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RESEARCH ARTICLE

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Judicial review on abuse of power by administrative authority

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Abstract Through the analysis on three typical cases, it is believed why courts rarely make judgments directly based on the review criteria of "abuse of power" pursuant to article 54 of the Administrative Litigation Law is mostly that the relevant legal provisions are not clear. Besides, in hearings, judges are more inclined to use "conversion techniques". Meanwhile, it is further revealed of the issues existing in the substantive review of courts.

Keywords administrative discretion, substantive review, hearing

摘要 通过对三个典型案件的分析，法院之所以被认为很少直接引用《行政诉讼法》第54条"滥用职权"的审查标准进行判决，主要是因为有关法律规定不明确，以及实际审判中法官更倾向于使用"转换技术"，同时进一步揭示法院在实质性审查上存在的问题。

关键词 行政裁量，实质性审查，判案

1 Introduction

Based on the result of retrievals,[1] there are only a few cases in which courts

[1] The author searched in *sina*, *google* and *baidu* for "administrative, discretion" and the results are very depressing, as there are few judgments in this respect. Judge Ma Minpeng helped the author collect judgments of administrative discretion cases in Haidian District Court and the result was also disappointing. It is said that in the past years there have not been many judgments in this respect in the Court. The author also asked three postgraduate students named Kong Haijian, Zhao Piling and Ma Wenzheng to search for cases in *chinalawinfo.com*

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directly apply the "abuse of power" of article 54(2) of the Administrative Litigation Law as the direct basis of judgments.[2] (Shen, 2004) Regardless of such factors as possible defects and lack of whole-heartedness in the way we collect information, such result itself is definitely well-worth exploring. Why? Some judge analyzes as follows: "The reason (thereof) is not that the abuse of power is rare, but that it is hard to determine the conditions for annulling the concrete "abuse of power". Firstly, as far as administrative authority is concerned, it is difficult and inappropriate for the court to determine what their subjective wills are. In the administrative act by administrative authority, there is the assumed effective force existence of the state public decision power. The court can not weigh the will of another organ of state power with its own will. Secondly, the objective manifestations of "abuse of power" overlap with or are hard to differentiate from the circumstances of "ultra vires" and "obviously unfair". Thirdly, it is difficult to tell the difference between "abuse of power" and some factual acts. (Jiang, 2005)

The author does not completely agree on the basic theoretical view contained in the above-mentioned judgment. For instance, firstly, "obviously unfair" should be a sub-criterion of "abuse of power" rather than in a parallel relationship with "abuse of power". Secondly, the substantive review of administrative discretion does not mean the measuring or speculation of the will of administrative authority; instead, it is to examine whether there is deviation in the discretion process. The substantive review is still mainly objective rather than subjective; and it is still a review of legality rather than extending further to be a review of morality.[3] (Nedjati, Trice, 1978)

The reason why there are only a few of such cases is most likely that so far our study of administrative discretion is not thorough enough, hence failing to provide effective solutions to legislative authorities and judicial interpretations,

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and other websites, and in the Library of Chinese People's Public Security and the National Library, they found some cases but not many. Here I would like to extend my thanks to the above-mentioned judge and students for their help.

[2] Prof. Shen Kui has similar finding after studying 270 cases in the Selected Cases of the Courts (Administrative Law Cases, 1992–1999). He said, "The result of study indeed surprises me. Among the 270 cases, 182 cases of which administrative authority lost lawsuit, among which only 6 cases explicitly applied the criteria of abuse of power in judging cases, together with one case that the plaintiff discarded the charge and the court did not make a judgment regarding substantive issues but the analysis, which confirmed the abuse of power was constituted. The latter totals up to seven cases, which accounted for 3.85% of the losing cases. Even with the three cases where the criteria of abuse of power were not applied in the judgments and only the analysts thought that they belonged to abuse of power, and only 10 cases in total, which account for 5.49% of the losing cases."

[3] The Administration Law of France also refuses to extend the concept of "abuse of power" to the violation of administration morality, which means that as long as the behavior of administrative authority does not clash with the basic principles of ethic and moral beliefs that constitute the foundation of the society, so whether they breach the moral law is not relevant.

and consequently the "abuse of power" of article 54(2) of the Administrative Litigation Law appears to be obscure and lacks operationally clear and detailed interpretation, and can only be put in the lofty altar. Nonetheless, besides this are there any other reasons that have not been noticed by us? This is the major motive and the original force of the study of this Paper. Maybe the research conclusions of this Paper can make further corrections and explanations to the issues that are "hard to determine" as mentioned by the above-mentioned scholar. However, the author wants to go beyond this level by analyzing some cases, hoping to sort out the major issues existing in the application of the criteria of substantive review by courts, or the courts' preferences to review techniques, and taking a step further to ask why there are such issues or preferences.

As discussed earlier, some cases have been collected for the study of this Paper. However, after careful reading of those cases one by one, we have found that the introduction to many cases is too simple with only conclusive judgment but without detailed description of the whole process, details and arguments; some cases, especially those used as auxiliary teaching materials, often present the linear relationship between case and theory; it is possible that they have been "chewed" or "tailored" carefully for the study, discussion and debate of the beginners. It can be said that as "materials" for research, most of the cases are not ideal. The author has just selected three cases which are relatively representative with relatively more information for analysis. Huide Company is a case that has been demonstrated by us, where the parties have provided very complete administrative decision and trial documents, and have given detailed introduction of the hearing process and argument points; while Yin Jianting and Kaili have been covered and tracked by media in details, and there has also been much discussion in academia, consequently the details of the cases have been continuously disclosed and the relevant legal issues are relatively clear, which are ideal as materials for case studies. More importantly, such three cases should be typical and representative based on the author's instinct of trial practice. Of course, in order to support more sufficiently the study of the author and to eliminate possible questioning of "generalization from limited cases" from readers, some other cases have also been used as explanatory and complementary auxiliary materials.

