

The application of the principle of proportionality in administrative emergency measures

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Abstract:Administrative emergency is the core mechanism for the country to respond to emergencies and maintain public safety. However, under the tension of power expansion and civil rights reduction, how to ensure the legitimacy and rationality of emergency measures has become a key issue. As the “emperor clause” of administrative law, the principle of proportionality provides a normative framework for the exercise of emergency administrative power through the three-stage review of "appropriateness, necessity and balance." Based on the theory and case, this paper aims to explore the specific application path, practical challenges and optimization direction of the principle of proportionality in administrative emergency.

Keywords:major emergency; administrative emergency; proportional principle; administrative emergency behavior

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1 The concept and basic requirements of the principle of proportionality

1.1 Concept of the principle of proportionality

The basic meaning of the principle of proportionality is that the implementation of administrative actions by administrative organs should take into account the realization of administrative objectives and the protection of the rights and interests of the counterpart. If the realization of administrative objectives may have some adverse impact on the rights and interests of the counterpart, this adverse impact should be limited to the smallest possible range and limit, and the two should be kept in an appropriate proportion. Its core idea is to prevent excessive intervention of state power in private interests.

1.2 Basic requirements of the principle of proportionality

The generalized principle of proportionality mainly has the following three requirements :

First, the principle of appropriateness, which emphasizes that the exercise of national public power to implement corresponding measures should ensure that the measures are closely related to the expected goals and functions, and pay attention to the ' goal consistency ' of the measures.

There should be a reasonable and close relationship between the means of restriction and the intended purpose, so as to ensure that the selected means can effectively serve the realization of the goal, so as to build a pattern of matching means and purpose. This principle is conducive to the restriction of motivation by administrative organs in the exercise of power, effectively avoiding the occurrence of some illegal acts, and realizing substantive justice.

Secondly, the principle of necessity, the core of which is that in the face of diversified paths to achieve administrative goals, administrative organs should select programs with the lowest degree of restriction on individual rights and interests and the least negative impact. This principle not only reflects the prudence and restraint of the administrative organs in the use of power, but also highlights the firm position of the principle of proportionality in safeguarding basic human rights.

Third, the principle of balance, that is, the principle of proportionality in a narrow sense. This principle focuses on the need for a balance between public welfare and private interests. The government's administrative behavior can neither violate the administrative purpose nor allow citizens to bear excessive burdens. The two must be balanced. As the saying goes, killing chickens with a cow knife expresses this idea.

2 The concept of administrative emergency

Administrative emergency means that administrative organs organize relevant forces to predict, supervise, control and coordinate public crisis events that may occur or have occurred, in order to effectively prevent, deal with and eliminate crises and reduce losses.

3 General requirements for the application of the principle of proportionality in administrative emergency

3.1 Limited scope of application

The purpose of implementing administrative emergency behavior is to deal with special problems such as major emergencies. The occurrence of major public emergencies is not a normal time, so the application of the principle of proportionality in administrative emergency actions should also be strictly implemented in accordance with specific space and time. Specifically, the administrative emergency behavior must have a clear crisis state as the premise, the determination of this state is not carried out by the administrative subject at will, but must be clearly stipulated by law. If the above two basic conditions cannot be met, it is necessary to break through the existing legal norms, and it must be decided by the competent state organs before the administrative emergency action can be initiated. The administrative power in the emergency state has certain expansion, but it needs to follow the 'necessary limit'.

3.2 statutory emergency power

The subject of administrative emergency behavior and the authorization of measures are subject to strict legal constraints, and administrative emergency behavior must conform to legal procedures. In emergencies and states of emergency, administrative subjects tend to be more inclined to solve prominent crisis problems. At this time, the protection of civil rights by administrative acts will be weakened. Especially when it is necessary to limit or damage the interests of citizens in certain specific circumstances, we must be particularly cautious. Such restrictions should be minimized, unless necessary, shall not limit the rights of citizens.

3.3 Proper emergency measures

The government's implementation of administrative emergency actions should be based on emergency situations. Emergency measures should be adapted to sudden public events. It should not blindly sacrifice citizens' rights and interests to achieve administrative purposes. Administrative emergency measures should maximize the balance. That is to say, the emergency response management measures taken by the government and its relevant departments should be adapted to the nature, degree and scope of social harm that may be caused by emergencies, grasp the balance between purpose and means, and avoid radical excess and negative inaction.

