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# Land Expropriation and Constitutional Protection of Farmers' Rights

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**Abstract** One of the reasons for many social tragedies resulted from land expropriation in China is failure of the constitution to bring into play its due functions in standardizing land expropriation power of the government and protecting farmers' rights. In the existing land expropriation system, government is not only a policy maker of land expropriation, but also a "referee" of dispute over land expropriation. Government' land expropriation power and land-expropriated farmers' rights become out of balance. As a result, some local governments do not attach importance to farmers' rights, making land-expropriated farmers dissatisfied and consequently leading to some social tragedies unfavorable for harmony and stability. To fundamentally settle disputes over land expropriation and realize win-win of farmers' right and state interest, it should bring into full play functions of the constitution through protecting farmers' right to participate in land expropriation and establishing constitution evaluation mechanism.

**Key words** Land expropriation, Public interests, Just compensation, Farmers' rights, Constitutional protection

Land expropriation, in essence, is the limitation on or deprivation of land owners by the state, while the land right is the exclusive right of the owner to dominate land at his disposal within the context of legal provisions. Therefore, land right is not merely manifested in the control of people over land, but actually reflects the human relationships. Some domestic scholars think that, according to Paragraph 2 of Article 10 of the existing *Constitution* of the PRC, if the government can prove that its expropriation action is for public interest and strictly accords with legal provisions, and land-expropriated farmers have obtained compensation, its land expropriation can be deemed legal, just and reasonable. However, at the level of constitution, such understanding is worth discussing. Just on the ground of public interest and compliance with legal procedure, it is far from enough to deprive of farmers' right of arranging land freely.

The ultimate purpose for establishing state system and state agency is to protect freedom and rights of every citizen. Therefore, even if the government has tangible proof that land expropriation is for public interest, and it abides by legal procedure and statutory compensation has been given, should it fail to pass the examination of proportionality principle and right balancing principle, the land expropriation action is still illegal.

## 1 The relationship between public interest, farmers' rights and land expropriation in the *Constitution*

**1.1 Definition of "can" in constitutional norm** From the semantic structure of legal language, legal norms generally are divided into authorization norms, prohibitive norms and obliga-

tory norms. The word "can" in legal norms belongs to typical authorization norms, in other words, it refers to the subject authorized with right taking or not taking actions<sup>[1]</sup>. In common legal norms, the word "can", in case of authorization norms, means the subject can take some action, or not take some action. Both types of actions will not violate legal provisions. Therefore, the word "can" in common legal norms has basically the same meaning with the word "can not" within the context of intendment of law<sup>[2]</sup>.

However, it is worth discussing whether the meaning of "can" in common legal norms can be used directly in constitutional norms. The word "can" in Paragraph 2 of Article 10 in the *Constitution* can be understood as follows: as long as it is for public interest, complies with legal land expropriation procedure and reasonable compensation has been made, the government decide whether to exercise land expropriation right or not. Such understanding is obviously not scientific. Although the constitutional interpretation, as a kind of legal interpretation, has the same features with common legal interpretation, there are differences in structure, connotation, validity and operational situations between the constitution and common laws. It is unable to really understand essential features of the constitution just from the means of understanding common legal norms or from political, sociological and philosophical levels<sup>[3]</sup>.

**1.2 Ultimate purpose of the constitution is to protect individual right** Constitutional norms can be generally divided into two types: one is about power of government and its operation model, and the other is about citizen rights. The ultimate purpose of both types is to protect freedom and rights of every citizen through standardizing power of government and its operation model. "The confirmation and protection of basic rights are an important central part of the whole constitutional value system. The constitution also establishes physical norms such as relevant state system and state organs, but its ultimate value is certainly oriented towards maintaining, coordinating and

Received: May 3, 2012 Accepted: May 26, 2012

Supported by Key Project of National Social Science Foundation (09AFX001) in 2009 and Decision Research Project of Henan Provincial Government (B543).

