

The Conflict of Law Values in Our Expropriation Legislation from the Law and Economics Visual Angle

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Abstract: At present, the conflict of law values is included in our country's expropriation legislation. The requirement that the old law be abolished and make a separate new law, the strict definition of public interest and the interests of the expropriation protection represent the pursuit of value of legal fairness and justice. Besides, the reasons for preventing the new law from being enacted represent the pursuit of value of legal efficiency. Traditional conflicts of Law legal value and settlement are amended and supplemented by law and economics.

Keywords: expropriation; value of law; conflict; law and economics; KarldorHicks Principle

1. The Actuality and Problems Existing in Chinese Expropriation

With the rapid economic development and the acceleration of industrialized and urbanized progress, in the name of constructing economic development zone and high and new technology industrial, many parts of China start the vigorous "land enclosure". Huge amounts of rural land are expropriated for non-agricultural construction. Rural Collective Land is lost dramatically. According to statistics, about 300 thousand peasants lose their land due to the expropriation and the loss of land rights of peasants is approximately 2 trillion. During the most petition cases, almost one-third cases are caused by expropriation. Quite a few problems are exposed during the course, what is worse some behaviors violate the expropriation's basic principles and the original meaning of legislation.

As a result of the recent cases of resisting expropriation by violence or even by sacrificing his life, on account of social opinion and scholars' strong appeal, Legal Affairs Office of the State Council held an Expert Forum and firstly established "State-owned land on the housing levy and Compensation Ordinance (draft)". Nevertheless, due to the local governments' opposition, the State Council had no clear message on when to establish the new ordinance even after more than five months. New Land Expropriation Ordinance had a big obstacle and Demolition Ordinance became a "nail household". The local governments' biggest reason is "public interest", that is to say, the public interest is damaged because several nail households refuse to reach an agreement according to the new law. The basis for both sides argued concludes the conflict and comparison of legal value.

2. The Comparison and Thought in Legal Value Contained in Expropriation

2.1. What is the Legal Value?

Legal value is the positive significance that law can satisfy people's need, in other words, the law's usefulness. The legal law is an old but new preposition of Law. As soon as human created acts or law, they began to consider the value of acts or law. It is not a blind action, since thousands of years ago, all lawyers and thinkers have been exploring the legal value. After thousands of years of concise, the research on legal value solidifies as several basic forms such as order, freedom, efficiency and justice, etc. Order that exists in society a certain degree of relationship stability, continuity of process, the rules of behavior and property and psychological security. In civilized society, law is the initial and the most effective way to prevent from being disorder and stop the out-of-order state. Law is foremost manner to establish and maintain the order. Freedom in legal significance is a specific domain in philosophy, the relational category between individuals and society, which means they could take all actions allowed by law. Therefore, Montesquieu showed that, freedom is the rights for doing everything allowed by law. If a citizen can violate law, he will be no longer free, with regards to the others' same rights. Efficiency and benefit can be used in kinds of aspects. Initially, they were in economic domain, for example, to increase economic efficiency. Later they were borrowed by law circle referring to the most important value purpose. Generally, the basic significance can be summarized as the greatest outputs from given inputs, that is to say, the least resource consumption but the same effects, or the same resource consumption but the greatest effects. Justice, right and fairness are the same Social Ethics, which express the idealistic state human beings go after. The phenomenon of justice is quite complicated, such as what Bodenheimer said, justice has Proteus's face, constantly and irregularly change with different objects and very different visage. Marxism believes that justice is the social proper conception and system which depends on

certain social economic basis. It is the organic unity between Social System Justice and the Main Act Just.

2.2. The Conflict of Legal Value and Traditional Law and Economics' Solution

There is a certain difference between the bit limit of the legal value, their importance is in particular order. Generally, order is the most basic value, which is the essential requirement to keep order. Other value can't be realized without the order. Justice is the highest value, which is the supreme object of law. Not absolutely, when it comes to achieve these goals, we should determine what value should be chosen in the end as a priority according to the actual situation. Furthermore, conflict and contradiction still exist among these legal values, especially the conflict of order and freedom, efficiency and fairness, which can't be eliminated but release these conflicts as possible as we could, to reduce conflicts or come to a certain state of coordination and balance. It also is the common task of legislators and law enforcement, and it is the law's idealistic object. That is to say, an opposition exists between these values, "under the specific historical conditions, freedom, order, justice and benefits etc, may appear antinomy, which may happen at any time during the whole course.

1) *It is the conflict of value of freedom and order*

Freedom highlights the main character while value emphasizes the establishment and maintenance of ordered state. Freedom is prone to breaking established order, meanwhile, to some extent, order sustain its balance by restraining freedom. Therefore, the conflict is unavoidable. Hence the problem of value preference is evitable in legislation and law enforcement. There are two different views: priority of freedom and priority of order. One the one hand, priority of freedom believes that the legal order must make a concession to freedom and order is not freedom's naysayer or preventer but its confirmer, distributor and protector. In the implementation process of law under the established law, if freedom collides with order, freedom will be stressed regardless of sacrificing order. It wouldn't be a good law if freedom is overall higher than law and order, whose freedom is damaged by order. On the other hand, law is order's embodiment, due to whose existence is the restraint and regulation in freedom, freedom must be order's ascription and criterion. After freedom and order's positions being confirmed, freedom obeys order unconditionally. Law-executors can ignore order, attain or limit some freedom. Overall, order is higher than freedom. In legislation, order is the object and freedom submits to order. In law enforcement, if freedom collides with order, people should figure for order at the cost of sacrificing the freedom, even regardless of the law.