First of all, through analysis of Huide Company, the author finds that it is easy for the court to mix up the confirmation of facts, legal application and administrative discretion. Then, via Yin Jianting, the awkwardness and embarrassment faced by the court due to the underdeveloped judicial review criteria system of administrative discretion and the "conversional" review strategy not so successful are revealed. Finally, through analyzing the hot discussions in media and academia regarding Kaili, we directly target a very sensitive issue in the judicial review of the

administrative discretion—the strength and limits of the review.

2 Misunderstanding of administrative discretion?

We start with Huide Company[4] to explore at what level administrative discretion should be exercised? How does the court misunderstand? Why does such misunderstanding occur? And there is a more theoretical question—why is there not an issue of administrative discretion in the finding of facts and in the application of settled standard to the facts.

2.1 At what level does the case involve administrative discretion?

In hearing of the case, one core issue was whether there was abuse of power in the decision to annul the alternation registration by defendant Qingdao Municipal Bureau for Commerce and Industry. During hearing of first instance, the

[4] On August 28, 2001, Huide Company held a general shareholders meeting and adopted a resolution in agreement that the founder members would invest to set up an accountant firm of partnership and the ordinary investors would withdraw their investment from the company. On September 28, the company's Management Committee unanimously passed "Opinions regarding the Distribution of Net Assets from December 1998 to September 30, 2001". From October 2001 to December 2001, Huide Company submitted relevant materials for the application of establishing an accountant partnership to relevant departments including Shandong Province Registered Accountant Association and Shandong Provincial Department of Finance, but did not get approval from relevant authorities. On the 6th and 7th of January, 2002, Wang Qinghe and other five shareholders signed the Actual Paid-in Capital (Total Capital Stock) and Equity Structure after the Shareholders of Huide Co., Ltd. Withdraw or Partially Withdraw Their Investment and Resolution of the Shareholders' Meeting, deciding that the above-mentioned six shareholders would covert their receivable profit into paid-in capital to enable the company to continue to maintain the original registered capital. Huide Company applied to Qingdao Municipal Bureau for Commerce and Industry for company alternation registration and equity change registration, and was told that the registration had been done after examination. On September 7, 2003, Qingdao Municipal Bureau for Commerce and Industry received a report that Huide Company had hidden the truth and provided false information when applying for the shareholder alteration registration. After investigation, Qingdao Municipal Bureau for Commerce and Industry issued to Huide Company a Notification of Ordered Corrections, and annulled Huide Company's shareholder alternation registration and the related equity change registration according to the provision of article 206 of the Company Law. Huide Company refused to accept the ruling and lodged an administrative litigation to Qingdao Municipal Intermediate Court on February 3, 2004. The court of first instance made a judgment to annul the original specific administrative action according to the provision of article 54(2) of the Administrative Litigation Law. The third party of the original trial appealed to Shandong Provincial Court. The appeal court overrode the decision of the court of first instance according to the provisions of article 61(2), (3) of the Administrative Litigation Law and maintained the decision of Qingdao Municipal Bureau for Commerce and Industry.

defendant argued, "According to legal provisions, regarding enterprise registration what the defendant conducts is a form review… after the form review is passed, the defendant will approve the registration and issue relevant certificates. Meanwhile, administrative authority should also monitor and check the approved matters that have been administratively permitted. If the enterprise is found to have violations, the administration for commerce and industry should file the case and start investigation, and have substantive review of the authenticity and legality of the application materials. If a violation is confirmed after the examination, the administrative permission can be annulled or other decision can be made according to the law. As a result, neither ultra vires nor abuse of power exists in the defendant's behavior." Can this argument be accepted?

There is no explicit provision regarding the specific way of review in article 24 of the Administrative Regulations on Company Registration, which means that the commerce and industry authorities have the power of discretion. For the above-mentioned materials submitted by the applying company, whether to have a form review or a substantive review is totally at the discretion of the commerce and industry authorities based on such factors as the human and material resources that can be allocated, the necessity of the review, the nature and importance of the matters under the alternation application. This power is undoubtedly administrative discretion.

In this case the defendant obviously adopted the form review but problems occurred. Defendant Qingdao Municipal Bureau for Commerce and Industry did not and maybe could not detect in a timely manner that there was some flaw in the materials submitted by Huide Company. For instance, in the "Statement of Share Transfer" three shareholders did not sign their names. In fact it is quite normal for this kind of problem to occur, which is an institutional defect that inevitably accompanies the efficiency of the form review. Even if problems occur, it does not mean that the exercise of the discretion itself is not legitimate. What we can say is that the operation of such power must be based on the integrity of the counterparts. If integrity is missing, sometimes it is really difficult for administrative authority to spot the problem from only reviewing the form, and consequently there maybe errors in the discretional decision. Moreover, the aforesaid problem is not the deviance of the process of discretion normally referred to in the meaning of judicial review, such as improper purpose of existence, irrelevant consideration or the obviously unfair discretional results. Assuming that there are no problems in the process of discretion, there is no obvious flaw in the materials submitted by the company that should alert the commerce and industry authorities, and the latter does not have any intent to "cover" any flaw for the company, then we can not be too harsh on the commerce and industry authorities by saying that they are "negligent" and questioning "why

they can not detect the flaw in the materials in a timely manner" and then requesting them to bear the legal consequences. The author would rather deem such error as a price or byproduct of the system.

