to organizations and individuals for stable and long-term use, it does not say the State shall rent land. Therefore someone said the Land Law violated the Constitution.

The Land Law stipulates land rental with an extremely short statement. This statement can be understood by two different ways. Land rental is a way to bring land in use, this way is an addition to assigning land for long-term use. For example the land is planned for construction, but when the State can not build yet, it can rent land until the plan is realized. An enterprise has demand of using land in a certain period, not in a long time. In this case land rental is reasonable. Land rental can be understood by another way. That is, rental is a way to bring land in use along with land assignment. Assigning or renting is for long-term use.

The Ordinance issued by the Standing Committee of the National Assembly is understood by the second way. There is no documents stipulating detailedly that the State shall rent land to households, individuals.

According to the Ordinance, the State shall assign land only to organizations (understood as enterprises in this article since most of problems concern enterprises) for public works, agro-forestry-aquaculture and salt-making. Land for other businesses is rented by the State. The enterprise



which is assigned land has LUR but limited one. It can contribute it to joint-venture, mortgage it (land for agro-forestry-aquaculture), or can only mortgage (for other businesses). The enterprise which is rented land has only right to use land.

Land rental should be seen as a measure to finance enterprises. They need not invest in buying LUR any more. This is of great significance to enterprises in shortage of capital. But this is only a wish. It is difficult to avoid compensation when land is recovered for rent, excluding wasteland for rent. If there is any compensation then who will pay it? It is unreasonable that the State will pay it and the State cannot afford. The enterprise pays it, that is, it buys LUR and so land rental is unreasonable. If the enterprise leases wasteland, it cannot avoid investment in reclaiming, but it does not feel satisfied when only rented.

When the regime of land assignment was changed into land rental one, the problem is how to settle enterprises' investment in having LUR. This investment is too big since it includes cost of compensation, land-use charge, infrastructure investment, not to mention funds given to localities, bribes.

It is most reasonable that the State shall recover the assigned land for rent. Therefore the State will compensate enterprises for their investment capital in the recovered land. If the State does it, enterprises will warmly welcome. But the State has to spend great funds on compensation and has no corresponding revenue. This solution is fit to the market

economy but not feasible. It does not mention technical difficulty in how to determine the rate of compensation.

Another satisfying solution can be found: land rent is subtracted from land-use charge which the State has to compensate for. This amount is certainly bigger than the land-use charge paid to the State, if the enterprise paid for compensation and invested in infrastructure. The Decree 18 concretizing the Ordinance accepts this solution. The remaining problem is how to subtract. In calculation, the compensation for land-use charge should be seen as the land rent paid in advance, since the enterprise paid before 1995 while land rental is effective from Jan 1, 1995. For the time being the annual rate of land rent is not known, but it is certainly many times less than the compensation for land-use charge. As a result the enterprise made the rent advance for many years. However this calculation is contrary to law of the market economy. That is, the advance is less than the due payment, especially advance for many years. Consequently, the discount rate for advance should be determined. For example, an enterprise has VND 120 million in compensation for land-use charge and this amount is seen as rent advance with annual land rent of VND 15 million. If the discount rate is calculated in accordance with the interest rate (20% per year), then the enterprise will not only maintain its compensation but also enjoy a profit of VND 9,000,000 (VND 120,000,000 x 20% - VND 15,000,000) per year. This calculation is unacceptable. If calculated by the advance for specific

years, the results are as follows: advance for 50 years: VND 75 million; 70 years: VND 90 million. In above cases the enterprise still has the remaining of its compensation. This calculation is reasonable and no one can object to. But if it is applied then the State will suffer great loss in comparison with previous land assignment.

From these above opinions, stipulations on renting land to enterprises should be reviewed. These stipulations must be appropriate to the Constitution, feasible and fit to law of the market economy which we accepted.

From long ago up to now, land is always a crucial problem to human being. The history recorded many wars broke out due to boundary problems, this is really land dispute. In a country, there were a lot of bloody conflicts concerning religion, race but they were also land disputes. In a village or town and even in a family, land disputes result in many conflicts. In the subsidy regime, there were no land disputes since the people needed land for dwelling. Land used for business depended on the State. Most of municipal residents were working for State enterprises, they waited for the State's house assignment, not land assignment. The rural inhabitants easily asked for land to build houses. The enterprise which is granted land for business did not consider it as capital. Everyone almost forgot the value of land and gave no attention to land. Land belonged to everyone but had no concrete owner.

The market economy and the change of economic structure led to the reverse of demand for land. Although they are not owners, individuals sold land and so did State agencies, enterprises. The land market was spontaneously formed, seething, then enjoyed a price boom. Land disputes appeared in both cities and rural areas, the encroachment on land happened in not a few areas because land is as precious as gold.

The proper solution to the land problem is of great significance to the politics, economy, and society. But land is always a complicated problem. It receives historical inheritance, and is sensitive to close interest of everyone. Therefore when making laws on land, legislators should deliberate on many sides, pay full attention to interests of numerous social strata, especially to the feasibility of law. The fact that stipulations in law cannot be enforced will eradicate the power of law ■