Study on the Premise and Stage of Judicial Review of Administrative Agreement

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Abstract

With the deepening of the construction of the rule of law in China, the theory of administrative law needs to be more forward-looking. The increase of administrative agreement cases in judicial practice will inevitably require the perfection of judicial review system. The new Administrative Litigation Law makes it clear that the administrative agreement is actionable in administrative law, which makes this theoretical concept officially recognized by law. But at present, the legal norms of administrative agreements are still deficient, and the litigation review system has not been systematized. With the diversification of governance methods, application of administrative agreements is increasingly extensive, and situation of the infiltration of private law into public law gradually forms, which also makes it increasingly urgent to construct judicial review system of administrative agreements. Under the background that the relevant legislation of the administrative agreement is not impeccable. To solve the disputes of the administrative agreement, we must take public law as the first and use private law simultaneously, and clarify the principle of the judicial review of the administrative agreement, and gradually improve the hierarchical mode of the judicial review of the administrative agreement.

Keywords

Administrative agreement; Judicial review; Administrative litigation.

1. Introduction

With the development of Chinese market economy and the deepening of the degree of contract socialization, the administrative agreement, as a new type of contract that integrates the nature of administration and contract, has been widely used. As a non-mandatory administrative mode, administrative agreement is an important way for citizens to participate in social construction. In an era of mixed administration, in an era of creative interaction and dependence on public power and private right, contract is the core of administrative law. The development process of administrative law reflects the characteristics of "the public has the private, the private has the public". The construction of the administrative agreement system is not only the need of conforming to the trend of The Times, but also the result of the commitment to innovation. The academic research should also conform to the trend of The Times, and constantly promote the improvement of the form of government governance and the protection of citizens’ rights and interests. The new Administrative Litigation Law amended in 2014 makes administrative agreements actionable in administrative law, Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Administrative Agreement Cases (hereinafter referred to as the Judicial Interpretation of Administrative Agreements) recently issued in 2019 provides a basic framework for the system of rules for judicial review of administrative agreements. Under the background of increasing cases of administrative agreements, a sound judicial review system of administrative agreements has not been established. The academic circles’
discussion on the judicial review of administrative agreement is not profound and comprehensive, nor has it formed a theoretical system of administrative agreement with broad consensus. In practice, the handling methods of administrative agreement disputes in various regions are not mature, so the development of the theory of administrative agreement system will be hindered, and the handling of relevant disputes is bound to be detrimental to the protection of public interests and the legitimate rights and interests of administrative counterparts. Therefore, these difficult problems need to be properly dealt with, and how to establish a comprehensive and effective judicial review mechanism of administrative agreements has become an important subject of the rule of law.

2. The Jurisprudential Basis of Judicial Review of Administrative Agreement

2.1. Judicial Review Based on Theory of Administrative Agreement

The administrative agreement is established through the agreement of both parties. Theoretically, the behavior of administrative agreement is a kind of bilateral administrative act. As for the nature of administrative agreement, it cannot be defined as administrative act directly, it is a contract with administrative nature. The basic nature of an administrative agreement is, firstly, the premise for the establishment of an administrative agreement is that both parties in the agreement express the same intention. As a category of contract, administrative agreement should fully reflect the inner meaning of the parties and follow the rules of offer and commitment in the theory of contract law. At the same time, the true and effective expression of will requires that the administrative agreement be signed on the basis of equality and voluntary. Secondly, the administrative subject is at least one party of the administrative agreement, which is the prerequisite for the conclusion of the administrative agreement. Administrative subject includes not only administrative organs with administrative functions and powers, but also organizations authorized by laws, regulations and rules to manage public affairs. Germany and France stipulate that private subject can sign an administrative agreement under specific circumstances, but it is against the legal principle and unrealistic for private subject to sign an administrative agreement in China. Thirdly, administrative prior power is the special power of the administrative subject as one of the parties to the agreement, which can break through the constraint of the contract to some extent due to the pursuit of public interest. [1] The so-called administrative prior power refers to the priority and benefit power enjoyed by the administrative subject for the effective exercise of authority or performance of duties. The "purpose theory" of administrative agreement indicates that the biggest difference between administrative agreement and civil contract is that one is for the public interest, the other is for the interests of the parties themselves. [2] The administrative prior power is not a complete and unlimited privilege, and administrative counterpart can use the right of compensation or compensation to eliminate the damage caused by the improper exercise of the administrative preferential right.