Therefore, if only the choice of way of behavior is concerned, the defendant's argument can be agreed and accepted: In deciding whether to adopt form review or substantive review, the defendant did not abuse power. However, in the hearing process of this case, the discussion of the abuse of power seemed to go far and too far.

2.2 How does the misunderstanding of administrative discretion occur?

When it was reported that the materials submitted by Huide Company were false, the defendant would definitely change to substantive review and had to examine the authenticity of the relevant materials one by one. There should not be any problem by itself, but it happened that in this process of substantive review, the court of first instance thought the defendant "had gone too far". In the opinion of the judge of the court of first instance, first of all, "in this case, all the shareholders of the plaintiff company had unanimously passed the resolution to form an accountant partnership and the majority of the shareholders had withdrawn their investment; eventually the accountant partnership was not formed, instead the six shareholders who planned to become partners continued to invest in and run the original limited company. Though such approach of shareholders withdrawing investment prior to new capital injection was not normative, it belonged to internal corporate behavior; as an administrative registration agency, the defendant should respect the free disposal result of the private rights and should not interfere too much by use of its administrative power." Secondly, "The Company Law has explicit and specific provisions regarding company liquidation, and the defendant does not have the right to make its own criteria." In consequences the defendant used its authority in an improper way, and the court of first instance annulled the defendant's decision according to the provision on "abuse of power" in article 54(2) of the Administrative Litigation Law.

What is interesting is that the aforesaid ruling of the court of first instance was not supported by the appeal court. The appeal court thought that whether Huide Company's behavior constituted a "serious circumstance" depended on the factual elements, towards which the commerce and industry authorities also had discretion. "When Huide Company applied for the alternation registration, it hid the resolution of the August 8 shareholders' meeting and fabricated the September 5 shareholders' meeting; the original company was not cancelled and the new partnership was not formed, while Wang Qinghe and five other people continued to run the original limited company. The truth was hidden; it was not

incorrect for the commerce and industry authority to think that the circumstance was serious."

In its judgment the appeal court further expounded that "Normally there are three circumstances of 'abuse of power': One is that the administrative action of administrative authority has improper purpose or motive and abuse power for private gains; another is that the administrative action of administrative authority has legitimate purpose or motive but the actual administrative action does not comply with statutory elements; and the third is that the administrative action of administrative authority has improper purpose or motive and the content of the administrative action is illegal. In this case, the Municipal Bureau for Commerce and Industry conducted the supervision and check based on the reporting, which demonstrated administration according to the law. At present there is no evidence to show that the commerce and industry authority or its personnel has abused power for private gains; the accused specific administrative action has confirmed that Huide Company's behavior and nature in applying for alternation registration complied with the provision of article 206 of the Company Law; the content of the accused specific administrative action does not violate any legal provisions. Therefore, there are not factors of abuse of power in the Cancellation Notice of the Municipal Bureau for Commerce and Industry."

Here let's not say that the above appeal court's explanation of "abuse of power" is not precise or correct at least when weighed and judged from the existing theoretical recognition. What is interesting is that the dialogue between the court of first instance and the court of second instance did not occur in the context of the above explained "abuse of power", but was about whether Huide Company hid relevant facts when applying for the alternation registration, and whether these flaws constituted "serious circumstances".

In other words, both the "going too far" claimed by the court of first instance and the "no abuse of power" are just symptoms on the surface and are a generic understanding of "abuse of power" in the normal sense but not the judicial meaning of the exact "abuse of power", definitely not the essence of the issue of the case. This is because when we use every sub-criterion of "abuse of power" to weigh and consider the case, it is not difficult to find that Defendant Bureau for Commerce and Industry does not pursue improper purpose; nether does it consider irrelevant factors, and it is hard to say the cancellation notice is extremely unfair. As a result, it is not wise for the appeal court to choose "abuse of power" in article 54(2) of the Administrative Litigation Law as the route and criteria for the review. The appellant, the appellee, the third party and the court should not and there is no need to cling to the question of whether there is "abuse of power".

The key to the mistake of the case is actually that Defendant Qingdao Municipal Bureau for Commerce and Industry made a mistake when

"hesitating" between the legal rules and the facts of the case; the mistake was incorrect finding of fact, which in turn led to wrong application of law and regulation. The appeal courts also did not detect this error and made a follow-up mistake.

2.3 There is no issue of discretion in finding of facts and application of criteria

It can be seen from the above analysis that both the defendant and the appeal court mistook the August 28 shareholders' meeting resolution for the crucial fact of this case, and made mistakes in the judgment, choice making and weight application among various relating facts; moreover, they did not strictly apply the liquidation criteria specified in the Company Law to the facts of the case and make correct judgment.

