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EXTENUATING CIRCUMSTANCES ADMINISTRATIVE LIABILITY IN THE LAW ON HANDLING OF ADMINISTRATIVE VIOLATIONS OF VIETNAM

***Nguyen Nhat Khanh*¹**

*Faculty of Administrative Law and State, Ho Chi Minh City University of Law
nnkhanh@hcmulaw.edu.vn*

Abstract

Extenuating circumstances administrative liability in Vietnamese law are understood as such circumstances related to the determination of sanctioning and the extent of responsibilities towards individuals, organizations which violated administrative law. These circumstances are to alleviate the extent of danger for the society of the violations; therefore, when these circumstances are applied, individuals, organizations violating the administrative law will incur lower legal consequences than normal cases. The paper analyzes the theoretical issues of extenuating circumstances administrative liability in Vietnamese law, points out some shortcomings and provides proposals for improvement.

Keywords

Extenuating circumstances; administrative liability; administrative violation; administrative sanctions; Vietnamese law

¹ LLM, PhD Student, Faculty of Administrative Law and State, Ho Chi Minh City University of Law.

02 Nguyen Tat Thanh Street, Ward 12, District 4, Ho Chi Minh City, Vietnam.

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I. Introduction

Handling administrative violations is not only to punish violators but also to educate them about the awareness to abide by laws and present the humanity of laws. The Law on Handling of Administrative Violations 2012 regulates the sanction principles as follows: *“The sanctioning of administrative violations must be based on the nature, seriousness, and consequences of these violations, violators and **extenuating as well as aggravating circumstances**.”*² The Law on Handling of Administrative Violations 2012 issues extenuating circumstances to guarantee humanity and to encourage violators to intentionally cooperate with positive attitudes to the problems and declare honestly. Meanwhile, aggravating circumstances are to punish more strictly those who commit crimes in a more dangerous manner, with behaviors that are detrimental to society.³ Within this paper, the author will focus on analyzing legal provisions on extenuating circumstances applied in how

² Law on the Handling of Administrative Violations in 2012, Art. 3 (1.c).

³ Scientific commentary on the Law on Handling of Administrative Violations in 2012, at 129 (Nguyen Canh Hop ed., Publisher Hong Duc., 2017).

to deal with sanctioning administrative violations, spouting out some shortcomings of the current law and proposing the complete directions.

Based on Article 9 of the Law on Handling of Administrative Violations 2012, the following are deemed as extenuating circumstances administrative liability:

— *An administrative violator has taken an act(s) to prevent or limit consequences of his/her violation or voluntarily remedy consequences and pay damages;*

— *An administrative violator has voluntarily reported his/her violation or has shown sincere repentance for the violation, or has actively assisted functional agencies in detecting or handling administrative violations;*

— *A person commits an administrative violation in the state of being emotionally provoked by an illegal act of another person; or acts beyond the legitimate defense limit or beyond requirements of an emergency circumstance;*

— *A person commits an administrative violation under force or due to his/her material or spiritual dependence on another;*

— *An administrative violator is a pregnant woman, a weak aged person or a person suffering an illness or disability which deprives him/her of the ability to perceive or control his/her acts;*

— *A person commits an administrative violation due to his/her particularly difficult plight which is not attributable to his/her acts;*

— *A person commits an administrative violation due to his/her ignorance;*

— *Other extenuating circumstances stipulated by the Government.*

Compared to the Ordinance on Handling of Administrative Violations 2002 (amended and supplemented in 2007, 2008), the Law on Handling of Administrative Violations 2012 added 3 extenuating circumstances included as follows: *i. An administrative violator has shown sincere repentance for the violation, or has actively assisted functional agencies in detecting or handling administrative violations; ii. Committing an administrative violation which is beyond the legitimate defense limit; iii. Committing an administrative violation*

which is beyond the requirements of an emergency circumstance. An addition to the circumstances “An administrative violator has shown sincere repentance for the violation; or has actively assisted functional agencies in detecting or handling administrative violations” is essential to encourage violators to correct the violations, cooperate with competent governmental agencies in order to promptly prevent, discover and handle violations. Meanwhile, adding the two circumstances “Committing an administrative violation which is beyond the legitimate defense limit” and “Committing an administrative violation which is beyond the requirements of an emergency circumstance” is considered to be appropriate in actual situations. This illustrates the humanity of laws when the subjects are in particular situations and must protect the legitimate interests of the government and organization as well as legitimate benefits and the rights of themselves and others.

II. The specific characteristics of extenuating circumstances administrative liability

Firstly, the application of extenuating circumstances reduces the level of administrative liability of individuals and organizations that violate administrative violations compared to normal cases.