2.2. Judicial Review Based on Law of Administrative Agreement

The current Administrative Litigation Law only specifically lists two types of administrative agreements: government franchise agreement and land and housing expropriation compensation agreement. In addition to these two types of agreements, other agreements are generally considered to be included. Article 2 of the Judicial Interpretation of Administrative Agreement lists five administrative agreements, and the sixth item indicates "other administrative agreements", which indicates that all types of administrative agreements are basically included in the scope of accepting cases by the people's courts at present. Since the administrative agreement has been recognized by legislation, the conclusion of the
administrative agreement is not only the right of the administrative subject, but also the right of citizens or organizations, so when there is a dispute over this right, how to resolve the dispute and contradiction has become a problem that has to be paid attention to in theory and practice. The judicial review system of administrative agreement has dual rationality in jurisprudence and law. Citizens’ rights must be protected by law, and any right that is not protected by the coercive power of the state is only a formal right, so the relief system has its rationality. In the administrative agreement, the administrative subject has administrative prior power and can sanction the counterpart who violates the administrative agreement based on the demand of public interest. The careless use of administrative prior power will lead to the abuse of the consequences and damage the interests of the counterpart. At this time, administrative counterpart needs to resort to the court for judicial review of the administrative agreement, and administrative counterpart can use the right of compensation or compensation to eliminate the damage caused by the improper exercise of administrative prior power. Administrative counterpart may participate in administrative activities independently in the process of signing and performing an administrative agreement. The administrative counterpart may not only require the administrative organ to fully and properly perform the agreement, but also, under certain circumstances, request the administrative organ to alter or rescind the administrative agreement. The purpose of administrative power operation is to regulate public power and protect private rights. The objective existence of rights needs a supporting guarantee system to ensure the continuous operation of rights. The legal rights and interests of the administrative subject and counterpart constitute the right basis of the judicial relief system of the administrative agreement.

The court shall apply the relevant provisions of the Administrative Litigation Law when trying an administrative agreement case. Civil legal norms can be applied to judicial review of private law clauses in administrative agreements. [3] Because the judicial review system of administrative agreement in China is relatively backward, if the legal norms applicable to administrative agreement are limited, then the dispute of administrative agreement cannot be solved comprehensively and effectively, and the rights and interests of the counterpart cannot be guaranteed. The stability and compatibility of the application of different legal norms should be taken into consideration when applying other legal norms according to specific cases.

3. The Hierarchy Structure of Judicial Review of Administrative Agreement

The remedy of judicial review is an effective measure to solve the dispute of administrative agreement. Reviewing the history of the origin of judicial review system of administrative agreements in China, before the implementation of the Administrative Litigation Law on October 1, 1990, China's administrative agreement litigation system was almost blank. From the implementation of the Administrative Litigation Law to the implementation of Interpretation of the Supreme People’s Court on Several Issues concerning the Enforcement of the Administrative Litigation Law of the People’s Republic of China on November 24, 1999, this system is more of a theoretical level, and administrative agreement disputes are mostly settled by civil litigation. With the continuous development of administrative litigation law, many places have issued local laws and regulations to bring administrative agreement cases into the operation mode of administrative litigation. Until the issue of the Judicial Interpretation of Administrative Agreements on November 27, 2019, the tension that there are no sufficient rules to follow in the judicial review of administrative agreements in China has been alleviated.
3.1. Principles of Review of Administrative Agreements

3.1.1. Review Based on the Principle of Good Faith

The principle of good faith in private law should be introduced into the administrative agreement as one of the basic principles to resolve the disputes in the administrative agreement. The principle of good faith is the inevitable follow of modern society ruled by law. Introducing the principle of good faith into the administrative agreement can not only limit the abuse of administrative prior power by administrative subjects, but also help to maintain the balance of interests of both parties in the administrative agreement, which is a concrete reflection of the fairness of the contract. [4] The principle of trust protection and the principle of good faith are “twin brothers”, administrative counterpart has trust interest because of the certainty of administrative act of the administrative subject. The beneficiary has good reason to believe that the administrative act exists, the administrative subject shall not arbitrarily change administrative act to make the contract party at a loss if it may affect the legitimate rights and interests of the other party. After signing an administrative agreement with the counterpart, the administrative subject shall not cancel, abolish or change the administrative agreement without authorization for reasons not attributable to the counterpart or because of changes in objective circumstances. The principle of trust protection has a stable effect on the effectiveness of the administrative agreement, that is, it prevents the administrative subject from willfully changing the effectiveness of the administrative agreement, but the administrative subject can revoke or change the administrative agreement under the condition of proper compensation or compensation for the interests of the relative party, which is out of the requirements of interest balance and public interests. For example, in an administrative agreement case, The people's government of a county of the defendant signed a tourism terminal construction agreement with a tourism development company of the plaintiff through consultation, in which the plaintiff shall be responsible for the construction and operation management of tourist port facilities. During preparing to construct in the plaintiff, the defendant verbally notify the plaintiff to stop the project construction, freeze the reason is that according to the geological disaster prevention and control of file regulation, "the country needs to make geological disaster management and the prevention and control", but the defendant to provide geological disaster prevention and control of normative documents are produced before the contract is signed, then the defendant and construction of the project contract to another company. In this case, the administrative organ violated the principle of good faith and damaged the legitimate rights and interests of the administrative counterpart, the reason for the defendant to terminate the contract was according to the provisions of the geological disaster prevention document, and the defendant had known the requirements of reservoir area management before signing the contract. Moreover, the document did not design the construction site agreed in the contract. Thus the defendant's unilateral termination of the contract violates the principle of good faith. Without notifying the plaintiff, the defendant contracted the construction project to another company without justifiable reasons, which damaged the trust interests of the plaintiff. Therefore, the defendant should bear the corresponding liability.

