On the Legal Attribute and Behavior Regulation of Administrative "Blacklist"

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Abstract

As a new way of administrative activities, the administrative blacklist has a complex behavior pattern, and the application of punishment measures has its particularity. In recent years, while the administrative "blacklist" has shown strong vitality, there are also major problems in the rule of law, which are mainly manifested as the legitimacy crisis of the basis of the administrative "blacklist" behavior, the lack of rules of the behavior process and the insufficient protection of the rights and interests of the object of the behavior. According to the regulation path of administrative "blacklist" behavior under the research paradigm of administrative process theory, we should regulate the behavior of administrative "blacklist" from the aspects of creation of reference basis, application scope, procedure standard and establishment of relief mechanism. Strictly control the scope of application of administrative "blacklist"; From the macro and micro level to consider the administrative "blacklist" procedure standard and establish the administrative "blacklist" internal and external relief mechanism, make it become the government to strengthen the supervision of legal and effective means.

Keywords

Administrative blacklist; Legal attribute; Administrative penalty; Administrative process theory; The behavior regulation.

1. Problem Introduction

The dual drive of the expansion of modern administrative tasks and the transformation of government functions calls for the innovation and reform of administrative law enforcement, and the administrative blacklist system is one of its typical representatives. In recent years, the cases of blacklist joint punishment have been frequently reported in newspapers and online media. For example, the typical case of the blacklist joint punishment issued by the State Administration of Taxation is the case of a pharmaceutical enterprise falsely writing value-added tax special invoices. According to the major tax case illegal breach case information released to the provisions of article 7, the case as a major tax illegal breach case being blacklisted at the same time, the drug companies or determined by the court to judge by the head of the legal representative of the actual responsibility person by the court to judge financial personnel directly responsible of the gang members information will be released. However, in recent years, while the administrative blacklist has shown great vitality in practice, it has fallen into the crisis of generalization and abuse. In the column of government information disclosure, the full text search of blacklist entries found that the network animation product blacklist floor steel production enterprises and the blacklist of public resource allocation blacklist and other types of administrative blacklists emerge in an endless stream. As Prof Hu worries, it seems anyone can set up a blacklist system. Under the background of speeding up the construction of government under the rule of law, the construction of administrative blacklist
system under the rule of law is an appropriate way to solve the crisis of generalization and abuse in the practice of administrative blacklist. Among them, the definition and definition of the legal attribute is an unavoidable preexisting problem, which directly affects the legal control mechanism of the administrative blacklist system and the setting of the right relief mode. In view of this, the author intends to make a comprehensive and dynamic investigation of the administrative blacklist in this paper, on the basis of clarifying its legal attributes, put forward effective behavior regulation ideas, hoping to be beneficial to the construction of the administrative blacklist under the rule of law.

2. Analysis on the Legal Nature of Administrative "Blacklist" Punishment Measures

2.1. The Dispute About the Legal Attribute of "Blacklist" System

At present, there are four main viewpoints about what kind of administrative acts the administrative blacklist belongs to in the academic circle: one is the administrative punishment theory that focuses on disciplinary acts; The second is the theory of administrative coercion, which focuses on the act of publication, the theory of administrative guidance, the theory of reputation punishment, the theory of public warning; The third is the typology theory that focuses on practical effect; Fourthly, it focuses on the multi-stage behavior nature theory of administrative process theory [1]. On the whole, the existing research mainly discusses the legal attribute of the administrative blacklist from the Angle of the theory of administrative act form and the theory of administrative process. The biggest difference between various theories lies in whether the administrative blacklist is an administrative punishment measure or a non-administrative punishment method.

Article 8 of the law on administrative penalties lists the types of administrative penalties, including warning, fine, confiscation of illegal gains, order to suspend production or suspend business, suspension of licence or administrative detention, and other administrative penalties prescribed by laws and regulations. Simply from the external form of standard, the administrative blacklist does not belong to the typical administrative punishment measures. Then, whether it belongs to other administrative punishment stipulated by laws and regulations? In the theory of administrative law, the biggest difference between administrative punishment and other administrative acts lies in the sanction and disadvantageous disposition of administrative punishment [2].