The values of extenuating circumstances administrative liability are shown when violating subjects in these circumstances will be reduced to administrative liability compared to normal cases (average sanctions). For example, in cases of being fined, Law on Handling of Administrative Violations 2012 issued “*if such violation involves an extenuating circumstance(s), the fine may be lower but must not be lower than the minimum level of the fine frame.*”⁴ For the sanction of deprivation of the right to use licenses or practice certificates for a definite time or suspension of operation for a definite time in road and railway traffic sections, Decree No 46/2016/ND-CP issued:

“the duration of the suspension of a license or practicing certificate or transport business operation as a penalty for a violation specified

⁴ Law on Handling of Administrative Violations in 2012, Art. 23 (4).

in this Decree is the average level of the bracket. The minimum level shall be applied if there is a mitigating factor...”⁵

Through it, it can be seen that the applications of extenuating circumstances are of importance in detail administrative responsibilities, guaranteeing equality in applying laws, violating individuals, and organizations have to take administrative responsibilities which are associated with characteristics, nature, and extent of the violation of each subject.

Secondly, the extenuating circumstances administrative liability with “open-ended” characteristics.

Analyzing the regulations in Article 9 of the Law on Handling of Administrative Violations 2012 to demonstrate that the extenuating circumstances are not in the “closed-in” list but can be expanded and added because along with the extenuating circumstances issued by the National Assembly which are listed in detail from Clause 1 to Clause 7, the Law is also regulated in an open manner in Clause 8 when allowing the Government to issue other extenuating circumstances. The expansion and addition depend on the decision of the Government. This regulation is necessary to create advantages for the authorities for actively making and choosing suitable extenuating circumstances with the variety of administrative violations in each different domain which aims to bring benefits for violators. This is a specific difference between extenuating circumstances and aggravating circumstances because of the policy of aggravating circumstances in a closed list which belongs to the authority of the National Assembly.⁶

⁵ Decree No 46/2016/ND-CP, Art. 77 (2).

⁶ Article 10 of the Law on Handling of Administrative Violations 2012 stipulates a “closed list” of aggravating circumstances including the following 12:

- a) *Committing an administrative violation in an organized manner;*
- b) *Repeatedly committing an administrative violation; recidivism;*
- c) *Inciting, enticing or using a minor to commit a violation; forcing one’s materially or spiritually dependent person to commit an administrative violation;*
- d) *Using a person who, with the clear knowledge of the violator, suffers a mental illness or other illness which deprives such person of the ability to perceive or control his/her acts, to commit an administrative violation;*
- e) *Affronting or libeling a person on public duty; committing an administrative violation in a hooligan manner;*

It must be noticed that only the government can have this privilege, other agencies which manage the authorities cannot issue regulations related to extenuating circumstances. This is a completely appropriate policy because the National Assembly is not the direct subject to carry out administrative activities, to arise relationships in administrative activities which occur unpredictably so it is needed to vary the form of sanction. Simultaneously, the Government is the highest state administrative body of the Socialist Republic of Vietnam, with the duty to unify and manage from the state to the local area, to enact the Decree in sanctioning administrative violations in all domains. By getting the Government to expand the foundation of extenuating circumstances administrative liability, it helps the competent individual to handle actively towards the variety of circumstances and violators, to enhance democracy in the handling of administrative violations.⁷ However, in the process of enacting the Decree on sanctioning administrative violations in each field, the competent agencies only focus on stipulating the administrative violations and the extent of sanction but not on other extenuating circumstances regulations.⁸

f) Abusing one's position or powers to commit an administrative violation;

g) Taking advantage of war conditions, a natural calamity, disaster, epidemic, or other special difficulties of the society to commit an administrative violation;

h) Committing an administrative violation while serving a penalty under a criminal judgment or while executing a decision of application of an administrative violation handling measure;

i) Continuing to perform an act of administrative violation after being requested by a competent person to stop such an act;

j) Absconding or concealing an administrative violation after committing such violation;

k) Committing an administrative violation on a large scale or involving a large quantity of goods or goods of large value;

l) Committing an administrative violation against many persons, a child, an aged person, a disabled person or a pregnant woman.

⁷ Scientific commentary on the Law on Handling of Administrative Violations in 2012, at 169 (Nguyen Canh Hop ed., Publisher Hong Duc, 2017).

⁸ Dao Thi Thu An, Extenuating and Aggravating Circumstances in Handling Administrative Violations — Practice and Issues Raised, 5 *Democracy and Law Journal* 10 (2007).

Thirdly, the extenuating circumstances administrative liability are applied by the authorized person and must be reflected in the decision to sanction an administrative violation.

Sanctioning of administrative violations is an activity of practicing the state power, through sanctioning, the competent holder in the name of the State's power to issue sanctions decisions compel the subject to administrative violations. It must be abided by sanctioning forms and remedial measures. Given the nature of the State's exercise of power, the application of this coercive measure must be sanctioned by the competent subjects in accordance with the provisions of law.

