

Subjective Aspects in the Process of Administrative Penalty

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Abstract—In the process of administrative penalty, the subjective aspect of the administrative counterpart is firstly the constitutional element of the administrative law-breaking act and secondly the consideration of the penalty. For the latter, the judicial practice has formed a unified, while the former has obvious controversy. The law seldom directly stipulates the subjective state and the subjective state after the explanation is still not clear, which will, to a certain extent, cause confusion in judicial practice. However, the “Administrative penalty Law” does not exclude the subjective aspect of the administrative counterpart status of the constituent elements, From the perspective of “the principle of combination of punishment and education” and “the linkage between administrative penalty and criminal penalty”, it can support the status of the subjective constituent elements in the administrative penalty established in Article 3 of the Law.

Keywords—Administrative, penalty, subjective, constituent requirement, legal explanation

I. INTRODUCTION

Compared to the criminal law having clearly defined the status of the subjective aspects of the Tatbestand and Rechtsfolge, administrative law for the subjective position becomes a little obscure. The criminal law considers that the subjective aspect of the crime is conducive to determining the crime and the conviction is reflected in the distinction between crime and non-crime and the boundary between this crime and its crime. The sentencing is reflected in the correct application of different legal punishments[1]. Administrative law does not form a unified view of the subjective aspect of administrative counterparts. Some scholars believe that the application of administrative penalties require subjective fault conditions for offenders[2][3]. On this basis, it should also be based on the principle of fault liability. In a few cases, such as industrial disaster, environmental pollution, and product liability, no fault liability should be applied[4]. However, some scholars believe that the application of administrative penalties does not consider subjective status[5]-[7]. The author also found that there are disputes in judicial practice through the search of cases.

II. SUBJECTIVE ASPECTS OF ADMINISTRATIVE PENALTY IN PRACTICE

The author uses the Pkulaw.cn for retrieval, limiting search criteria to administrative cases and full-text keywords subjective fault to search. As of July 7, 2017, 319 cases meet the preliminary requirements. analyzing of the reply of the administrative and the court’s argument, the following rule can be found: the

subjective of the administrative counterpart exerts two levels of influence on the administrative penalty made by the administrative agency. Firstly, it influences the tatbestand of administrative penalty; secondly it affects administrative penalty’s Rechtsfolge.

A. Subjective is a Consideration of the Severity of Administrative Penalties

The case of China Social Science Press and Xicheng Branch of Beijing Administration[8], the court of second instance found the West Branch Trade and Industry had wrongly determined the circumstances of the infringement. According to the specific circumstances of the case and the subjective faults and consequences, a fine of 357,560.53 yuan for the social sciences publishing house is obviously unfair and shall be revoked. In this case, the legal basis is article 52 of the Regulations on the Implementation of the Trademark Law. The specific amount is determined on the basis of the circumstances of the case. The fault of the social science publishing house is one of them. The same view also appeared in the trademark violation infringement case of Suzhou Dingsheng Food Co., Ltd. and Suzhou City Bureau of Industry and Commerce[9].

The case of Mengdachi Company and Environmental Protection Bureau of Suzhou Industrial Park[10] Embodies the influence of administrative counterparts' faults on the exercise of discretionary powers for administrative penalty. The court held that the plaintiff’s subjective fault was relatively large, and the defendant’s penalty against the plaintiff was not improper within the statutory penalties.

From the above cases, it can be seen that when an administrative agency makes an administrative penalty, it considers the subjective aspect as the benchmark for punishment and has its legal and regulatory basis. This is not only reflected in the Article 4 of the Administrative penalty Law on the determination of the principle of suiting penalty to fault, in the specific administrative field, there are corresponding regulations. For example, Article 5 of the Public Security Administration Punishment Law and article 63 of the Trademark Law.

B. Whether Subjective Fault is the Tatbestand of Administrative Penalty

Compared with the consistency of the impact of "quantity penalty", whether the application of administrative penalty should require administrative subjective fault has great controversy.

