

Application of administrative power and criminal investigation power of public security organs

XUGUANG ZHAO¹, ZIHENG PANG^{2*}

¹ML Supervisor, School of Humanities and Social Sciences, North China Electric Power University, Changping District, Beijing, China

²ML Candidate, School of Humanities and Social Sciences, North China Electric Power University, Changping District, Beijing, China

***Corresponding Author:** ZIHENG PANG, ML Candidate, School of Humanities and Social Sciences, North China Electric Power University, Changping District, Beijing, China

ABSTRACT

China's public security organs have the dual functions of administrative power and criminal investigation power. In reality, there are a variety of confusion between administrative coercive measures and criminal investigation measures. This paper makes a brief analysis based on the empirical research of scholars and the cases of "Fuzhou Chen brothers IP phone case" and "husband and wife watching yellow discs in Henan province" as examples. Then analyze the causes from the perspectives of subject, means of behavior, legal consequences and responsibility, summarize the effective ways for some scholars to solve this problem, and strengthen the external supervision and the internal control of police discretion.

Key Words: Administrative law enforcement, criminal investigation, police power, judicial supervision

INTRODUCTION

The nature and functions of public security organs

The earliest way to explore the nature of public security organs can be found in the People's Police Regulations of the People's Republic of China (hereinafter referred to as the People's Police Regulations) in 1957. Article 1 of the law stipulates that the people's police of the People's Republic of China belongs to the people, is one of the important tools of the people's democratic dictatorship, and is an armed state public security administrative force. The promulgation of the people's police law of the People's Republic of China in 1995 (hereinafter referred to as the People's Police Law) means the abolition of the people's police regulations. From the first draft to the last before the vote, the people's police law maintained the definition of the nature of the people's police as an armed public security administrative force and criminal justice force of the people's democratic dictatorship. However, because the people's police could not be characterized as an armed force, the article was finally not adopted.

The law does not describe its nature, but stipulates in Article 2 that the task of the people's police is to prevent, stop and punish

illegal and criminal activities. Article 2 of the Regulations on the Organization and Administration of public security organs stipulates that public security organs are an important tool of the people's democratic dictatorship, and the people's police are an armed national public security administrative force and criminal judicial force. It can be seen that there are obvious differences between the legislative organs (the National People's Congress and its Standing Committee) and the administrative organs (the State Council and the Ministry of Public Security) on the content and expression of the nature of public security organs, and there is the principle of priority of illegal law. The qualitative focus of different legal norms on public security organs is the determination of the nature of armed forces, which is the product of historical development and the reflection of national class and social attributes in different periods, and its nature has not changed.

In addition to the legal provisions, we should start from another path and explore its nature from the functions enjoyed by public security organs. The administrative power of public security organs shows the attribute of administrative power, but whether they enjoy the nature of criminal investigation power is the

focus of fierce debate in the academic circles. The mainstream views include the theory of administrative power, the theory of judicial power and the dualism or integration theory of administrative and judicial power, which has triggered extensive discussion in the academic circles on whether the police power has the judicial attribute. From the perspective of what should be, the police power of public security organs belongs to administrative power. However, from the perspective of reality, the dual attribute of police power exists objectively. How to switch roles and take reasonable and legal procedures and measures in the process of power operation is the focus that we should pay attention to, which is often difficult to control. In reality, there are some problems such as unclear exercise of the functions of public security organs and unclear boundaries.

Practical problems in the exercise of power by public security organs

Firstly, it should belong to the situation in which the public security organ exercises its administrative power. The public security organ makes an administrative act based on the administrative law enforcement function. If the administrative act causes the litigation of the administrative counterpart, the sued act belongs to an administrative case, and the court shall try it based on the provisions of the administrative procedure law. In practice, in order to evade responsibility or for the purpose of severely cracking down on illegal and criminal acts, the public security organ calls the implementation act a criminal investigation act. The non Actionability of criminal investigation affects the normal progress of administrative trial activities, and it is difficult to safeguard the legitimate rights and interests of the opposite party.

