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Analysis of Administrative Discretion and its Governance

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Abstract

The essence of administrative is discretion. The core of administrative law is to solve the problem of administrative discretion effectively by the rule of law. In modern society, administrative discretion as a typical feature of public administration has completely penetrated into every corner of the field of administrative law. Then administrative law became a core issue. Administrative discretion is important so the sources of administrative discretion, concepts, governance have yet to be further in-depth. The life of administrative is discretion. The life of modern public is almost administration discretion and the center of the discretionary task of administrative is through the rule of law to solve the problem of administrative discretion. The role of administrative discretion in the event of significance is self-evident. This paper will analysis the administrative discretion of sources, concepts, content, governance, and a series of related question.

Keywords: *Judgement, Administrative Discretion,Governance*.

1. Introduction

Administrative discretion is the basis of existence and also is the fact that it causes serious damage by abuse . The dual nature of the administrative discretion is not only the basis for the research on the control of the discretionary power, but also the difficulty of the research.

Administration according to law is the key to running a country according to law. The discretion of the administrative discretion is the important part of the administrative power.So it is of great theoretical value and practical significance to carry out deep discussion on the administrative discretion.

2.The Origin and Development of Administrative Discretion

According to China's Taiwan scholar research that administrative discretion stems from the German scholar. In the civil law system which represented by Germany, on the definition of administrative discretion, the civil law been researched it for a long time. It can be divided into two stages by the world war II: the first stage (before World War II) was represented by the German scholar Meyer and the Austrian scholar Te Cina. Meyer's study which set out from the relationship between the discretion and law will be divided into pure administrative discretion and the law applicable to administrative discretion. Pure administrative discretion is the executive to the state property management and public law on the exercise of the right to form and so on; and the law applicable discretion refers to the application of Article Flexibility Act. The executive have much more consideration and rights to specific cases. The second phase (after World War II)was represented by German Maurer, flat Turner et al as. Maurer made a more detailed distinction between administrative discretion and uncertain legal concepts on the basis of Te Cina.

As represented by the British and American the common law system is broadly divided into two groups about the definition of administrative discretion: the first was represented by the famous jurist Davis, Dwyane Wade, Fossey,Craig,Huck. Those people think that administrative discretion is a multi-selective power like " dance in shackles". Another group was represented by American law scholar Ronald Dworkin who thinks that administrative discretion exists "the only correct answer" . And the only answer needs related entities to uncover them through their own efforts. As this definition, Dworkin divided the administrative discretion into a weak sense of discretion and a strong sense of discretion. The Common law has a very broad understanding of administrative discretion which has a wide range of choice. This not only includes the entity selection options, but also procedural options, and it not only includes the final choice, but also the middle selection, and even extended to the method, manner, time, the degree of attention, and many other cofactors.

Studying on administrative discretion in Taiwan is more depth than scholars in mainland. Administrative discretion's research of writings were published early. Domestic administrative discretion research began in the 1980s. Wang Min Chan is the first person who defined the concept of administrative discretion. In his editor of the "Summary of Administrative Law" which a book of administrative discretion is defined as: "where the law has no detail provisions, the administrative agencies handle the specific event, and appropriate methods can be taken pursuant to the freedom of judgement. The administrative measures is discretionary. " After this, Luo Haocai, Zhang shuyi, Zhu Xinli, scholars also defined the

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right of administrative discretion. This book is actually the concept of administrative discretion earliest formulation. This book is after the reform and opening up the first textbook, a variety of materials in subsequent administrative discretion are deeply affected. Peking University Press in 1996 as "administrative law". For example, Peking University Press, 1999, published jointly with the Higher Education Press, "Administrative Law and Administrative Procedure Law", 2004 Founder of China Publishing House of the "New Theory of Administrative Law", etc. are similar. There are three identical points, the first is that the administrative discretion is a power to convenient to our administrative agency; secondly, the premise of this power's using is the lack of restrictions norms; The third is that the power of administrative discretion must be restricted by the administrative agency itself ' ability.Moreover, there are also three different points: the first is that has a slightly different presentation before this power's application. The second is that has difference in the range of the administration discretion. The third is that the administration discretion whether need explicit authorization of law. In addition, many data doesn't distinct "administration freedom discretion" from "administration discretion". And it become the reason why many scholar object to it. It seems that the abuse of executive power all originate in "administrative discretion" Of course, many scholars think that administrative discretion and administrative discretion has a strict distinction.

The research distinguish the uncertain legal concept from the administrative discretion. The uncertain legal concept refers to a liquid which is not clear that the characteristics of the legal concept, which includes a core concept identified some broad and ambiguous concept of a peripheral. Such a concept is not clear, common in regulations Elements level, there are aspects of the legal effect of the statute.The administration of the constituent elements in the law to achieve, it may select a different behavior, namely the law and the constituent elements are connected, not simply a legal effect, in which the decision at least two or even several possibilities have been given some degree of freedom of action, namely the so-called administrative discretion. Administrative organ to exercise discretion and not subject to any discretionary bound by its administrative discretion in addition to compliance with the general principles of law, but also should be consistent with Act authorized purposes, and shall not exceed the scope of statutory discretion.