2) *It is the conflict of value of fairness and efficiency*

Fairness highlights average, consensus and common prosperity, while efficiency stresses development, speediness, difference or some people getting rich first. Therefore, conflicts also exist between them. There are mainly two viewpoints of the choice of value orientation. One is priority of fairness, which considers that efficient and fairness are mutually independent value form, which means fair has the priority when efficiency collides with fairness. In the entire legal value system, fair value should sit at the top and become the initial value goal of social resources. It decides the social configuration such as power and rights, leading the individual resources configuration, not permitting to damage or lose fairness by stressing efficiency. From time immemorial justice is the primary value of social system, everyone each own inviolability based on justice. The other is priority of efficient, with the consideration that priority of efficient itself is the inexorable law. Efficiency is economic category while others belong to moral category. Law and economics shows that law promotes the efficient development of the economy by defining and maintaining the proper order, lowering transaction costs for goods, which is the primary task. In the whole legal value system, the value of efficiency is primary and becomes the initial value criterion on configuring social enterprises resources, which determines social configuration of legal resources such as power, rights. Therefore, "rights should be endowed to those who value them most." When efficient collides with fairness, efficiency should be preferred position of living in higher value, relegating fairness to second place or even sacrificing it.

Any of these two values can't be in terms of absolutes during the course of choosing value for legislators and all legalists, whose position in the value series depends on the social development and requirements.

2.3. The Legal Value Contained in the Legislative Debate on Expropriation of China

At present, the conflict of law values is included in our country's expropriation legislation. The requirement that the old law be abolished and make a separate new law, the strict definition of public interest and the interests of the expropriation protection represent the pursuit of value of legal fairness and justice. Besides, the reasons for preventing the new law from being enacted represent the pursuit of value of legal efficiency. According to the old law, the facilities for local governments to the implement of for forced removal increase the efficiency, but it seriously infringes the benefits of people whom are expropriated and impacts the legal value of fairness and justice. However, social may be inefficient, if the new law endows the people who are expropriated the great power to resist forced removal. Hence it damages the legal value of efficiency. There are two kinds of conflicts of legal value contained in the legislation of expropriation in China.

3. Comparison and Thinking in the Legal Value of the Traditional Method of Law

3.1. Traditional Legal Solution to the Conflict of Laws

Sometimes the mutual conflict may happen among kinds of legal values. The conflict of principles of balanced value of traditional Laws as follows:

1) *Principle of value rank*

Principle of value rank refers to the value which comes first is better, when legal value at the different rank interferes with each other. Firstly, the basic legal value (freedom, justice and order) is prior to the general value (profits, efficient). Generally, Free Law is the top of value. Justice is inferior to freedom. Order is limited by freedom and justice.

2) *Principle of cases balance*

Principle of cases, which means to the necessity to consider all aspects, when the legal values at the same step come to conflict, with the purpose to take into account the interests of all parties properly and find the balanced point among them.

3) *Principle of proportion*

Principle of proportion refers to minimize the extent of the damage, while sacrificing one value because of another value.

3.2. The solutions to conflicts of these two legal values in the controversy over the legislation of expropriation according to traditional Laws.

In accordance with the solutions mentioned above, the value rank of justice is prior than that of efficiency. The protection for the rights for the private possession of people who are expropriated should be prior to efficiency. The people who are expropriated can deal with their own possession on their own authority. No coercive behavior could be conducted by expropriators.

4. The Comparison and Thinking in Legal Values in Law and Economics

4.1. The Thinking and Comparison in Legal Value According to Law and Economics

Law and economics proposes its own thinking on the legal value itself. The legal value and its judge criterion

are necessary to be definite. Is it certain that it will bring the social justice and fairness if the people who are expropriated can refuse to be expropriated and dispose their possession as their wishes? Law and economics believes that the ultimate purpose of law is to propel the whole social welfare by reasonable system, violation of which will go against the whole purpose of justice.

4.2. The solutions to the conflicts of these two legal values in the controversy over expropriation legislation.

Law and economics believes that the analysis of social welfare's maximization, that is, the sum of the welfare of expropriators' and that of people who are expropriated having been maximized makes the social justice come true.

5. Modification, KarldorHicks Principle and supplement

Law and economics modifies and supplements the conflict of traditional legal value and its solutions. Pareto Optimality is mirage. Expropriation and requisition arrangements should be improved by KarldorHicks Principle, that is, the improvement can be in progress or even the maximum, if the out of welfare of expropriators' less than the welfare gains of people who are expropriated. By that means, the social value of justice and fairness comes true.

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