Take the "Fuzhou Chen brothers IP phone case", which is known as the "first lawsuit of China's Internet Affairs", as an example. This case caused a sensation at that time. It not only has the research value of the relationship between law making and social development, but also has the reflection meaning of the exercise of administrative power and criminal investigation power of public security organs. In the first instance, Fuzhou Mawei District People's court ruled that the act of Chen brothers using the Internet to start international long-distance telephone business violated the crime of illegal operation stipulated in the Criminal Law. The act of temporarily withholding money and

goods by Mawei branch of Fuzhou Public Security Bureau belongs to criminal investigation, rather than the illegal administrative act of abuse of power claimed by the plaintiff. The plaintiff refused and appealed. In the second instance of Fuzhou intermediate people's court, the judge creatively proposed that the appellant, the appellee and the court invite expert witnesses to testify in court, explained the IP phone from the technical and legal aspects, and finally decided that under the background of underdeveloped network technology and no specific system norms for IP phone in the country at that time, The behavior of the Chen brothers does not constitute the crime of illegal business operation.

Secondly, it should belong to the situation that the public security organ exercises the power of criminal investigation. In the initial investigation stage of criminal investigation, there are the following problems: due to the adoption of administrative coercive measures by convenience, a case should be filed but not filed, replace "criminal punishment" with "administrative punishment", evade the filing supervision and post review of the procuratorial organ, and the court expands the administrative jurisdiction, mistakenly attributes the criminal investigation act to a actionable administrative act, Interfere with criminal investigation power with administrative jurisdiction. The confusion between administrative acts and criminal investigation acts between the public security organs and the courts above, first, it reduces the prestige of the public power organs; The second is to make the guilty escape criminal prosecution, damage the interests of citizens, legal persons, social organizations and the state, and is not conducive to stabilizing social order.

Take Professor Weimin Zuo's Empirical Research on search measures as an example. The Criminal Procedure Law has made relevant provisions on search with and without license. With regard to search with a warrant, the production of a search warrant to the searched person is a prerequisite for search, which requires procedural written documents in order to exercise the search function strictly and carefully. However, the sample survey found that the search rate with a warrant was less than 10%. For search without a warrant, although there is no requirement for a search warrant, a search record must be made. However, the sample survey results do not show the situation of search without a license, which is obviously inconsistent with the current situation of search

in practice. However, if we believe the authenticity of the sample survey data, the serious lack of search warrants and search documents and the number of seized documents cannot be self-consistent. The only explanation is that there are other measures to replace the use of search measures in judicial practice. These measures include evidence checking, site inspection and evidence collection and withdrawal from the suspect or other evidence holders.

In conclusion, the act of searching in the name of inspection and replacing criminal coercive measures with administrative coercive measures confuse the scope of administrative power and criminal investigation power of public security organs, especially the loopholes in search procedures without license, which provides the possibility for relevant personnel to escape legal investigation. This does not conform to the principle of proportionality and the legitimacy of the procedure, nor is it conducive to the protection of the rights of the suspect.

Professor Jinghua Ma's Empirical Research on the system of investigation to the case shows that the application of oral summons in practice presents the characteristics of expansion and compulsion. The scope of application of oral summons in legal provisions is very limited, but because there is no requirement of prior approval in its procedure, the application is flexible and convenient. In judicial practice, the application of oral summons by public security organs not only corresponds to current cases, but also applies to the objects of summons and forced summons in non-current cases, and the degree of compulsion is the same as that of forced summons. In brief, the measures in the sense of administrative law such as lien and oral summons are applicable to the measures of investigation in criminal cases, which are groundless in law.

Thirdly, public security organs often mix administrative management and criminal investigation means in a case, which is more common in group violations. Administrative coercive measures are applied to some participants and criminal coercive measures are applied to some participants. Or use the fuzziness of the preliminary investigation stage before filing a case to switch the use of administrative coercive measures and criminal coercive measures. Finally, the perpetrator falls into the criminal trap of the police due to unclear procedures, and it is difficult to escape

administrative punishment or get involved in criminal proceedings.

Take the "husband and wife watching yellow discs in Henan Province" incident in 2002 as an example. IN 2002, the police of Wanhua police station of Baota public security branch of Yan'an City received a report from the masses, saying that Mr.Zhang and his wife played yellow discs at home, and the police went to investigate. The four policemen who entered the house wore police uniforms without alarm numbers, did not wear police hats, and did not even express their identity and purpose to Mr. and Mrs. Zhang. Due to the unclear identity of these people who suddenly entered the house, Mr.Zhang resisted and had a physical conflict with the police. At that time, Mr.Zhang's TV sets and DVD players were seized on the grounds of "spreading obscene articles" and a fine of 1000 yuan was paid. Later, he was criminally detained on suspicion of "obstructing official duties". Although Mr.Zhang was not finally arrested with the approval of the procuratorate, he has actually been criminally detained for 15 days.