The extenuating circumstances administrative liability are details associated with the violating subject, which reduce the level of administrative responsibility of that subject, so the application of these circumstances must be considered together with the decision to sanction administrative violations. Therefore, if the subject of administrative violations is considered to be applied the extenuating circumstances, these details must be shown in the content of the decision to sanction the administrative violation.⁹ On that basis, the subjects with sanctioning competence may apply lower sanctions compared to normal cases. When applying these circumstances, competent subjects must rely on objective truths to comprehensively consider and assess details attached to violating subjects. Therefore, in order to ensure the openness, the strictness of the law and consistency in the sanctioning process, the law stipulates that the application of the extenuating circumstances must be reflected in the sanctioning decision issued by the competent subjects.

Fourthly, the application of the extenuating circumstances administrative liability is "concreteness".

The "concreteness" of the application of the extenuating circumstances administrative liability firstly has been shown by the extenuating circumstances having to be considered in each violation

⁹ See The Form of Decision on sanctioning administrative violations No. MQĐ02 in the Appendix "Some forms in handling administrative violations" issued together with the Government's Decree No 97/2017/ND-CP of August 18, 2017 amending and supplementing a number of articles of the Government's Decree No 81/2013/ND-CP of July 19, 2013 detailing a number of articles and measures to implement the Law on Handling of Administrative Violations 2012.

case. If an entity commits an administrative violation many times at different periods, the consideration and application of the extenuating circumstances (if any) shall only be applied according to each specific case. Suppose, on August 15, 2017, Mrs. A committed an act of *“insulting the honor and dignity of others”* as prescribed at Decree No 167/2013/ND-CP¹⁰ a warning or a fine ranging from VND 100,000 to VND 300,000 shall be imposed for this violation. At the time of performing the act, Mrs. A is 8-month pregnant, this is the time when the woman has unusual emotional, psychological, and mental manifestations, so when considering sanctioning for Mrs. A, the authority may consider adopting the extenuating circumstance as *“pregnant woman who has been an administrative violator”* to reduce her administrative liability. However, on April 3, 2018, Mrs. A continued to commit acts of *“spreading nails on roads”*, according to Decree No 46/2016/ND-CP, a fine ranging from VND 6,000,000 to VND 8,000,000 shall be imposed for this act.¹¹ This time, Mrs. A had given birth, so at the time of carrying out the act, Mrs. A was in a completely normal state of mind and consciousness, so there were no other circumstances to be mitigated and thus, she was sanctioned as in common cases.

In addition, the “concreteness” of the application of the extenuating circumstances in sanctioning administrative violations is reflected by the fact that only those who satisfy the prescribed signs can apply the extenuating circumstances, which shows that clear in the case of multiple people committing an administrative violation. The Law on Handling of Administrative Violations 2012 stipulates that *“many people committing the same act of administrative violation shall each be sanctioned for such administrative violation.”*¹² However, the level of administrative responsibility of each person may vary depending on the specific circumstances attached to each violator. When conducting the sanctioning, the competent subject will have to base on these facts to decide the sanctioning form and level of sanction for each violator. For example, N and H jointly perform an act of “Stealing property” of other

¹⁰ Decree No 167/2013/ND-CP, Art. 5 (1.a).

¹¹ Decree No 167/2013/ND-CP, Art. 11 (6.a).

¹² Law on the Handling of Administrative Violations in 2012, Art. 3 (1.d).

people (the value of the stolen property is not sufficient to constitute a crime) as prescribed at Decree No 167/2013/ND-CP, this act may be subjected to a fine from VND 1,000,000 to VND 2,000,000.¹³ When discovered by a competent agency, N “*voluntarily declared*” the violation while H was still resolute not to declare his violation. Therefore, when carrying out the sanction, the competent person will still sanction both N and H for the “Stealing property” of other people. However, only N will be considered for application of the extenuating circumstance as “*The violator voluntarily declared the act*” as prescribed in Clause 2, Article 9 of the Law on Handling of Administrative Violations 2012.

The practice of implementing the Law on Handling of Administrative Violations 2012 has proved that the application of the administrative violations to individuals and organizations committing administrative violations is effective and practical, effective in personalizing, distributing the level of administrative responsibility. However, the legal regulations on the extenuating circumstances of administrative violations in sanctioning administrative violations still exist many shortcomings, leading to many difficulties and inconsistencies in the application of laws, reducing the effectiveness of sanctions against administrative violations, therefore, there is a need to make proposals for further improvement.