In the case of the Linzhou Housing and Urban-Rural Development Bureau and Guo Qingji[11], Linzhou City Housing and Urban-Rural Construction Bureau applied to the court for enforcement. The court rejected his request, because he didn't identified administrative counterpart subjective fault. In the Yang Jinzhu and Urumqi Urban Passenger Transportation Management Company Traffic Administrative Case[12]. The court found no evidence to prove subjective fault, then the court canceled the administrative penalty. The second instance court upheld this view.

In the field of food and drug safety there were two opposing cases. In the case of Qiao Bin and Guangzhou City Luogang District Food and Drug Administration [13], The first-instance court held that Riweijian Co., Ltd. actively reported to the relevant departments that it was unable to obtain the food production license corresponding to the production. But in the case of Zhejiang Quanjin Pharmaceutical Co., Ltd. and Hangzhou Health Bureau[14], there is different opinion. The Hangzhou Municipal Health Bureau argued that subjective fault is not a constituent factor of administrative penalty. The court and the Hangzhou Health Bureau have a consistent view.

There were other cases that administrative agency claimed subjective fault was not a constituent factor of administrative penalty: the case of Qiu Chaoguang and Huangpu Branch of Shanghai Public Security Bureau[15]; the case of Ma Mouyue and Jinan City Traffic Police[16]; the case of ** industry (Shanghai) Co., Ltd. and Shanghai ** human resources and social security bureau[17].

After the above analysis, not only it is controversial whether the subject of an administrative penalty is essential in the same area, but also in a case where the court and the administrative agency have not the same opinion. Of course, the view that affects the magnitude of administrative penalties is uniform. Even if denying subjective fault is Tatbestand, it also recognizes its influence on the magnitude of punishment. For example, in the case of Henan Zhenglong Food Co., Ltd. and State Intellectual Property Office[18], the court held that the subjective fault of the perpetrator was not a condition for determining the infringement of intellectual property rights, and its only impact was the liability for compensation. As for administrative agency, in the case of Hubei Jiuzhou International Travel Service Co., Ltd. and Wuhan Tourism Bureau[19], Wuhan Tourism Bureau believed that from a subjective perspective, administrative penalty is not subject to subjective fault, and subjective fault is only a factor in determining the extent of the penalty. The existing problem is whether the subjective aspect of the administrative counterpart is a constituent element of administrative illegal acts.

III. SUBJECTIVE IN LAW

To solve whether the subjective aspect is the Tatbestand of administrative penalty, we should start with the legal norms. As administrative penalty involves restrictions on the rights of citizens, they often adopt the principle of prudence, that is, without the provisions of the law, administrative agency may not impose administrative penalty[20].

The legislative model of China's administrative penalty has not adopted a codification model. Instead, the Administrative

Penalty Law is a general program, and the specific content is scattered among various laws, regulations and rules. Chapter 2 of the Administrative penalty Act provides that. This indicates that the basis for the administrative penalty is between the law and the regulation, and it complies with the principle of statutory punishment. However, the existence of blanktatbestand has created a gap in the closed area for the creation of abstract elements[21].

Taking the road traffic safety in Hangzhou as an example. Besides Law of The People's Republic Of China on Administrative Penalty, the other specifications are Road Traffic Safety Law of the People's Republic of China, Regulation on the Implementation of the Road Traffic Safety Law of the People's Republic of China, Implementation of the Road Traffic Safety Law of the People's Republic of China Approach in Zhejiang Province, Hangzhou Road Safety Management Regulations. In the above specifications, the blanktatbestand is having not Motor Vehicle Third Party Liability Insurance and Vehicles failing to meet national safety technical standard. it clearly points out the specific rules that can supplement the blanktatbestand, and meets the requirements of clarity, it does not violate the statutory principle of punishment, enabling people to predict. Therefore, according to the principle of lower-level laws does not conflict with higher-level law and the second chapter of the Administrative Penalty Law, the administrative penalties for traffic violations have been listed in the above-mentioned laws and other norms, including Tatbestand and Rechtsfolge. Among them, the description of the subjective status of administrative counterparts in legal requirements can be divided into three categories.

