

COMPARATIVE STUDY ON ADMINISTRATIVE SUBJECT TYPES

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Abstract

This paper studies the situation and defects of China's modern administrative subject types through comparative analysis on the administrative subject types of continental law system and Anglo-American law system countries, analyzes the necessity and applicability of constructing multiple administrative subject system in China, and also provides several innovations for the construction of Chinese administrative subject system from the perspective of China's legal culture characteristics and adaptability.

Key words: Administrative subject; Subject types; Diversification

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INTRODUCTION

Modern administrative act patterns' changes—series of characteristics of administrative acts in modern society, such as expansion of administrative acts and socialization of administrative responsibility which have made several social subjects take increasing burden of public functions. Reflected in specific administrative acts, it has brought difficulties for identifying certain social subjects which are similar to administrative subjects in their nature and functions. Therefore, reasonable thinking on modern administrative subjects' nature, characteristics, position, and thus admitting correctly the diversification of modern administrative subject to make it meet the needs of the development of Chinese society, is the logical starting point of completing and developing administrative theory as well as improving legalization of modern administration and administrative procedures,

and protecting administrative counterparts' legal rights in practice. The author starts from comparing administrative subjects' types in continental law system and Anglo-American law system countries to analyze the construction of Chinese multiple administrative subject system.

1. ADMINISTRATIVE SUBJECT TYPE IN CONTINENTAL LAW SYSTEM

1.1 France

There are three kinds of administrative subjects: the state, local administrative groups, and public legal person.

A. The state. The state is the most fundamental administrative subject and also the origin of other administrative subjects' power. The state is the main subject engaging in administrative management. The state's administrative management functions are basically handed by the following two level administrative subjects—the central administrative organs and local administrative organs. The central administrative organs include the President, prime minister, ministers, and some advisory bodies. Local administrative organs include two types: administrative organs with general permission and the ones with special permission.

B. Local administrative groups. Local administrative groups have independent legal status and administrative power within their own regional scope, and take legal responsibility independently. People always cannot tell the difference between local administrative groups and local administrative organs but in fact they are different in nature. Local administrative groups are not national administrative organizations but local administrative parties. Local administrative groups can be divided into the ones in cities and towns, the ones in provincial region, and large regions' autonomy administrative ones (Wang, 1988).

C. The public legal person. The public legal person is a special kind of legal person who generates by basing on the concepts of public legal person and private legal person. Public legal person is a social organization which has certain public power in property and right of disposing to deal with specific public affairs according to power separation mode. It can also be called public organization and public interest organizations (Shi, 2003). For example, guild, school, hospital, and museum and so on. The administrative subject concept of public legal person in France is built under the situation that administrative power expands, administrative management diversifies, and administrative methods increase gradually. Therefore, it has resolved the conflict between administrative function execution requirements and single administrative subject in administrative law theory.

1.2 Germany

In Germany, administrative subject types include: a. the state. From jurisprudence point of view, the power of state is the origin of all other powers which has made the state the original administrative subject in administrative law. b. public legal person. Public legal person has two characters: one is that public legal person is the basic form of legal person and has independent legal personality; the second is that public legal person takes the responsibility of administrative functions or

it is governmental organization in fact. The two basic characters of public legal person have decided that it cannot just be a legal person in common sense. It takes the social management responsibility, takes independent legal liability, and also is very important administrative subject type apart from the state. Public legal person types mainly are: public mass organizations, public buildings, and public consortiums. c. Administrative units which have partial administrative power. Complete administrative power belongs to the state or other administrative subject in complete sense while partial administrative power can only refers to certain administrative functions in certain areas. d. Authorized person. The authorized person in nature is private law subject. However, with the authorization of the state and other administrative subjects, he or she can take certain administrative functions which can be temporary or long-term. e. Private law organizations. Private law organizations are the so-called corporations, companies, and other organizations. They usually are given certain administrative functions to improve administration effective under some circumstances as well as eliminating social disputes. Therefore, German scholar Muller thought that problems can be much easier to solve under certain circumstance if private law organizations are used.

2. ADMINISTRATIVE SUBJECT TYPE IN COMMON LAW SYSTEM

2.1 United Kingdom

There are basically the following types of administrative subjects in UK: a. central government. b. local government which is different from local branches set up by central government. It has independent legal status (Wang, 1987). c. public legal person. Mainly refers to administrative organs which engage in certain public affairs and have certain independency and independent legal personality besides central administrative organs and local administrative organs which have normal functions (Wang, 1987).

2.2 United States

In the United States, administrative subjects are: a. administrative organs, b. independent control committees, and c. governmental corporations. With the development of administration's form and content, many common law counties think that as long as public organizations carry out administrative functions or public management functions, all legal relations happened during the execution of the administrative and public management functions must be adjusted by administrative legal system. Such understanding has boosted new development of administrative subject theory which is increasing amount of administrative subjects and the accelerating of administrative subjects' diversification.