CAUSES AND DIFFERENTIATION OF CONFUSION IN THE EXERCISE OF PUBLIC SECURITY ORGANS' FUNCTIONS

Analysis on the causes of confusion between the exercise of administrative power and criminal investigation power

In terms of the nature of the implementation subject, the public security organ highlights the nature of its administrative power in terms of organization mode, activity procedure and function. Compared with legislative power and judicial power, the public security organ should be positioned as the implementer of national administrative power. However, in practice, the decision-making power of public security organs in the field of public security administration and the power of compulsory punishment in criminal investigation activities all show the characteristics of their exercise of judicial power. That is to say, it is the conflict between the necessary norms of police ownership and administrative power and the actual exercise of judicial power by public security organs.

In terms of the nature of illegal acts, they often show the dual attributes of administrative violations and criminal violations or the fuzziness of the definition of their nature. Article 2 of the Law of the People's Republic of

China on Administrative Penalties for Public Security stipulates that "if it is not enough for criminal punishment, the public security organ shall impose administrative penalties for public security in accordance with this Law". This provision explains the relationship between illegality and crime from the level of legal provisions. They are not opposites, but the progressive degree of social harmfulness and illegality. In other words, through "circumstances", "consequences" and "amount", we can realize the connection between administrative violations and criminal crimes. Quantitative change causes qualitative change, and there are intersections, overlaps, and even conflicts.

In terms of legal means and measures implemented by public security organs according to their functions and powers, administrative coercive measures and criminal investigation measures have the similarity of behavior appearance. The Administrative Coercion Law of the People's Republic of China stipulates that administrative organs can implement administrative coercive measures for temporary control of citizens' personal and property in the process of administrative management, such as restricting personal freedom, sealing up places, seizing property, etc. The Criminal Procedure Law provides for criminal coercive measures such as seizure of material evidence, documentary evidence and detention to preserve evidence. Administrative summons and criminal summons, administrative detention and criminal detention, administrative confiscation, fines, seizure of property and criminal seizure of material evidence, recovery of stolen goods, etc. they have similar effects on the person and property of citizens, legal persons or other organizations. They are compulsory measures against personal rights and property rights, coupled with the lack and loopholes of procedure handling, It makes it more difficult for the relative person to distinguish different measures.

In terms of the legal norms for the public security organs to implement different acts according to their functions and powers, the punishment for illegal administrative acts is based on the relevant provisions of administrative litigation, but there is a lack of necessary supervision for illegal criminal investigation. This system defect provides the possibility for the public security organs to evade legal responsibility. The Rules of Criminal Procedure of the People's

Procuratorate stipulates that the procuratorate has the power of judicial supervision over the filing and investigation of public security organs, but the provisions on the means and procedures of supervision lack substantive significance and practical effect.

For the illegal acts in the criminal investigation and coercive measures of the public security organ, if the circumstances are minor, the procuratorate shall put forward them orally to the public security organ, and may issue a notice to correct the illegal acts. Supervise the implementation and urge the public security organ to reply.

But how effective is supervision? How is the implementation of the public security organs? The above all reflect the poor implementation and implementation of the judicial supervision of the procuratorate, and it is difficult to play the due role of supervision in practice.

In terms of the legal consequences and responsibilities of the exercise of public power, the facts of criminal investigation measures need to go through strict examination and approval procedures, and the improper exercise of criminal investigation power will lead to the investigation of responsibility for wrong cases and state compensation responsibility. The exercise of administrative power is not. Compared with criminal coercive measures, some administrative coercive measures to control the person also do not need complicated examination and approval procedures.

Taking detaining interrogation as an example, according to the Provisions on the Procedures for handling Administrative Cases by public security organs, the detaining interrogation can be decided by the people's police (investigators) according to the degree of suspicion of violation. The general period can be up to 24 hours and can be extended to 48 hours after the report is approved.

If it is later considered that administrative coercive measures should not be taken, it only needs to be lifted immediately without any accountability measures.

