

Research on the Standard Effectiveness of Administrative Discretion

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Abstract: The criterion of discretion has always been the common concern of both theorists and practitioners in administrative law. Along with the growing prominence of the welfare society and the administrative countries, administrative discretion, as the "essence" of administrative law, has become an important topic in modern administration of the rule of law. The resulting benchmark. Administrative law enforcement officers in our country seem to be more willing to accept loose discretion, so the discretionary benchmarks are of great significance to the limitation of public power. The theoretical basis of the effectiveness of the discretionary benchmark is the principle of equality, the principle of administrative self-restraint and the protection of trust, and its validity reflects certain relativistic features. It not only has legal effect on the relatives, but also has certain binding force on the court. In general, the courts, to the extent that they recognize the discretion of administrative authorities for their knowledge, skills and habits, or because of their predictability, stability and equality with respect to government regulation, External validity.

1. The overall outlook of the benchmarking

The criterion of discretion is a kind of concrete judgment choice criterion set by administrative organs based on the detailed rules of administrative discretion. In Anglo-American law, administrative discretion is a relatively crude concept. They tend to include all the selective acts of the executive in the scope of administrative discretion, and scholars often "only make a rather broad factual description." In contrast, the German traditional administrative law has always regarded the dualistic position of conservative discretion as a criterion, that is, the issue of legal effect and legal requirement of discretion as an independent issue to be analyzed. Among the domestic scholars, there are many who support these two views. Anglo-American legal system advocates liberalism and lays a more relaxed restriction on discretion, thus advocating "monism." While civil law countries oppose the so-called absolute liberalism in the continental law system and their restrictions on discretion are more stringent, they advocate "dualism." "Monism" seems to have gained more support from the outset. They think: "Whether it is the interpretation of the legal concept of uncertainty and the assessment of the facts of the case, or the decisions and actions made in the legal effect Choice, etc., there is a discretion. " Based on the pragmatism and the current actual situation of administration, many domestic scholars have chosen "the theory of one-dollar discretion."

2. Dispute on the effectiveness of administrative discretion: "zhou wenming. yunnan wenshan county traffic police brigade administrative punishment case"

Administrative practice work in such a case: on August 2, 2007, wen-ming zhou driving to provincial highway 210 line somewhere in wenshan, yunnan province, were wenshan stopped by traffic police brigade police on duty and told that their speed to 90 km per hour, the speed of 70 km, a section is speeding, and with 50%, with the speeding fines of up to 200 yuan, 3 points. Formulated the specification file according to the bureau of yunnan province, yunnan province road traffic safety violations fine standard provisional regulations (hereinafter referred to as the interim provisions on punishment standard) article 9 paragraph 31: "more than an hour before the 50% of vehicles, a fine of less than RMB 100 to 50 yuan". Zhou said that the penalty of 200 yuan for traffic police was illegal and the administrative lawsuit was brought. After the trial, the court heard that the fine of the traffic

police was unfair and the fine was changed to 80 yuan. The police in wenshan have appealed against the decision. The reason is: 1. Article 90 of the road traffic safety law stipulates that: "the maximum penalty of 50 per cent for speeding is 200 yuan". The actual situation in wenshan county is that the traffic accidents caused by speeding are increasing year by year, which is the important reason for the high incidence of accidents. Therefore, in view of this serious situation, wenshan county traffic police have been imposing a maximum penalty for speeding. Second-instance court thinks, the interim provisions on punishment according to the standard of yunnan province public security department to establish normative documents belong to internal issued by its effectiveness under laws and regulations, and court of first instance based on normative documents the appellant content of punishment of legal provisions shall be applicable to the change in the law there, hereby revoked the first-instance judgment, dismissed the appellee wen-ming zhou's claim. In this case, the outcome of the second instance judgment is different: the basis of the judgment is the provisional provisions of the punishment standard, and the basis of the second instance judgment is the road traffic safety law. Obviously, the former is the normative document under the regulation, the latter is the law. The court of first instance considers that the provisional regulations on punishment shall be legally binding and that the discretion of the administrative organ shall be restricted and the court may use it as the basis for the judgment. Second-instance court thinks, the interim provisions on punishment standard is only internal documents issued by the administrative organ, and belongs to the regulations of the following normative documents, do not belong to modify the former "administrative procedural law" stipulated in article 52 of the people's court trial basis of administrative litigation cases, so will not be applicable.