4 Challenges and optimization of the application of the principle of proportionality in administrative emergency

4.1 Practical difficulties

First of all, information occlusion and asymmetry in the state of emergency may lead to 'excessive' or 'insufficient' measures. For example, it is difficult to accurately assess the risk of transmission in the early stage of the epidemic, and individualized management for the purpose of infringement is impractical. Secondly, the quantitative dilemma of public and private interests. The principle of proportionality requires 'quantitative comparison of profit and loss', but the public interest in emergency scenarios is often prioritized, which may squeeze the space of private rights. Although the public interest often represents the interests of most people in society, in fact, no matter how representative the public interest is, it is impossible to cover every individual in society. Therefore, in order to maximize the social and public interests, it is inevitable to cause damage to personal interests, and sometimes even to damage the interests of the vast majority of individuals in order to achieve social and public interests. Thirdly, the contradiction between the applicable benchmark of the principle of proportionality and the urgent need to solve the problem of emergency state. In the critical period of prevention and control of major emergencies, in order to judge whether a certain means is the least harmful to the

interests of citizens or there is no other means of less infringement, then this will greatly weaken the prevention and control ability and response efficiency of an administrative organ to such incidents.

4.2 Optimize the path

(1) The object of empowerment should be the subject of legal provisions.

The principle of proportionality is written into the emergency response mechanism, which requires the subject to exercise the administrative emergency power to be authorized by law. At present, the main body of the administrative emergency power basically has a legal basis, and the reason for the contradiction in practice is that the administrative subject is not qualified. For example, in order to improve administrative efficiency, in the flood control by the grass-roots mass self-government organizations to levy, requisition ; in response to public health events, the township government directly adopts isolation measures. As an expansion of power in a state of emergency, the administrative emergency power will damage the basic rights of the administrative counterpart, which requires that the subject of power must be strictly limited, and the emergency mandatory measures can only be applied by the subject stipulated in the legislation. If the subject is not qualified, its administrative act should be deemed invalid.

(2) The operation of power should be the procedure stipulated by law.

In practice, by combing the relevant precedents, the author finds that the reason for many administrative litigations is not the opposition of the administrative counterpart to the administrative subject, but the failure of the administrative subject to implement the administrative act in accordance with the legal procedures. Taking the act of expropriation and requisition as an example, the specific procedures are stipulated in the " Land Management Law of the People 's Republic of China " and the " Civil Code of the People 's Republic of China. " However, in practice, some administrative subjects do not strictly follow the legal procedures when levying and requisitioning, and even do not issue relevant written documents when levying and requisitioning personal movable and immovable property, and do not make corresponding compensation afterwards, which aggravates the conflict with the administrative counterpart. Therefore, it is necessary to standardize emergency law enforcement through the ' three systems ' of administrative law enforcement (publicity, recording, and auditing) to ensure the transparent operation of power.

(3) Specific measures should be the content of the law.

On the basis of the eligibility of the subject and the statutory procedure, the specific application of the administrative emergency power, that is, the content of the emergency mandatory measures, must also be clear and specific. For example, when applying the measure of expropriation and requisition, the concept of " expropriation " and " requisition " should be clearly distinguished, and the two concepts should not be confused when applying specific measures. " Expropriation " is mainly reflected in the violation of " ownership. " In general, the ownership of the movable or immovable property will change after the expropriation of the administrative subject ; the " requisition " is reflected in the infringement of the " right to use, " and the ownership will not change. After the emergency is restored, the administrative subject should return the requisitioned movable or immovable property.

5 Conclusion

The application of the principle of proportionality in administrative emergency is not only a ' tight spell ' to restrain the abuse of power, but also a ' booster ' to achieve emergency effectiveness. In the face of the particularity of the state of emergency, it is necessary to seek a dynamic balance between " public welfare priority " and " rights protection " : on the one hand, it recognizes the discretionary space of emergency measures, and on the other hand, it prevents power from crossing the border through third-order review. In the future, it is necessary to further deepen the standards of judicial review in combination with cases, and embed the principle of proportionality into the whole process of emergency management through system construction, so as to promote the transformation of emergency administration from " efficiency priority " to " rule of law priority. "

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