The newly revised provisions on the procedures for handling administrative cases by public security organs have added new personal control measures such as detention review and restriction of activity scope to the types of administrative coercive measures. These measures are as simple as detention interrogation, but have strong power.

The importance and necessity of distinguishing different functions of public security organs

Clarify the different ways and means for citizens to seek relief and safeguard their legitimate rights and interests. If the opposite party is not satisfied with the administrative law enforcement act of the public security organ, it may bring an administrative lawsuit to the court to examine the legitimacy of its act. The criminal investigation behavior does not belong to the scope of accepting cases in administrative litigation, and is supervised by the procuratorial organ in accordance with the provisions of the criminal procedure law. The reasons for the confusion of public security organs in the exercise of different functions have been described and analyzed in detail above. For ordinary people who are not legal professionals, there are cognitive limitations and mixed behavior in distinguishing administrative coercive measures from criminal coercive measures, which then affect them to seek appropriate judicial relief. Considering time, economic cost and so on, Are not conducive to the parties to safeguard their legitimate rights and interests.

Improve the overall quality of public security law enforcement personnel and enhance the professionalism and standardization of the police force. The construction of police force is the key to the standardization of public security law enforcement.

Standardize the consciousness deviation and behavior deviation existing in the current police force management; Rectify the problems of failure to follow the law, wrong compliance with the law, and non-compliance with procedures when dealing with specific cases; Improve the employment mechanism and eliminate the channels of import and export; Set up scientific performance evaluation standards, not only the case solving rate as the evaluation requirements, but also pay attention to indicators such as victim investigation, people's sense of security, people's satisfaction and the harmony of police people relations;

At the same time, we should pay more attention to the preferential treatment of the police, pay attention to the work of the police, keep it in mind and implement it in our work, pay attention to the mental health of the police, carry out crisis intervention in time, ensure the security of the police work and improve the enthusiasm of the work.

Standardize the behavior of public security organs, correctly exercise the functions of administrative law enforcement and criminal investigation, promote the courts to correctly exercise their judicial functions, and enhance the executive power and credibility of public power organs. In practice, whether the confusion of the functions of public security organs or the wrong judgment of the court will damage the authority of national public power. The compulsion of state public power is the guarantee of the exercise of power, but it is not a "sword of power" to citizens. Just because public power is mandatory, it should be exercised according to law to avoid the false appearance of "officials protecting each other" or "power first".

It is conducive to improve China's judicial supervision system. The independence of the judicial supervision of the procuratorate is the premise of its impartiality. As a special legal supervision, it is indispensable to check and balance the abuse of judicial power and maintain judicial justice and authority. At present, the implementation and standardization of judicial supervision are prominent. It is very important to reasonably define, limit and standardize the supervision mechanism such as the subject, scope, methods and procedures of supervision. By clarifying the exercise of administrative power and criminal investigation power of public security organs, and the distinction between administrative coercive measures and criminal coercive measures, we can give play to the judicial supervision role of the procuratorate, improve China's judicial supervision system, and comprehensively promote the rule of law.

THE SOLUTION TO THE CONFLICT IN THE EXERCISE OF PUBLIC SECURITY ORGANS' FUNCTIONS

Correctly understand the relationship between the two functions of public security organs

In the final analysis, the dual attributes of the criminal function of public security organs should be related to China's current power structure and legal sanctions system. At present, the legal sanctions against violators in China's legal system are divided into civil sanctions, administrative sanctions and criminal sanctions. Under the current system, public security organs have the dual attributes of administrative power and criminal investigation power. Try to completely distinguish administrative behavior from criminal investigation behavior is against

the practice law of public security work. Practical experience shows that even countries that separate administrative police from judicial police at the legal level have to face the same practical difficulties as us.

For example, the Japanese Law on the Performance of Police Duties stipulates that the police can stop criminal activities and question those suspected of attempting to commit a crime or those who have been found to have attempted to commit a crime based on reasonable judgment. However, without the provisions of the criminal procedure law, it is not allowed to restrict personal freedom or take him to a police station, police station or station against his will, or force him to answer questions. In practice, there are cases of urgent arrest of the questioned object or seizure of the items held by him.