III. Some practical issues of extenuating circumstances administrative liability in vietnamese law

3.1. Extenuating circumstances in sanctioning administrative violations

The Law on Promulgation of legislative documents 2015 issued: “*The language of legislative documents is Vietnamese must be accurate, common, clear, and understandable. Contents of legislative documents must be specific, not vague...*”¹⁴ This is one of the important requirements of the development and promulgation of legal documents to ensure that everyone can read and understand the laws easily and in the spirit of the agency drafting, thereby facilitating the observance

¹³ Decree No 167/2013/ND-CP, Art. 15 (1.a).

¹⁴ Law on Promulgation of legislative documents in 2015, Art. 8.

and application of legal regulations in an easy and uniform manner in practice.

Basically, most of the bases for using the extenuating circumstances are quite clear and easy to apply in practice. However, there are still some unclear grounds that could make it difficult for the competent entity to apply. For example, Clause 5, Article 9 of the Law on Handling of Administrative Violations 2012 stipulates that “*an administrative violator is a pregnant woman, a weak aged person or a person suffering an illness or disability which deprives him/her of the ability to perceive or control his/her acts.*” In general, these subjects have certain limitations in terms of awareness, psychology, and health at the time of committing administrative violations, so it is necessary to consider applying the extenuating circumstances, but to apply which one in each regulation is not easy.

Regarding the circumstance that “*the administrative violator is a weak old person*”, there are currently no regulations guiding this content. According to the provisions of the Law on the Elderly 2009, “*the elderly people prescribed in this Law are Vietnamese citizens aged full 60 years or older.*”¹⁵ Meanwhile, according to the guidance of Resolution No 01/2006/NQ-HDTP dated May 15, 2006 of the Council of Judges of the Supreme People’s Court guiding the application of a number of provisions of the Criminal Code, “*old people*” are defined as people aged 70 or over.¹⁶ According to Resolution No 01/2007/NQ-HDTP dated October 2, 2007 of the Council of Judges of the Supreme People’s Court guiding the application of a number of provisions of the penal code on the statute of limitations for executing a judgment, exempting from serving penalties or reducing the time limit for serving penalties, there are also guidelines on the subjects “*people who are too old and weak*” who are 70 years of age or older or people aged 60 or older but often sick.¹⁷ Thus, it can be seen that although there have been a number of documents mentioned, the subjects specified in the above-mentioned guiding documents are not identical with the subjects of “*a weak old*

¹⁵ Law on the Elderly in 2009, Art. 2.

¹⁶ Resolution No 01/2006/NQ-HDTP, Section 2 (4).

¹⁷ Resolution No 01/2007/NQ-HDTP, Section 4 (1.a).

person” prescribed in Clause 5, Article 9 of the Law on Handling of Administrative Violations 2012 and, thus, are not applicable in the field of sanctioning of administrative violations but are applied in the field of criminal matters. Therefore, the determination of the circumstance that “*administrative violators are weak aged people*” when sanctioning in reality now completely depends on the subjective judgment of the person with sanctioning competence. In order to correctly identify this particular subject, the person with sanctioning competence must base on each specific case to assess the health status and age of the violator at the time they commit the administrative violation.

In addition, the Law on Handling of Administrative Violations in 2012 does not provide guidance on the fact that “*an administrative violator is **a person suffering from an illness or disability which deprives him/her of the ability to perceive or control his/her acts.***” These are special subjects that, when committing an administrative violation, they are not fully aware of the dangers to the society of their act and cannot control the act, so the Law on Handling of Administrative Violations 2012 stipulates that this is the extenuating circumstance. However, the question is how to identify a person at the time of committing an administrative violation falling into the above situation. For instance, if a driver of a vehicle with the flu has dizziness or distraction leading to a traffic law violation, it is considered as a disease that limits the ability to perceive or control the behavior. Is it allowed to apply this extenuating circumstance? This requires a thorough medical evaluation to determine, while the majority of sanctioning authority have no specialized knowledge in this field.

In addition, the contents of the extenuating circumstances are when “*a person commits an administrative violation due to his/her particularly difficult plight which is not attributable to his/her acts*” (Clause 6, Article 9) or “*A person commits an administrative violation due to his/her ignorance*” (Clause 7, Article 9), but there is no clear explanation. What circumstances are considered to be “particularly difficult”, just based on the presentation of the violator or must be certified by any state agency or not? What criteria to identify an administrative violator with “ignorance”? All of these questions are currently being left out by the Law on Handling of Administrative

Violations in 2012, which implies the risk of inconsistent application of the law, possibly even a fertile area for a competent person to apply these facts at will. Therefore, it is imperative that there is a specific need to explain these grounds for the extenuating circumstances to be applied correctly when the actual sanctions are applied.

Therefore, the Law on Handling of Administrative Violations 2012 and its implementing documents need to supplement regulations explaining terms and guiding specific identification criteria for the extenuating circumstances that have not been clearly defined to create the solid legal framework for the application of these circumstances, avoiding the situation of arbitrary application of the law in practice.

