

Research on the practical dilemma and legislative path of administrative guidance

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Abstract: Under the background of rapid economic and social development, administrative guidance is increasingly frequently used in the adjustment of market economy activities. However, the administrative guidance with subject specificity, non-mandatory, flexibility and unilateralism has exposed the dilemma of nature alienation, procedure confusion, low efficiency, blind decision-making, lack of supervision, vague responsibility and weak relief in practice. Therefore, we should choose the legislative mode of unified legislation, formulate administrative regulations first, then formulate laws, give full play to the functions of both regulatory law and guarantee law, and determine the specific legislative content from the aspects of administrative guidance subject, scope of application, procedure and form, right relief and so on.

1. Introduction

In contemporary society, administrative guidance, as an administrative means, plays an important role in guiding, standardizing and promoting the development of various fields. However, due to various subjective and objective reasons, China is facing a small number of problems in the field of administrative guidance legislation, such as vague content. With the rapid development of economy and society and the increasing complexity of public affairs, administrative guidance has increasingly exposed many complex problems in practice.

2. Theoretical analysis of administrative guidance

2.1 Conceptual explanation

As a tool to reconcile the relationship between market economy and state, administrative guidance has attracted the attention of many scholars. They have different views on this concept, but the basic framework and core content are convergent. This paper draws on the writing method of 'Civil Code' to refine the core concept of administrative guidance. Japanese scholar Koda emphasizes that administrative guidance is non-mandatory, such as advice and suggestions, aiming at obtaining cooperation from administrative objects and achieving administrative purposes, and its power is limited to the scope given by law to prevent abuse of power [1]. Luo Chuanxian briefly defines administrative guidance as the behavior of administrative organs to induce the cooperation

of counterparts by non-power means, especially referring to the word "fact" and emphasizing its non-legal behavior characteristics [2]. Yang Haikun, a mainland scholar, pointed out that administrative guidance includes non-coercive means such as advice and advice, which can be implemented by administrative organs and other legal subjects [3].

Based on the above scholars' opinions on administrative guidance, the author believes that administrative guidance refers to the fact that administrative organs (including other legal subjects), within the scope of their functions and powers, in order to achieve the best administrative state they foresee and achieve some kind of desire, to suggest, persuade, warn, guide, guide, mediate and other non-command, non-mandatory means to guide the administrative counterpart.

2.2 Characteristic analysis

Administrative guidance has the following characteristics: first, subject specificity. Administrative guidance reflects the meaning of the administrative subject, has authority and government credibility, and is the basis of people trust. Secondly, non-mandatory. Administrative guidance is regarded as soft law and not mandatory. The administrative subject adopts non-coercive means, and the counterpart can choose whether to accept it voluntarily. Third, flexibility. Administrative guidance has various forms, such as mediation, advice, etc., with a wide range of functions and diverse audience groups, which enhances its flexibility. For example, training can effectively popularize knowledge, reduce errors and reduce the burden on the government. Fourth, unilateralism. Administrative guidance is a unilateral act that does not require the reaction of the other party. Once implemented, it is deemed to be established. Whether the other party accepts does not affect the implementation of administrative guidance.

3. Dilemmas in the practice of administrative guidance

3.1 Alienation of nature

In recent years, with the rapid development of the economy, the phenomenon of impure motivation of administrative guidance has become increasingly prominent. This impure phenomenon is concentrated in the pursuit of private interests by some government departments and staff, and does not take the public interest as the starting point and the foothold, so that the guidance behavior loses its proper meaning. For example, some administrative agencies may be biased in favor of specific enterprises or groups in administrative guidance due to personal relationships, interest disputes or other unjust motives of individual personnel, resulting in unfair competition and resource allocation problems. This situation may include the use of administrative guidance for extortion, illegal collection of fees and other acts, undermining the public interest and the principle of the rule of law. At the same time, in the process of the actual implementation of administrative guidance, some administrative organs emphasize too much on the follow-up of administrative guidance, which leads to the influence of the administrative relative person under the pressure of the power and status of the administrative guidance subject, and has to act in accordance with the provisions of the administrative guidance. Its influence goes beyond the scope of the original guidance and suggestions, and then derives a mandatory implementation trend.

