

Comparative Study on Judicial Remedies for Land Expropriation Decisions in China and France

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Abstract

Land expropriation deprives the original land rights holders of ownership or other property rights, and does not require the consent of the expropriated person. Therefore, the purpose of administrative agencies implementing expropriation must be for the public interest, and there must be complex procedural requirements and compensation requirements. Furthermore, by studying France's "comparative analysis of gains and losses" method to review public interest requirements and incorporating the approval of public interest actions into judicial review, we need to achieve a gradual leap from accepting land expropriation decision cases to establishing standards for reviewing public interest, from reviewing various procedural conditions for land acquisition to improving the effectiveness of judicial remedies for land acquisition disputes.

Keywords

Land Expropriation Decision; Judicial Remedy; Public Interest.

1. Definition of Land Acquisition Decisions in China and France

Although the legal provisions on land acquisition in China and France are different in terms of subject and procedure, the public interest and compensation elements are the core of the land acquisition laws in both countries.

1.1. In China

From the provisions of Article 10 (3) of the Constitution and Article 2 (4) of the Land Management Law, it can be seen that the decision to expropriate land is a decision made by the state to expropriate land for the public interest. However, it is different from the Administrative Penalty Law, which sets up a special chapter in Chapter 5 to specify the conditions, procedures, evidence, etc. for administrative penalty decisions, and also from the Administrative Licensing Law, which sets up a special section in Chapter 4, Section 2 to specify the review and decision-making of administrative licenses. The Land Management Law and the Implementation Regulations of the Land Management Law have not effectively connected with Article 12 (5) of the Administrative Litigation Law, and have not clearly defined the subject and content of land acquisition decisions.

Therefore, there is still controversy in China regarding what actions are actionable land acquisition decisions. One view holds that the approval action is a land acquisition decision, while another view holds that the announcement action is a land acquisition decision. The author agrees with the second viewpoint, that is, in the following research, China's view on judicial remedies for land acquisition decisions is based on this foundation.

1.2. In France

In France, public interest expropriation refers to the system in which the state, in accordance with legal form and the principle of prior fair compensation, obtains private immovable property ownership or other property rights through compulsory means for the public interest.[1] The conditions and procedures have been stipulated in Code of Public Interest

Expropriation of French (Code de l'expropriation pour cause d'utilité publique). The conditions for expropriating immovable property or property rights are in line with the public interest and prior fair compensation. The procedure of expropriation of real estate or real right of real estate can be divided into administrative stage and judicial stage. The administrative stage includes prior investigation, approval of public interests, investigation of owners and land plots, and transferable decision; The judicial stage includes public interest collection and judgment, as well as determining compensation. Real estate includes land, houses, rivers, etc[2].

In our country, the decision to expropriate land is a final decision made by the administrative organization, and its legal consequence is the transfer of ownership of the expropriated land. From the perspective of effectiveness, in order to achieve the same legal consequences, the land acquisition decision in France should be a public interest acquisition judgment of judicial courts. However, from the perspective of the actors, the final decision of the French administrative body can only be a transferable decision, as the law grants the power to transfer ownership of expropriated land to French judicial courts. This article is based on land expropriation behavior, regardless of the subject of the behavior, and discusses the judicial remedies that lead to the transfer of ownership of the expropriated land and previous actions. Therefore, land expropriation decisions are defined as public interest expropriation judgments of judicial courts.