3.1.2. Review Based on the Principle of Change of Circumstances

The change of circumstances is a major and unpredictable and decisive change that takes place after the signing of agreement. The change was not specified in the agreement. In general, if the parties to an agreement foresee the situation in advance, the inner will to enter into a particular agreement will fade away. The principle of change of circumstances is widely used in civil cases in judicial practice. For administrative agreements with contractual nature, the principle of change of circumstances should also be applied. It is necessary to apply the principle of change of circumstances in the litigation of administrative agreement in China. [5] Since based on the purpose of public interests and administrative agreement, if the process of implementation of
administrative agreement have unforeseen decisive change, allowing them to continue to perform contract would cause greater losses. The principle of change of circumstances can effectively protect the public interests, so it should be clear that the principle of change of circumstances can be applied to the judicial review of administrative agreements. If the application of the principle of change of circumstances causes losses to the legal rights and interests of the counterpart in the course of the court’s review of administrative agreement cases, the state shall give appropriate compensation. The principle of fairness refers to the effect of the parties engaging in material activities according to the general social fairness concept and taking into account the balance of social interests. If it is introduced into the judicial review system of administrative agreement, it can make the exercise of administrative power more rational and reflect human nature. The principle of fair compensation has a good effect on the settlement of disputes in administrative agreements. On the one hand, the principle of fairness can promote the exercise of administrative preferential rights to be more fair and proper, On the other hand, it can ensure that the loss of the counterpart can be compensated in time, which not only protects the legitimate rights and interests of the counterpart, but also finally meets the needs of the public interest. For example, in an administrative agreement case, A company and the district government signed a state-owned real estate transfer agreement, after the contract was signed but not before the handover, The local earthquake of magnitude 7 destroyed all the immovable property and the house movable property that should have been sold, so that the contract could not be fulfilled. After the earthquake, The district government wanted to rescind the administrative agreement, but the two parties did not reach an agreement on the details, so they did not reach an agreement to rescind the administrative agreement. The trial of the court introduced the principle of change of circumstances, according to which the administrative agreement was terminated and the loss of the company was properly compensated. In this case, the earthquake was a force majeure event that occurred after the conclusion of the contract, and neither party could foresee the force majeure event and neither party was at fault. The court made a judgment by introducing the principle of change of circumstances, absolving both parties of the liability for breach of contract, and making appropriate compensation for the relative party's loss according to the principle of fair compensation.

3.2. Review of the Legality of Administrative Agreements

The judicial review of administrative agreement should follow the basic principles of legality review stipulated in Article 6 of the current Administrative Litigation Law and Article 11 of the Judicial Interpretation of Administrative Agreement. The parties to an administrative agreement have more options for the content of the agreement than in a civil contract. If the principle of legality is not restricted to the administrative subject, there will be the abuse of contract or illegal exercise of power. The content of an administrative agreement concluded by an administrative organ must be related to the matters under its administrative jurisdiction, and an administrative organ may not implement the acts of an administrative agreement outside the law. [6]

