

Procedure Standard and Administrative Investigation

—Realization of the Self-Discipline Principle

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How to effectively protect the interests and rights of individuals and how to even realize a higher-level goal, individual justice and creative property are disturbing problems in administrative investigation. However, the complexity of the problem is increased because it includes arbitrary investigation and compulsory investigation. The specialness of the problem can be discovered through the clarity of administrative investigations on the attribution of concrete administrative acts. There is another effective method, namely the procedure standard reflecting the self-discipline principle except the mainstream method of right-control (*i.e.* judicial review). It is a combination of self-discipline with right-control, and may be one of the methods keeping pace with judicial review to realize the above-mentioned goal.

Keywords: Administrative Investigation; Concrete Administrative Act; Discretionary Act; Self-discipline Principle

Introduction

There are over thirty direct legal norms about administrative investigation in China through rough statistics. For example, in the Article 6 of *Customs Law*, it is provisioned that the following powers shall be exercised by customs: To check it under the approval from direct or authorized subordinate customs director except citizens residence, and also the parties concerned shall be present when smuggling case is being investigated by customs officials outside these zone. The check may be carried out if the parties concerned fail to present and the witnesses is present. To detain those means of transport, goods and articles proved to be involved in smuggling. In addition, laws and regulations including similar provisions on administrative investigation include *Labor Law*, *Food Hygiene Law*, *Securities Law*, *Law on Medical Practitioners*, *the Control Regulations Regarding Civil Explosives*, *Road Traffic Safety Law* etc. In the modern administrative countries, people have realized that administration according to law in a strict sense cannot be pursued, but also is not appropriate for desired seeking. Therefore, Davis repeatedly emphasized a fact, that is, the legal rules and the discretion are in coexistence at any legal systems in history. Roscoe Pound also proposed in an empirical and inductive way that there was no legal system that could achieve justice only relying on rules but not on discretion, no matter how rigor and specific its rule system was. Two aspects of the rules and the discretion will be involved in the process of implementing justice. This is also a dilemma for people to have to confront with. The judicial review will always be a mainstream effective method to limit the discretion from the view of both the continental law system's self-discipline theory and the Anglo-American law system's power controlling method. From the perspectives of controlling the discretion and preventing its

system construction, it is the common trend that the discretion's scope and purpose are carried out the judicial review by judicial powers in administrative petition. Meanwhile, it is especially necessary to pay attention to that power limits the system forms of investigated space in a self-discipline way. The self-discipline, namely the procedure standard is the realization of the self-restraint principle.

Administrative Investigation and Procedure Standard

Firstly, administrative investigation act is concrete administrative act (Ye, 2005). Concrete administrative acts refer to the authority-based unilateral administrative acts made by them that the organs and organizations as well as its personnel implement their management and exercise their power for the rights and obligations of specific citizens, legal persons and other organizations with regard to specific issues. However, there are different opinions about it. It is generally recognized that administrative investigation is the activity that administrative organs have to collect the information related to the acts before making certain administrative acts. And then, it is necessary that the similarities and differences have to be clearly defined between administrative investigation and administrative inspection: 1) They depend on each other for existence and are not easy to separate according to the studies of Taiwan scholars. 2) The former can be regarded as a super-ordinate concept, and the latter can be used as methods or means of the former. Administrative inspection, asking the parties, requiring the parties to provide relevant information and identification are generally called as administrative investigation (Yang, 2000). In other words, its concept includes the inspection. It is generally thought for the nature of investigation that its acts are a factual

behavior. This viewpoint is supported by the majorities of China's scholars. Also, there are some viewpoints to show that it is a procedural administrative act.

The thesis that administrative investigation act is concrete administrative act remains really credible from four aspects as followed. Firstly, at least in terms of two essential factors that is administrative power function, and the legal effect uncovered by generalness, it includes not only the factual acts not producing effect for counterparts or the rights of related persons, but also the legal acts directly punishing for them. So that it possesses two seemingly contradictory characteristics including subservience—subsidiaries and phase and independence. The emphasis is whether it is with compulsory legal effect. This is just the reason why it is special as concrete administrative act. Their acts are legal act or non-legal act in a legal sense. However, it is not scientific that it is divided for a factual behavior that is not a legal act, belongs to administrative service and adjusts by the administrative law between legal and non-legal act (Fang, 1996).

