



Legal Response to The Rigidity of Discretion in Automatic Administrative Punishment

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Abstract. With the modern emerging technologies such as artificial intelligence and big data, the administrative law enforcement means have become more intelligent, and the automation level of digital administration has improved significantly. Automated administration, as its name implies, refers to the administrative activities in which specific links or all links in administrative procedures are handled by artificial intelligence without manual individual intervention, so as to realize some or all unmanned administrative activities. This paper takes automatic administrative punishment as the research object to discuss the rigid problem of discretion in automatic administrative punishment. And to strengthen the subject status of administrative organs, give discretion execution, and solve the problem of rigid discretion in automatic administrative punishment by means of communicative rationality.

Keywords: Automated administration, Administrative punishment, Rigidity of administrative discretion, Subject status, Communicative rationality.

1 Introduction

The exercise of discretion in administrative punishment is carried out by administrative law enforcement personnel within the scope of their functions and powers, based on legal principles or things, to deal with different cases with different discretion, so as to maximize the protection of the legal rights of administrative counterparts and realize case justice. Automatic administrative punishment has changed the exercise of discretion of administrative organs, and the subject of exercising discretion has changed from administrative law enforcement personnel to automatic machine system.^[1] The automatic system transcodes the discretion rules, and carries out mechanical discretion on different cases based on the algorithm rules input in advance, which leads to the rigid operation of discretion. Its essential attribute can be classified as the algorithm expression of discretion operation, which also constitutes the fundamental difference between automatic discretion and manual discretion.

When specific cases do not need to be judged according to specific circumstances, automatic discretion has incomparable advantages over human discretion. However, everything has two sides, and the advantages and disadvantages of automatic decision-making are also its disadvantages. Because of the deterministic characteristics of

algorithms, ambiguity is not allowed in programming, which makes it difficult for automatic discretion systems to choose the most appropriate decisions for specific situations like human beings.^[2] This practice, which has to limit or even give up discretion when designing algorithms, is manifested as "rigid discretion" in practice. This paper takes the exercise of discretion in automatic administrative punishment as the breakthrough point, studies the risks and challenges faced by the operation of administrative discretion in the application of automatic administrative punishment and the legal response, and discusses the rigid exercise of discretion in automatic administrative punishment. This has significant theoretical and practical significance for maximizing the function of discretion in automatic administrative punishment and ensuring the legitimate rights of administrative counterparts.

2 Operation Mechanism of Discretion in Automatic Administrative Punishment

2.1 Rule Transcoding of Administrative Discretion

As a product of technological construction, machines have independent language system and thinking logic, which is fundamentally different from human brain activity. Computer codes constitute the language system of machines, which translate human natural language into codes and further translate natural language into binary instructions that machines can recognize with the help of compiling operations.^[3] For example, the ability to translate legal provisions expressed in natural language into code and convert them into binary instructions that can be recognized by computers by compiling operations, so as to enable computers to use laws. However, it is difficult to reproduce the discretion of administrative punishment by simple computer code. It exists in the form of scattered letters. At this time, the algorithm is needed to combine the codes according to the computer logic and arrange the codes one by one according to the applicable steps of the law. The automatic administrative machine has the discretion. Generally speaking, the code and algorithm transcode the administrative penalty discretion into a computer language recognizable by the machine. The computer structure language constructs the administrative discretion decision-making system through semantic network. And the machine is used as the carrier to execute binary instructions to realize illegal data input and administrative discretion result export and other work.

It is obvious that codes and algorithms not only evolve the effect discretion, but also dominate the result of administrative penalty discretion. The computer code arranged according to the algorithm rules directly dominates the justice degree of the result of automatic administrative penalty discretion. The case effect discretion of illegal behavior and illegal consequence has been evolved into reality by the code and algorithm, which at the same time ensures the standardized operation of automatic administrative discretion and the substantive justice of the discretion result. In view of this, the algorithm composed of this code sequence constitutes the discretionary benchmark in automatic administrative punishment. Code and the algorithm control behind it construct the exercise of administrative discretion through technology.

2.2 Discretionary Application of Algorithm Rules

The discretionary nature of automatic administrative punishment indicates that the exercise of discretion is undergoing the intelligent evolution of computer technology at present. It is mainly manifested in two aspects: first, using technical means to code the legal provisions in order to eliminate the administrative discretion space in the application of the law. Because the algorithm evolves the exercise of administrative penalty discretion into a combination of various discretion factors, factual elements are directly added to the discretion system in order to realize one-to-one correspondence between factual elements and legal provisions. Secondly, the objective level of discretion is realized through the operation of computer technology. Discretion is the autonomy of the administrative subject to a certain extent within the determined scope, and its exercise of power itself has a very strong subjectivity. But the automatic administrative penalty discretion system separates the administrative law enforcement personnel from the discretion and transfers the discretion power to the objective algorithm machine, which changes the interference of the subjective factors of the law enforcement personnel and enhances the objectivity of the administrative penalty discretion judgment.

3 Challenges of Discretion Operation in Automated Administrative Punishment

3.1 The Administrative Subject Has Insufficient Space for Artificial Discretion

Automated administrative punishment reduces the exercise space of administrative subject's discretion. According to the computer algorithm instruction, the administrative discretion is changed into a mechanical rule. The reference factors needed in the applicable discretion are input by the system, and the factors without reference are eliminated in advance. Microinstructions connected through computer machines can achieve the purpose of legal provisions.^[4] The core of law is to pursue fairness. Can fairness be quantified by algorithms? First of all, fairness is an uncertain legal concept, and it is very difficult to translate it into algorithmic fairness. Secondly, quantified and algorithmic fairness may bring discrimination.^[5] When we move from an administrative decision that requires individual judgment to a procedural process, the overall interests of society, human nature, emotion, local customs and other factors may be ignored.