2. An Analysis of the Differences and Similarities

2.1. Land Acquisition Procedures

The land acquisition process in our country can be divided into pre announcement of land acquisition, investigation of land status, social stability risk assessment, signing of land acquisition compensation and resettlement agreements, land acquisition applications, approval of land acquisition, and land acquisition announcements. From the legal provisions, it can be seen that land acquisition in our country is led by administrative organs, especially county-level people's governments, while judicial organs only conduct insufficient review of administrative cases related to land acquisition decisions.[3] The land acquisition process in France can be further divided into the submission of investigation files by the expropriator to the governor of the location where the expropriated land is located, the governor's decision to conduct a public investigation, the approval of the public interest by the governor or the Supreme Administrative Court, the determination of the owner and land plot through investigation, the governor's decision of transferable decision, the governor's application to the judicial court for a public interest acquisition judgment (resulting in the transfer of real estate ownership), and the parties applying to the judicial court to determine the amount of compensation. Among them, the determination of amount of compensation can be determined through mutual consultation and agreement between the parties involved in the expropriation.[4] The biggest difference between the above procedures is that the competent authorities responsible for the transfer of ownership of the expropriated land are different. In France, they are judicial courts, while in China, they are administrative authorities. Secondly, the time for approving public interests varies. In France, the approval of public interests is carried out by the provincial governor or the Supreme Court after a public investigation and before a land plot investigation, which is in an early stage of the entire expropriation process. In China, the approval of public interests is carried out after the county-level people's government applies to the provincial people's government for land expropriation, and the provincial people's government reviews whether the expropriation of land is necessary. When examining the reasonableness, it is necessary to examine whether it is in the public interest, which is at a very late stage in the entire expropriation process.

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2.2. The Similarities

Firstly, regarding the availability of judicial remedies. Legal norms provide a judicial remedy channel for land expropriation decisions. When the Standing Committee of the National People's Congress of China revised the Administrative Litigation Law in 2014, expropriation decisions and compensation decisions were included in the scope of administrative litigation. Article 23, section 1, Item 2 of the new Administrative Reconsideration Law, which will come into effect on January 1, 2024, stipulates that in any of the following circumstances, the applicant shall first apply for administrative reconsideration to the administrative reconsideration organ. If the applicant is dissatisfied with the administrative reconsideration decision, they may file an administrative lawsuit with the people's court in accordance with the law: (2) if they are dissatisfied with the decision made by the administrative organ that infringes on the ownership or use right of the natural resources they have already obtained in accordance with the law. When the expropriated party believes that the land acquisition decision has infringed on their property rights, they must follow the principle of pre-reconsideration when seeking relief, which is similar to the legal effect of Article 30 (1) of the revised Administrative Reconsideration Law. In France, the decision to transfer ownership in public interest expropriation cannot be appealed and can only be reviewed by the Supreme Court, which will review whether there are legal errors in the judgment. [5] However, in 2020, France had an important decision on the issue of judicial relief for public interest expropriation. [6] The third chapter of the second part of the second volume of the Code of Public Welfare Collection stipulates the content of appeals against public interest expropriation judgments.

Secondly, regarding the modesty of judicial remedies. Both China and France are Civil Law countries. Influenced by traditional administrative management concepts and the principle of legal retention, civil law countries not only provide judicial adjudication procedures, but also focus on using administrative remedies to resolve land acquisition disputes in their dispute resolution mechanisms. In the case of mediation and dispute resolution, the overall design of civil law countries is more conducive to improving the efficiency of land acquisition. [7] Chinese law requires that disputes over land acquisition decisions can be resolved through either reconsideration or litigation. Only when approval is in the public interest can public welfare expropriation be carried out legally in France, and the transfer of ownership based on court rulings has a legal basis. The decision to approve public interest is made by the administrative agencies. In addition to administrative remedies, there is also compensation dispute mediation. The author agrees that the legal effect of compensation and resettlement decisions affects the legal effect of expropriation decisions [8], This is not to demand that compensation is illegal if it does not reach the expropriated person, but to require that the land acquisition compensation decision has been made in accordance with the law before or at the same time as making the expropriation decision. The legal procedures for land acquisition stipulated in China's Land Management Law are clear evidence. The court recognizes the consensus reached by both

parties regarding the compensation amount, and compensation disputes can be resolved through mediation. Article 60 of China's Administrative Litigation Law stipulates that compensation disputes can be mediated. The French Administrative Justice Code provides for three situations: parties applying for mediation[9], court initiated mediation[10], and mandatory prior mediation[11]. The Code of Public Interest Expropriation stipulates that if there are still differences in compensation between the expropriator and the expropriated person after eight days of on-site investigation, it shall be determined by the judges.