3. The basis of the effectiveness of administrative discretion basis

In addition to being bound by the law, the executive is subject to what it calls its case. In other words, the executive authorities should exercise their administration according to law and at the same time also consider the principle of equality and fairness under the same circumstances as giving the same treatment to the people. In fact, the self-restraint of the executive authorities stems from the binding legal provisions and constitutional "equality before the law". The administrative organ must be limited by its administrative precedent or even administrative practice formed in the daily law enforcement activities, otherwise the people will lose the predictability of the administrative action, meanwhile, the administrative action of the administrative organ will lose its stability, equality and fairness. Undoubtedly, these administrative precedents based on discretion have gained the trust of the people and have exerted their influence on the outside world. When the executive violated the precedent, the people supposedly received unfair treatment, and the executive authorities did not abide by the precedent. The existence and legitimacy of administrative precedent are the preconditions and foundations of the self-restraint of administrative agencies. The pre-existing precedent of administrative precedent can lead to the conscious observance of precedents by administrative agencies, and the administrative precedent must be legal. Self-restraint by the executive authorities can supplement the lack of law or deficiencies, which can only happen without violating the law. To sum up, the theoretical basis of the external validity of the discretionary benchmarks is the administrative self-restraint, the principle of equality and the protection of trust. Administrative self-restraint is the administrative practice established by the executive branch through the often applicable administrative rules that no special treatment should be given for the same situation without special justification. When an administrative organ violates a lawful precedent without special reasons, it violates the principle of equality. To put it simply, the people at this time were not only dissatisfied with the case, but also were dissatisfied with the failure of the executive authorities to follow the precedent that the people had gained trust in the ever-growing particular legal order in their long-term experience. Once credible interests had come into existence, Be protected by law. Therefore, the relatives have the right to require the executive authorities to comply with the standard of discretion laid down by them, which shows that the benchmark of discretion has the external effect.

There is no doubt that the legislature has more advantages than the executive authorities. However,

the response of the legislature in the face of rapid social changes is undoubtedly slow. In other words, legislators are unable to provide timely and clear legal norms in emerging fields and the common legislation that lacks generality can not at all play a real role. The demands of emerging administrative tasks impel the administrative practices to develop new administrative behaviors and forms of organization to deal with, which is especially obvious in the fields of technology related to science and technology and environmental protection. Under the new situation, the executive authorities should continue to exert the restraining effect of administrative precedents and practices and equally protect the legitimate rights and interests of the relatives so as to protect the trust interests of the counterparts. At the same time, the executive authorities also need to improve their skills and skills in setting a benchmark of discretion because of their inherent or original legislative power within administrative functions. Based on this original rationale, we set out a benchmark of external validity in line with the current situation.

4. The effectiveness of administrative discretion benchmark attributes

From the sociological point of view, all the norms should pay attention to the reaction of the people, that is to say, the norm plays an important role in the object of application. In other words, what factors will be affected by the implementation of the discretion benchmark?

4.1 Discretionary benchmark setter's own factors: a balance of professionalism and ease of use.

The effectiveness of a discretionary benchmark depends first and foremost on the technical and instrumental premise of a discretionary benchmark: that the specific content of a discretionary benchmark should be straightforward and should not be expressed in an obscure manner and, in an appropriate, open The way announced. American jurisprudence professor Dworkin once said: "Law is an interpretative concept." The date of implementation of legal norms is the time when legal norms are explained. Especially in modern and complicated social situations, due to the limited cognition of lawmakers, there are a lot of uncertain concepts in legal provisions, and more timely explanations can be applied to the cases. The discretionary benchmarks are instructive and explanatory, and are directly addressed to the general public and should be expressed in a clear, straightforward way. The publication of these discretionary benchmarks can not be limited to the way in which government websites are published or published, but should also be announced in modern ways such as the media, the Internet, WeChat and SMS so that more ordinary people can see it in the first place Get and understand the content of the benchmark. Of course, well-understood modes of communication often reduce the professionalism and accuracy of legal normative languages, but these problems can be mitigated to a certain extent or to a lesser extent as long as they are taken into consideration in the process of formulation Avoided. The translation of obscure norms into general language requires technical and empirical skills that, to some extent, can create difficulties in benchmarking work. However, as long as the degree of mastery is good enough to enable the public to understand and thus enhance the people's compliance Discretion benchmark of consciousness.

4.2 Factor of the discretion base bearer: the consistency between legal and general values.

According to Max weber, the people's acceptance and trust of policies and institutions is usually based on blind and universal loyalty to the state. Whoever distrusts the state or does not identify with the will of the state is likely to propose its own rules or circumvent the rules of the country in order to regulate them. If by discretion benchmark values consistent with that of ordinary people generally follow the social ethics, people widely, comply with the self-consciousness of discretion benchmark will be enhanced, and the difficulty of the administrative organs using benchmark law enforcement will decrease. On the contrary, it will not only increase the difficulty of law enforcement, but also rely on coercive force as a guarantee. Given the diversity of social interests, discretion benchmark interest should be paid great attention to coordination, balance and integration, namely the parties share the benefits both in the profit distribution, and the reasonable share the burden, if encounter resistance, punitive measures. In general, people are more likely to follow rules that are closely related to their daily life, rather than against the rules of life experience, unreasonable, or even tough standards.