The first category explicitly states the subjective states of the administrative counterparts. For example, Road Traffic Safety Law of the People's Republic of China: intentionally shelters, smears or does not comply with the provisions to install a motor vehicle plate, intentionally damages, moves or alters traffic facilities; Road Traffic Safety Law of the People's Republic of China Approach in Zhejiang Province: intentionally shelters, smears a motor vehicle plate; Hangzhou Road Safety Management Regulations: intentionally shelters, smears a motor vehicle plate. It can be seen that there are fewer such clauses and all of them are clearly "intentional". The second category is to determine the relative subjective status through interpretation. Some words in the specification that have a specific subjective state. For example, Road Traffic Safety Law of the People's Republic of China: drives a motor vehicle after drinking alcohol, anyone forges, alters or uses forged or altered motor vehicle registration certificate, plate, vehicle license or driving license, forces a motor vehicle driver to violate the road traffic safety laws or regulations or the requirements on safe driving of motor vehicles to drive a motor vehicle. Regulation on the Implementation of the Road Traffic Safety Law of the People's Republic of China: anyone who obtains the registration of motor vehicles or a driving license by unlawful means such as fraud or bribery. In addition, the law also refers to the subjective state of the person through the form of supplementary explanations. For example, Road Traffic Safety Law of the People's Republic of China violates the provisions on traffic control to pass by force, without listening to the dissuasion. The "without listening to the dissuasion" here is to make it clear that the subjective should be

intentional. The third category indefinitely states the subjective states of the administrative counterparts. Any behavior that is not the same as the above two cases can be considered as an indefinite subjective status. For example, Road Traffic Safety Law of the People's Republic of China: any assembled motor vehicle or any motor vehicle which has reached the standards for being discarded as unserviceable is driven on road, delivering a motor vehicle to be driven by a person who has no motor vehicle driving license or whose motor vehicle driving license is revoked or temporarily seized. Regulation on the Implementation of the Road Traffic Safety Law of the People's Republic of China: the vehicle that he is driving does not match the type of vehicle he is allow to drive in the driving certificate. Implementation of the Road Traffic Safety Law of the People's Republic of China Approach in Zhejiang Province: does not follow the traffic signal. It should be said that the vast majority of subjective states fall into this category, and the reasons behind the actions are endless in legislation and law enforcement.

It can be found that there is very little description of the subjective state of the administrative counterpart. Therefore, some scholars believe that there is no need to consider faults in administrative penalties. Ideally, legal norms require a complete description of the basic characteristics of illegal behavior. The reality is quite the opposite, but what is omitted does not mean that it is not an essential element. For example, *Rechtswidrigkeit* and *Vorwerfbarkeit* are often the objects that have been omitted. However, in the absence of *Rechtswidrigkeit* and *Vorwerfbarkeit*, we still can not impose administrative penalties on relatives[22]. Therefore, the subjective state is not specified in the specific legal provisions and it cannot be taken for granted that it will not be considered.

IV. SUBJECTIVE ASPECT AS THE PATH CHOICE OF ADMINISTRATIVE PENALTIES

If there is a principled legal provision, the omission of specific provisions cannot negate this. The principled legal provisions should exist in the Administrative penalty Law. As a result, administrative penalty constitutes important elements, which can be found in Articles 1 and 3 of the Administrative penalty Law concerning object and objective provision, and Articles 25 and 26 regarding subject[23]. Although there are no subjective regulations, the subjective requirements can be obtained through interpretation. Article 3 of the Law of The People's Republic of China provided that where administrative penalty needs to be imposed on citizens, legal persons or other organizations for their violations of the order of administration, it shall be prescribed by laws, rules or regulations pursuant to this Law and imposed by administrative organs in compliance with the procedure prescribed by this Law. It can be thought of as a general standard: subject, objective requirement, object, subjective state [24]. For subjective state, if the law stipulates "the violation of administrative order, it shall be given an administrative penalty, according to ...", then cannot explain the subjective state. The violation of administrative order refers to the definiteness, and the administrative penalty should be given to *Rechtswidrigkeit* and *Vorwerfbarkeit*[25]. Meanwhile, this is similar to the expression of Article 13 of the Criminal Law. It means that subjective factors can block illegality, and no-fault administrative counterparts should not be subject to administrative penalty.

The above understanding of the elements of administrative penalty. Inward, aligned with the principles of punishment and education stipulated in Article 5 of the Administrative penalty Law; outward, it is consistent with the connection mechanism of administrative penalties and criminal penalty.