The application of the circumstance “*Administrative violators are weak old people*”, requires competent sanctioning of persons to prove that violators are both “old” and “weak”. The proof that the violator is an “old person” may be based on their age, but the current law does not specify how old is considered “old”. Meanwhile, to prove that a person is “weak” is even more difficult because it requires thorough supervision and medical examination, so it is difficult to give a common criterion to apply for those different cases. Therefore, according to the author, it is necessary for the Law on Handling of Administrative Violations 2012 to absorb the provisions of the criminal law in dealing with this inadequacy. The previous Criminal Code only used the criteria “the elderly” without the additional “the weak” criteria to apply the mitigating factors of criminal responsibility to offenders,¹⁸ but the application also encountered obstacles due to lack of specified instructions as stated. In order to solve this problem, the Criminal Code 2015 (amended and supplemented in 2017) has been improved when specifying the age of offenders to serve as quantitative criteria for the application of the mitigating factors of criminal responsibility for offenders instead of the previous criteria “old people”. Specifically, this Code stipulates that “*offenders who are full 70 years of age or older*” are allowed to apply mitigating factors on criminal responsibility.¹⁹ Therefore, the author thinks that the Law on Handling of Administrative Violations

¹⁸ Criminal Code in 1985, Art. 38 (1.e); Criminal Code in 1999 (amended and supplemented in 2009), Art. 46 (1.m).

¹⁹ Criminal Code in 2015 (amended and supplemented in 2017), Art. 51 (1.o).

2012 should also learn from the experience of criminal law and replace the extenuating circumstance “*Administrative violators are weak aged people*” to “*Administrative violators are people full 70 years of age or older.*” This provision will make it easier to identify the extenuating circumstances in reality, while also ensuring the humanity of the law because according to many health experts, the 70-year-old landmark is also considered a suitable landmark to evaluate the “old” and “weak” factors in a particular person.²⁰

For other circumstances, such as “*A person who commits an administrative violation has a disease or disability that limits his / her ability to perceive or control his/her acts*”, “*A person commits an administrative violation due to his/her particularly difficult plight which is not attributable to his/her acts*” or “*A person commits an administrative violation due to his/her ignorance*”, the author boldly proposed the Law on Handling of Administrative Violations in 2012 need to consider supplementing the regulations allowing the Government to enact a specific Decree to guide the application of these circumstances. For each extenuating circumstance, the Government should promulgate clear guidelines for each specific criterion so that the authorized sanctioning person can base on that to be considered and applied in practice.

3.2. Legislative documents that stipulate additional extenuating circumstances that are not in accordance with the provisions of the Law on Handling of Administrative Violations 2012

As mentioned, one of the characteristics of the extenuating circumstances in sanctioning administrative violations is “*open-ended*”, reflected by the Law on Handling of Administrative Violations 2012 which allows the Government to enact the Decrees about how to define new extenuating circumstances in accordance with each specific field of state management to enable citizens to enjoy favorable circumstances

²⁰ Diep The Vinh, *The definitions of “the elderly, the feeble and elderly, the over feeble and elderly” need to be changed.* May 18, 2017. <https://kiemsat.vn/can-sua-doi-cac-khai-niem-nguoi-gia-nguoi-gia-yeu-va-nguoi-qua-gia-yeu-trong-blhs-47028.html>.

to reduce their level of administrative responsibility. However, through the survey, the author found that there are still existing cases where the unauthorized subject entity “*arbitrarily*” stipulates new extenuating circumstances that are not in accordance with the provisions of the Law on Handling of Administrative Violations 2012.

For example, the issue of sanctioning administrative violations in the field of science-technology and technology transfer is now governed by the Government’s Decree No 64/2013/ND-CP of June 27, 2013 (amended and supplemented by Decree No 93/2014/ND-CP dated October 17, 2014). The content of this Decree does not contain any provisions on the extenuating or aggravating circumstances when sanctioning administrative violations in the field of science — technology and technology transfer. However, the Ministry of Science and Technology’s Circular No 20/2015/TT-BKHCN of November 5, 2015, guiding the implementation of Decree No 93/2014/ND-CP, “*arbitrarily*” supplemented the extenuating circumstances for violations of the registration of results of performing State budget-funded scientific and technological tasks as follows: “*Imposing the extenuating circumstance for cases where the hosting organization has registered the results within 01 year, counting from 30 days after the date of official acceptance of the scientific and technological task until the violation is detected.*”²¹ The issue to note here is that the Decree No 64/2013/ND-CP (amended and supplemented by Decree No 93/2014/ND-CP) issued by the Government did not mention this extenuating circumstance. Thus, it can be concluded that in this case the Ministry of Science and Technology has “*arbitrarily*” provided additional extenuating circumstances, although this agency is not allowed by the Law on Handling of Administrative Violations 2012 to do this.