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realizing its central values" <sup>[4]</sup>. "Basic rights of citizens are foundation and growth points of state power. Without citizen rights, the state power will become water without a source or a tree without roots." <sup>[5]</sup> The reason for people trusting the constitution, society needing the constitution, power submitting to the constitution and the state being limited by the constitution lies in that the constitution realizes the maximum value of every citizen' enjoying and exercising his rights through limiting the state power <sup>[6]</sup>.

Therefore, no matter in traditional constitution or modern constitution, there is the word "can" in the norms of state power and citizen right, but its legal meaning is completely different in these two types of norms. In the former, "can" belongs to "limited authorization", while in the latter, it belongs to "arbitrary authorization". The limited authorization means that the state power shall be exercised only when there is no better way, otherwise it will run counter to purpose of legislation of the constitution. The arbitrary authorization means the exercise of right is arbitrary. As long as it does not violate provisions of the constitution, the state has no power to forbid citizens to exercise their rights.

**1.3 Public interest is a basic prerequisite for land expropriation** According to Paragraph 2 of Article 10 in the *Constitution*, the public interest is not a necessary and sufficient condition for land expropriation. In other words, even if it is for public interest, complies with legal procedure and compensation has been given, the government should not exercise land expropriation right at will. Only if there is no better or reasonable alternative, can the constitution authorize the government to exercise land expropriation right. However, since academic circle and pragmatic circle understand the word "can" in Paragraph 2 of Article 10 in the *Constitution* only from common legal norms, but not from the constitutional level, the limited authorization of constitutional norms becomes arbitrary authorization in practice. In twenty years of even near half century, the land expropriation right of Chinese government at all level is absolute <sup>[7]</sup>, which leads to land expropriation full of contradictions.

In real life, the state is just an abstract subject, the real one exercising the state power is the government at all levels, so some local governments can obtain huge economic and political benefits from land expropriation. Some local governments expropriate land in excuse of public interest. What' more, through improper understanding of land expropriation articles in the constitution, many local governments jump out of the constitutional supervision.

## 2 Constitutional conception of protecting farmers' basic constitutional rights and limiting government's land expropriation right

**2.1 Respecting citizens' democratic autonomous rights and defining the public interest in the way of citizens' democratic participation** Many jurisprudential scholars believe that the defining the public interest through improving laws is a major measure for limiting the discretionary power of government at the time of land expropriation. Some scholars suggest

that the legislation should firstly make a clear definition of the public interest; other scholars recommend that it is required to incorporate the judgment of public interest into the scope of procedure control, and submit the dispute over public interest to judicial authority <sup>[8]</sup>.

Nevertheless, theoretically, the idea of protecting citizen interest and standardizing land expropriation actions of the government through strict legal definition will be bound to fail. The reason is simple, the public interest itself is an uncertain concept. Apart from the uncertain content, its uncertainty also is manifested in beneficial objects. Also, there are new contents of public interest along with practice of principle of state with adequate legal system, democratic concept and protection of basic human rights <sup>[9]</sup>. The public interest is so abstract, obscure and not operational, so any land expropriation project can be connected with it. As a result, it is difficult to limit land expropriation actions through defining the public interest.

In addition, more attention to the definition of public interest will take us to mistaken ideas. In recent years, with acceleration of urban renewal and rural transformation, the land expropriation and building demolition become source of frequent occurrence of social conflicts. In the course of land expropriation, excessive emphasis on whether the purpose of land expropriation accords with public interest leads to great puzzle in both theory and practice.

In foreign jurisprudential circle, they generally do not focus on the definition of public interest, but pay attention to who will decide the problem of public interest. In democratic county, it is also still difficult to answer the question of definition of public interest, but the question of "who will decide the problem of public interest" has clear answer. In foreign counties, the decision of land expropriation is an exclusive right of parliament, and neither the government nor the court is entitled to make decision. Under the protection of democracy, local government will not expropriate land unless for urgent need. Even if there is expropriation, no large scale group event will occur <sup>[10]</sup>.

