

Study on the inheritance of illegality in non-security detention

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Abstract: *Due to the theory of public risk and the need for social governance, non-security detention penalties for referral to public security organs have been stipulated in areas such as environmental protection, food and network security. However, in the legislation and law enforcement practice only pay attention to the final legal effect of various forms of behaviours, to the behavior of administrative subjects in the administrative process of the intrinsic relevance of the lack of sufficient attention. In the context of the modernization of the administrative rule of law for the combination of administrative subjects of law enforcement mode requirements are increasingly strict, whether the administrative acts have illegal inheritance relationship should also get the attention of the academic community.*

Keywords: *non-security detention; law enforcement structures; transfer; procedural controls*

1. Combination of administrative acts articulated by transfer - non-security detention

1.1. Whether non-security detention should be treated as a combination of administrative acts

Administrative detention is a severe administrative punishment that is used as a means of restricting personal freedom for a short period of time. In the field of public order and security, it is mainly reflected in the field of maintaining social order and security, such as disturbing public order, jeopardizing public security, infringing on personal property, and jeopardizing social management, etc. Previously, some scholars also believed that administrative detention is security detention.^[1] But with the continuous improvement of the construction of the rule of law and the rise of public risk control theory, in the field of non-security legislation has also appeared in a number of cases should be sentenced to administrative detention. Unlike the emphasis on maintaining the stability of social order, non-security detention focuses on preventing violations of the law, restricting the malignant expansion of individual rights and adopting a certain degree of restriction and regulation of individual rights and freedoms. Although both non-security detention and security detention belong to the same category of administrative detention, there are significant differences between the two in terms of the structure and nature of law enforcement. Since non-security detention is mainly stipulated in the field of environment, food, drugs and network security, its purpose is not only to maintain law and order, but mainly to prevent and limit the transfer and virtualization of the subject of responsibility, and the target of punishment is not physically dangerous, in terms of the subject of law enforcement, the existing legal provisions of the expression of the "... transfer the case to the public security organs above the county level."^[2] Specific law enforcement structures are often expressed as a combination of law enforcement modes in which other administrative subjects impose administrative penalties, and where the administrative relative under the legal relationship of administrative penalties refuses to carry out the penalty decision, the administrative subject transfers the case to the public security authorities for administrative detention in accordance with this Law. The combination of administrative acts formed on the basis of internal referrals between administrative subjects within the framework of the same legal basis may have an alienating effect on the structure of law enforcement, resulting in the overriding of the independent value of non-security detention.

Since administrative acts are carried out by administrative subjects, the adjustment of administrative organs often receives more attention than the issue of combinations of administrative acts.^[3] Non-political detention, which constitutes a combination of administrative acts, is a causal combination in terms of law enforcement structure. That is to say, the specific administrative acts are connected to each other by a causal relationship to form a combination of administrative acts, with the preceding administrative act occurring as a cause and the following administrative act appearing as a result.^[4] That is, the former administrative subject to make administrative penalty decision as the cause, the

administrative relative refuses to implement the latter administrative subject to make detention punishment as the result, if there is no former administrative penalty, there is no later administrative detention, constituting a causal connection. The law enforcement structure of the combination of acts should be examined with attention to both the technical composition of the administrative act and its humanistic composition. Complex combinations of law enforcement actions, although the prior protection of the administrative relative is more adequate, but because it involves multiple administrative subjects, each administrative subject and the administrative relative between the administrative legal relationship, correcting the administrative subject of the illegal behavior of the legal basis is also correspondingly increased.

1.2. Differences in transfer between non-security detention and the "linkage of justice"

Non-security detention, as a safeguard for refusal to carry out general administrative penalties, constitutes an integral administrative act rather than an independent security detention, and the transfer procedure, as a connecting factor in this combination of administrative acts, is different from the general transfer of administrative offences suspected of having committed offences under the "convergence of the two laws" [5-6]. That is to say, the successive administrative behavior in practice the articulation problem as well as the administrative relative, the protection of the rights of the people concerned is becoming more and more prominent. In the non-security field, transfer and detention are the core links of the law enforcement structure, but the administrative process control aspects of transfer and detention discretion are rarely neglected. In this paper, we will look at the procedural impact of the transfer process in the administrative process and the subsequent substantive problems of detention discretion, and propose measures to optimize the structural impact of the transfer process and detention discretion in the administrative process.