Conducting a thorough review of legal documents that stipulate the sanctioning of administrative violations, especially the Circulars guiding sanctioning Decrees in the fields to promptly detect and abolish the regulations of “*arbitrary*” supplementing the extenuating circumstances. It is necessary to abolish the provisions of Article 5 (2.a) of Circular No 20/2015/TT-BKHCN: “*Applying the extenuating circumstances*

²¹ Circular No 20/2015/TT-BKHCN, Art. 5 (2.a).

when sanctioning for the case where the host organization has registered the results within 01 year, counting from 30 days after the date of official acceptance of the science and technology task until the violation is detected” because of the Ministry of Science and Technology does not have the right to stipulate more new extenuating circumstances.

3.3. The Law on Handling of Administrative Violations 2012 has not yet developed a general principle to determine the specific level of sanctions in case of administrative violations with extenuating circumstances

From the perspective of administrative law, the principle in state management is the overall administration of legal provisions with the main ideas as the basis for organizing the implementation of State management activities.²² The application of the extenuating circumstances in administrative sanctioning activities also needs to adhere to certain principles so that the application of these circumstances will achieve the expected effect. Unfortunately, the Law on Handling of Administrative Violations in 2012 and its implementing documents have not yet developed general principles to apply the extenuating circumstances when sanctioning, thereby creating many legal gaps when applying these facts in sanctioning practice.

The extenuating circumstances are characterized by a reduced level of administrative responsibility of the subject of administrative violations, but these circumstances are only meaningful for those administrative violations subject to sanction forms on the fine bracket (with regulations on the minimum to the maximum level) such as fines, deprivation of the right to use licenses, professional practice certificates for a definite time or suspension of operation for a definite time. For sanctions such as confiscation of material evidence, means of administrative violations or deportation, the application of the sanctions is not meaningful because of the fixedness of these sanctions. For the form of warning sanction, the extenuating circumstances are meant as a condition for subjects of administrative violations for individuals aged

²² Hanoi Law University. Vietnamese Administrative Law Curriculum. Publisher People's Police. 75, 76. (2008).

full 16 years of age or older and organizations violating administrative regulations to apply this form of sanction (non-serious administrative violations with involved extenuating circumstances, and according to regulations subject to this sanctioning form of warning).

Currently, the Law on Handling of Administrative Violations 2012 only stipulates the principle of determining specific levels of fines in case of extenuating circumstances for fines. Meanwhile, for other sanctions such as deprivation of the right to use licenses, professional practice certificates for a definite time or suspension of operation for a definite time, the Law does not have any specific principles for determining the level of sanctions. For fines, the Law on Handling of Administrative Violations 2012 stipulates: *“The specific fine level for an administrative violation is the average of the prescribed fine bracket for such behavior; if there are extenuating circumstances, the fine may be reduced but not lower than the minimum of the fine frame; if aggravating circumstances are involved, the fine level may be increased but must not exceed the maximum fine level of the fine bracket.”*²³ However, this provision is still general, so it creates a non-uniform application in practice.

For example, Decree No 102/2014/ND-CP stipulates a fine of between VND 5,000,000 and VND 10,000,000 for acts of encroaching on or occupying residential land.²⁴ According to the guidance of the Law on Handling of Administrative Violations 2012, when individuals commit the above violations with extenuating circumstances, the person with sanctioning competence may reduce fines below the average level (below VND 7,500,000) and the lowest reduction is VND 5,000,000. However, the question is based on the criteria to determine the specific reduction. This issue has not been thoroughly resolved by the Law on Handling of Administrative Violations 2012, resulting in the decision to reduce the amount of the fine depends entirely on the subjective awareness of the person with sanctioning competence without relying on any quantitative criteria.

²³ Law on Handling of Administrative Violations in 2012, Art. 23 (4).

²⁴ Decree No 102/2014/ND-CP, Art. 10 (3).

In order to solve the above problems, a number of Decrees and Circulars guiding the sanctioning of administrative violations in the fields have developed the principle of determining specific levels of a fine when violating subjects that have extenuating circumstances, through our survey, the following two common ways are summarized:

The first way determines the sanction reduced by a percentage. For example, for administrative violations in the field of tax, Decree No 129/2013/ND-CP stipulates that *when a fine is imposed, a specific fine for a tax procedure violation is the average of the frame fines are prescribed for such acts. For acts of violating tax procedures, each extenuating circumstance is entitled to a 20 % reduction of the average fine level of the fine bracket.*²⁵ In the field of competition, Decree No 71/2014 / ND-CP (amended and supplemented by Decree No 141/2018/ND-CP) provides for administrative violations regarding control of restrictive acts, in case of competition or unfair competition regulations, each extenuating circumstance shall be *reduced by 15 % of the fine level compared to ordinary violations.*²⁶ Meanwhile, Circular No 07/2014/TT-BTC guiding the sanctioning of administrative violations in the field of management and use of State assets stipulates that *for every extenuating circumstance, the fine will be reduced by 20 % compared to the average level of the fine bracket which is prescribed for that behavior.*²⁷ Although the determination of reduced fines by percentage makes it easy for the competent entity to determine the specific amount of fines when the extenuating circumstances are available, if this method is applied to the sanctioning of administrative violations in all sectors, it still has certain limitations. Specifically, if the lawmaker stipulates that the percentage (%) is too low (less than 10 %), the sanction will not promote the value of the extenuating circumstances because the actual reduction of fines will not be different than a normal violation. Conversely, if the percentage (%) is 10 % or 20 % or more, there is also the risk of being disabled in many cases. In fact, if the lawmaker has set a percentage (%) of 10 %, or 20 % or more, only one

²⁵ Decree No 129/2013/ND-CP, Art. 3.

²⁶ Decree No 71/2014/ND-CP (amended and supplemented by Decree No 141/2018/ND-CP), Art. 4 (5), and Art. 5 (4).

²⁷ Circular No 07/2014/TT-BTC Art. 3 (2.b).

extenuating circumstance is required, the fine is equal,²⁸ even lower than the lowest fines of fine bracket.²⁹ Therefore, if there are two or three extenuating circumstances, it is only possible to apply the minimum fine of the fine frame but not different from the case of having one. This is completely inconsistent with the purpose of sanctioning to educate and deter violators and also not in accordance with the principle of sanction that must be “*based on the nature, seriousness, and consequences of the violation, regarding violations and the world center, aggravating circumstances.*”³⁰ It would be absurd if the violating subject has many extenuating circumstances, the fine applied is exactly the same as the violating subject having only one extenuating circumstance.³¹

The second way determines the reduction sanction according to the principle of reduction of the average. In the field of price, fee, fee and invoice management, Decree No 109/2013/ND-CP (amended and supplemented by Decree No 49/2016/ND-CP) stipulates the fine of a violation against regulations on pricing, fee, and invoicing, without aggravating or extenuating circumstances is the average level of the fine bracket for such violation. The average fine is the arithmetic mean of the minimum and maximum fines. *An extenuating circumstance shall cause the average fine to decrease. The decrease is the arithmetic mean of the minimum fine and average fine. The minimum fine shall*

²⁸ Article 6 (2.b) of the Decree No 46/2016/ND-CP sanctioning administrative violations in the field of road traffic and rail transport prescribes a fine of from VND 80,000 to VND 100,000 for the act of “Going three abreast or more”. If the violator has an extenuating circumstance and applies the “10 % reduction of the average fine level of the fine frame”, the fine will be VND 81,000 ($\text{VND } 90,000 - 10\% \times \text{VND } 90,000 = \text{VND } 81,000$). This fine is approximately equal to the minimum fine.

²⁹ Article 6 (1.a) of the Decree No 46/2016/ND-CP sanctioning administrative violations in the field of road traffic and rail transport prescribes a fine of from VND 60,000 to VND 80,000 for the act of “*Disobeying road signs or road markings*”. If the violator has an extenuating circumstance and applies the “20 % reduction of the average fine level of the fine frame”, the fine will be VND 56,000 ($\text{VND } 70,000 - 20\% \times \text{VND } 70,000 = \text{VND } 56,000$). This fine is even lower than the minimum fine.

³⁰ Law on the Handling of Administrative Violations in 2012, Art. 3 (1.c).

³¹ Cao Vu Minh, Issues in Need of Amendment under the Law on Handling of Administrative Violations in 2012, 1 *State and Law Review* 9 (2019).

*apply if two extenuating circumstances are found. An aggravating circumstance shall cancel out an extenuating circumstance.*³²

In our opinion, this method has many advantages over the method of determining the reduction in percentage and can be applied to all areas, because determining the reduction in this way helped the authority to easily determine the reduction of sanction levels when there is an extenuating circumstance while creating a division of administrative responsibilities between the violation of having a single extenuating circumstance and the violation with many extenuating circumstances.