Indeed, in these two links there are issues in the administrative authority's judgment and choice. However, different from D. J. Galligan, the author does not prefer to generalize administrative discretion to these links. In the matter of facts, even in England, traditionally it has been processed as "jurisdictional fact" or "precedent fact".[5] (Craig, 2003; Supperstone, Goudie, 1997) For such undefined legal or statutory concepts as "serious circumstances", although administrative authority has a certain "room for judgment" for it, it still belongs to applying defined criteria to the facts but not administrative discretion itself. The reasons why the author insists not to generalize administrative discretion to the two above-mentioned links are as follows:

Firstly, with respect to the finding of facts, we have already formed a set of judicial review techniques, for instance, in the confirmation of more professional and technical facts, the judgment of administrative authority is relatively tolerated and respected. Because administrative officials are experts and are in direct contact with the parties to the case, they are in a better position to assess the factual situation. (Schwarze, 1996) Similarly, we have already many legal interpretation techniques which are adequate to make sure that administrative authority will not experience lack of standards in the process of applying the defined criteria to the facts. There are relevant provisions on both aspects in article 54 of the Administrative Law, that is, whether the evidence is irrefutable and whether the application of law and regulations is correct as specified in article 54(1) and article 54(2). Is it necessary to clarify whether there are discretional factors in those links and to introduce discretional control techniques?

[5] There is a slight difference between "jurisdictional fact" and "precedent fact", but it is very hard to clearly tell the difference. Professor P. P. Craig mentioned in his works that for administrative decision made due to misunderstanding or negligence of the existing and relevant evidence, the parties concerned can request judicial review. However, Craig reviewed the questions within the scope of jurisdiction rather than that of discretion.

Will needless repetitions occur in effect or will there be incompatibility of the internal review techniques? All these are dubious.

Secondly, the author has also noticed a latest research tendency and interest, which is to coordinate various factors and links related to discretion from the standpoint of the control of administrative discretion so as to have a complete control chain for administrative discretion.[6] (Liu, 1998) This approach to thinking by using discretion as the limits is not unreasonable but necessary; nonetheless, the purpose of coordination is to completely and totally treat and handle administrative discretion from the perspective of the theory of administrative process, but not to and should not extend the discretion factors to all the links of the whole chain and turn everything that has been touched by the theory of process into discretion.

Of course this is a very complicated question. Sometimes, issues occurring in finding of facts or application of law are internally related to the pursuit of improper purpose or irrelevant consideration, and are the products of the latter, or they can be said the result of intentional editing of facts and distortion of the law pulled by the latter's factors. Furthermore sometimes it is difficult to separate the former from the latter—for instance, considering irrelevant factors is externally reflected as purposeful choice of facts. In such circumstance, we can say that this is an issue of discretion. However, we can not expand discretion to all the finding of facts or law application because of this.

3 Is avoidance aimed at seeking more objective basis?

Another case worth of thinking is the one in which Yin Jianting protests the restriction on his appointment imposed by Zhuzhou Municipal Education Bureau (hereinafter referred to as "Yin Jianting"). In this case, a middle school teacher Yin Jianting expressed his viewpoint and remarks as "the purpose of receiving education is to make money and marry a beautiful girl" in his thesis entitled "Educational Lesson upon Entry of School" and his book entitled "An Old Gun in This World", and tried to sell his works to students. For this reason he was investigated and penalized by Zhuzhou Municipal Education Bureau, which on August 31, 2000 released Zhu Jiao Tong Zi (2001) No.60 Circular on the Investigation and Punishment of Selling "An Old Gun in This World" to

[6] Professor Liu Zongde has some noteworthy comments. He said: "Strictly speaking, erroneous confirmation of facts is not a question of discretion limits but a "factual question" and should be completely reviewed by the court; however the confirmation of faction is often accompanied by "evaluation"; whether the evaluation of fact is appropriate is closely related to discretion, and for this reason the theories and precedents have always mistaken the facts for one of the criteria of discretion control."

Students, and made the decision that "all the schools in Zhuzhou city (including the five counties and districts) shall not hire Yin Jianting as teacher". (Luo, 2007)

Then is it too harsh for the Municipal Education Bureau to request all the schools not to hire Yin Jianting, to impose geographical restrictions on his constitutional right of work and to deprive him of his job just because of Yin Jianting's inappropriate remarks? Does this involve "abuse of power"?

What is interesting is that the court did not conduct the trial according to the review route of "abuse of power" of article 54(2) of the Administrative Litigation Law; instead it referred to "ultra vires" of article 54(2) of the Administrative Litigation Law. The court cleverly quoted the provision of article 17 of the Law of Teachers: "Schools and other educational organizations should gradually implement the appointment system for teachers. The appointment of teachers should follow the principle of equality of status of both parties; the school and the teacher shall sign an appointment contract to explicitly define the rights, obligations and responsibilities of both parties"; it maintained that whether or not to appoint a teacher should be decided between the school and the teacher through the signing of contract, and the competent education authorities could not "stretch their hands too long" to restrict the right of appointment of Plaintiff Yin Jianting by an administrative order, which had exceeded its administrative authority. Yin Jianting ended up winning the case but eventually was blacklisted by all the schools in the region. Although for this case the dust has settled, it still provokes much thinking.

