

Express Your Legal View In English

英语 用 表达

你的法律观点

——第二届全国法律英语大赛论文集



法律出版社
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杨富斌
鲁勤

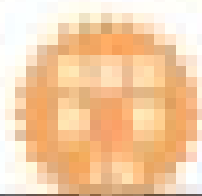
主编

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——第二届中国法律英语大赛获奖作品

法律英语



本届法律英语大赛和本书的出版均得到北京第二外国语学院资助，特此致谢！

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主编前言

与首届全国高校法律英语大赛相比,第二届全国高校法律英语大赛有如下特点:

第一,参赛学校更多。参加本届法律英语大赛口语比赛和论文比赛的学校有近 200 所,主要法律院校(系)基本上都有学生参加。尤其是中国人民大学法学院、清华大学法学院、中国政法大学、华东政法大学、西南政法大学、西北政法大学、浙江大学法学院、汕头大学法学院、西南财经大学、华中科技大学等院校参赛学生较多,并且有的学校在参赛之前还在本校进行了预赛。因此,本届大赛给有关单位颁发了最佳组织奖。

第二,论题更加广泛。无论本届法律英语大赛口语比赛的选题,还是论文比赛的选题,都涉及许多方面的论题。譬如,有的论述中国法律进程中的现实问题,如许霆案引发的法律思考,“毒奶粉事件”引发的食品安全问题的法律思考,中国刑事审判程序的思考,安乐死问题的思考,中国的法律教育问题思考,中国城镇化进程中引发的法律问题思考,中国企业的社会责任问题思考,等等;有的则论述各个部门法的专门法律问题,比较多地集中在中外法律比较和国际法中的有关问题,以及合同法、公司法、侵权法、商标法、劳动法、金融法、海商法和旅游法中的有关问题。这些论题既反映了参赛选手对我国现实的法律进程中出现的各种问题的广泛关注,也反映了参赛选手对各个部门法中的热点问题也进行了比较深入的思考。这从一个侧面反映了我国当代法律大学生和研究生关注的热点问题,因为这些选题都是参赛选手自选的题目,大赛组委会并没有指定有关论题。

第三,水平有所提高。无论是口语比赛还是论文比赛,从参赛选手提供的演讲稿和参赛论文来看,均比首届全国高校法律英语大赛的水平有所提高。主要表现在:一是多数论文选题比较好,选题既有现实意义又有一定理论意义,值得进行理论探讨;二是论文的结构比较合理,更加符合英语国家的

论文规范和要求;三是论证比较充分,层次分明,逻辑结构较强。这可能是选手们借鉴了参加首届全国法律英语大赛的经验,撰写论文的时间也比较充分,同时,许多论文的撰写得到了有关老师的指导。我们组委会还给有关老师颁发了论文指导奖。

第四,组织更加有序。借鉴首届全国法律英语大赛的经验,我们在组织选手报名、安排口语比赛的具体程序、评委选择、论文评阅等有关具体环节方面,比第一届更加稳妥和有序,从而使整个法律英语大赛工作有条不紊地进行。大家知道,我们北京第二外国语学院法政学院作为主办方,并没有专职人员在从事这项工作。与比赛有关的全部工作,都是法学系的老师们和法政学院的行政人员,在搞好自己的教学、科研和行政工作的同时,挤出时间加班加点完成的。在此,作为组委会的牵头人,我要十分感谢为法律英语大赛付出辛苦的各位老师和法政学院的行政人员以及组委会临时聘请的其他工作人员。他们主要有申海恩博士、王天星博士、孟凡哲博士、韩阳博士等,还有办公室主任刘泉喜老师、教学秘书陈伟功老师、资料员许文老师等,还有党总支书记罗从科同志和副书记高凌云同志的大力支持。没有他们的大力支持、辛勤工作和默默的付出,法律英语大赛的顺利进行和成功举办是不可能的。大家知道,许多学校的许多人早就想过组织全国法律英语大赛,但一直停留在理念层面,没有真正地具体实施。北京第二外国语学院法政学院之所以能率先把这项活动具体地组织起来,得益于上述这些同志的真抓实干和默默地付出。即使赛后整理、修改和编辑论文这项工作,就进行了半年多。因为法律英语论文不像汉语那样看起来那么轻松,这既需要编者具有相当的英语水平,又要对法律有所了解。一篇一篇地阅读和修改这些论文,七十多篇,几十万字,在时间和进度上无论如何也快不了。有些论文还要返给作者修改,有的论文即使修改后也不符合规范和要求,最终没有收入论文集,但对其付出的劳动比其他论文还多。所以,直到比赛完毕半年多之久,才把这本论文集编辑完毕,作为主编才敢把这本论文集的“齐、清、定”稿交给出版社。

此外,还要感谢此次协办本届法律英语大赛的法律出版社、全国法律英语考试委员会等单位。尤其要感谢北京第二外国语学院对组织法律英语大赛的大力支持,包括提供比赛场地,协助组织比赛,提供经费支持等。

作为组委会牵头人,我衷心期望全国高校法律英语大赛越办越好,越办水平越高,能真正起到推动我国高校法律英语学习,提高学生用英语表达法律观点的能力——这正是我们以“用英语表达你的法律观点”为论文集名称的用意所在。从长远看,举办全国高校法律英语大赛,必将会推动我国法律英语教学和与国外法学界进行交流沟通的能力,提高我国大学生和研究生的法律英语水平,进而在深层次上推进我国社会主义法治建设的进程。

作为主办方,我们衷心期望有关参赛选手和院校,对我们的比赛组织工作提出宝贵的意见和建议,以便我们不断地改进和提高举办法律英语大赛的水平,把全国高校法律英语大赛办得越来越好!