First of all, the sanction of administrative punishment is built on the basis of illegal acts. The administrative blacklist is mainly aimed at the bad behavior records of the administrative relative person, and the bad behavior records are mainly caused by the illegal behavior of the administrative relative person who is investigated for administrative responsibility or criminal responsibility.

Secondly, the sanction nature of administrative punishment will produce adverse punishment to the rights of the lawbreaker. The disciplinary measures of administrative blacklist mainly include: canceling all kinds of policy support; Cancel the relevant honorary title, etc. These punitive measures have strong sanction nature, which will directly lead to the restriction or deprivation of the legal rights and interests of the administrative counterpart, such as personal rights and property rights.

It can be seen that the administrative blacklist has both sanctions and adverse sanctions, belonging to the category of other administrative penalties. Of course, from different points of view, the administrative blacklist also has the characteristics of guidance, warning and law popularization. However, these characteristics are not the core characteristics of the administrative blacklist, its most prominent feature lies in its punitive.
2.2. The Behavior Characteristics of Administrative Blacklist Punishment Measures

2.2.1. The Compound Nature of Administrative "Blacklist" Behavior Mode

From the applicable conditions of administrative "blacklist", it presents a compound structure of "illegal sanction + credit punishment". As a matter of fact, the application of administrative "blacklist" disciplinary measures is to punish the perpetrator again for the same illegal behavior. However, this does not violate the basic requirements of the principle of "no more punishment in case": on the one hand, the illegal acts listed in the administrative "blacklist" can be given many different kinds of punishment according to different norms because they have violated several legal norms without competition and cooperation at the same time [3]; On the other hand, the disciplinary measures of the administrative "blacklist" do not include the type of property punishment, which does not violate the provisions of Article 24 of the Administrative Punishment Law that "a party shall not be fined more than twice for the same illegal act".

From the application process of administrative "blacklist", there is a compound structure of "bad behavior information identification publicity + joint punishment". From the perspective of administrative process theory, the application process of administrative blacklist can be simplified into two main stages. The first is the identification and publicity stage of bad behavior information. The "blacklist" identification authorities identify the illegal behavior information of the parties, convert it into "bad behavior information" and publicize it to the public. The second is the application stage of joint disciplinary measures. For the parties listed in the administrative "blacklist", the competent administrative organs may, according to their respective functions, take joint disciplinary measures for trust-breaking according to law.

From the application results of administrative blacklist, there is a compound structure of "reputation penalty + behavior penalty/qualification penalty". The administrative "blacklist" should be made public, and the information released mainly includes illegal information and disciplinary information. The publication of such information belongs to the category of reputation penalty, the main object of which is the personal reputation and reputation. The publication of information will have a mental suppression on the parties concerned, making them dare not to commit the crime again under the pressure of public opinion [4]. At the same time, the parties listed in the "blacklist" should be subjected to joint punishment, which mainly includes two types of punishment: behavior punishment and qualification punishment. Among them, the prohibition of some activities or projects belongs to the category of behavior punishment, and the cancellation of all kinds of policy support, honorary titles, and the qualification of award and excellence evaluation belong to the category of qualification punishment.

2.2.2. The Particularity of the Application of Administrative "Blacklist" Punishment Measures

First, pay equal attention to punishment and education. Article 5 of the Administrative Punishment Law establishes the basic principle of "combining punishment with education", but there is a widespread phenomenon of "heavier punishment than education" in the daily law enforcement activities of administrative organs. The heavy punishment of administrative organs belongs to passive and passive deterrence education, which mainly focuses on the "repressive" effect of the punishment mechanism, but neglects a series of positive effects that the punishment mechanism may produce. By contrast, the "blacklist" pay more attention to the implementation of the education purpose, from the point of the implementation process, the administrative system of "blacklist" set up a credit repair mechanism [5], are listed in the "blacklist" offender insincere behavior, positive corrective active correct illegal behavior methods such as the repair of the credit, can apply to the "blacklist" policy in advance from the blacklist. Credit repair is a kind of positive education, which not only makes the violators
appreciate the humanized law enforcement from the heart, but also makes them condemn themselves from the good heart. It can better encourage the violators to take the initiative to correct the illegal behavior and abide by the law more actively and consciously.