Through the regulation of social norms and pressures, the effect is far greater than the driving force of the cutting benchmark itself.

5. The administrative discretion base on the judicial binding force

5.1 Discretion Reference: Explain The Optimal Position Of Function.

The benchmark aims to illustrate and emphasize the binding force of specific laws and regulations or regulations in this area, and to require the respective administrative bodies to implement and voluntarily comply. Can't positioning of administrative legislation from the behavior nature, but discretion benchmark from the content or quoted corresponding terms of legal norms, and once the formulation and implementation of these regulations and became the behavior of administrative organs to implement administrative conditions and basis, is similar to the law of binding. The amount of discretion in China is basically an interpretative administrative rule. By legal interpretation for administrative discretion restrict by the law, is a basic path of the theory of the administrative discretion, also the discretion benchmark is shi Ming of the law, and administrative organs to correctly identify the counterpart lively guidance law. The other party in the face of crude empty law may not be able to understand its meaning and purpose, needs further to explain the administrative organ or instructions, easy-to-read discretion benchmark can break through the public and specification between the diaphragm. From the point of view of functionalism, some discretion is different from the law, and the interpretation ability of the court is not necessarily superior to the administrative organ. Because these issues must be decided by political or technical considerations, they can only trust the professionalism of the discretion benchmark and the rich experience accumulated over the years in administration. The court is not an expert in administration, so it must be put in the executive branch. Discretion benchmark can not only control the implementation of the administrative discretion, supervision and operation of the administrative behavior, but also improve the relative person's predictive, reduce the uncertainty of the administrative behavior, enhance confidence in the other party of the executive branch, to enhance the credibility of the administrative organ. For the control of administrative discretion, the discretion is more pertinence and operability than the legal norm. "The law and the rules are to define the powers of the public body, while the discretion is designed to ensure consistency and consistency in the implementation of these rights." Administrative discretion in the aspect of legal norms to explain more than court, is an important link of monitoring system at the same time, due to the content of the administrative authority of administrative work relatively familiar, easy to judge discretion to exercise the appropriate or not.

5.2 Boundary of judicial review.

There are three types of violation of the law: 1. Second, the abuse of discretion; Third, discretion. The discretionary overpower means that administrative organs exercise discretion over the scope of legal authorization. Abuse of discretion is refers to the administrative organs to exercise discretion against authorized purpose, nothing to do with the factors, or authorized outside under the guise of discretion in the name of the pursuit of personal purposes, or the exercise of discretion has obvious flaws, etc. Discretion is an exercise in the discretion of an administrative organ to exercise discretion or negligence. The court's examination of discretion and discretion is the criterion of whether the reference content violates the scope, type, extent and condition of the legal authorization. In contrast, the court's review of discretion cannot be easily judged from the content of the discretion. The court should consider whether administrative organs to exercise discretion in line with the authorized purpose, and to respect the rationality of the administrative authority of professional judgment, at the same time be a balance between legal norms and management experience. Based on the above analysis, the author thinks that under normal circumstances, the court shall be the administrative organs of the knowledge, experience, technology, and form of practice to give due respect for a long time, or under the principle of equality, the principle of reliance interest as well as the administrative principle of self restraint, shall be recognised administrative discretion benchmark as the referee basis. After admitting discretion benchmark has the external force of law under the premise of fully

understand the laws, regulations and rules and regulations under the validity of the level difference between administrative rules, to determine the degree of attitude and respect. Simple, high efficacy grade rules must be lower than the effectiveness level more worthy of recognition and respect the rules, at the same time, below rules for effectiveness level lower administrative rules must be strict censorship. The court may, in accordance with a higher level of legal norms or based on its own understanding and judgment, ultimately make decisions on specific issues.

References

- [1] Chen Aie: "administrative legislation and the development of science and technology", which contains the fifth issue of Taiwan local law in 1999.
- [2] Chen Chunsheng: "the theory and system of administrative law", Yuan Zhao publishing company, 2007 edition.
- [3] Otto Mayer: "German administrative law", translated by Liu Fei, the Commercial Press 2002 edition.
- [4] "Xiuming relationship behavior of administrative law and legal theory", the new version of the Limited by Share Ltd in 2005 Xuelin publishing.
- [6] Wu Jinsong: analysis of the nature of the discretion standard of administrative law enforcement, which contains the first issue of Journal of South China Normal University in 2012.