3.1 Why was the trial route of the proportionality principle not followed?

Although as analyzed by some scholars the decision of Defendant Education Bureau violated the proportionality principle, "In this case, even if Zhuzhou Municipal Education Bureau made the decision out of good motive and for the purpose of safeguarding public interest, the legality of its administrative discretion has been questioned due to the irrational and immoderate relationship between the means and the end, and its administrative discretion is deemed to have constituted 'flawed discretion' and needs to be reviewed by the judicial organ." (Wu, 2007) But the court did not respond to this in the actual trial largely because that the proportionality principle is still "very remote" both in the Administrative Litigation Law and in relevant judicial interpretation and has not turned into a specific and operational review standard. Under the judicial trial system and operation mode without a tradition of case law, the judge can not and dare not develop a new style of his own.

Perhaps some people would remind that in our country's administrative trial practice there have been precedents of the ideas of the proportionality principle

expounded in the "obviously unfair" or article 54(4) of the Administrative Litigation Law. For example, in Huifeng Industrial Co. v. Harbin Municipal Planning Bureau, what the court adopted was similar to the principle of feasible coordination proposed by K. Hesse. (Schwarze, 1992) In demolishing the unapproved buildings, on the one hand, the purpose of law enforcement of the administrative authority had to be realized, that is, "not to cover the central boulevard and to protect the top of Xinhua Bookstore (formerly Foreign Languages Bookstore)", and on the other hand, the parties did not have to pay too high a price, hence reaching a win-win situation. (Hu, 2005) However, to adopt a similar trial approach in Yin Jianting, the court had its concerns. The reason is quite simple, Huifeng Industrial Co. v. Harbin Planning Bureau involves the issue of obviously unfair in the administrative penalty, while Yin Jianting only involves inappropriate decision of the education bureau, and as a result, the latter case can not directly refer to "obviously unfair (in administrative penalty)" in article 54(4) of the Administrative Litigation Law.

In fact, logically "obviously unfair" is supposed to be a sub-standard in "abuse of power" in article 54(2) of the Administrative Litigation Law; there may be an issue of "obviously unfair" in any administrative action, so theoretically the court if fully justified to adopt the standard of "abuse of power" to conduct a review of "obviously unfair" and take the opportunity to introduce the proportionality principle. Nonetheless, by isolating "obviously unfair" the Administrative Litigation Law has the legislative intention to separately link administrative punishment and the change of judgment, but this can easily cause the judge to have a fixed thinking process that "obviously unfair" is parallel to "abuse of power" and that it only applies to administrative punishment and nothing else, thus restricting the judge's trial and tying his hands.

3.2 "Convertible" review strategy

Because of the reasons analyzed above, the court avoided the review route of "abuse of power", and started from the appointment system of teachers to review whether Defendant Education Bureau had the right to interfere, and concluded that the defendant "exceeded its authority". The court chose to make the judgment by referring to "ultra vires" in article 54(2), undoubtedly hoping to add to the authority and legitimacy of its judgment from a more objective and intuitive perspective. And it works very well in actual effect. At least from the coverage of the media, the judgment of the case has been approved and generally accepted by the plaintiff, the defendant, the public and the media. There was no appeal after the judgment was made. The author has not found a report or article that is against the aforesaid judgment through Internet search.

Such review strategy that "moves" towards the more objective review criteria

(can be called "convertible review strategy") has been extensively used in the review of cases involving administrative discretion. The conversion can happen inside the substantive review standard system of administrative discretion, such as between the inappropriateness of the purpose and relevant considerations; more often it occurs outside the system and connects with other review criteria system, for example, the review of relevant considerations can sometimes end up with the review of procedural breach without providing any reason. Another example is, as the inappropriateness of the purpose or motivation can sometimes demonstrate itself as violation of law externally, if the behavior of the administrative authority can be found externally illegal, the court can also choose the review criteria on violation of law. (Brown, Bell, 1993)

The reason for the review standard to "move" externally is that, from the perspective of the theory of administrative process, there is internal cooperation or involvement between various administrative links and the discretion process, which jointly form a behavioral "field". If there is a problem at one of the links of the discretion process, it can well be only a "symptom", and the problem can be caused by problems of other links that are connected to it; or, its result can affect the related links. In other words, there is a causal relationship or a relationship of the form and the content between them. On the other hand, the use of the "conversional" review technique shows also to some extent that the substantive review criteria of administrative discretion is not easy to master and use, at least compared with other external review standards.

Nonetheless, intuitively speaking, the external "move" will obviously reduce the court's direct adoption of "abuse of power" of article 54(2) of the Administrative Litigation Law in its judgment.

However, in the author's opinion, there is a problem with the judgment of Yin Jianting. In the case, the court obviously considered the hiring between the school and the teacher a pure civil activity and the contract signed a civil contract, thus it was not appropriate and proper for the administrative authority to interfere using public power. In public schools, the agreement between the school and the teacher as to whether a teacher should be hired for what position, and what the job descriptions are involves public welfare issues such as whether the use of public fund is reasonable and whether all the job seekers are treated in a fair way; it is definitely not like and should not like that in the private schools where all the decisions are made totally according to the free will of the parties. The right to hire of public schools should be restricted in some way by public law; in this sense the employment agreement formed is more like an administrative contract than an ordinary civil contract (employment contract). In the case the education bureau instructed all the public schools (middle schools) in its jurisdiction "not to hire Yin Jianting as teacher", which should be deemed as an administrative policy, that is, it gave instruction to all the public schools in its

jurisdiction through a policy. According to the theory of administrative contract this should be permitted, and there are no such issues as "ultra vires" and "butting into someone else's business". The "convertible" review strategy did not work that well in this case.