Second, the legal effect of punitive measures is mainly facing the future. Administrative punishment is the after-action treatment of administrative organ against the result of the illegal act of administrative counterpart. However, the application of administrative "blacklist" joint disciplinary measures is facing the future legal effect, it is not a direct result of the illegal behavior, but to the party engaged in some activities in the future capacity or qualification restrictions.

Third, the application of punitive measures is sustainable. The application of joint disciplinary measures of administrative "blacklist" has continuity in time, which is generally consistent with the time limit stipulated by the party listed in the "blacklist". During the duration of the blacklist, each administrative organ may take corresponding disciplinary measures within the scope of its functions and powers. In addition, the restrictions on the rights or behavior of the parties will generally continue until the expiration of the blacklist period.

3. Legal Problems in the Implementation of Administrative Blacklist

3.1. Legitimacy Crisis of Administrative "Blacklist" Act Basis

The credit punishment implemented by the main body of public power is mainly aimed at the behavior of dishonesty which does not follow the legal obligation and has adverse consequences in public law [6]. In its original sense, administration by law requires that the administration must be bound by the rules of the legislature representing public opinion [7]. However, the current administrative "blacklist" system is mostly established by administrative normative documents, and the primary problem it faces is that it does not conform to the principle of administration according to law. This is mainly reflected in two aspects. First of all, the identification of administrative "blacklist" tends to adopt a broader standard. There are two prominent problems: first, the scope of "law" in the illegality standard is too broad, including a large number of administrative normative documents, industry standards, financial discipline, etc., in the absence of high-ranking legal norms, the administrative "blacklist" is easy to be abused; Second is illegality standard multivariate, serious illegal standard with many illegal covered by the scope of illegal behaviors are not identical, many illegal standard includes serious violations and general illegal behavior, its applicable objects more broad, the standard difference between regions will lead to the same illegal act different "phenomenon is the emergence of the fair and justice of law principles.

Secondly, the legal basis for setting and implementing disciplinary measures is not clear. Creating the correction of anomie is the primary problem facing the administrative blacklist system. In practice, the legal basis for the establishment and implementation of administrative "blacklist" disciplinary measures is chaotic. Some have a clear basis of national law, such as the basis of China's "Environmental Resources Protection Law" Article 54, paragraph 3 of the environmental blacklist; Some are based on administrative laws and regulations, such as the blacklist of performers according to Article 49 (1) of the Regulations on the Administration of Commercial Performance in China. Some have clear rules and regulations, such as the blacklist of serious illegal and trust-breaking enterprises, the blacklist of unpaid wages for migrant workers. It is this kind of legal basis for setting and implementing disciplinary measures is not clear, which leads to the administrative blacklist system falling into the crisis of generalization and abuse.
3.2. Administrative "Blacklist" Behavior Process Rules Are Missing

The implementation of the administrative "blacklist" behavior will infringe the freedom and property of the lawbreaker to a certain extent, and its implementation must follow the due legal procedure, and the behavior process must meet the minimum fairness in the procedure [8]. For power, procedure is the natural boundary that constrains power; For the people, procedure becomes a rule to be enforced and a safety barrier against the encroachment of power [9]. Although the current system stipulates the statement and defense procedure of the wrongdoer and the information disclosure procedure of the "blacklist", the relevant system lacks uniformity and has not yet formed a complete administrative "blacklist" management procedure.