Thirdly, regarding the principle of prior fair compensation. China, like France, has a principle of fair compensation in advance, but this is not reflected in ownership, but in possession. [12]That is to say, when the court reviews the legality of land acquisition decisions, it does not review compensation decisions and performance. Because the principle of prior fair compensation does not hinder the transfer of ownership of the expropriated land. In France, after the compensation amount is determined through negotiation between the parties or court judgment, the expropriation unit shall settle the amount according to the determined amount. Only after the settlement is completed, the expropriation unit obtains the actual ownership of the expropriated real estate. [13]According to China's Land Management Law, local governments at or above the county level that apply for land acquisition should promptly implement compensation fees, social security fees, etc., and ensure that they are fully paid and used for specific purposes. If the relevant fees are not fully paid, approval for land acquisition shall not be granted.[14] At first glance, the implementation here may seem like compensation is in the hands of the expropriated, but considering the practice of land expropriation in China, this is quite difficult. This is not only due to considerations of land expropriation efficiency, but also because the land in China is collectively owned, not privately owned.

2.3. Differences

Firstly, regarding the scope of judicial remedies. The Administrative Litigation Law of our country requires that the final administrative act can be accepted, and the preliminary act of land acquisition decision can be interpreted as the procedural act of preparation, argumentation, research, reporting, consultation, etc. carried out by the current agency to make administrative actions. [15]Therefore, the expropriated party can only directly question the legality of the land acquisition decision itself after the administrative agency makes the decision, or indirectly question the legality of the land acquisition decision on the grounds of infringing on their legitimate rights and interests, and file a lawsuit with the court, The basis for the success of the latter is the court's willingness to apply the principle of illegal inheritance; [16]However, approval actions are usually rejected by the court through interpretation as internal administrative actions or procedural administrative actions. [17]In France, land acquisition is divided into administrative and judicial stages, and actionable actions include approving public interest and transferable decisions in the administrative stage, as well as public interest acquisition and compensation judgments in the judicial stage. The decision to approve the public interest can be made by the provincial governor, minister, and the Supreme Administrative Court[18], and approving the public interest can bring a lawsuit against it to the administrative court[19], which is different from the current situation in China. The transferable decision is made by the provincial governor and can be sued in the administrative court, just like the decision approving the public interest. The public interest expropriation judgment and compensation judgment are made by judicial courts (public interest expropriation judges), and both can be appealed to. [20]It can be seen that France's legal provisions on judicial remedies for land acquisition decisions are more comprehensive and sufficient.

Secondly, regarding the deadline for judicial relief. According to the Administrative Remedies Law of our country, land acquisition decisions must undergo administrative reconsideration,

and for cases that have undergone administrative reconsideration, the litigation period is 15 days from the date of receiving the reconsideration decision or 15 days from the date of expiration of the reconsideration period. As mentioned earlier, the land acquisition decision is a public announcement by the county-level people's government, and the review authority is the provincial-level people's government. In the entire acquisition process, the provincial-level government plays the role of the approver. During this period, the provincial-level people's government reviews the necessity, rationality, and public interest of the county-level people's government's land acquisition application. In France, the deadline for filing a lawsuit against the approval of public interest and transferable decisions is two months after the decision is received or made public, and the lawsuit is filed with the administrative court. The appeal against the public interest expropriation judgment can only be made by revoking the original judgment, having no authority, exceeding authority, or having formal defects. If the final decision of the administrative judge revokes the approval of public interest or transferable decisions, any expropriated person may have the judge declare that the public interest expropriation judgment has no legal basis and request the revocation of the judgment; If the application of the expropriated party requesting to declare that the public interest expropriation judgment lacks legal basis is deemed unacceptable, the expropriated party shall submit the application to the court clerk who made the public interest expropriation decision within two months after receiving the final decision of the administrative judge to revoke the public interest declaration or transferable decision.[21] The compensation award may be appealed by the party or government commissioner to the court clerk within one month of receiving the compensation award[22].