Secondly, the study paradigm of administrative law has undergone a change from static to dynamic with the development of research. On one hand, the theory research for the acts was only statically investigated for its legal effects in *administrative law* in the past. And its establishment was not fully focused on. The types of individual administrative act were often independently analyzed, but the macroscopic administrative acts were not investigated in the realization of macroscopic administrative purpose. It is often emphasized for one party's legal status of administrative subject, and ignored for its counterpart's idea that play important role in the final generation of administrative decision's legal effect (Zhou, 2006). On the other hand, the perspective of observing problems in this theory of static act types study paradigm is certainly that administrative investigation as a so-called factual act will be excluded from the types of administrative acts. Now, it is only regarded as an activity of administrative subject to collect evidences according to authority, but not as process and opportunity to provide claims and protect the legitimate rights and interests for specific counterparts. However, its meaning and nature are changed with the emergence of a recent study for administrative process theory (Shiono, 1999a). Its purpose is to break the traditional study paradigm for its activities are static and local in the *administrative law*. And the act will be not made hard segmentation. Administrative activities to realize its purpose are regarded as a dynamic process continuing the beginning and the end and make examinations from many perspectives, so as to obtain a more scientific and more systematic explanation to administrative phenomena (Zhou, 2006). So, it should not be excluded from the system of the concrete acts and from the legal area.

Thirdly, discretion was bound to exist in concrete administrative act. Why are there so many discretions in the process of administrative investigation? Three reasons were proposed by Davis. 1) The abuse of discretion itself is caused in administrative by the organs' pursuit for powers. 2) The rules were absent for various reasons. 3) Discretion may be helpful for the individual justice and the realization of the real rationality of law. Therefore, it can be seen that the discretion act except pursuing power are a double-edged sword, which can not only give rise to tyranny and infringe upon the rights and interests of individuals, but also may be helpful for the realization of Individualized Justice and Creative Administration required in dif-

ferent case. However, how do promote this power to be exercised in a rational way (Zhu, 2006)? Because its specific act embodies the operation of the state's administrative power and aims to realize its administrative goals. It is the administrative subject's legal behavior on the premise of owning their power. It is generally recognized that discretion is thought to be the act's power decided by administrative organs according to the goal, spirit, principles, scope, and administratively rational principle of rule of law provisioned by the laws and regulations empowering them and based on objective facts. So, the administration discretion has almost become the pronoun of the executive power (Zhang, 2001). A large amount of discretionary acts must be contained in it if the investigation is concrete administrative act and embodies its power. The discretionary acts are also called as cheap discretionary acts. It refers to the legal norms only stipulate the principles, and authorize administrative subject independently take corresponding measures and make consideration and decision acts under the premise of according legislation purpose and law principle. However, the ideal legal activists have to confront with such a fact—the place where law is terminated is where discretionary acts make progress (Wang, 2002). Because of the limitations of legal rules to the adjustment of social life, the discretionary acts in administrative investigation are naturally contained in the rule of law. In the modern administrative countries, people have realized that administration according to law in a strict sense cannot be pursued, but also is not appropriate for desired seeking. However, endless social relations of continuous evolvement can be constantly adjusted no matter laws are created in an advanced and planned way or continuously established through the ceaseless accumulation of the rules of law. The sufficient knowledge on future is not owned by people based on an assumption of limited knowledge. Therefore, Davis repeatedly emphasized a fact, that is, the legal rules and the discretion are in coexistence at any legal systems in history (Wang, 2002). Roscoe Pound also proposed in an empirical and inductive way that there was no a legal system that could achieve justice only relying on rules but not on discretion, no matter how rigor and specific its rule system was. Two aspects of the rules and the discretion will be involved in the process of implementing justice (Shiono, 1999b). This is also a dilemma for people to have to confront with.

