Review of Regulatory Model and Applicable System for the Scope of Administrative Agreements

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Abstract: With the rise of PPP agreements and the expansion of the scope of public law adjustments, administrative agreements have become a way for governments to achieve administrative acts. At this stage, the scope regulation model of China's administrative agreement is the "general prohibition" model, in order to give full play to the advantages of the administrative agreement, after fully comparing the three regulatory models, we put forward the "general allow, special prohibition" model that we should adopt. At the same time, the legal application of administrative agreements has been clearly sorted out. The institutional characteristics and composition analysis of "preferential rights" such as unilateral cancellation and modification are elaborated, followed by logical proof of its application to civil law norms, and finally the possibility of its inclusion in administrative reconsideration is demonstrated, and a preliminary substantive review plan is proposed.

Keywords: Administrative Agreement; Regulatory model; Administrative privilege; Applicable civil law; Reconsideration review

1. Introduction

Article 12, paragraph 1, item 11 of the Administrative Procedure Law clarifies that administrative agreements are included in the scope of administrative litigation, but this article does not directly give a qualitative interpretation of administrative agreements, nor does it list some types. In view of this, article 1 of the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Administrative Agreement Cases stipulates that "an agreement with rights and obligations under administrative law concluded by an administrative organ through consultation with citizens, legal persons, or other organizations in order to achieve administrative management or public service objectives is an administrative agreement provided for in Item 11, Paragraph 1 of Article 12 of the Administrative Procedure Law." From this, we can see that this model of "positive enumeration and bottom-up" limits the scope of administrative litigation and is not conducive to the development of a new governance model in the current international community. Therefore, we should expand the scope of conclusion of administrative agreements, and at the same time, we should also establish a negative list and consider the judicial review path of administrative agreements[1].

2. Factors and Regulatory Models for Expanding the Scope of Conclusion

Administrative agreement is a modern national public government under the concept of democracy, rule of law, part of the public governance in the "administrative obedience" relationship appropriately transformed into "equal cooperation" relationship, which is a major breakthrough in the concept of contract to public government and professional administration, China's administrative agreement is the earliest application in state-owned enterprise contracting contracts. With the continuous deepening of the state's management of social and economic affairs, more and more matters have been brought into the scope of public law, and the resulting new economic relations and contractual relations have been incorporated into it, and administrative agreements have become a way for the government to realize the public interest of society. Administrative agreements also in fact contain the disposition of public power, so they should be restricted. Within the overall framework of public law, the concept of freedom of contract naturally needs to evolve before it can be applied. In civil contracts, the determination of the validity of the contract tends to be reversed, as long as it is not contrary to laws, regulations, public order and good customs, etc., it should be recognized as valid, but the application in administrative contracts
is too broad, and it may make administrative rights lose the constraint of legal administrative principles. Therefore, at this stage, there are 12 kinds of administrative agreements stipulated in China's legal norms, in addition, public security contract agreements, administrative detention suspension guarantee agreements, etc. have been recognized and adopted because they have obtained the authorization of the higher law, but in practice, a large number of administrative contracts that have not been authorized have played a very good social effect, and in theory, such behavior should obviously be prohibited. In order to further enhance the democratization of administration and the standardization of administrative activities, we should further expand the scope of concluding administrative agreements in legislation. Due to the differences in economic development level and urban governance capacity in various regions in China, the legislative system of unified administrative agreements will obviously restrict the attempts of some regions, and if the power to conclude administrative agreements is decentralized, the level of formulation of organs at all levels is different, which will lead to conflicts between legal norms. Obviously, only by changing this "legislative model" can we effectively alleviate the contradiction between legislation and practice[2].

2.1 Regulatory Mode Selection

According to the foreign administrative agreement conclusion mode, it can be roughly divided into three types, including "general prohibition mode", "general permission mode", and "general permission and special prohibition mode". The "general prohibition model" will curb the development of administrative agreements under the premise that the scope of the current public legal system is expanded and administrative efficiency is expanded. The "general permissibility model" is conducive to the development of administrative agreements, but to a certain extent, it will lead to the relinquishment of administrative rights and evasion of its own responsibilities. The "generally permissible and special prohibition model" can better balance the conflict between the purpose of expanding the scope of conclusion and the performance of administrative duties by administrative organs in accordance with the law.