From different countries' situation we can see that the boost of the decentralization of administrative power, diversification of administrative methods, and privatization of public law, led to the diversification of administrative subject types and made administrative subject type theory develop continuously. For example, in Germany, the generation of "private law organization form administrative subject" is a huge breakthrough of traditional administrative subject system in administrative law theory. It has also made every country

around the world think whether public identity is the only reason for recognizing administrative subject? Or the subject's organizational form, rules for activities, or nature of power and conducts are the subjective standard for identifying administrative subject? However, the transition in concept and theory will definitely include administrative subject type theory into an open and diversified new era.

3. CURRENT SITUATION OF CHINESE ADMINISTRATIVE SUBJECT TYPES

No matter in various kinds of teaching materials or administrative law monographs, scholars used to divide Chinese administrative law subject into two basic kinds: functional administrative subject and authorized administrative subject. According to Professor Hu Jianmiao's explanation in his book *Administrative Law* that "any management subject without being authorized by any other organizations having administrative power generates along with the establishment of the subject is functional subject." Compared with functional administrative subject, "administrative power does not come into being with the establishment of the organization but from authorization of the management subject is authorized administrative subject." According to Chinese administrative law common saying, Chinese administrative law theory has divided administrative law subjects into two basic kinds: Functional administrative subject and authorized administrative subject.

3.1 Functional Administrative Subject types

The power of functional administrative subjects derives from Chinese Constitution and other organizational laws. Normally, functional administrative subjects are: central administrative organs and local administrative organs.

3.2 Authorized Administrative Subject Types

The expansion of modern administrative service and management scope has made a lot of public services and managements cannot be completed or practiced merely by administrative organs' power. For example, food quality supervision and financial regulation etc. Therefore, in order to release administrative pressure, it is necessary to authorize certain dispersive administrative functions to related social organizations according to administrative laws and regulations apart from functional administrative types. Such social organizations execute public power within the scope of the laws and regulations and also bear public functions. In China, such organizations are called "authorized administrative subjects" which include the following types:

A. Administrative executive branch. Administrative executive branch is set up by administrative organs for the purpose of administrative management to handle different kinds of administrative affairs including administrative organs' internal organizations, dispatched organizations and temporary organizations.

B. Enterprises. Of course, only when enterprise acts within laws and regulations authorized scope according to laws and regulations it can be administrative subject. At normal circumstance, enterprises can only exist as common civil and commercial law subjects.

C. Public institution. Which should be mentioned here is that Chinese public institutions can only act as administrative subject within a very small scale such as

schools awarding degrees to students. That is to say not all public institutions' social services and social managements are made with the identification of administrative subject. This is the fundamental difference between Chinese public institution and continental law countries' public legal person or public inaedificatio.

D. Social groups. For example, consumers' rights and interests protection organization and Institute of Certified Public Accountants and so on.

E. Other organizations such as neighborhood committees and other organizations which have certain administrative power and functions.

The definition of administrative subject in China currently is still in the surface level. No matter functional or authorized administrative subjects are just set up for meeting the requirements of administrative judicial practices without thinking about the internal value of administrative subject theory. Meanwhile, as the logic start point of administrative law research, administrative subject type theory should pay more attention on resolving deep-layer administrative law theory and principles but not just be limited within the functional understanding and surface layer understanding. Thus, modern administrative subject type research, from certain significance, is surface-layered, practical, closed, and short-sighted research.

The limited research goals of traditional administrative subject theory have restricted its development space which is also the result of neglecting administrative subject value function and giving lower or too simple evaluation of administrative subjects' active functions (Tu, 2002).

4. THE CONSTRUCTION OF CHINESE DIVERSIFIED ADMINISTRATIVE SUBJECT TYPES

China's administrative subject types' characteristics are—double administrative subject model including functional administrative subject as main part and authorized administrative subject as subsidy. We should see that no matter administrative organs or law and regulations authorized administrative subject have limit in taking social public responsibility. Meanwhile, there are a lot subjects which are neither administrative organs nor authorized subjects but they take social public functions in certain degree in practice. Such situation is useless for the rationalization of Chinese administrative subject theory and the identifications for rights and obligations in Chinese administrative practice. Therefore, the author thinks it is necessary to add social intermediary organizations and public legal person as administrative subject so that to realize the diversified construction of Chinese administrative subject types.

4.1 Include Social Intermediary Organizations as Administrative Subject

From the introduction of both continental law and common law countries' administrative subject types it can be seen that in the two legal systems the government only administration has become the past and what follows up is government and other social organizations work together to provide public service and public management among which social intermediary organizations have played great part in public service. Especially in education, health and hygiene, environment, welfare, and social remedy, social intermediary organizations supplement government in service and management and also bear the pressure of government in public service as well as public management. However, in fact,

social intermediary organizations' participation in administration has already gained feedback. Therefore, include social intermediary organizations as one of administrative subjects has become a necessary step for the diversification process of Chinese administrative subject type.