The act of administrative agreement itself belongs to the theoretical category of the administrative act. Courts mainly examine the legality of administrative acts and the contents of administrative agreements. Specifically, the subject, purpose and procedure of the administrative agreement must be legal. [7] Firstly, whether the subject of the administrative agreement conforms to the legal norms and whether the parties to the agreement are qualified to sign the administrative agreement; Secondly, whether the purpose of the administrative agreement conforms to the spiritual requirements of the legal norms. In addition to conforming to explicit norms, when the purpose of legal norms is not clear, the administrative agreement concluded by the administrative subject on the basis of administrative discretion should at least
meet the needs of public interests; Thirdly, whether the procedural behavior of the administrative agreement is legal; Fourthly, whether the administrative subject performs its obligations according to the provisions of the law. If there is an ambiguous agreement in the agreement, the administrative subject should perform the agreed items in accordance with the principle of legality, and the refusal to perform requires the evidence to prove its behavior is legitimate and lawful; Fifthly, administrative prior right must be exercised accurately and properly. The administrative subject must bear the corresponding liability of compensation for the behavior that causes the interest damage to the counterpart. For example, in the administrative agreement case of “Guo and Chen v. People’s Government of Pugong Mountain District “, the court believed that the judicial review of the administrative agreement should follow the principle of legality of the administrative contract, and both the legal subject and the legal content are indispensable. The principle of legal reservation that "administrative activities must have legal basis" must be embodied. In the administrative agreement case of “Anji Casting Factory v. Anji County People’s Government”, the court held that, based on the duality of administrative agreement, the judicial review of administrative agreement cases should adhere to the principles of whole-process supervision and double review and double judgment. In the specific review process, the court should not only examine the validity of the contract of the administrative agreement, but also examine the acts of the administrative agreement, especially the legality of the acts such as the conclusion, performance, modification and rescission of the administrative agreement.

3.3. Review of the Rationality of Administrative Agreement

In the traditional administrative litigation, the reasonableness examination of administrative act often focuses on the "abuse of power" or "obvious impropriety" of administrative act. For the reasonableness of administrative agreements, the Judicial Interpretation of Administrative Agreement not only inherits the traditional review of "abuse of power" and "obvious impropriety" in administrative litigation, but also introduces the revocable situation of signing contracts due to duress and fraud in the norms of private law. For example, In the administrative agreement case of "Wang v. Jiangsu Yizheng Zaolinwan Tourism Resort Management Office", the court held that in the process of the case agreement, although there is no direct evidence to prove that the relevant demolition personnel used violence, coercion and other means to Wang. Given Wang's advanced age and the fact that the negotiations lasted from early in the morning to early in the morning of the following day, it is difficult to confirm that Wang has true meaning when signing the relocation agreement. From this, the court decided to cancel the house relocation agreement prosecuted in this case. Accordingly, the court decision cancels this case house relocation agreement. In this case, the court reviewed the rationality of the signing of the administrative agreement, If the administrative agreement sued is signed under duress or other circumstances contrary to the true expression of the will of the other party, the court may revoke the administrative agreement by judgment according to law.

In the traditional administrative law, the administrative power of the administrative organ is undoubtedly in the dominant position. Law endows administrative subjects with executive power to manage state and social affairs. The administrative counterpart must perform the administrative decision of the administrative subject according to law. In the process of performing the administrative agreement, if there are illegal reasons which can be attributed to the counterpart or the need to safeguard the social interests, then the exercise of the administrative prior power can highlight its legitimacy. On behalf of the public interest, the administrative subject can punish the other party of the illegal agreement or affect the effectiveness of the administrative agreement, and limit the expansion of the illegal counterpart's interests, and prevent the counterpart from abusing his rights obtained in the administrative agreement to make illegal profits. For example, the administrative counterpart
takes advantage of the franchise agreement to excessively develop natural resources. In order to prevent the administrative counterpart from seeking illegal interests, the administrative organ can unilaterally change or rescind the administrative agreement to protect the public interest. If the exercise of administrative prior power exceeds the limit, it is an unreasonable phenomenon in itself. It is necessary to control the power and prevent the abuse of power by administrative organs. From the point of view of administrative agreement theory of various countries, complete administrative prior power does not exist. [8] The court can rely on its judicial power to check and balance the abuse of the administrative prior power, and the counterpart can also demand the defendant administrative authority to compensate or compensate for its interests with the help of judicial power. The court's decision should be impartial on the basis of examining the evidence and the facts of the case. In the case of Cui v. Fengxian People's Government of Xuzhou City for Investment Invitation, The court examined the reasonableness of the abuse of administrative prior power. The court holds that the administrative preferential right of the administrative subject cannot be abused, especially in the case of the administrative agreement. The interpretation of the key provisions should restrict the administrative subject from exercising administrative prior power arbitrarily.