Significance—Realization of the Self-Discipline Principle

As above mentioned, it is the specific act. The discretion exists in all steps of the material and procedure behaviors. As a special concrete act, some acts such as arbitrary investigation will not make the rights and obligations of administrative counterparts change, increase or decrease. However, from the perspective of theory for dynamic behavior types, the inalienable relevance between arbitrary investigation and administrative decision to be globally and dynamically observed is a stage or a procedural link indispensable for a complete administrative decision. From the perspective of an increasingly growing trend in administrative law, the function of administrative law is not to guarantee the individual autonomy. And it is providing a political process to ensure the widely-affected interests in administrative procedures to be fairly represented (Richard, 2002). That is a hidden concrete administrative act and covered with a layer of tender veil. In order to lift the layer of veil, violated

discretionary acts may be caused by resistance for us, and even a higher pursuit will be emerged. We should have our own strategies to achieve the requirements of different instances of the individual justice and creative administration.

The judicial review will always be a mainstream effective method to limit the discretion from the view of both the continental law system's self-discipline theory and the Anglo-American law system's power controlling method. In fact, there is another different development trend except the above-mentioned system arrangement to achieve the purpose of control through external system's function, which is that administrative power limits the system forms of investigated space in a self-discipline way, namely the self-discipline of discretion. From the perspectives of controlling the discretion and preventing its system construction, it is the common trend that the discretion's scope and purpose are carried out the judicial review by judicial powers in administrative petition. Meanwhile, it is especially necessary to pay attention to that power limits the system forms of investigated space in a self-discipline way. The self-discipline, namely the procedure standard is the realization of the self-restraint principle. Its self-discipline principle refers to the principle that its subject would be constrained in the same all cases, and the same decision or the similar measure are made for the relevant administrative counterparts according to the front decision and measure if administrative subject used to make certain decisions, take certain measures or have been ascertained by case law in a case. As mentioned, the investigation is mainly reflected in the procedural administrative act. Legal and reasonable procedures are guaranteeing for individual rights and interests, and therefore the procedure standard as self-discipline should be established. The standard is not only the law of self-discipline, but also the law of power controlling.

For example, a self-discipline system was established in the *Administrative Procedural Law* issued by Japanese in November 1993 and also the organs were required to make and promulgate the standard, thus setting up a set of written statutory obligations for the self-discipline from the perspective of procedure legislation (Shiono, 1999b). The internal procedure standard for the investigation is the basic standard that preset by administrative organs and provided for the judicial review. It can be carried out the internal control or achieved the self-control for the discretionary acts in this investigation. From the above mentioned, it can be seen that the internal procedure standard of the investigation has to be established as follows. 1) Fortification has to be made for its self-discipline function to prevent the arbitrary administration. 2) The applicable standard is made by the subjects for the investigation acts, so as to abandon their arbitrariness in judgment and practices, ensure its rationality and reduce moral risks. 3) The standard should be established and published to allow citizens to possibly predict the corresponding investigation act. 4) The standard shall provide a certain measuring standard for judicial review to improve judicial efficiency (Karllewellyn, 1960). 5) In this dichotomy situation of the rules-discretion, to achieve the individual justice and the creative administration will ultimately

safeguard the individual rights and interests for citizens. Its essence is also the effective harmonic methods between the strict constitutionalism and the discretion (Hartmut, 2000). The principle is focused on the restraint for the standard, decision and measures based on the administration itself. These standard, decision and measure were always shown in the previous cases through the explicit instruction or implication of the subject. At the same time, it will be more and more widely applied for the procedure standard that can embody the principle.

Conclusion

As mentioned, it is not true to put all practices of the administrative act under the legal regulation. So, it is without saying for the discretion that exists in many fields. The principle is premised under the existence of administrative discretion, and expands the post-intervention scope of courts to exercise their discretion's power from the perspective of protecting private rights. In conclusion, both of the concrete acts and the discretion should be controlled. And it is more worth guarding for the investigation act as it is a special and concealed concrete act covered with a layer of tender veil. The procedure standard that reflected the principle may be the effective self-discipline and power controlling rules like the judicial review.

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