A. *Combination of Punishment and Education*

The Article 5 of The People's Republic of China on Administrative Penalty provided that in imposing administrative penalty and setting to rights illegal acts, penalty shall be combined with education, so that citizens, legal persons and other organizations shall become aware of the importance of observing law. This article is called the combination of punishment and education. It embodies the two functions of administrative penalty: punishment and education. In order to achieve the purpose to deter and prevent illegal, should be given to education when punished[26].

On the one hand, the administrative penalty is a subjective vicious punishment for person. It is reasonable to punish this. If the perpetrator is not subjectively at fault, it indicates that the perpetrator has no bad intention and it is inappropriate to apply administrative penalties to him. As for the no-fault liability in civil law, not for punishment. The significance of applying the principle of no-fault liability lies in aggravating the actor's responsibilities, making it easier for the infringer's claim for damage compensation to be realized, and the right to be damaged to receive timely relief[27]. On the other hand, administrative penalties, as a kind of behavior with a punitive attribute, punish administrative counterparts, not only for the suppression and punishment of illegal actions, but also for the education of administrative counterparts.

If the perpetrator is not at fault, the application of administrative penalty will only play the role of punishment. Taking administrative subjective crime existence as one of the important elements of administrative violations can increase the administrative counterpart's acceptability of administrative penalty. Because sin is the psychological basis for administrative counterparts to accept administrative penalty; without such a psychological basis, administrative penalty is difficult to produce the expected legal effect[28]. Proverbs goes: "Responsibility, penalty." Punishment for violation of administrative law should be based on the behavior of people have subjective criticism and accountability. If the perpetrator is not subjectively or negligent in his subjective manner, he should not be blameworthy, and he will not be punished[29]. An innocent person to take responsibility, fails to reflect the educational function of administrative penalty.

B. *Convergence of Administrative Penalties and Penalties*

Convergence of administrative penalties and criminal penalty, in the big aspect, is the relationship between administrative illegality and crime. There is a controversy over the relationship between administrative illegality and crimes. Some people think that the relationship is quantitative, others think it is a qualitative relationship. The division of statutory offenders (also called administrative offenders) and natural offenders in criminal law is regarded as the main point of view of the qualitative difference. The statutory offenders are guilty of violations of orders or prohibitions in administrative regulations and are not guilty of social ethics. Natural crimes are

censured for their moral and ethical violation, it is not necessary to comply with the law[30]. It can be seen that the division between the two is mainly based on the relationship with ethics. However, it cannot be overlooked that ethical itself is vicissitude, its definition of connotation will be trapped in an insurmountable predicament, and it is hard to say that the act of being subject to administrative penalty does not violate ethics. For example, Article 43 of the Public Security Administration Punishment provides for administrative penalties for beating other people and deliberately injuring another person's body. It should be said that the role of ethics is reflected in the impact of legislation and judicial decisions on legal consequences. For example, adding ethics to the considerations of social hazards. Therefore, the difference between administrative violations and crimes is "quantity". There is no essential difference between administrative penalties and penalties, and it is the difference in degree of social harm. On the one hand, when "constitute a crime, criminal responsibility is pursued according to law", the administrative wrongful act with greater social harmfulness is stipulated as a crime, while other administrative illegal acts are subject to administrative penalty; on the other hand, in the current trend of non-penalization, converting the behavior that should have been punished by penalties into administrative penalties is a major channel.

V. CONCLUSIONS

After the above analysis, the conclusion of this paper is that during the process of administrative penalty, the subjective aspect of the administrative counterpart also has the status of the constituent elements. But it can't be ignored is that, compared with the criminal law, administrative law considerations of efficiency to be increased, to explore how administrative authorities constitute an administrative penalty can not be separated from practice and lack of maneuverability. The use of objective illegality to presume the subjective fault of the actor or don't consider the subjective fault at all, will greatly reduce the work pressure on the administrative agency, on the contrary it will cause arbitrary executive power. If the administrative legal theory does not emphasize the Tatbestand of administrative penalties, it may cause the administrative authorities to identify administrative penalties according to "needs"[31]. Therefore, using the principle of proportionality to find the balance between the two will be the next question the author will study.

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