Thirdly, regarding judicial remedies. This includes four aspects, the first of which is the characteristics of the subject composition that provides judicial relief. When reviewing such cases, French administrative courts often listen to the opinions of government commissioners (later renamed public reporters), They are mostly legal experts, but their opinions are not binding on the judges who hear the case, who can decide whether to adopt them or not on their own. The government commissioner system in administrative litigation is a major feature of French administrative litigation, which has existed for nearly two centuries and has played a triple role in improving trial quality, promoting the development of precedents, and enhancing trial transparency.[23] However, in administrative litigation in China, only judges, lawyers, and both parties play important roles. The second aspect is the composition characteristics of judicial remedies. As mentioned earlier, the French administrative court accepts disputes over public interest and transferable decisions, while the judicial court accepts disputes over ownership transfer and compensation. And the administrative court's acceptance of the above-mentioned disputes does not require the land acquisition behavior to achieve the effect of transferring ownership, but rather to approve the public interest and make a transferable decision before filing a lawsuit and seeking relief. The legality of land acquisition behavior is subject to the making of land acquisition decisions by Chinese courts. Both countries review and decide whether it meets the conditions of public interest, but the theoretical application of the review is not the same. The third aspect is the theoretical application characteristics of judicial remedies. As early as the 1970s, French administrative judges created a review mechanism called "profit and loss comparative analysis" to protect private land ownership and defend public interests. The method of using this mechanism by the court is that "a project can only be declared as having a public purpose if the damage to private property, project cost, and potential social disadvantages, or the damage to other public interests does not exceed the benefits it brings".[24] However, the review of public interests by Chinese courts is relatively simple. As long as the administrative agency can prove that the project is a "key project" or "in line with the plan," it will be considered in the public interest by the court. The fourth aspect is about the judicial relief characteristics of emergency expropriation. The French Code of Public

Welfare Expropriation stipulates the emergency expropriation procedure and corresponding judicial relief system, which reduces on-site investigation time when the administrative agency determines the expropriation project is urgent [25]. The parties may express any opinion beyond the limitations of submitting materials to the court [26], the judge determines the amount of provisional compensation, and takes possession of the expropriated land after payment or deposit by the expropriator [27]. Subsequently, the final compensation amount will be determined [28], etc. There are no relevant provisions for emergency expropriation in China's land management law.

3. Enlightenment and Reference

It is an undeniable fact that the power of land expropriation in our country lacks judicial relief, and the land rights and interests of the expropriated lack legal protection. Some scholars advocate for the use of judicial functionalism to shape grassroots land governance through evidence logic. [29] Guidance on the Judicial Review Methodology of Using the Principle of Proportionality as the Public Welfare Purpose of "Integrated Development" [30]. In addition to these, the author believes that the existing problems in the judicial relief of land expropriation in China can also be improved from the following aspects.