3.2 Scattered procedures and low efficiency

Administrative guidance lacks procedural norms, and the implementation of administrative guidance often lacks clear procedural provisions, resulting in non-standard operation and easy corruption. First, the system is not standardized, that is, there is no corresponding administrative

guidance legal protection. The administrative procedure law has not yet been introduced, and there is no corresponding guidance work standard. Secondly, the procedure is not standardized, and there is no corresponding institutional basis, which leads to the lack of clear legal normative documents in the implementation process. At present, due to the lack of specific legal norms, there is no clear basis for the use of administrative subjects. This makes the administrative guidance in some cases may exceed its scope of responsibility, beyond the guidance and coordination role it should play, the problem of excessive use, and then evolved into excessive intervention. Third, management is not standardized. There is no special management and supervision procedure in the process of putting forward, supervising and implementing the guiding suggestions, and there is no clear definition of the object of responsibility and the way of implementation, which easily leads to the phenomenon of inaction of administrative guidance. At the same time, the evaluation and feedback mechanism is not perfect, which makes it difficult to adjust and improve the administrative guidance measures in time, affecting the quality and effect of implementation. In addition, the administrative counterpart's lack of understanding of the guiding policy also leads to low efficiency. As shown in the 'Li Sande case', improper handling of interest disputes not only hinders the implementation of administrative planning, but also damages the legitimate rights and interests of the administrative counterpart.

3.3 Blind decision-making

From the perspective of the specific content of administrative guidance, on the one hand, the makers of administrative guidance may lack in-depth understanding of specific fields or industries. Government agencies may fail to fully consider the complexity and particularity of specific industries when formulating guidance documents due to limited resources or involvement in multiple fields. This lack of understanding of the actual situation may lead to the blindness of decision-making, because of the lack of a comprehensive and in-depth understanding of related affairs. On the other hand, the government's own interests may occupy a dominant position in the decision-making of administrative guidance. As government agencies often have their own political and economic interests in mind, the guidance document may be more inclined to serve the government's long-term goals, sometimes with a certain deviation from the needs of all sectors of society. This bias may lead to decision-making inconsistent with the actual situation, loss of scientific and objectivity.

3.4 Lack of supervision and relief

In practice, administrative guidance has the problems of low transparency and vague definition of responsibility. First of all, low transparency leads to dark box operation, which is easy to breed corruption. Because the administrative counterpart cannot understand the guidance process in time, the right to know is damaged, and the legitimate rights and interests are infringed. This is mainly due to the lack of clear laws and regulations on the supervision standards and procedures of administrative guidance. The relevant laws and regulations are not detailed and clear enough, and it is difficult for regulators to accurately evaluate the administrative guidance behavior, resulting in the lack of effective supervision and restriction when guiding power is exercised. At the same time, administrative guidance involves multiple departments and levels, but the coordination and supervision mechanism is not perfect, and the lack of effective coordination affects the comprehensiveness and timeliness of supervision. In addition, the public supervision mechanism is weak, the lack of transparency, the public's understanding and participation in administrative guidance is limited, it is difficult to play a supervisory role.

Secondly, the fuzzy definition of responsibility is another major problem in the process of

administrative guidance. The specific performance is that the subject of responsibility is not clear, and it is difficult to hold specific administrative organs and staff accountable when problems arise. At the same time, the supervision and responsibility mechanism is not perfect, and the illegal behavior is not handled well. Taiyuan People's Government, the unclear responsibility of administrative guidance behavior makes it difficult to resolve dispute litigation [4].

In view of the negative impact of administrative guidance, the existing relief system is not perfect, and the relief efforts are limited. It is difficult for citizens to obtain effective relief when they are improperly affected. As the case of Nanjing professional counterfeiters shows [5], malicious behavior is essentially different from ordinary reporting complaints, reflecting the imperfection of the relief system and the lack of relief, which brings great pressure to the society.