2.1.1 General Prohibition Mode

Administrative law scholars represented by German scholar Otto Meyer believe that public law relations belong to state relations, the will of the state is in a higher dimensional dominant role, there is a clear distinction between public law and private law, public law is based on the principle of the binding unilateral will of the state, and it is impossible for the state and private individuals to express their consensual expression[3].

At the same time, the essential requirement of administration according to law is also incompatible with the principle of "freedom of contract". Therefore, early Germany believed that the conclusion of an administrative agreement could only be carried out unless it was expressly approved and adopted by a legal norm, otherwise it could only be regarded as a unilateral administrative act of an administrative organ.

The "general prohibition" model, which absolutely separates public law and justice, considers that the differences between public law and justice are naturally irreconcilable, and in fact became irreversible with the change of government functions, so this model was abolished soon after.

2.1.2 General Allowed Mode

After the Second World War, the wave of administrative democratization began to rise, and the German Administrative Procedure Act of 1976 affirmed the validity of administrative agreements in principle. Article 54 clearly stipulates that an administrative agreement may be concluded in this matter as long as there are no provisions (including direct provisions and presumption of interpretation) in the relevant law dealing with the field.

The "general permissibility model" has made a great breakthrough in the scope of conclusion compared with the "general prohibition model", but in this mode, it does not explain which administrative acts can be replaced by administrative agreements, and does not divide the fundamental attributes of rights, which will lead to the dilemma that administrative organs may face in the administrative process, or there will be administrative organs in order to alleviate their responsibilities to "package" a large number of rights to third parties, and become the subject of administrative hollowing[4].

2.1.3 General Permitted, Special Prohibited

France has derived the "general permissibility, special prohibition model", which prohibits the
conclusion of administrative agreements in areas related to the exercise of sovereignty. Since 1982, the United States has also made initial attempts at administrative contracts in some areas where administrative agreements should be prohibited, such as the US government's attempt to hand over the management of prisons, a state violence machine, to an administrative counterpart, and although American administrative agreements are widely used in the field of public services, the United States still prohibits the exclusion of "essentially government functions" from the scope of administrative agreements.

2.2 Existing models of regulation in China and their choices

Although the interpretation mentions a variety of administrative agreements, the scope of its regulation is determined using the "statutory permissibility" clearly stipulated by laws, regulations and rules, which is an exception and a "general prohibition" regulatory model. The "general prohibition" model mentioned above is contrary to the model of public-private cooperation and should not be the choice of regulatory model in China. The difference between the two lies mainly in whether or not administrative agreements in general are positive. China should adopt the model of "general permit, special prohibition", under the premise of clarifying that administrative agreements can be formulated under general circumstances, and by clarifying the constituent elements of the legality of administrative agreements, the negative list system for administrative agreements is set up in reverse, which is in line with the concept of simplifying administration and delegating power and democratizing administration to the greatest extent[5].

2.3 Negative list for concluding administrative agreements

2.3.1 Agree on sovereignty-related prohibitions

The process of desirable is a process of mutual compromise based on negotiation and convergence of opinions, and desirable means compromise to a certain extent. Sovereignty means non-compromise, especially when it comes to the people within a sovereign State, where equality between the two is hardly reflected, or there will be restrictions and impairments of sovereignty. In addition, the transfer (or transfer) and sharing (or sharing) of national sovereignty express the will of the sovereign state, not the will of the recipient and the sharer[6].

2.3.2 Administrative agreements on the restriction of rights are prohibited

In the scope of the conclusion of administrative agreements, France has developed the basic principle of "how the authority will be exercised in the future shall not be restricted by contract". If China's Constitution clearly stipulates that citizens' basic rights are sacred and inviolable, in the absence of relevant provisions of law, no organ or individual may restrict, exclude or restrict the rights of others. At present, a large number of "right disposition clause" agreements have appeared in real life, such as interest appeal strike agreements. It should be recognized that the basic rights of administrative counterparties cannot be restricted and excluded by contract or agreement.