3.1. From Resistance to Acceptance, Solving the Problem of Receiving Cases

On the one hand, the reply of the Supreme People's Court on the application of Article 30, Paragraph 2 of the Administrative Reconsideration Law of the People's Republic of China (September 20, 2005 [2005] Xinghe Zi No. 23) clarifies that the land acquisition decision of the State Council or provincial people's government is the final ruling and the court shall not accept it. This explanation is not only far fetched, but with the latest revision of the Administrative Reconsideration Law, it will also have no legal basis. The Supreme People's Court can take this opportunity to clarify through judicial interpretation that the land acquisition decision can receive judicial review after reconsideration, that is, if the expropriated person disagrees with the administrative reconsideration decision after applying to the administrative organ, the court should accept and review the concept. In addition, it should be clarified that the decision-making body for land acquisition is the county-level people's government to determine the defendant. On the other hand, expanding the scope of judicial remedies mainly involves the government's judgment of public interests. According to Article 26 of the Implementation Regulations of China's Land Management Law, administrative organs can gradually enter the land acquisition process when they judge public interests and consider them to be in line with public interests. In addition, Chinese courts highly respect administrative agencies in their review of public interests. The combination of the two has resulted in minimal impact of public interest conditions on the legality of land acquisition. This does not benefit the legalization of land acquisition and will also affect the construction of a rule of law government. Our country can learn from France to recognize actions that are in the public interest by administrative agencies. From the current legal perspective, determining them as approved expropriation actions is the best choice that will not excessively affect the efficiency of land expropriation and will not result in the inability of judicial remedies. The approval actions of administrative organs not only examine the rationality and necessity of expropriation, but also examine the public interest. However, the court only reviews the public interest, as detailed in the second point below.

3.2. From Acceptance to Expertise, Improve the Effectiveness of Relief

On the one hand, the court needs to improve its methods of reviewing public interests. After changing the concept of refusing to review, the court continuously accumulates experience and summarizes review methods suitable for China's national conditions in the process of

reviewing the legality of land acquisition decisions. The principle of proportionality in administrative law refers to the fact that administrative agencies should take into account the achievement of administrative goals and the protection of the interests of counterparties when implementing administrative actions. If the achievement of administrative goals may cause certain adverse effects on the rights and interests of counterparties, such adverse effects should be limited to the smallest possible scope and limit. [31] Compliance with the principle of proportionality is considered a requirement for reasonable administration. Based on the requirement of judicial review of the legality of administrative acts, this principle is not widely applied in courts.[32] The "comparative analysis of gains and losses" review mechanism in France is the application of the appropriate principle in the broad proportion principle. The essential requirement of the appropriate principle is that the benefits outweigh the costs. The French administrative court will address the damage to private property The engineering cost and potential social disadvantages or damage to other public interests shall be considered as costs. France's approach avoids the necessity of reviewing land acquisition behavior and minimizing damage, avoiding questioning the rationality of judicial review of administrative actions or excessive intervention in administration. We can learn from this. On the other hand, the court needs to review the land acquisition decision and its prior actions together, in order to urge administrative agencies to carry out the acquisition in accordance with legal procedures and requirements, and to provide sufficient and effective remedies for the rights and interests of the expropriated. The manifestation of land acquisition decisions in documents is the announcement of land acquisition issued by the county-level people's government. The content of the announcement complies with legal provisions and is legal in substance; The steps for making the announcement of land expropriation, the subjects responsible for each step, and the compliance with legal requirements in each step are considered procedural legality. If the administrative subject only achieves substantive legality, it cannot be considered comprehensive legality. It is necessary to unify substantive legality with procedural legality in order to truly achieve legality in a specific administrative act, Judicial review agencies can revoke specific administrative actions based solely on the criterion of procedural illegality[33].

4. Conclusion

"The Administrative Litigation Law is not only the cornerstone of China's rule of law, but also the cornerstone of the development of contemporary Chinese law." Young administrative law scholars are facing the problem of how to more down-to-earth localize when learning and borrowing from the excellent legal cultures of other countries. But in today's rapidly changing world, we need to muster up courage and be brave enough to try, even if it's better to "feel the stones and cross the river" than to remain stagnant. Although land expropriation by the state is beneficial to the public, it imposes a heavy burden on the expropriated. For the expropriated, land represents an economic source and includes a source of growth. Because of this, various countries have established procedures, compensation and other conditions for land expropriation. In order to better balance public and private interests, courts should play their legal and social functions, promote the exercise of land expropriation rights in accordance with the law, and protect land rights and interests. Although the problem of no access to judicial relief has been improved, judicial relief is effective and should be pursued in the construction of a rule of law in China. The "comparative analysis of gains and losses" method in France, as well as the important phased administrative actions for relief (compared to land acquisition decisions, approving public interests is phased), are worth learning from and learning from.

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