This mainly has three prominent problems: one is the inclusion of "blacklist" procedure incomplete. The existing system has not yet systematically stipulated the inclusion procedure of "blacklist", especially the absence of the procedure of explaining reasons by administrative organs. For example, Article 6 of Tianjin Safety Evaluation Institution "Blacklist" Management System stipulates the basic procedures of being included in the work safety "Blacklist", including three procedures of information collection, discussion and approval and information announcement, and the lack of the participation procedure of the regulated object and the procedure of the administrative organ to explain the reason. This will have a direct impact on the legality of the administrative "blacklist".

Second, the "blacklist" time limit set confusion, lack of uniform rules. The term of the administrative "blacklist" generally ranges from three months to seven years, and there are no uniform rules and standards for the term. For example, the "Chongqing Dangerous Chemicals and Fireworks Production and Operation Safety Production Blacklist System" stipulated a two-year period; However, the Measures of Shanghai Municipality for the Key Supervision and List Management of Serious Illegal Food and Drug Enterprises and Related Personnel (Trial) stipulates a period of five years.

The third is the lack of evaluation feedback procedures. A complete administrative "blacklist" management procedure should include a follow-up, monitoring and evaluation mechanism after the event, but there is no relevant system provision at present. As mentioned above, there are three procedures stipulated in the Management System of "Blacklist" of Tianjin Safety Assessment Institutions, which lacks evaluation feedback procedures such as the withdrawal of the blacklist.

3.3. Insufficient Protection of the Rights and Interests of the Object of Administrative "Blacklist" Behavior

As a new kind of punishment measure, the administrative blacklist has the particularity of its application mode and the continuity of its application period, so it often causes more damage to the lawbreaker than the general administrative punishment measure. The existing system lacks provisions on the protection of the lawbreaker's rights and interests, which is mainly reflected in two aspects.

First, the rules for a credit repair mechanism are extremely brief. Credit repair mechanism allows illegal trust-breakers to restore normal credit after meeting certain conditions, which is in line with the legal interests goal of protecting the interests of obligees, improving administrative efficiency and optimizing public order[10]. The construction of the credit repair mechanism of administrative "blacklist" should adhere to the principle of combining punishment for trust-breaking with education and care, and combining the repair of illegal acts with the repair of trust-breaking information. However, in the current system, only a few places of the system stipulates the credit repair mechanism; Moreover, the existing regulations are also very brief and lack of systematic regulations on the methods, contents and procedures of
credit repair, which makes it difficult to realize the institutional function of "punishment and education". Secondly, the protection mechanism of personal credit information rights and interests is not perfect. From a global perspective, the legislation of personal information protection is quietly surpassing the original narrow scope of privacy protection and gradually turning to the basis of personal information right of self-determination [11]. The formulation and implementation of administrative "blacklist" are based on trust-breaking information. However, the existing regulations focus on the collection, identification, release, application and management of trust-breaking information, while ignoring the protection of the rights and interests of individual credit information. Specifically, first, there is insufficient protection of personal privacy. The existing system is not clear about the scope and mode of disclosure of "blacklist" information, nor has it established a registration and review system for credit information inquiry and use, so the personal privacy of law-breakers is vulnerable to disclosure and infringement. Second, the credit information correction mechanism is not perfect, the existing system of "blacklist" information objection appeal and information change system provisions are missing, deprives the lawbreaker of the right to apply for correction of wrong information; Third, the credit information tort liability investigation mechanism is not perfect, the existing system does not clearly stipulate the "blacklist" management behavior leads to damage to the rights and interests of the offender appeal relief channels, in violation of the principle of "rights without relief" the basic requirements.