In the review involving cases of administrative discretion, regardless of the "convertible" or other review strategy is adopted, is it true that as long as the judge can find a violation of law that is sufficient to cause the administrative action to be annulled, the review can be ended and judgment can be made; or, the judge has to find every breach involved in the case one by one? If it is the latter case, the judge's intentional avoidance will be criticized and in vain, and the extensively acclaimed "convertible" interview strategy will also be attacked and challenged.

First of all, the simple approach of "picking out the thorn" can undoubtedly save the judge's review cost. However, when the defendant executes the judgment there could be an issue of unclear correction goal which needs the defendant to use his own discretion. While finding all the law breaking situations one by one before making the judgment can specify and intensify the goal of the defendant's execution of the judgment, and is actually also beneficial to the plaintiff. Of course this will increase the judge's review cost. From an in-depth level, how to solve this problem is closely related to whether the administrative litigation system adopts the principle of "full trial" or the principle of "no trial without complaint", and whether it "emphasizes the supervision of administrative power" or "emphasizes the protection of the legal rights and interests of the objects of administration. The author prefers the principle of one-by-one review.

Next, even if we accept the idea of one-by-one review, it does not necessarily mean the "convertible" strategy in the review of administrative discretion will definitely be negated. It only requires that we further limit the conditions for its application. That is to say, (1) In the existing framework of review system, the direct substantive review of administrative discretion will be encountered with legal obstacles that can not be overcome, or will have high cost; (2) Whether or not the review is conducted using the approach of "abuse of power", the final correction effect is the same. Only the aforesaid conditions are met can the "convertible" review strategy be considered to legally avoid the possible problems that may occur in the discretion.

4 Does the administrative power excessively impinge on the right of administrative discretion?

Kaili Highway Construction Holdings Co., Ltd. v. China Securities Regulatory

Commission (hereinafter referred to as "Kaili") that has attracted intense attention from media and academia can be said a typical case of the judicial interference limits of administrative discretion. (Liu, 2002) Discussion around Kaili is of multiple facets and perspectives, including finding of facts regarding whether Kaili's 1995–1997 profit figures are false and whether the "return of materials" constitutes procedural flaw. However, in view of what we are discussing, here we will elaborate only one of the very important argument points of this case.

The court of second instance holds: "To determine whether the profit reflected in Kaili's financial reports is objective and true, the crucial factor is whether the company complies with the state's uniform enterprise accounting system. If China Securities Regulatory Commission (CSRC) finds something suspicious, it should entrust relevant competent authorities or professional agencies to examine and verify Kaili's financial reports according to the Special Regulations on the Financial Accounting for Companies and Enterprises. The CSRC Document (2000) No.50 issued by CSRC without the examination and verification of professional agencies does not have sufficient evidence to confirm the facts."

This statement immediately caused wide challenges and was criticized by some scholars, and was questioned as "judicial impingement on the free discretion of administrative authority". This is because the Securities Law grants CSRC the determination right regarding the authenticity of the accounting information; however it should be within the free discretion of CRSC to choose the approach of determination when there are no relevant provisions of laws and regulation. The ruling of second instance required CSRC to make the judgment based on the result of examination and confirmation of relevant organs, which stipulates the determination approach for CSRC. Such interference does not have legal basis. (Peng, 2001; Xue, Zhang, 2001)

The above-mentioned criticism also worries other scholars, "In Kaili, the judge painstakingly avoided directly challenging the conclusion of the administrative authority; instead, he only required the administrative authority to listen to the opinions of professionals when making judgment on professional issues. If such a logical judgment can be accused of 'impinging on the free discretion of the administrative authority' or 'exceeding the limits of judicial power', the living space of the administrative litigation itself is not optimistic." (Liu, 2002)

The author, however, basically agrees with the viewpoint of the critics. The Securities Law grants CSRC the determination right regarding the authenticity of the accounting information, without further stipulating specific operational method and procedural requirements, then it is up to the discretion of CSRC. As a special regulatory authority, CSRC can choose to make the determination, or consider entrusting other professional agencies with the determination based on

factors such as the work load, the level of difficulty, and the human and material resources that can be allocated in the verification of the authenticity of the case's accounting information, and the level of social influence of the case. Nonetheless, in the judgment, the court considered it a flaw that CSRC "should but did not entrust relevant competent authorities or professional agencies with the examination and verification of Kaili's financial reports according to the 'Special Regulations on the Financial Accounting for Companies and Enterprises'", which will undoubtedly produce systematic effect for the future work procedure of CSRC. In other words, in the future, for all the technical issues like financial accounting, CSRC does not have the right to judge by itself but has to entrust with professional agencies. Otherwise, once the case is brought to the court, it will most likely repeat the story of Kaili. This kind of predictable judicial consequences has actually formed a "strait waistcoat" for the exercise of the administrative discretion right in this respect by CSRC, which will have no choice but to follow the route specified by the court's judgment.

However, this actually selects the specific behavior mode for CSRC and replaces CSRC's judgment with the behavior mode that the court thinks the best, which has undoubtedly exceeded the role that the court should play within the constitutional framework, jumping from the review of legality that should be observed to the review of merits illegitimately. The court becomes a superior competent authority over CSRC instead of being a pure dispute judgment organ. Such undesirable consequence is what "brings a bigger problem than the one it tries to solve" and is what scholars of administrative law consider the real problem with the judgment of the court of second instance. Why?