编完此书,撰写此前言之际,我正在美国美丽的宜居城市之一——加利福尼亚州洛杉矶市克莱蒙大学城作访问学者。望着窗外明媚的阳光、漂亮的圣诞树和其他美丽的圣诞装饰,如释重负般地能在今天把这本书稿发给出版社田编辑,心情格外地舒畅。想到前些日子驾车前往旧金山考察斯坦福大学法学院、加州大学洛杉矶分校(UCLA)法学院等西部著名院校,在旧金山市拜访著名旅游法专家、世界旅游法组织(IFTTA)副主席、阿诺利克律师事务所(Anolik Law Office)主任亚历山大·阿诺利克(Dr. Alexander Anolik)博士,特别地感到掌握法律英语的重要性。当你能用较为流利的英语与外国学者讨论法律问题,进行较为深入的学术交流之时,那种愉悦和快感真是难以言表。

杨富斌

2009年12月18日

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STUDY ON THE LEGALITY AND COMPENSATION SYSTEM OF URBAN HOUSE DEMOLITION IN CHINA

By Liu Peipei

East China University of Political Science and Law

Abstract: Thanks to the rapid and sustainable development of economy as well as the urbanization, China has witnessed profound change. At the same time, the demolition has come along with the process of city restructure and planning. The essence of urban house demolition is just a forced contract between government and households based on the state power. Dissatisfaction and doubts are produced by households about compensation principle, scope, and standard because of the legal loophole. So it's necessary to do studies on the legality and compensation system of this issue and present legislative proposals focus on the realistic problems. The author conducts a project selecting Longyan city in Fujian province as experimental unit and do some research about the issue of urban house demolition. In addition, this study is supported and financed by ECUPL and Allen&Overy Law Firm.

Key words: urban house demolition, public benefit collection, public interest, Legality, compensation system, anomy and reconstruction, hearing and estimation system

A. Introduction

As a result of modernization and urbanization, the demolition of old-styled houses has been unavoidable. Since 1980s, China has entered into a period of city expanding and massive redevelopment of old districts with an increasing number of dilapidated houses being torn down for modern houses and the incredible need for building and upgrading modern cities. However, for all sorts of reasons, the compensation for demolition is not officially regulated and lacks

criteria system Dissatisfaction and doubts are produced by households relocated about compensation principle, scope, and standard because of the legal loophole. As a postgraduate student as well as the president of Jurisprudential association of Youth which is one of best association in our university, I feel a real sense that I should undertake the guarantee task of people's interests as my responsibilities, so I conducted a project focus on the issue of demolition. Our research group stepped into an old district in Fujian province and did the project by means of various methods including field trip, questionnaire survey, face-to-face interviews, consultation with the local government and the parties concerned, providing legal aid to the households who suffered damage due to demolition and so on in order to obtain an in-depth knowledge of the demolition issues, taking what we have learned into practice and turning in the research report and advice to the local government, ultimately helping the interested person in the old district and making some contribution to the common weal projects.

B. Statutory Background

In accordance with the principle of the ownership being separated from the right to the use of the land, the land belongs to the state which can't make full use of it for development and construction. So the state established the system whereby the right to the use of the state-owned land in the urban areas may be assigned and transferred in order to achieve the maximum extent of allocating resources effectively and reform the system of using the State-owned land in the urban areas, rationally develop, utilize and manage the land, strengthen land administration and promote urban construction and economic development. Any company, enterprise, other organization and individual within or outside the People's Republic of China may, unless otherwise provided by law, obtain the right to the use of the land and engage in land development, utilization and management in accordance with Chinese related laws and provisions. Since a considerable portion of the right to the use of the land closely linked to the house on it, the country established the house demolition system besides the land expropriation system based on the consideration of ownership and the right to subsistence of households when the land is needed by the country because of construction. Urban house demolition is an issue widely concerning laws and regulations, the function of the government, public rights and so on, but the issues mentioned in the introduction above has contributed to the threat of the

stability of society and relations between the citizens and the local government and has brought about conflicts, which are gradually being intensified. As it shows by the survey we have done, up to 69% of the related households say they are will to be relocated provided they get reasonable compensation; slightly over 16% of the interviewees put it that they will cooperate with the government since it is contributing to the country. Only a small fraction of people are determined to stay and refuse to be relocated (5%). A proportion of 10% show their hopelessness that they can do nothing if the government is to carry out the demolition project. When asked about the plan after demolition, about 63% of interviewees are full of confidence of being better life, while 37% of interviewees worried about the future life and the most important factors they were anxious are the scope and standard of compensation. So how to safeguard the legal rights of the households relocated due to demolition and improve the relation between the government and local people in terms of sustained economy growth and future development of the city have great important significant to theoretical and practical circles.