4. Legislation analysis and path selection of administrative guidance

4.1 Legislative mode selection: unified legislation

For administrative guidance legislation, this study advocates a unified legislative model. This choice is based on the following considerations:

First of all, unified legislation is the inevitable demand of the development of the times. As a unified multi-ethnic country, under the background of rapid economic, social and technological development, China urgently needs to formulate a unified legal norm to all aspects of administrative guidance, so as to better adapt to the complex and changeable social needs and promote the modernization of the national governance system and governance capacity. Unified legislation can ensure the consistency and coordination of administrative guidance nationwide [6].

Secondly, unified legislation is conducive to improving the unity and coordination of laws. Administrative guidance involves a wide range of fields and complex content. Through unified legislation, it can ensure that the administrative guidance between different regions and different fields maintains consistency in legal content, implementation norms and implementation principles, avoids confusion and contradictions, and improves the predictability and stability of implementation. At the same time, unified legislation can form a more systematic and complete regulatory standards, avoid possible problems such as logical confusion and lack of effective command between regulations, so as to improve the operability of administrative guidance.

Finally, unified legislation can save legislative resources and improve implementation efficiency. The formulation of a unified core legal document for administrative guidance can avoid the repeated formulation of similar administrative guidance provisions in various places or fields, and reduce the redundancy and duplication of legislation. This centralized legislative approach can effectively save national legislative resources and make it more focused on legislative formulation and adjustment in key areas. At the same time, due to the more consistent legal standards, the executors can understand and implement the administrative guidance more clearly, which reduces the implementation difficulties caused by the ambiguity of the law. In addition, the strong coordination ability of the central government also makes it easier for administrative guidance to be implemented consistently across the country.

4.2 Choice of legislative form: from administrative regulations to law

In the form of administrative guidance legislation, this study tends to first formulate administrative regulations by the State Council, and then gradually transition to law. The choice of this legislative form is based on the following two considerations:

First of all, the adjustment object of the administrative guidance law is specific. The adjustment object of the administrative guidance law is the administrative organs at all levels (including other

legal subjects). The legislation in the field of administrative activities carried out by the highest administrative organ of the State Council can not only ensure the rationality of the quality of legislation, but also facilitate the implementation after legislation. Thanks to the close relationship between the State Council and the administrative organs at all levels, it has a deeper understanding of the problems and difficulties in the implementation of administrative guidance, and can timely feedback and improve the laws and regulations.

Secondly, the content of administrative guidance legislation adjustment is realistic and flexible. The content of administrative guidance legislation is usually closely related to specific fields, industries or actual situations, involving all aspects of actual operation and implementation. When the specific situation of the industry changes, the content of administrative guidance legislation should also be flexibly adjusted. Therefore, the choice of administrative regulations can be more direct and flexible to adapt to the rapidly changing social needs. Compared with the law, the formulation process of administrative regulations is more rapid, and the power to formulate is more concentrated. The State Council can more flexibly adjust the relevant provisions of administrative guidance according to actual needs without going through the cumbersome review process of the National People's Congress. It is easier to make adjustments in a short period of time to make it more in line with the actual situation and more realistic.

4.3 Choice of legislative function: protection law and regulation law

In the legislation of administrative guidance, this study believes that the dual functions of security law and regulatory law should be reflected.

First of all, the function of the protection law must be reflected. This is determined by the principle of statutory authority of administrative organs. The principle of statutory authority requires that administrative organs can only exercise their functions and powers within the scope expressly stipulated by law. In the field of administrative guidance, the widespread administrative guidance behavior must have a precise authorization in legislation. Through statutory procedures and authorizations, it is ensured that administrative organs can clarify their statutory authority when exercising their administrative guidance power, so as to avoid acts that exceed their statutory authority. At the same time, legislation guarantees the right of administrative guidance, and further stipulates the scope of its obligations while authorizing it, which is conducive to strengthening the awareness of consistency of power and responsibility, so that administrative guidance is no longer a purely discretionary act.