2. Clarification of succession to illegality in non-security detention

2.1. Succession to illegality in the administrative process

Multi-stage administrative procedures and plural administrative activities constitute a combination of administrative gradually become one of the normal administrative means, in the judicial review of the subsequent acts can be judged together with the legality of the former acts has become a difficult problem in the modern administrative remedies procedures. [6] Due to the lack of guidance of administrative process theory in the domestic administrative law system, multi-stage administration in the field of administrative licensing has been externalized into several independent administrative acts in the system design, [7] which has become the starting point and hot spot for the discussion of the theory of illegality inheritance in our country, while the question of whether or not there is a "inheritance of illegality" between the former administrative penalty and the subsequent administrative detention in the field of administrative penalty has been little studied. The research on the issue of "inheritance of illegality" is very little. In the non-security detention multi-administrative subject, multi-stage combination of administrative mode as a relief theory of its applicability and the scope of application of the administrative law enforcement process, has become one of the administrative behavior between the difficulties to be clarified.

Based on the character of the public force of the validity of an administrative act, it is required that when an administrative subject makes an administrative act subject to another administrative act, it should respect its validity at the legal level, and should not arbitrarily deny or turn a blind eye to the existence of the elements of unlawfulness, but rather should be brought to the attention of the competent authorities. [8] In the non-security detention of such administrative behavior combination mode of law enforcement structure, other administrative subjects made by the punishment decision in the public security organs before the detention decision, the former whether the existence of elements of unlawfulness is not the scope of the latter's review, the latter also do not have the right to its legality of the review, that is, in the successive acts of the illegal inheritance of our country adopts the illegality of the truncation of the said. ①Administrative behavior illegal succession theory in China's administrative law system of theoretical research started late, but the practical application of justice has long given

① The "illegality truncation" refers to the illegality of the prior act only in the stage of the act itself can not be inherited by the subsequent act. See Zhu Mang, "administrative behavior illegality inheritance" of the performance and its scope and the relationship between the statutory norms angle of exploration - case judgment and statutory norms angle of exploration [J]. China Jurisprudence, 2010(03):181.

response, such as the supreme people's court announced the "shen xi xian et al. v. beijing municipal planning commission case",^[9] as well as in the "rice monopoly heap company v. The criteria for judging the succession of illegality were summarized in the case of the administrative reconsideration decision of the Ministry of Land and Resources."^[10] Illegal inheritance theory is divided into broad, narrow and the narrowest in terms of the differences in the composition of the elements, of which the former requires that the prior act is actionable, while the latter two on the contrary requires that the prior act is not actionable, resulting in a different understanding of the landing point is the necessity to intervene in the theory of illegal inheritance. Our scholars for illegal inheritance theory of research reference to Germany, Japan, but our country in the theory of the effectiveness of administrative behavior and administrative relief procedures have their own characteristics of the design of the system, can not be copied from Germany and Japan's academic conclusions.^[11] For example, the provisions of Article 18 of^① the Referral Measures have skillfully avoided the question of whether there is inheritance of illegality, and the provision requires that when the administrative relative is dissatisfied with the administrative act and requests for relief, the organ that made the former administrative act shall assist and cooperate with the organ that made the latter administrative act to do a good job in the administrative reconsideration and the administrative response to the lawsuit. From the static analysis of the actual law system and provisions, the first for the status of the organ in the two relief procedures are consistent, are to assist with the latter act of the organ, but in the administrative reconsideration procedure after the administrative organs of the higher authorities do not have the right to review the former administrative organs, which is also from the side of the potential intention of the legislation does not first for the legitimacy as a judicial review of the latter act of the contents of the content. The administrative bodies that have performed successive administrative acts are not subjects of review on an equal footing, and their administrative acts are not identical in terms of the content of their review by the judicial authorities, but the statutory obligation to assist the authority that preceded them recognizes the relevance of the content of the penalties that existed between the two.