3. Unilateral Changes and Unilateral Termination of Administrative Agreements

In the process of performing the administrative agreement, the stability achieved in the public interest should strictly abide by the contract, and unilateral modification and unilateral termination can only be exercised under exceptional circumstances. Many laws and regulations in China also regulate the strict observance of the principle of contract. Article 31 of the Regulations on Optimizing the Business Environment issued by the State Council in 2019 stipulates: "Local people's governments at all levels and their relevant departments shall perform the policy commitments made to market entities in accordance with the law and all kinds of contracts concluded in accordance with the law, and shall not breach or break the contract on the grounds of administrative division adjustment, government change, institutional or functional adjustment, and change of relevant responsible persons." "This is a practice of the spirit and concept of the contract, and in the process of contract performance, any party should strictly abide by the principle of good faith to promote the realization of the purpose of the contract." However, there are exceptions to the clear recognition of strict adherence to the principle of contract. In the process of unilateral changes to administrative agreements, full consideration should be given to the balance between autonomy and public interest. An administrative agreement is not an administrative act that is completely full of administrative "high power", but a "soft" means for administrative subjects to manage society[7].

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According to the theory and practice of French administrative agreements, the unilateral termination of administrative agreements includes the following two aspects. One of them is that when unforeseen economic reasons make it impossible to perform the government franchise agreement, the French Council of State will make the government perform the financial support obligation to the administrative counterpart. This is in view of the fact that public services must be safeguarded and public interests must be restored in a timely manner. The second point is to consider that if there is a major change in public interest in the process of performing the contract, and the public interest can no longer be satisfied by continuing to perform the original agreement, the administrative organ can unilaterally terminate or unilaterally modify the administrative agreement.

It can be seen that the public welfare nature of the administrative agreement must conform to the development and change of the public interest, and the public interest cannot remain static. If the administrative entity arbitrarily changes or terminates the administrative agreement, the other party to the administrative agreement will lose confidence in the government, and the government's authority will decline. Second, it will also increase the cost of government demand and cooperation in other markets. At the same time, China also provides for the legal consequences of the lifting and modification of exceptions. In addition, Article 16 of the Judicial Interpretation of Administrative Agreements clearly treats unilateral changes and rescissions made by administrative entities based on the consideration of national interests and social public interests as high-power administrative acts, and is included in the scope of legality review provided for in Article 70 of the Administrative Procedure Law.

3.1 Unilateral change of the system characteristics and applicable conditions

This kind of unilateral rescission is different from unilateral rescission in private law, which shows a certain nature of public power and constitutes a "high-power act", but after all, this rescission is not like administrative unilateral acts, and the background of unilateral cancellation contains contractual constraints. High-power acts refer to a unilateral expression by an administrative subject in order to regulate interests, and this unilateral expression has certain privileges that can immediately produce legal effects. Of course, the rescission of such effects must also be subject to a review of legality and, in some respects, a remedy to the administrative counterpart. To sum up, we can summarize the four basic characteristics of unilateral lifting: First, the subject is specific. That is, only the administrative organ can exercise the unilateral right of rescission, because this right is not of the affirmative power type. Second, the content is unilateral. The expression of the intention of such cancellation and change is determined unilaterally, and even if the administrative counterpart can provide suggestions, etc., the final right to decide whether to cancel or change still belongs to the administrative entity. Third, immediate effect. Once the administrative entity expresses its intention to unilaterally terminate or unilaterally change, its legal effect can be undoubtedly highlighted. Fourth, ex post review, out of the preferential protection of the public interest and consideration of the interests of the administrative counterpart, requires ex post review, and if it violates the superior law, it should be declared invalid.

At the same time, unilateral modification of the act of rescission is also subject to further constraints on the contractual relationship. Therefore, in the process of concluding an administrative agreement, it is necessary to stipulate in advance the constituent elements and effective elements for the realization of administrative high-power rights, and as long as the facts that meet the constituent elements occur, the right of unilateral administrative rescission or modification can be exercised. In addition, if the counterparty to the agreement has a preliminary expectation of the benefits it can obtain in the future when concluding the contractual relationship, such expectation should not be infringed by the unilateral rescission of the administrative entity, so even if the high-power act is legal, the administrative entity still has to compensate for the benefits not obtained by the counterparty to the agreement.