C. Investigation & Analysis

1. The Foundation and Premise of Urban House Demolition and Its Current Situation

1.1 Public Benefit Collection of Real Estate: the Nature of Urban House Demolition

The Article 22 of the Amendment to the Constitution of PRC passed in 2004 rules that *the state may, for the public interest, expropriate or take over private property of citizens for public use, and pay compensation in accordance with the law*, which is the first provision of Chinese Constitution on the issue of public benefit collection. Similar legislation can be found in *Article 42 of Real Right Law of the People's Republic of China*, "*In order to meet the demands of public interests, it is allowed to requisition lands owned collectively, premises owned by entities and individuals or other realties according to the statutory power limit and procedures. When requisitioning the premises owned by entities and individuals or other realties, it is required to compensate for demolishment and relocation in accordance with law and protect the lawful rights and interests of the owners of the requisitioned realties; when requisitioning the individuals*

residential houses, it is required to guarantee the housing conditions of the owners of the requisitioned houses. ”

Notwithstanding, expropriation is the reflection of posing certain restrictions to the protection and execution of the private rights, it must be carried out for the public interest and should be restricted within certain range and certain basis in accordance with the law above, what's more, compensation system is also demanded. However, the provisions are of principle and a lot of problems unsolved remains in reality although there is really a progress compared with the original situation that there is no distinct divide between public expropriation and commercial expropriation, besides, urban house demolition is excluded from the scope of statutory public expropriation.

1. 2 The Criteria of Public Interest Can Be Formulated with the Perspective of Procedural and Substantive Law

Expropriation which lack of public interest is a kind of violation to constitution; moreover, it can't be seen in accordance with constitution even if compensation is paid, so it's important to give exact definition to public interest.^① However, there is no law giving certain concept about “public interest”, 68.2% of interviewees think the demolition exists around them aims at the public interest, while the remaining 31.8% of interviewees have qualified opinion about this by our survey. Therefore, how to define the public interest is the key to the premise of demolition. It is well known by Kelsen school on behalf of positivism that only legalized the state's purpose can define the concept of public interest whose value appears after it is admitted by the state.^② In the light of Germany classical expropriation theory, there must be public affairs existing in the activity of public benefit collection, such as hospital, school, hydraulic engineering and so on and the ownership of the expropriation's object should be transferred to public affairs when the expropriation is done.^③ It is believed by the author that we should take the related factors such as political, economic, social and cultural into consideration and use a number of substantive and procedural provisions to prevent the state from infringing private right by

① Li Lei, Simple discussion about the deficiency of expropriation system of constitution, *Journal of Sun Yatsen University (Social Science Edition)*, Vol. 2, 2002.

② Chen Xin-min, *The basic theory of Germany public law (volume 1)*, Shandong People Press, 2001, p. 186.

③ Wang Ke-wen, *Research on the legal issues of urban demolition*, Law Press China, 2007, p. 18.

misuse the concept of the public interest.

1.2.1 Substantive Criteria Can Be Presented with Material Things

From the substantive aspect, as pointed out by Scottish philosophy David Hume in his works *An Enquiry concerning the Principles of Morals*, the public interest must be shown with material things otherwise it will be something fictitious.^① The characteristics of public goods provide an excellent reference standard for determining the authenticity of the public interest. Public goods whose goal is to meet the basic needs of society have a strong feature of public and non-profit, which appear non-competitive, repeated consumption, commonality and universality in the consumption. It's not difficult to find that if a project of demolition has the feature of "non-competitive", "repeated consumption" and so on, plus the ultimate goal is to satisfy overall development needs of the people and the state, we should admit it has the nature of public interest although some additional non-public benefits achieved in the implementation of public interest simultaneously.

1.2.2 Hearing and Transparency Are Demanded by Procedure

From the other aspect of procedure, since public interest consistent with the entity standard may be damaged individuals' benefit because of violation of procedural justice, the authority possessed binding force as well as specific confirmation procedure are indispensable in the process of conforming public interest. Public participation and public interest confirmation reflected in both the legislating and implementation process are required to set up in order to judge the nature of a certain house demolition project. For one hand, the government and the related bureau should open ears to the public, for instance, holding hearing is a good way to guarantee the smooth way for the public to voice themselves and there is no doubt it's contributing to the smooth implementation. On the other hand, the government should bears the burden to keep transparency during each process to the public, that is to say, the duty of disclosure can make sure more people are aware of what the government is doing while public hearings can never include all people with their administrative region.

① David Hume as author, Zeng Xiao-ping as interpreter, *An Enquiry concerning the Principles of Morals*, The Commercial Press, 2002, p. 45.