Firstly, due to power separation and the consideration that it is based on the level of professionalism and technical capability of the administrative authority that the legislative organ grants the right of free discretion to the former, the court's review of administrative discretion normally is limited to reviewing whether there is deviation in the process of discretion, for example, whether improper purpose is sought, whether there are issues in the relevant consideration, whether the result of discretion is obviously unfair, or whether it is not proportionate between the means and the end, etc. All these review standards are for "steering the course" so that the exercise of discretion by the administrative authority will not deviate from the purpose of legislative authorization, but are definitely not meant to exercise discretion for the administrative authority, much less for the court to evaluate the merits of the behavior mode decided by the administrative authority. This is the interference limits that the doctrine of power separation requires the court to observe. Unless the court strictly stays within the limits of its power, it actually seizes the power of the administrative authority in the name of controlling the latter's abuse of power. (Supperstone, Goudie, 1997)

Secondly, the court of second instance "took a bold step forward"; it did not solve the problem and did not form a good systematic effect, but on the contrary, it further intensified the power struggle already existed among CSRC, the competent accounting authorities and the professional accounting agencies due to the ambiguous power of the last word,[7] (Liu, 2002) turning the judgment of the court of second instance to a target of public criticism hence it could be accepted by all aspects. The aforesaid negative consequence brought by the judgment of second instance of Kaili just explains from the opposite side why the court's competence under the constitutional system should be limited, whether it is constitutional competence or it is institutional competence. (Jowell, 1999)

Therefore, just as what some scholars analyze, "In light of the vast difference between the evidence of the plaintiff and that of the defendant, the judge naturally made the conclusion: CSRC's confirmation that Kaili's financial data was false lacked sufficient evidence. If the court directly made the judgment based on this, Kaili could have been closed smoothly, and CSRC would need to examine again Kaili's stock offering documents. The final result could be that, after careful and prudent study of the technical accounting issues, especially after exchanging ideas with the Ministry of Finance on the selection and application of the accounting rules, CSRC would refuse to give Kaili the approval for financing by listing the company for the reason of abusing account rules and providing false financial data. However the court of second instance took an extra step by making improvement suggestion for the working procedure of CSRC, thus 'introducing a bigger problem than the one which tried to solve'." (Liu, 2002)

Indeed, the judgment of the court of second instance really worries us, but what is more meaningful is that the case has triggered sufficient vigilance in us against the internal defects in the respect of administrative litigation system and urged us to reflect on this. The mistake of the court of second instance may only be a semblance, and the in-depth "source of disease" can well be in the

[7] Some scholars think that in terms of the final evaluation of financial information, the power/right allocation among CSRC, the competent accounting authorities and the professional accounting agencies has always been ambiguous. The court of second instance of Kaili requested CSRC to submit the questionable accounting information to the competent accounting authorities or professional institutions for examination and verification, making certain arrangement that is in favor of accounting (professional) departments with respect to the legislatively unclear power structure, which triggered the time bomb, and the strong reaction thus caused was basically from the standpoint of securities regulation and was impossible to calm down. Perhaps such analysis is rational but is not the crux of the real concern and criticism of the judgment of second instance of Kaili from the angle of administrative jurisprudence. It is a very good notation to explain why it is not easy for the court to tell the administrative authority how to adopt what kind of specific behavior mode.

systematic design of the limits and depth of judicial interference, which already has the problem of ambiguous limits.

For example, "alteration of judgment" specified in article 54(4) of the Administrative Litigation Law, "order the defending administrative authority to take relevant remedy measures" specified in article 58 and article 59, and "define the time limit of making specific administrative action again" specified in article 60 of the Supreme People's Court's Interpretation of Several Issues Regarding the Implementation of the Administrative Litigation Law of the People's Republic of China, are undoubtedly all aimed at increasing the benefit of administrative trial and realizing the economic principle of litigation, including reducing the cost of litigation and responding to the plaintiff's request in a timely manner; meanwhile, they are the result of the "onrush" that the court is forced to make faced with the absence and weakness of various supervision systems of the administrative power. Judged from the effect of the practice, it can not be said that it is totally ineffective. This is because the plaintiff's expectation of the litigation is usually not high; as long as they have some gain instead of "returning empty-handed", they are normally willing to stop the litigation; and as long as the court's judgment is just slightly changed which does not affect excessively the benefits of the administrative authority, the defendant will not respond in a drastic way.

However, we still want to question closely whether it is appropriate and practical for the court to replace the administrative authority to select "alteration solutions", define "relevant remedy measures",[8] and "set the time limit for specific execution"? Will they make it "extremely difficult" for the administrative authority in the execution, and cause more serious disputes involving also the parties concerned? Although theoretically there are major differences regarding this, (Yang, 2003) at least under the circumstances when the subject relationship is not clear (like the ambiguousness of the right of the last word in Kaili), and the decision making and execution activities of the administrative authority are affected by objective factors beyond their control (such as scarce resource), the aforesaid legal regulations and judicial interpretation will provide a potential cause and catalyst for disputes therefore such system design is not desirable. Otherwise, perhaps we will vaguely see the

[8] Regarding "order the defending administrative authority to take relevant remedy measures" in the above-mentioned article 58 and article 59 of judicial interpretations, there can be two kinds of understanding and practice in actual implementation: One is to request the administrative authority to adopt remedy measures in principle, and the specific measures will be decided by the administrative authority, but the court at most only provides the direction for improvement in a suggestive way; and the other is to specifically define the remedy measures that should (at least should) be adopted by the administrative authority. The former one gives no cause for criticism, and the author is only concerned about the latter.