Therefore, in line with features of the public interest, there is not necessarily objective criterion for judging whether the land expropriation accords with the public interest. In this situation, it preferred to build citizen participation system and let farmers participate in decision making and implementation of land expropriation. After all, the land expropriation of government is also to improve farmers' living condition, rather than purely for itself.

## 2.2 Respecting farmers' land right and determining compensation standard in the way of equal transaction

Some scholars contend that the definition of land property right is not so important, as long as the compensation is fair, the non-rational impulse of land expropriation will be contained. In the rural land expropriation compensation system, there are problems of unclear compensation subjects, narrow compensation scope, low compensation criterion, single compensation way and difficult realization of compensation, etc., leading to strong dissatisfaction or even resistance against land expropriation. Therefore, to completely solve the problem of rural land expro-

priation, we must provide fair compensation for land-expropriated farmers<sup>[11]</sup>. Surplus compensation, full compensation and statutory compensation are slightly different, but can be deemed basically as fair compensation because all of these approve the market price compensation. Scholars recommend that it is required to firstly annul the provision of compensation as per land expropriation purpose in the *Land Management Law*. Then, the compensation price is determined by an independent land price evaluation organization and supervised by judicial authority, only these are consistent with basic rights of fair compensation<sup>[12]</sup>.

It should be noted that, just as the definition of "public interest", the word "fair" is also a legal concept difficult to define. In other words, even if the fair compensation is realized, it is still difficult to contain the land expropriation impulse of government. The above fair compensation refers to an independent land price evaluation organization determining compensation price and the judicial authority supervising the process. Such concept does not make clear the root source of low compensation price. From the point of view of some economists, the price rise of expropriated land is an act of government, because neither land owners nor users participate in this land appreciation activity, therefore, they fail to receive the price rise part after land expropriation. In this situation, even if there is independent compensation organization, it is difficult to determine whether its price evaluation is fair or not. It also seems impractical if we place hope on the supervision of judicial authority, because courts are restricted by government in personnel, finance and material.

In fact, for rural land expropriation, it is completely feasible to bring into play the guidance role of market, and bring into play supplementary role of government. If both seller and purchaser can complete land property right transaction through voluntary negotiation, government will be disconnected with land expropriation and lose its legal reason and motive force. This is not only favorable for fundamentally eliminating corruption in demolition, but also helpful for reasonable and civilized development of China's urbanization and new socialist countryside construction. Only when the seller and buyer fail to reach agreement or the transaction cost is too high or clearly not favorable for public interest, can the government exercise the power of land expropriation.

**2.3 Respecting farmers' other constitutional basic rights and establishing proper constitutional evaluation system for land expropriation** As stated above, land expropriation is the limitation of land owners and users by the state for realization of public interest. At present, due to influence of urban and rural dual development model, rural land is not merely a type of property for farmers, it is also closely connected with farmers' equal basic rights of selecting lifestyle, in survival and development, work, and inviolability of domicile. It can be deemed as a prerequisite right for enjoying basic rights specified in the constitution. To limit farmers' land right, the state should have proper reason approved by the constitution and accord with constitutional provisions. Therefore, even if the government ex-

propriates land for public interest, it perhaps can not implement land expropriation, because it is necessary to measure the value and benefit of land expropriation act.

According to proportionality principle and right balancing principle, some countries consider the land expropriation as necessary limitation on land rights by the state power, namely, land right protection as a section of protection of citizens' basic rights, rather than merely the loss of actual property value<sup>[9]</sup>. The land expropriation is deemed as a legal limitation of special property right. In foreign countries, the constitutional provision of property ownership is generally right of inviolability firstly. Then, it sets up the right limitation article. Finally, it establishes fair compensation article for land expropriation. These articles form a relatively complete constitutional system of property collection. With establishment of the constitutional system, the neutral constitutional enforcement body will accept and hear disputes over land expropriation independently, so as to guarantee the win-win of public interest and individual rights.