At this time, the reason for the start of police power can only be based on the purpose of administrative power, not on the promotion of criminal investigation power, but the result is to complete the purpose of criminal investigation power. Therefore, we should face up to the inevitability of the problems existing under the dual functions of public security organs.

The solution of the conflict in the exercise of public security organs' functions

Firstly, Establish and improve the police law system. A complete police law system should include police behavior law and police organization law. Among them, the police behavior law is the glue to bridge the gap between police administrative power and police criminal power. On the basis of respecting the law of the coordinated operation of police administrative power and investigation power, police behavior law can explain the legal nature and consequences of police specific behavior through complete police law enforcement behavior rules, legal consequences and relief procedures.

Whether in the exercise of administrative functions or criminal investigation functions, there must be consequences if there is an act, and there must be norms if there is an anomie. The police behavior law requires that there must be a clear, specific and direct legal basis for the authority of police organizations, the establishment, change and cancellation of police organizations, and the establishment of police organizations. In the absence of clear legal provisions, no organ or organization has the right to make decisions.

At present, there is no specific code of conduct law and organizational law in China, and the People's Police Law is more like a general mixed version. In this regard, we can learn from the experience of Britain. In the British law known as case law, the establishment and development of modern police system mainly rely on written law. Since modern times, British police law has fully possessed the characteristics of written law and established the legal system of written law.

In 1984, the British Police and Criminal Evidence act stipulated in detail the procedural elements and evidence rules of police interrogation through legislation. Police interrogation does not need to judge whether it belongs to investigation power or administrative power, but is directly related to the exclusion rules of illegal evidence. Subsequently, the Criminal Justice and Public Order Law of 1994, the Regulation Law of Investigation Power of 2000, the Police Reform Law of 2002 and other laws have been passed successively, the power category of police power has been explicit, and the police complaint system and internal investigation procedures represented by the police complaint bureau have become more and more perfect.

Secondly, improve the external supervision of police power. Judicial supervision is the inherent requirement of constitutionalism, The supervision of police power by judicial power is the trend of social development.

Articles 5 and 8 of the resolution on human rights in the criminal procedure law adopted by the 15th Congress of the World Association of criminal law in 1994 put forward: "according to the principle of presumption of innocence, pretrial detention must be implemented according to the order of the judge, and decisions should be made according to the specific circumstances of the case." "Any government measures affecting the fundamental rights of the accused, including those taken by the police, must be authorized by the judge and subject to judicial review." "Except in the cases referred to in Article 8, any measure taken by the police or the decision of the prosecution authority on coercive measures shall be approved by the judge within 24 hours."

The judicial writ system in Britain and the United States has reference value. Due to their neutrality, British magistrates conduct judicial review of criminal compulsory punishment and dominate the issuance of writs. The fourth

amendment to the constitution of the United States stipulates that "neutral and detached judicial officers" have the power to issue judicial writs. A judge does not have to be a lawyer or a judge, but two criteria must be met. He must be neutral and detached, and he must be able to judge whether there is a reasonable basis for the arrest or search requested. Without the judicial review and decision of the judge, the police or prosecutors cannot implement criminal compulsory punishment.

Thirdly, strengthen the internal control of police discretion. Strengthen internal law enforcement supervision, supervise law enforcement through various ways such as daily case review, law enforcement inspection, law enforcement responsibility system assessment and case supervision by the legal department of public security organs, and find problems in law enforcement.

Investigate the responsibility for law enforcement faults, implement the provisions of the provisions on internal law enforcement supervision of public security organs and the provisions on investigating the responsibility for law enforcement faults of the people's police of public security organs, and refine and strengthen punitive measures.

We will implement the open system of police affairs, unblock and broaden external supervision channels, and consciously accept the supervision of the Party committee, the government, the National People's Congress, the CPPCC, the judicial department and the people. Under the new situation, we should pay attention to the role of the news media, do a good job in reporting and making correct reports, and enhance the openness and transparency of police work.

CONCLUSION

Correctly understand the functions of administrative law enforcement and criminal investigation of public security organs, and clarify the boundaries between them. Different scholars have given different research directions and paths for the exercise of the functions of public security organs, but on the whole, there is confusion between administrative investigation measures and criminal investigation measures. At the present stage, we should adhere to the exercise of functions according to law and regulations, and strengthen the supervision and review of law enforcement by public security organs. Improve the external supervision of

police power and the internal control of police discretion.

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