"shadow" of the disputes in Kaili again.

5 Conclusion

Through the above-mentioned analysis, we may come to the following basic judgments:

(1) Currently the review criteria for administrative discretion in our country's administrative litigation system are undistributed, and the theoretical recognition does not accord with or is not consistent with the actual practice. Academically some cases should belong to "abuse of power", but as they can not be effectively supported by legislation and judicial interpretation, the court dare not take hasty actions and directly adopt the academic theoretical cognition in the trial. The appeal system, with the addition of the investigation system of the unjust cases, further deters the judge from making any creative move. Yin Jianting is an adequate indication. There was an obvious lack of proportion between the means and the end, but the court did not dare to use the proportionality principle in the trial. Therefore, it is extremely imperative to speed up the restructure and improvement in the respect of system.

(2) When there are other violation of laws that are more obvious, the court is more willing to select those judicial review criteria that are more objective and easy to operate, such as Clause 2 "error in the application of law and regulations", Clause 3 "violation of statutory procedure" and Clause 4 "ultra vires" of article 54(2) of the Administrative Litigation Law, to mitigate the risks at trials. Similarly, the use of "convertible" review strategy will also drastically reduce the direct adoption of "abuse of power" of article 54(2) of the Administrative Litigation Law in trials. This could be the key reason why there are relatively few cases of "abuse of power", meaning it is not that there are few cases of "abuse of power", but the "conversion rate" of the court's review criteria is high. Yin Jianting is an example, though the use of such technique in the case is not very successful.

(3) Similar to Huide Company, "confusing one thing with another", making erroneous application, or daring not to take hasty actions and making intentional avoidance are not rare due to the judge's uncertainty about the content of "abuse of power".[9] (Shen, 2004) A more serious misunderstanding is that some courts even mistakenly think that the free discretion is complete self-governance by the administrative authority, and it is totally up to the administrative authority to

[9] Dr. Shen Kui also found in his research that "the application of the standard of abuse of power in trials is confusing, and mostly does not appear to be related to administrative discretion."

"have the last word", and the court can not interfere. Faced with the abuse of discretion by the administrative authority, the court hesitates to move forward.[10] (Wang, 2006) The consequence is that, on the one hand, a great number of cases of abuse of power "slip away" right before the eyes of the judge, seriously damaging the effectiveness of the administrative judicial control and drastically reducing the number of cases of "abuse of power" objectively; on the other hand, there appear some "fake" cases of confusing application that scholars find both funny and annoying. Such a situation is most worrisome and depressing; the change of the status must depend on the further improvement of the judge's quality, and clearer judicial policy and legislative provisions.

(4) From Kaili which has drawn much attention from media and academia, it is not difficult to find that the depth and strength of reviewing administrative discretion, and the angle and method of judicial interference, are still tough issues that the court can not solve very well. The root of the problem still lies in the fact that we have not sorted out in a proper way relevant legal system and judicial interpretation from the perspective of power separation, thus affecting the actual trial benefit in the pursuit of it (a paradox resulted from the role of the court in violation of power separation). "The lost system should be sought among the people". We have to find the limits of judicial interference from the system. Maybe we can "swap horses" and start from improving other supervision mechanism for the administrative power, including those political and administrative ones, instead of only relying on the administrative "onrush". At least, even if we still want to keep judicial interference means like "change of judgment", "defining time limit for new specific administrative action" and "requesting the defending administrative authority to take relevant remedy measures", it is still necessary and beneficial to further detail their specific

[10] For example, in an administrative case where the verdict of a housing demolishing dispute was protested, there were three people in a household to be relocated: The elderly was over 70 years old, the son and daughter-in-law both were physically handicapped. Without reaching an agreement in the negotiation with the demolishing company, the housing authorities decided to move the household to a three-bedroom apartment at the top of the building (6th floor, without lift). All the people in the household felt it was unfair: How to live on such a floor? They then brought it to the court for a solution. But the result was very disappointing, as the court held, from the perspective of the law, the housing authorities' decision of on which floor to settle the households was within its own free discretion right, and the court could not help it. In fact, the development trend of the theory of administrative discretion has shown "no administrative discretion can be free from judicial review". In the above case, the ruling of the housing authorities is obviously unreasonable without properly considering the residents of the household, especially without considering sufficiently the convenience of the elderly's living. That failing to consider relevant factors constitutes discretion flaw belongs to abuse of power, so the court has the right to interfere.

application conditions.[11] (Yang, 2003)

Although such approach as drawing conclusions from individual cases may make the mistake of overgeneralization, and the approach of case study is not the best method to investigate the frequency of a particular phenomena, the author strongly believes the analysis and conclusion thereof are of certain value, and can reflect some mistakes that are "easy to make" in court reviews.

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[11] The author notices that scholars who support the existing administrative litigation system also stress that "in executing the judgment, if conditions are available, the court should define as detailed as possible the specific content of the obligations to be performed by the defendant; if conditions are not available or if the event contains relatively more professional factors and discretional factors, the court should also explicitly expound its legal advice regarding the obligations as the guideline for the administrative authority to perform the obligations." That means for the court to clearly define the content for execution in the judgment, there must be some preconditions such as judgment standards that are relatively objective and not easy to cause the dispute to the defendant.

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