4. Remedies for Breach of Administrative Agreement

Breach of contract refers to the breach of the content of the agreement, and liability is the consequence of the breach of contract by the parties. Article 19 of the Judicial Interpretation of the Administrative Agreement has stipulated the way to assume the liability for breach of contract. To be specific, liability for breach of contract shall be combined with the provisions of Article 78 of the Administrative Litigation Law. According to the request of the plaintiff, the defendant shall be judged to continue to perform, take remedial measures or bear the liability for compensation. The administrative counterpart is willing to sign an administrative agreement, its purpose is not to damage their own interests to achieve the effect of safeguarding public interests, but to obtain their own benefits through operation. According to the different types of subjects, the liability for breach of contract of administrative agreement can be divided into the liability for breach of contract of administrative subject and the liability for breach of contract of administrative counterpart.

4.1. Liability for Breach of Contract of Administrative Subject

The disputes arising from the breach of contract of administrative subject mainly include three kinds of situations. The first is the dispute arising from the failure of the administrative subject to abide by the principle of trust protection, the failure to achieve the effect of contract performance or the violation of its obligation to abide by the agreement; The second is the dispute caused by the failure of the administrative subject to fulfill the contract or the implementation of the contract has no benefit to the actual situation; The third is the dispute arising from the exercise of administrative prior power by administrative subjects. In the first two cases, the court may, in accordance with Article 78 of the Administrative Procedure Law, order the defendant to continue to perform or order the defendant to give corresponding compensation or compensation for the loss caused to the plaintiff. In the first two cases, the court may, in accordance with Article 78 of the Administrative Litigation Law, order the defendant to continue to perform or order the defendant to give corresponding compensation or compensation for the loss caused to the plaintiff. [9] In the third case, administrative organ enjoys a certain priority and beneficial power in the process of signing and performing the administrative agreement. There are basically three kinds of disputes arising from the exercise of administrative prior power by administrative subjects. Firstly, the disputes arising from the abuse of the power of direction and supervision. By means of guidance and supervision, the administrative organ forces the administrative counterpart to change the established
performance plan, which increases the extra time and cost for the administrative counterpart, or the administrative organ forcibly exercises the power of guidance and supervision in order to expand its own interests; Secondly, the dispute arising from the abuse of the sanction power. The abuse of the sanction power of the administrative subject is due to the consequence of the breach of contract caused by the administrative counterpart. The administrative subject forces the counterpart to change or terminate the contract on the grounds of the breach of contract, or the sanction procedure of the administrative organ is improper; Thirdly, the dispute arising from the abuse of unilateral alteration and rescission right. The administrative subject forces the unilateral alteration or termination of the administrative agreement in order to realize the maximization of its own interests under the circumstance that it cannot be attributed to the counterpart.

4.2. Liability for Breach of Contract of Administrative Counterpart

The administrative counterpart must fully perform its contractual obligations as agreed in the contract. The default of the administrative counterpart mainly includes two situations. Firstly, the administrative counterpart violates the agreement by entrusting others to exercise part or all of his rights and obligations; Secondly, the administrative counterpart did not take the initiative to perform the contract or did not realize the positive effect of the contract. At present, although some laws and regulations stipulate the way of litigation relief for the other party’s breach of contract, the nature of the way is not clear. [10] Both Article 51 of Law of the People’s Republic of China on the Contracting of Rural Land and Article 25 of Regulation on the Expropriation of Buildings on State-owned Land and Compensation grant the litigant the right to Sue, but the specific nature of the lawsuit is not clear in the provisions. The current Administrative Litigation Law stipulates that the counterpart may resort to the people’s court for the violation of the administrative agreement by the administrative organ. But when the administrative counterpart violates the administrative agreement, the liability for breach of contract of the administrative counterpart is not stipulated in detail in law. At present, the subject of breach of contract of administrative agreement which is clearly defined in our administrative legislation is mainly the administrative subject. The current legislation does not put forward a feasible solution to the breach of contract of administrative counterpart, it only provides the rudimentary model of administrative agreement dispute settlement under the circumstances of deliberately avoiding the relevant possibility or without considering special requirements.

5. Conclusion

The construction of the judicial review system of administrative agreement and the exploration of the theoretical focus of the judicial review system of administrative agreement in China are not specific and in-depth. The regulations of administrative agreements are being improved, but the substantive and procedural provisions are not precise enough. On the basis of the current legal norms, it is the development direction of the administrative agreement review system to formulate the administrative agreement review regulations. It not only reflects the idea of law-based governance of the country, but also has a good effect on the development of social economy in practice. It can also provide a systematic method for resolving disputes over administrative agreements, and feedback the development of administrative jurisprudence theory. The formation of a new legal and reasonable adjustment mechanism based on existing litigation structure may play a role in the systematization of the judicial review mechanism of administrative agreements.
References