A differentiated understanding of the contestability of prior acts is instructive in recognizing the linkage between administrative acts before and after the transfer of non-security detention. The general administrative act of punishment before the transfer and the administrative act of punishment after the transfer constitute not only a procedural linkage, but also a prerequisite relationship in terms of elements. That is, the content of the effect of the prior act is one of the constituent elements of the subsequent act, and the judgment of whether the subsequent act is lawful or unlawful is a judgment of whether it conforms to the legal norms regulating the subsequent act.^[12] Based on the legislative purpose of non-security detention, there is no direct correlation between the content of the detention and the goal of regulation.^[13] Detention punishment as a safeguard measure of former administrative punishment is a relationship between means and ends. Therefore, it is necessary to review the legality of the former administrative punishment as one of the judgment criteria in the constitutive elements of non-security detention as a subsequent act.

2.2. Legality of the benchmarks for the imposition of custodial penalties

Administrative discretion is an important part of the theory of administrative behavior in traditional administrative law studies.^[14] However, in the case of non-security detention, the legislative authority and legal application of detention discretionary standards are not clear. The administrative process in the broad sense includes administrative legislative activities, and in the realization of legal norms, without departmental regulations jointly issued by administrative departments, it is difficult to clarify the law enforcement competence of each administrative organ in the administrative process. For example, Article 41 of the Measures for the Administrative Punishment of the Ecological Environment (hereinafter referred to as the "Measures for Punishment") stipulates the benchmarks for punishment and discretion^②,

^① Article 18 of the Measures for Transfer: If the person concerned applies for administrative reconsideration or files an administrative lawsuit against the penalty of administrative detention, the department to which the case has been transferred shall assist in cooperating with the public security organs in the work related to administrative reconsideration and administrative litigation.

^② Article 41 of the Measures for the Imposition of Penalties: The exercise of discretionary ecological and environmental administrative penalties shall be consistent with the purpose of the legislation and take into comprehensive consideration the following circumstances: (a) the environmental pollution, ecological damage and social impact caused by the violation; (b) the degree of subjective fault of the party concerned; (c) the specific manner or means of the violation; (d) the duration of the violation; (e) the specific object of the violation; (f) whether the party is a first-time offender or a repeat offender; (g) the attitude of the party to correcting the violation and the corrective measures taken and their effects. (vi) whether the party concerned is a first-time offender or a repeat offender; (vii) the attitude of the party concerned in correcting the offending behavior and the corrective measures taken and their effects. Where the circumstances of the same type of offense are the same or similar, and the degree of social harm is comparable, the type and magnitude of the administrative penalty shall be comparable.

as well as the sixth type of punishment stipulated in Article 8, "administrative detention", but the administrative subject of the decision to administratively detain is the public security organ, which is the subject of the latter action, so should it carry out the administrative law enforcement activities in accordance with the rules of another department separately formulated regulations, "Measures for Punishment", and the administrative authority of each administrative organ in the administrative process. Should the administrative law enforcement activities be carried out in accordance with the criteria for the imposition of penalties set out in the Measures for the Imposition of Penalties, a separate departmental regulation? At the same time, in accordance with the provisions of article 24 of the Administrative Punishments Law^①, administrative organs have the right to formulate discretionary standards for administrative punishments, and the public security organs, as the decision-making organs for non-security detention, have the right to make separate provisions for the discretionary standards in accordance with the law, and the intersection of the legislative competencies presented at this point will inevitably lead to a fragmentation of the totality of administrative activities. At the same time, since the regulations formulated by the former authorities contain the content of the latter, it is also necessary to clarify whether the latter authorities, as the recipients of the case files, have the right to make administrative activities, including administrative legislation, in respect of the transfer procedure.

The lack of clarity as to the legality of the discretionary basis also reflects the problem of the relevance of the preceding and following acts.