Regarding the sanctioning form of depriving of the right to use licenses, professional practice certificates for a definite time or suspending operation for a definite time, although the Law on Handling of Administrative Violations 2012 has not specified the principle of determining the reduction level of fines when having extenuating circumstances, but through the survey of Decrees stipulating the sanctioning of administrative violations in the fields, we found that there are a number of Decrees guiding the determination of reduced fines for these sanctions when there are extenuating circumstances as follows:

Decree No 46/2016/ND-CP sanctioning administrative violations in the field of road and rail transport provides: *“The duration of the suspension of a license or practicing certificate or transport business operation as a sanction for a violation specified in this Decree is the average level of the bracket. The minimum level shall apply if there is an extenuating circumstance...”*³³ Meanwhile, Decree No 33/2017/ND-CP sanctioning administrative violations in the field of water resources and minerals provides the principle for determining the reduction level of fines for the issuance of extenuating circumstances with sanctioning forms of “deprivation of the right to use licenses, professional practice certificates” or “operation stoppages” are as follows:

“The period of suspension of a license or practicing certificate or suspension of operations as a sanction for a violation specified in this

³² Decree No 109/2013/ND-CP (amended and supplemented by Decree No 49/2016/ND-CP), Art. 3 (6).

³³ Decree No 46/2016/ND-CP, Art. 77 (2).

*Decree is the average level of the suspension period bracket applied to such violation. It may be shorter than the average level, but not shorter than the minimum level of the suspension period bracket if there are any extenuating circumstances...*³⁴

However, both of these methods also have certain limitations, so they cannot be used as a common standard to apply to all fields. If being applied according to Decree No 46/2016/ND-CP, it will not make a difference in the level of administrative liability reduction in case the administrative violator has many extenuating circumstances, because for the violators shall be applied the “*minimum of the time frame*” for deprivation or suspension of operation with only one extenuating circumstance. Meanwhile, if applying under Decree No 33/2017/ND-CP, the specific reduction cannot be determined, but depends on the discretion of the sanctioning authorities. Therefore, it is necessary that lawmakers also need to develop an appropriate general principle to apply to all areas of administrative sanctions for forms of sanctioning “deprivation of the right to use permits and certificates” or “suspend operation” when the violators have the extenuating circumstances.

Thus, lawmakers need to consider adding in the Law on Handling of Administrative Violations 2012 the principle of determining reduced sanction levels for specific administrative violations when the extenuating circumstances are available. As analyzed above, we believe that the lawmakers should not choose the method of determining the reduced sanction levels by the percentage (%). Otherwise, we highly recommend that lawmakers should determine the reduced sanction levels based on the average sanction level of the sanction bracket. The average reduction principle should be considered in accordance with the provisions of Decree No 109/2013/ND-CP (amended and supplemented by Decree No 49/2016/ND-CP). Accordingly, the Law on Handling of Administrative Violations in 2012 may be amended as follows:

Regarding the sanctioning form of fines: “*The specific fine level of an act of violation is the average of the fine bracket prescribed for such violation. In case there is an extenuating circumstance, the*

³⁴ Decree No 33/2017/ND-CP, Art. 66 (2).

average reduction is applied. The average reduction is determined by halving the total of the minimum and the average. In case there are more than one extenuating circumstances, the minimum rate of the fine bracket shall be applied. In the case of both aggravating circumstances and extenuating circumstances, the principle of an aggravating circumstance is deducted for extenuating circumstances.”

For the sanctioning form of “deprivation of the right to use licenses, professional practice certificates or to suspend operation for a definite time”, the provisions are as follows:

“Time limits for deprivation of the right to use licenses, professional practice certificates or suspension periods only specifically activate for a violation which is the average of the time frame of deprivation or suspension of operation specified in that act. In case there is an extenuating circumstance, the average reduction is applied. The average reduction is determined by halving the total of the minimum and the average. In case there are more than one extenuating circumstances, the minimum of the time limit shall be applied. In the case of both aggravating circumstances and extenuating circumstances, the principle of an aggravating circumstance is deducted for an extenuating circumstance.”³⁵

IV. Conclusion

The state of law must uphold the rule-of-law principle. The rule-of-law principle is to recognize the objective existence of the law, to ensure the supremacy of the Constitution and the law. That means state agencies, civil servants and officials are all bound by the law.³⁶ Not stopping there, the rule of law essentially requires the law to be published publicly, with clear content, no conflict, stability, predictability, feasibility, and general application for all relevant stakeholders reflect the values of social progress such as freedom, dignity, humanity, justice, democracy

³⁵ Cao Vu Minh, Issues in Need of Amendment under the Law on Handling of Administrative Violations in 2012, 1 *State and Law Review* 10, 12 (2019).

³⁶ Tran Thai Duong, Discuss the Concept and Principle of Rule-of-Law, 3 *State and Law Review* 4 (2017).

and human rights.³⁷ Therefore, the amendment of the Law on Handling of Administrative Violations 2012 and its guiding documents are related to the establishment and application of the extenuating circumstances is imperative to create a solid legal framework for the application of using these circumstances in the actual sanctioning of administrative violations, thereby creating a division of administrative responsibilities, promoting the educational value of the sanction and showing the law's humanitarian.

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