In Article 51 of the existing *Constitution* of China, it stipulates that Citizens of the People's Republic of China, in exercising their freedoms and rights, may not infringe upon the interests of the state, of society or of the collective, or upon the lawful freedoms and rights of other citizens. As a constitutional principle, the above limitation does not have obvious problem. However, if applied in practice, there may be many problems. For example, if citizens exercise rights of assembly, of association, of procession and of demonstration, it will definitely influence social public order and traffic order; the enjoyment of right to receive education and right of labor require increase of investment by the state; and it is not certain whether citizens' disobedience of demolition decision or refusal to relocation harm the public interest. It is thus clear that the public interest, which focuses on the state, social and collective interests, does not necessarily have absolute and certain inviolability. Once there is conflict between individual interest and public interest, the constitution requires that individual interest should submit to the public interest. Apart from this, it should comprehensively consider the legitimacy, validity and rationality of public interest<sup>[5]</sup>.

Similarly, when individuals exercise freedom and rights stipulated by the constitution, sometimes it will infringe upon freedom and rights of other citizens. For example, in the transformation of old urban areas, most residents want to demolish slum areas, reconstruct gardens or recreational and body-fitting places, while those people whose shacks will be demolished hope to keep their shacks to make them have place of residence. Thus, it is required to make a proper choice. In theory, it is correct that when exercising their freedom and rights, citizens should not infringe upon freedom and rights of other citizens; in practice, if the above situation happens, we should not simply consider that the freedom and rights of an individual certainly can not be exercised as long as it infringes upon legal freedom and rights of others. The proper way is that we should make judgment of interest and value, to decide which rights should be protected firstly by law.

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and technology and management<sup>[12]</sup>.

## 8 The long cycle of moderately large-scale operation of land may lead to various social contradictions

In our survey, a county in northern region of Henan Province once laid down the uniform requirement of not less than 6 hm<sup>2</sup> and not shorter than 10 years. This requirement is essential for big farming households who choose planting grain crops in a way of connecting pieces of land, because they have to loan a million or several million yuan to purchase large agricultural machinery. If the term of contract is short, there will certainly be no economic benefit. However, long term contract may make ordinary farmers dissatisfied. Since the existing land property right is not clear and incomplete, farmers have demand of adjusting land according to population change, and rural cadres also want to adjust the land for their interest. The state policy stipulates that there will be no change of term of land contract in 15 years and 30 years respectively in the first and second round land contract, and it stresses that the land will not change along with increase or decrease of population. However, since 1978, farmers' contracted land has been adjusted for 3.01 times on average, and at least 60% farmer households will suffer from these conflicts.

At present, short-term activities appear in the course of large-scale operation of land implemented by rural grass-roots government. Limited by the present performance assessment, grass-roots government often act with undue haste in the course of land circulation. In addition to excessive discretion, forcing farmers to transfer land is a habitual practice in many places. And individual farmers have no capacity to confront with government. Besides, in the course of letting through bid inviting of grass-roots government, it is inevitably subject to powerful interest groups, so there are frequent occurrences of violation of farmers' land use right or limiting farmer' autonomy in using land. As a result, farmers may doubt about the real purpose of government in adjusting land. Therefore, land management should not only seek scale merit. If the population is small but land is much, developing agricultural production will certainly depend on mechanized and large-scale operation. However,

if the population is large but land is little, there will be another situation. Even if we have to develop moderately large-scale operation, it is unnecessary to cancel farmers' operation, because the difference between great production and small production lies in the level of socialization, rather than in the size of unit production scale.

In sum, government taking back land from farmers by force will lead to many social and economic conflicts. At current stage, it is unable to increase land production efficiency, so local government should be cautious in implementing such policy.

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