4. Administrative "Blacklist" Behavior Regulation Path of the Rule of Law

4.1. According to Regulation: The Creation of Administrative "Blacklist" Is based on "Laws and Administrative Regulations"

The administrative blacklist system shall be established according to "laws and administrative regulations". First of all, from the overall perspective, as a compound administrative activity mode, the administrative blacklist system has the property of invasion and benefit, and its creation should be subject to the restriction of Article 8 and Article 9 of China's Legislation Law. Second, from a process perspective, administrative blacklist system of disciplinary actions is administrative punishment in nature, belongs to the item 7 of article 8 is "administrative penalty law" of "other administrative penalties", so administrative blacklist system creation should be and the administrative penalty types of establishment on the basis of coordination and cohesion, which shall be formulated by the laws and administrative regulations. In addition, laws and administrative regulations should also follow two basic principles to create a "blacklist". First, the establishment and implementation of disciplinary measures should follow the requirements of the principle of prohibiting improper association [12], and there should be an appropriate association between different illegal acts and their corresponding disciplinary measures. At the same time, it is necessary to accurately grasp the close relationship between the subject of punishment, the behavior of punishment and the object of punishment. Second, the establishment and implementation of punishment measures should also follow the requirements of the principle of proportion, and grasp the "light and heavy" of punishment measures, so that it can not only achieve the effect of punishment, but also achieve the purpose of creating a good credit environment to stimulate the enthusiasm of punishment subjects.

Therefore, the establishment and implementation of the existing punitive measures should be improved from three aspects: First, the establishment basis should be clear. The system stipulates clearly the legal basis for the establishment of disciplinary measures, which makes the establishment of various disciplinary measures legitimate. Second, we need to clarify the subject of implementation. In order to realize the purpose of joint punishment effectively, the
main body of each punishment measure should be defined in the system regulation. Third, clear applicable conditions to avoid misuse and abuse of disciplinary measures.

4.2. Content Regulation: Strictly Control the Scope of Application of Administrative "Blacklist"

If the purpose of establishing the control of reference is to solve the problem of lack of formal legality, the control of the scope of application should be carried out in the framework of substantive legality with higher standards. The breadth and depth of the application of administrative blacklist system in practice, to a certain extent, depends on the extent of its application. The regulation of the scope of application of the administrative blacklist can be carried out from the two aspects of applicable conditions and applicable objects.

First, according to the different operation process, the conditions of application of the administrative blacklist system include the conditions of blacklisting, the conditions of publication and the conditions of punishment. In practice, due to the lack of process thinking, the setting of applicable conditions is too broad, and there is a lack of necessary hierarchy distinction between the three. The author suggests that the control of applicable conditions should comprehensively consider two factors: the degree of illegal behavior of the parties concerned and the severity of adverse consequences of the administrative blacklist system. As far as the former is concerned, the circumstances that have not yet reached the illegal standard should be excluded from the applicable conditions. As for the latter, compared with the inclusion act, the publication act and the punishment act have more serious adverse effects on the administrative counterpart, so the conditions of publication and punishment should be more strictly controlled.

Second, according to the different objects, the administrative blacklist system actually contains two situations of acting on the natural person and the organization. At present in practice, the scope of application of administrative blacklist system does not make corresponding distinctions due to the different objects. From the point of view of legal protection, compared with group information, the protection of the natural person information more strict conditions, such as collect any information should be on the premise of natural person agreed to, and shall not collect any income, deposit, securities, commercial insurance, real estate information and the amount of tax information, it is prohibited to collect natural religion, gene, fingerprints, blood type, disease and medical history information, etc. From the perspective of the type and importance of rights, the right of personal dignity exclusive to the natural person is in the core circle of the right system, and shall not be restricted in principle, unless it exists.

4.3. Process Regulation: Considering the Procedural Norms of Administrative "Blacklist" from the Macro and Micro Levels

In terms of the legality of administrative activities and the importance of the protection of counterpart’s rights, it should be reflected in the following four aspects.

First, inform the counterpart in advance, and listen to its statement and defense opinions. In practice, not all normative documents stipulate the procedural provisions that the counterpart must be informed in advance before being blacklisted. The author believes that, based on the requirements of due process and the dual considerations of fully protecting the administrative counterpart’s right to know, the counterpart should be informed before being blacklisted, before being published to the public and before the joint punishment, and carefully listen to the opinions of his presentation and defense.