Secondly, the function of the regulatory law is to prevent the abuse of administrative guidance and neglect to perform their duties. Through the formulation of the regulatory law, clear procedures and standards can be established to regulate the behavior of administrative organs in administrative guidance. This helps to avoid the abuse of administrative guidance power, protect the legitimate rights and interests of the counterpart, solve the practical dilemma of excessive concentration of power and opaque procedures, and ensure that administrative guidance is carried out legally and effectively within the legal framework. The formulation of regulatory law also helps to improve the legitimacy, fairness and standardization of administrative guidance.

To sum up, the dual functions of security law and regulatory law in the legislation of administrative guidance are helpful to balance the power relationship within the legal framework, ensure that the administrative organs have sufficient legal authorization, and are subject to necessary constraints and supervision, so as to promote the scientific, standardized and effective implementation of administrative guidance.

4.4 Choice of legislative content

The content selection of administrative guidance legislation should cover the subject of administrative guidance, the scope of application, procedures and forms, and rights relief, so as to ensure the legitimacy, transparency and standardization of administrative guidance.

First of all, the subject of administrative guidance should be limited to the administrative subject, that is, the state administrative organs and their staff. This limitation aims to ensure that the subject of administrative guidance is within the statutory framework and prevents the intervention of other non-statutory subjects. The subject of administrative guidance shoulders specific responsibilities and is a specific administrative organ with public administrative authority. By limiting the subject of administrative guidance, we can achieve specific administrative purposes, prevent the abuse of administrative power, and ensure that power can be implemented accurately.

Secondly, the scope of application of administrative guidance should be limited to the three functions of regulation, mediation and assistance [7]. Specifically, including in order to protect the public interest on the violation of social order, damage to the public interest behavior to regulate and stop ; mediate, persuade and coordinate private or organizations with conflicts of interest ; and when the administrative subject has more resource information and technical means, through administrative guidance to help the administrative counterpart to solve the lack of resources, information, technology and lead to the situation can not achieve the goal [8]. These restrictions on the scope of application help to ensure the pertinence and effectiveness of administrative guidance.

In terms of the procedures and forms of administrative guidance, a fair, legal, scientific and legally based procedure should be established to ensure the scientific and democratic nature of administrative guidance. Administrative guidance should adopt a soft form, such as advice, suggestions, guidance, persuasion, consultation, encouragement, etc., fully respect the wishes of the other party, and adhere to the principle of democratic voluntariness. At the same time, five systems should be established to ensure the transparency, impartiality and effectiveness of administrative guidance, such as administrative guidance disclosure system, avoidance system, justification system, hearing system and evaluation system. The establishment of these systems is helpful to standardize the behavior of administrative guidance and protect the rights and interests of administrative counterparts.

Finally, in terms of the right relief of administrative guidance, administrative guidance should be included in the scope of judicial review through legislation. Because the administrative guidance behavior does not have the effect of administrative litigation at present, when the legitimate interests of the counterpart are damaged by administrative guidance, the right relief cannot be carried out through administrative litigation or administrative reconsideration. Therefore, it is necessary to establish flexible means of relief and make detailed provisions on various possible situations to protect the rights of the counterpart. Specifically, it can be stipulated that when the content and procedure of administrative guidance violate the legal provisions or there is administrative guidance of cross-border power enforcement and abuse of discretion, the relative person can save relevant evidence to file a lawsuit to the administrative organ and apply for interest compensation.

5. Conclusion

In summary, administrative guidance, as a tool to reconcile the relationship between the market economy and the state, plays an increasingly important role in modern society. In order to overcome the difficulties faced by administrative guidance in practice and promote the scientific, standardized and effective implementation of administrative guidance, it is necessary to strengthen the legislative research and practical exploration of administrative guidance. The unified legislative model, the

choice of legislative form from administrative regulations to law, the choice of legislative function of the dual function of security law and regulatory law, and the specific legislative content suggestions proposed in this paper provide a useful reference for the legislative practice of administrative guidance.

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