3. Application of non-security detention to the doctrine of inheritance of illegality

3.1. Clarification of the substantive legal basis for discretionary detention benchmarks

In terms of substantive control over detention discretion, the first step should be to clarify the criteria for detention discretion that the public security authorities need to rely on when making detention decisions in referred cases. Legislatively, the various departments of the State Council may jointly formulate departmental regulations to clarify the various details involved in multidepartmental law enforcement, or else the Administrative Punishments Law should be given precedence over departmental regulations at the legal level, recognizing that it is up to the detaining authority to formulate the discretionary benchmarks. Or at least should be responded to in the environmental administrative detention in the detention of discretion whether to apply the environmental penalties stipulated in the Environmental Penalties Measures environmental penalties benchmarks, in order to safeguard the unity of the national system of the rule of law and the integrity of the administrative subject of the administrative activities. Benchmark system is a kind of regulation of administrative discretion, is the inevitable result of the increasing level of awareness and the trend of the rule of law in society.^[15] From the perspective of the progress of realizing the rule of law, the practice of discretionary benchmarks should undoubtedly be further expanded in the administrative field and administrative matters, and become a focus of the government's rule of law construction.^[16] In terms of the control of penalty discretion, although the benchmark system has framed the scope of discretion, the specific process of control is a technical issue. The establishment of discretionary benchmarks in the legislation presents the characteristics of the internalization of external behavior, that is, in the form of internal norms and then evolved into the need for legislation to the public.^[17] And punishment discretion since the evolution of the external behavior, it is necessary in accordance with the requirements of the external behavior of strict control, in the application of substantive law basis must be clear, clear, to avoid the degree of ambiguity.

3.2. Clarifying the role of the doctrine of inheritance of illegality in the administrative process

If the theory of inheritance of illegality is recognized in judicial proceedings, then its partial application to the process of administrative acts may be considered. Such as after the act of the organ to the former act of the lawfulness of the transfer of the procedure, not the former administrative penalty, although not have the right to change, but can be illegal inheritance on the grounds of not to make a decision on the penalty. As a theoretical support for two reasons, one of the so-called "public power" is not originally within the administrative act,^② is the actual law given by a specific organ in accordance with the legal procedures so as to exclude the effectiveness of its administrative act, through the adoption

^① Article 24 of the Administrative Penalties Law: Administrative organs may, in accordance with the law, formulate benchmarks for administrative penalties and standardize the exercise of administrative penalty discretion. The administrative penalty discretionary benchmarks shall be publicized to the community.

^② For example, article 38, paragraph 2, of the Administrative Penalties Law: If the violation of legal procedures constitutes a major and obvious violation of the law, the administrative penalty shall be invalid.

of the revocation of the legal system related to the deduction of the lawsuit, that is, a kind of institutional reflexive effect, also known as the "procedural law of the public".

The exploration of the theory of succession of illegality is conducive to the clarification of the correlation between the acts and the degree of correlation, which is the basis for the dynamic examination of the combination of administrative acts in the administrative process, and is also the key point that can make it possible to view the whole process. Therefore, the control of procedures in the administrative process should focus on the correlation of behavior as the object of investigation, so as to respond to the lawfulness problem arising from the discretionary benchmark. That is, relying on the theory of inheritance of illegality, the illegal elements of the former behavior as a review of the legality of the discretionary behavior, so that administrative discretion in the judicial review of certain constraints.

4. Conclusion

Administrative jurisprudence is closely related to the practice of the rule of law and the process of the rule of law in the country, and administrative penalties, as a key means of balancing the power of the State and the rights of its citizens, are one of the mainstays of the rule of law in administration, with strict control at the level of the law enforcement structure. Non-political detention as a combination of administrative behavior in the field of administrative penalties in the field of law enforcement mode, the penalty implementation stage and as a guarantee of implementation leads to the uniqueness of the degree of punishment jump, unlike administrative licensing in the behavior of a single type of combination or multi-stage law enforcement mode. Therefore, in the exploration of the penalty process should pay more attention to the behavior directly or indirectly affect the relative rights and obligations of the actual situation, not only to a comprehensive, integrated perspective on the procedural process of constraints, in the administrative behavior combination of law enforcement structure should also pay attention to the form of behavior and the dynamic correlation between the purpose of the administration.

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