3.2 The Due Process Rights of the Counterpart Are Eroded

The principle of public participation in administrative due process is extremely important. Some form of hearing is considered as the most basic requirement of procedural due process, and the minimum of due process provided by administrative organs.^[6] However, due to the private monopoly of the automated decision-making system, the public's right to participate can not be guaranteed to the greatest extent. The core of the principle of public participation in administrative due process is "listening to public opinions". Its connotation includes two aspects: First, the public has the right to

participate in administrative activities, which reflects the public will formation function of due process; Secondly, the right of statement and defense of the parties should be fully guaranteed in administrative law enforcement. In the process of public participation in administrative punishment activities, special procedures should be set up to ensure their participation rights and ensure the symmetry of information obtained by all parties.^[7] Citizens' active participation in administrative punishment activities aims at influencing the formation of discretion results through their own behaviors, rather than participating as the background of administrative activities.

At present, algorithms are widely embedded in political activities, which leads to multiple implementation of the principle of public participation. First, private enterprise monopolizes technology. Second, the mechanized operation of the algorithm rules deprives the counterpart of the opportunity to state and defend. It can be seen that automatic administrative penalty discretion not only avoids public participation and hearing in administrative decision-making, but also dispels the procedure of parties' statement and defense, which leads to the lack of public participation in due process rights.

4 Standardize the Exercise of Discretionary Power of Automatic Administrative Punishment

4.1 Strengthen the Principal Position of Administrative Organs

Artificial intelligence is a highly intelligent tool created by human beings, but no matter how intelligent it is, it cannot replace human beings after all. Behind all the automated administrative penalty discretion, the administrative subject still controls the system. At the same time, due to the current degree of computer algorithms, human unique characteristics such as empathy and morality cannot be transformed into computer algorithm discretion.^[8] Therefore, the main body can only be the administrative organ that can make discretion and judgment according to specific cases.^[9] This can not only prevent the rigidity of discretion, but also prevent the algorithm power from being deeply embedded in public power, which leads to the weakening of administrative discretion.

4.2 Giving Discretion to Execute with Communicative Rationality

The discretion of automatic administrative punishment is a public communication behavior in public space involving administrative subject and administrative counterpart. That is to say, the subjects of both parties are working towards the purpose of making fair discretion under the provisions of existing laws.^[10] Automated administrative penalty discretion is not only a unilateral administrative activity of administrative subjects. In the administrative communication activities, the administrative counterpart also needs to carry out the necessary administrative discretion activities, which will also have an impact on the results of automatic administrative punishment. Therefore, the automatic administrative penalty discretion should be based on the legal norms of both sides of the administrative discretion to reach the final consensus. If the administrative

organ does not carry out necessary communication with the administrative counterpart, it will not guarantee the fairness of discretion, and there will be a large number of administrations at that time. The implementation of any legal system requires natural persons to implement the automatic administrative penalty discretion system even relying on artificial intelligence system. Therefore, both the administrative counterpart and the administrative subject need to cultivate rational quality in order to standardize the exercise of automatic administrative penalty discretion.

5 Conclusion

The purpose of this paper is to deeply study the exercise of discretion in the current automatic administrative punishment. Through the frequent litigation cases in the practice of automatic administrative punishment, we can find that the exercise of discretion in the current automatic administrative punishment has formed a new challenge compared with the exercise of administrative discretion, that is, the exercise of discretion in automatic administrative punishment is rigid. It is mainly manifested in the lack of artificial discretion space of administrative subjects and the erosion of due process rights of counterparts. This paper explores the deep-seated essence of the problem through the representation of the problem and finds that the root of the problem lies in the fact that the deterministic characteristics of the algorithm make it difficult for the automatic discretion system to choose the most appropriate discretion party for specific situations like human beings, which leads to the crisis of discretion rigidity. In this paper, by emphasizing the subject status of administrative organs and endowing discretionary execution with communicative rationality, the discretionary power can play its due function and value.

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References

1. Konstant A. Rights, administrative discretion and Dawood[J]. *South African Journal on Human Rights*,2016,32(1):106-129.
2. K. D T. Administrative Discretion in U. S. Banking Regulation[J]. *European Company and Financial Law Review*,2023,19(6):992-1009.
3. Cartier G. Administrative Discretion and the Spirit of Legality: From Theory to Practice[J]. *Canadian Journal of Law and Society*,2010,24(3):313-335.
4. Chen Ben, Pei Yanan. On the application risk of algorithm decision-making in automatic administration and its prevention path [J]. *Journal of Southwest University for Nationalities (Humanities and Social Sciences Edition)*, 2021, 42 (01): 74-81.

5. Zha Yunfei. Research on Automatic Specific Administrative Acts in the Era of Artificial Intelligence [J]. *Comparative Law Research*, 2018, (05): 167-179.
6. Zhang Linghan. Conflict and reconciliation between algorithm automatic decision-making and administrative due process system [J]. *Dongxue*, 2020, (06): 4-17.
7. Liu Dongliang. Technical due process: double variation of procedural law and algorithm in the era of artificial intelligence [J]. *Comparative Law Research*, 2020, (05): 64-79.
8. Ma Yanxin. Classification of Automated Administration and Reform of Legal Control [J]. *Research on Administrative Law*, 2019, (01): 80-92.
9. Hu Minjie. Legal control of automated administration [J]. *Research on Administrative Law*, 2019, (02): 56-66.
10. Su Haiyu. On the communication control of administrative discretion [J]. *Politics and Law*, 2017, (02): 83-91.

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