Second, the administrative decision is served on the counterpart, and the relief rights and approaches are informed. Based on the requirements of the legality of the administrative act [13], and the need to protect the rights of the administrative counterpart, the official decision
should be served on the counterpart, and the counterpart should be informed of his right of relief, the corresponding way of relief and the deadline.

Third, hearing procedure. The disciplinary behavior in the administrative blacklist system is administrative punishment in nature. From the literal point of view of Article 42 of Administrative Punishment Law of our country, the punishment acts as "qualification punishment" and "personal punishment" do not meet the requirements of hearing. However, the expansion of the applicable scope of the hearing procedure has reached a consensus in the academic community and has been confirmed by the Supreme People's Court [14]. Therefore, the administrative counterpart who has been told to be included in the administrative blacklist should be given the right to apply for a hearing.

Fourth, suspending procedure. The administrative organ may decide to temporarily withdraw the publication of the blacklist and suspend the disciplinary measures after the administrative organ verifies all the facts before making the final decision.

4.4. Outcome Regulation: Establish Internal and External Relief Mechanism of Administrative "Blacklist"

The right remedy theory that "there is a right without a remedy" is the theoretical basis for establishing a remedy system for administrative acts [15]. Through the path of rights protection, the establishment of a comprehensive and effective administrative blacklist system relief mechanism is the control of its results. In this paper, the author focuses on the judicial relief mechanism, and according to the guidance of the theory of administrative process, respectively to be included in the act, included in the act, the act of publication and punishment of four stage behavior analysis.

First, although there are proposed on behavior of the designed to inform the other party beforehand, and listen to the statements and their external administrative procedures, but its essence was prepared on the behavior of the behavior, not the actual impact on the rights and obligations of the parties, in accordance with the administrative mature theory, proposed in behavior should be excluded from the scope of judicial review.

Second, inclusion includes two situations: "inclusion decision" and "non-inclusion decision". As far as the inclusion act with "inclusion decision" is concerned, its nature is specific administrative act, and according to the provisions of the scope of accepting cases in China's administrative procedure law, it should be brought into the scope of judicial review. In the case of inclusion without "inclusion decision", it is an internal administrative act in nature and should be excluded from the scope of judicial review.

Thirdly, the publicizing behavior can be divided into the publicizing behavior facing the parties and the publicizing behavior facing the public. In terms of facing the release behavior of the parties, doctrinal its property belongs to administrative fact behavior, should be left out of judicial review, but there are exceptions, such as according to our country "administrative procedural law" article 12 (scope) the provisions of paragraph 8 if the parties concerned to release behavior for infringing its reputation and other human rights institute an administrative lawsuit, the court shall not refuse to do judgment. As far as the act of publicizing to the public is concerned, technically its nature belongs to the act of administrative fact, and it should be excluded from the scope of judicial review because of the absence of the above two exceptions.

Fourthly, the nature of punishment is administrative punishment, which belongs to "qualification punishment" and "personal punishment" in theory. According to the provisions of the scope of accepting cases in administrative litigation, it should be brought into the scope of judicial review. At the same time, if the court finds that the punishment is "obviously unfair" after review, it can directly make a modified judgment according to Article 77 of the Administrative Procedure Law of China.
5. Conclusion

In the process of social governance in the new era, the administrative "blacklist", a new type of administrative punishment, bears the responsibility of building a social credit system. Its establishment and implementation should move forward under the framework of the rule of law. Although the academic circles on the legal attribute of administrative "blacklist" has not yet come to an agreement, but from the "blacklist" as the basis of an analysis of the sanctions and adverse actions, it should belong to the category of "other administrative punishment", which can be respectively for administrative legitimacy "blacklist" on the implementation of the rule of law problem analysis and regulation. Of course, the author in this article is only a preliminary discussion on the administrative legitimacy "blacklist" control and rights protection problems, such as how to communion with the existing administrative law enforcement ways, how to ensure "blacklist" of the actual effectiveness, and how to implement the administrative legitimacy "blacklist" together with the best balance such as subject, still needs further research.

References