3.2 Analysis of the composition of applicable conditions

The exercise of high-power rights must be authorized and managed by the superior law, otherwise the interests of the counterparty to the agreement will be in a position where the interests cannot be guaranteed. It should be noted that unlike French administrative law, which regards the precedents of the Supreme Administrative Court as an important source of law, the judgments of China's people's courts have not acquired the status of formal source of law. Our rights should be derived from statutory norms, which currently seem to be obtained mainly through "special clause authorization" and "extension of terms of competence".
3.2.1 Special Terms Authorization

Article 13 of the Measures for the Administration of Municipal Public Utilities Franchise stipulates: "If an enterprise that obtains a concession undertakes the government's public welfare instructions and causes economic losses, the government shall give corresponding compensation." At the same time, Article 358 of the Civil Code also stipulates the early recovery and compensation of the right to the use of construction land, which also reflects that the administrative organ can unilaterally terminate the administrative agreement according to the administrative right according to this article.

3.2.2 Extension of Terms of Reference

According to Articles 10 and 11 of the Regulations on the Expropriation and Compensation of Housing on State-Owned Land, the relevant expropriation compensation plan for housing expropriation activities shall be decided by the people's governments of cities and counties, and subsequent expropriation compensation agreements shall also be specifically concluded in accordance with the expropriation compensation plan. Based on the authority of the expropriation compensation plan already obtained, the administrative entity has also obtained the right to unilaterally change the expropriation compensation plan that has been announced, and the unilateral change to the plan will directly lead to changes in the content of the "Expropriation Compensation Agreement" that has been concluded, and may also lead to the unilateral termination of the above-mentioned administrative agreement, thus highlighting the extended unilateral rescission right obtained by using the previous authority.

4. Administrative Agreements Apply: Application Paths and Reconsideration Review of Civil Cases

4.1 Approved Path

Article 27 of the Judicial Interpretation of Administrative Agreements stipulates: "People's courts hearing administrative agreement cases may refer to the relevant provisions on civil contracts applicable to civil law norms. "The application by reference means that three meanings can be deduced: the first point is to talk about the presumption of similarity, and the similarity between the two systems does not need to be examined separately by the (lower) judicial authority, but should focus on the degree of application of the reference norm in a particular case. The second point is functional requirements, because the reference norms can fill the loopholes in existing legal norms, and there are gaps in administrative law norms, so it is necessary to refer to civil law norms. The third point is a direct obstacle to the path of application, which means that the specification cannot be applied directly, even if there is an urgent need to refer to the specification. Considering that the administrative responsibilities shouldered by administrative entities have more social interests, they should be more obligated when applying the change of circumstances and dissolution of the civil law, so it is necessary to amend and apply the basic legal norms and systems of the civil law. In civil law, a "compromise theory" is adopted for "change of circumstances", taking into account both the "subjective factors" of the contracting party and its "objective factors". Among them, the determination of subjective factors is based on the ability and intelligence of ordinary well-meaning people. However, in the administrative agreement, the administrative entity advocates that when the situation changes, it should have a stronger ability to foresee subjective factors and a higher duty of diligence. Therefore, when the contracting entity claims to terminate the administrative agreement on the grounds of a change of circumstances, it cannot be based on the duty of care of ordinary people, but on a higher level of judgment.

When the contracting entity claims the application of the change of circumstances and rescission, the rescission process must be transparent and subject to supervision, which is also a disguised way to prevent the abuse of administrative power by the administrative organ, even if it is really necessary to change, it should consult with the administrative counterpart, and supervise the public at the same time do a good job in the corresponding compensation work and the development of subsequent public services.

When a contracting entity refers to the change of circumstances applicable to the civil law in the contracting act and the unilateral rescission act of the administrative entity's high power, it is very likely that a competition in the legal sense will occur. In the case of Miao Qiangwen v. Panzhou Municipal People's Government of Guizhou Province made by the Guizhou Provincial Higher People's Court, administrative entities should give priority to the right of unilateral modification or rescission in the face of the above-mentioned competing acts. This is because the legal effect of unilateral rescission of modification is immediate, and the realization of public interests has strict requirements for timeliness.
If the civil law change of circumstances regime applies. The status of the contracting parties is uncertain, and the agreement is also in a state of uncertainty. At the same time, the loss to the administrative counterparty can be better compensated for by the unilateral termination of the agreement, even if the termination of the agreement is authorized by legal norms, the counterparty to the agreement also bears the cost of protecting the public interest to a certain extent, which is out of the balance of interests from the perspective of administrative law.