There are three types of social intermediary organizations in China: economic social intermediary organizations, social class social intermediary organizations, and cultural social intermediary organizations. Legally speaking, we do not recognize social intermediary organizations as authorized administrative subject. However, in practice, social intermediary organizations have been carrying out certain social public functions, providing public service, and even public management. Then, how should we define its nature? The author thinks that the trend of social practice development and administrative theory development – admitting the administrative subject position of social subjects which take public functions. Such trend requires us to set social intermediary organizations as new administrative subject type with the guidance of modern administrative concept so that to resolve the logic resource problem of administrative subject theory and procedure practices.

4.2 Include Public Legal Person as Administrative Subject

4.2.1 Public Legal Person Concept Analysis

In Chinese administrative law theory, there is no concept of public legal person. The reason that the term public legal person became popular in China derives from the book *French Administrative Law* translated by Chinese scholar Wang Mingyang. This book introduces basic issues of French administrative law and in the content of administrative subject the term public legal person which is never appeared in Chinese administrative subject theory shows up. Civil law countries have similar administrative subject with public legal person. In French it is called "public legal person" while in Germany it is called "public inaedificatio". The generation of public legal person has certain social historical reasons. Public legal person appeared in the period of private capitalism. The main reason is that there were many administrative supplies at that time and administrative organs have great administrative pressure. At the same time, there were a lot administrative functions cannot be carried out independently due to obvious technique reasons. Thus, public legal person who has certain professional knowledge appeared accordingly. For example, post office, railroad, highway, electronic and water supply institutions came out at such circumstance (Li, 1993). Therefore, it can be said that public legal person is a new technology designed in administrative subject system under certain historical condition for the realization of administrative management and administrative service effect, fairness, and justice. It is an expansion and variation of administrative organizational form in the condition of administrative power socialization and publication. So, provide administrative service in a very broad scope, improve administrative effect and public service quality is the establishment goal of public legal person. The service scope of public legal person also includes science and technology research, education, and culture and so on. As a result, public legal person is different from traditional legal person; it has the following significant features:

First, public legal person has the nature of legal person of public law. The so called legal person of public law is "established legal person according to public law with the aim of public affairs" (Wang, 1988).

Second, public legal person usually has two major functions which are management and service. It is different from its parent body, the administrative organ. Public legal person does not directly give orders or do public management; instead, it carries out public management indirectly through public service activities. "The relation between public legal person and its parent administrative organ is cooperation, division, and confront" (Weng, 2009). So we can say that public legal person's public management behavior has the nature of service and indirectness so that to realize public function more softly.

At last, public legal person has independent ability to bear legal responsibility. The reason is that the public power of public legal person does not come from the authorization of administrative organs but from the specialty of its nature. Meanwhile, public legal person is neither internal unit nor organization within administrative organ. Thus, public legal person act independently in social activities and takes independent legal responsibility.

From the above analysis it can be seen that public legal person is a type of administrative subject. It has administrative functions and takes independent administrative responsibilities such as the state, local groups, and social intermediary organizations. According to the concepts of public legal person in French, German, Japanese, and Taiwan administrative laws, public legal persons can be divided into the following types in practice: service inaedificatio, culture and education inaedificatio, child care inaedificatio, folk-custom inaedificatio, and business inaedificatio, etc.(Ma, 2000).

4.2.2 Reasons for Introducing Public Legal Person into Chinese Administrative Subject System

It is definite that there is no public legal person or private legal person division in Chinese administrative law. Therefore, the similar body like public legal person in China is actually public institution. Since there is no division of public and private legal person, schools, hospitals, and museums and other public institutions are in a very blur legal position in fact. In real life, we deny the administrative subject position of these public institutions but on the contrary give them public service functions; in legal practice, disputes happened in public service of public institutions are excluded from either civil procedure nor administrative procedure. The fundamental reason for this phenomenon lies in that public institution is not administrative subject recognized by Chinese laws. Thus, it is very essential for China to introduce the double legal system of public and private legal persons. Under such system, we need to construct more reasonable administrative subject system, that is to say, to treat public institution as administrative subject - the public legal person so that to realize effective combination of administrative organization forms, administrative procedures, and administrative basic theories.

CONCLUSION

In conclusion, the one dimension and dual dimensions eras of administrative subjects have come to an end. Admitting and reasonably acknowledging modern administrative subjects' diversification, recognizing social intermediary

organizations and public legal person as administrative subjects, and making better use of social service and public management functions so that to adapt to Chinese social economics development requirement is the necessary demand of the execution of Chinese modern administrative functions, legalization of administrative procedure, and the protection of administrative counterpart's actual substantive and procedural rights.

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