3.The Content and Concept of Administrative Discretion

This paper thinks that administrative discretion must be abide by the administrative agency's rule of the scope and magnitude. According to legal and common sense, it should uphold the principle of fair and rational and also judge and select the most appropriate manner and content to perform the power of administrative.The concept definition contains the following three meanings: First, the most essential features of discretion is option, and it is built on the basis of certain objective subjective choice. Just judgment and measure is not enough.The essence of administrative discretion is a kind of self-determination or self-choice. Secondly, although the selection is the core of discretion, but the judgment is the premise and foundation. During the perform of administration distraction, when the administrative body identify the relevant facts or explain some uncertainty legal concept, it must be follow the appropriate evidence and legal rules of interpretation and application of these rules. The administrative body should focus on the judgment. Thirdly, as Professor Davis said that the executive authorities should have a certain discretion in the interpretation of the legal facts, but the power of administrative discretion should be focus on deciding what measures to take. The reason is that the legal elements is the prerequisite of the executive power. And it determines the extent of executive power to a large degree. If it allowed the executive has the discretionary powers in these areas, it actually means the executive authorities to grant their own power. Thus,different decision may come to different conclusions, but the sole purpose is to reflect the reality of the facts or legal argument truly. So the choice is the only and objective one. Of course the latter is the so-called real discretion .

First of all, the word "discretion" is concerned "freedom" by itself that is why there is different from the administrative freedom discretion from the administrative discretion. If the two words have the same meaning, the existent of this situation is insignificant. And how to understand the "discretion" that contains "free" in it. Many scholars have called the administrative discretion as administrative freedom Discretion directly. Some scholar divided administrative discretion into regulatory discretion or cheap discretion, and they think because it is free, it certainly should be excluded from judicial review. It is so-called that" the discretionary administrative act cannot be the object of the trial.That being the case, then those administrative discretion who are not legitimate must be subject to judicial review. Here, the "freedom" does not give administrative organ freedom or arbitrariness, so it is different from the freedom which enjoyed by the people.

4. The Need for Administration Discretion & its Control

The "discretion" in the administrative discretion contains that human's consideration about the process of their own consciousness.It seems to be object to the standard of

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law's regulation. But now, the rule of law does not exclude administrative discretion certainly, on the contrary, the existence of administrative discretion is a necessary complement and inevitable requirement to the rule of law now.

Administrative discretion is required inevitable by the rule of law's administrative activity.Of course,the administrative is bound to be restricted by the law, but mobility of itself must be maintained.Only the executive has some room for discretion, with flexible choice, rather than simply "law enforcement machinery" in order to give full initiative of the executive power, creativity and formative to achieve more effective substance of the law and justice, and it could promote our society to develop. Administrative discretion is the best way to realize justice under state law. In a sense, the reason why the legislature to grant the executive discretion right, the most fundamental reason is that the discretion could satisfy the justice of every case under the rule of law. When legislators set the constituent elements of legal norms, they are often unable to take full account of the need to achieve justice cases in the specific circumstances with regard to special circumstances, particularly in cases involving the relevant norms complex plot. Especially when they cannot predict the exact rules of conduct. And even if legislators could establish clear rules, the executive authorities in the applicable law in the process also need have some relatively independent autonomous space. The widespread presence of administrative discretion is an indisputable fact. However, every esteemed discretion has dangerous facts go hand in hand.In the contemporary administrative areas, we not only need to emphasize the need for discretion but also waken the hazard or harm of discretion . "All of discretion could be abused, and it is still a wisdom." And excessive or unnecessary discretion would constitute a potential threat or immediate harm to the justice of case.

Firstly, using the right to rule itself that is a prerequisite to build a system of administrative discretion now. Looking abroad, whether it is English or German, in the discretion of the administrative control should be restricted that is a truth. In the UK, Parliament can through the form of legislation to granted discretion to any aspect of the executive, but the court review the administration discretion of agency's action by extending the ultra vires invalid principles and the principles of rationality, thus it realize the Parliament cannot be achieved supervisory role. The National People's Congress and the Supreme Court could use this reference in China. Administrative Court in Germany could review the discretion of any executive. Germany and the United Kingdom could rely on the separation of powers to establish control mechanism which can prevent the emergence of the monopoly on power effectively. There is no administrative court, and the separation of powers does not adapt to national conditions, but the basic concept of the right can be governed by the separation of powers.

Secondly, the establishment and improvement of the Administrative Procedure Act can effectively control and oversight administrative discretion. Not only the German law but also the civil law system, with the development of society, according to this reality that the expand of the administrative discretion this , all must improve the administrative procedural law and the control of administrative discretion. Although Administrative Procedure Law said that the people's court shall revoke or partially revoke the judgment, and it may re-sentence the defendant to make a specific administrative act on the violation of specific legal procedures.Because of the legislative concepts and legislative technical reasons many of administrative law only provides substantive norms, but do not make provision for the relevant procedures. This allows the court to repeal those who did not violate legal procedures which society accepted and harm our party. Although some legislative defects are inevitable, but to strengthen the norms of administrative procedures can largely compensate for legislative loopholes. Therefore, the establishment of procedural norms are to achieve the administrative discretion of regulation to pass.

Thirdly, judicial is a effective measure to control the administrative discretion . As the saying goes, "no relief , no rights." Although there are many ways to the right's damage of remedy the damage, it is undeniable that our judicial means is the most undoubtedly and convincing and reliable means. In the UK and Germany, administration discretion mainly rely on jurisdiction for regulation. Jurisdiction is the highest and ultimate means to regulate the administrative discretion. And while we strengthen the judicial review of administrative discretion for supervision is also very important.

5. Conclusions

In conclusion, what we should do, it is not to oppose or reject administrative discretion but to those in the administrative discretion and contrary to the rule of law, and do our best to make it conform to the legal value and purpose.

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