It is true that the change of circumstances system also has its own unique advantages, as the change of circumstances imposes the obligation of the parties to the administrative agreement to renegotiate, and regards consultation as a precondition for the termination of judicial change, in order to promote the parties' independent consultation and mediation of their respective interests. Unilateral rescission of the obligation, which does not involve the obligation to negotiate, will reduce the possibility of the parties to negotiate again. At the same time, it can also reduce the possibility of damage to the rights and interests of administrative counterparts. Because the people's court in the change of circumstances system fails to negotiate, it can coordinate according to its authority to solve the loss of interests of the party that may suffer unfair. The realization of interests is also called unilateral dissolution more quickly, and mediation also enables the dispute to be substantially resolved to the greatest extent.

To sum up, in the relationship of competition and cooperation, the administrative counterparty is the weak party, and should give the counterparty more protection of interests as much as possible in the process of relief, and achieve an accurate balance of interests in the process of specific legal norms, so that the case resolution skills can take into account the public interest and handle the interests of the counterparty safely.

4.2 Judicial Review

At present, the role of administrative reconsideration as the main channel for resolving administrative disputes has been clarified, so it is necessary and feasible to include administrative agreements in administrative reconsideration. The review of reconsideration of administrative agreements should adhere to the standards of legality review, contractual review, and substantive dispute resolution. Before the issuance of the Draft for Comments, good results have been achieved in the practice of various places, and in the establishment of professional reconsideration committees, there is not only the administrative reconsideration member model, but also the administrative advisory committee model. These advisory bodies have absorbed a large number of scholars in related fields, such as public security, land, human resources and other departments, so that the reviewers have a deeper understanding of various professional issues than litigation. At the same time, according to the principle of "judicial finality", any administrative dispute that can be remedied can be resolved through final judicial means, so it can be considered to give the reconsideration act a precursor based on the professionalism of the administrative agreement, and the Draft for Comments has stipulated that personnel engaged in administrative reconsideration for the first time should pass a legal professional qualification certificate, from this point of view, professional judges are proficient in the application of legal knowledge compared to administrative reconsideration personnel, and the advantages of this proficiency and application are guaranteed in administrative litigation. It can not only quickly cultivate and develop a group of reconsideration personnel who are proficient in professional knowledge and law in various fields, but also save litigation resources to a large extent and reduce the pressure of judicial organs to respond to litigation.

Administrative agreements must first address the issue of legality, which is the first element of judicial review. Due to its special constituent elements and contents, both the public and private regulatory systems will be severely challenged. At this stage, efforts should be made to build a review path for the judiciary by the reconsideration mechanism. For this reason, consideration may be given to adopting the "distinction theory" to review the legality of the unilateral modification or termination of administrative organs' exercise of "administrative preferential rights", and to conduct contractual reviews of administrative organs' strict compliance with the principle of contract, which is a review mode in administrative litigation. In the process of administrative reconsideration, contractual review cannot simply review civil legal norms, nor can it directly claim the application of administrative legal norms and civil legal norms respectively in accordance with the content of the litigation in accordance with administrative litigation. In the case of unification of legal relationships, legality review and contractual review are applied separately at each stage in combination with the parties' request for reconsideration and substantive disputes. Where circumstances such as requests for rescission, modification, or confirmation of illegality or invalidity are to apply, a legality review may be applied in accordance with law, and if it is claimed that the administrative organ has not performed the administrative agreement in
accordance with the contract, has not performed ancillary obligations, or requires it to continue to perform the administrative agreement, the contractual review may be applied in accordance with law. Adhering to the standard of substantive dispute resolution is the concrete deepening of the implementation of the concept of administrative reconsideration in administrative agreements, that is, not only reviewing legality, contract and reasonableness. The legal normative system does not perfectly meet the litigation requirements of the parties at all times, and this phenomenon of "case closure" in real society is still widely present.

The purpose of regulating administrative agreements should be to promote the participation of counterparties in administrative activities on the one hand, and to better realize public interests on the other hand, and "high-power" behaviors should be narrowed to greatly promote the enthusiasm of the public to participate in construction, so as to build a service-oriented government and a democratized government.

5. Conclusion

As a new type of way for administrative entities to implement social management, administrative agreements still need to be further expanded in the scope of regulation to promote the efficient development of administrative agreements, and at the same time subject to the characteristics of the high power of administrative subjects in administrative agreements, the regulation of systems such as change of circumstances and unilateral termination must adhere to the public interest as the goal, adhere to the main channel of administrative reconsideration to resolve administrative disputes, and adhere to the dual-track review operation of legality and reasonableness as the basis.

References