

An Exploration on the Construction and Improvement of Administrative Legal Supervision Mechanism

FANG Jiaojiao^{[a],*}

^[a]Lecturer, Faculty of Economy & Law, Liaoning University of Science and Technology, Anshan, China.

*Corresponding author.

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Abstract

The origin and destination of law-based administration is the supervision and restriction of administrative power. With the deepening of the anti-corruption, the establishment and improvement of administrative legal supervision mechanism is the urgent need of administrative legal system in the new period. Focusing on the basic issues of administrative legal supervision mechanism, this article will analyze the necessity of the construction of administrative legal supervision mechanism to explore the necessary modes and types of administrative legal supervision mechanism. Our basic approach for ruling by law is to supervise and restrain administrative power through effective legal supervision system, so we must establish the concept that administrative power is a limited power. We must ensure the independence and effectiveness, legitimacy and feasibility of supervision power, and establish a corresponding legal supervision mechanism to ensure an effective implementation of administrative legal supervision.

Key words: Administrative legal supervision mechanism; Definition; Construction

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INTRODUCTION

Montesquieu expounded power in *The Spirit of the Laws*, "All people having powers are likely to abuse

the powers, which are an eternal and unchanging experience. Powerful people will not be stopped until encounter limits." The limits have now been set by laws and regulations. With the evolution and development of human society, the necessity to implement effective legal supervision to those state authorities above society, especially the administrative authority accounting for a large proportion, has won a growing awareness by people.

1. DEFINITION AND FEATURES OF ADMINISTRATIVE LEGAL SUPERVISION MECHANISM

Supervision means that a certain criterion has been taken to determine whether a behavior goes amiss, and carry out certain measures and ways to make it back to the correct and normal state.

Administrative legal supervision means that state organs implement legally binding supervision and urge upon administrative organs and the administrative activities of their civil servants in accordance with law. In the field of administrative law studies, there are two confusing concepts, namely "administrative legal supervision" and "administrative legal monitoring". The former refers to the supervision to administrative organs and their civil servants, and the latter refers to the monitoring of administrative organs to the related parties of administration.

Administrative legal supervision has the following four characteristics:

1.1 Specific Administrative Supervisor

The subject of administrative legal supervision is the state organs granted with the right of supervision in accordance with law. It firstly must be state organs. Secondly, even the state organs are not all the subjects of administrative legal supervision, they must possess special authorization

according to law. For example, power organs and judiciary organs have legal authorities, so they belong to the subjects of administrative legal supervision. Military organs, however, are not entitled to supervise administrative organs and their civil servants.

1.2 Specific Supervision Object

The object of administrative legal supervision is administrative organs and their civil servants. Those non-administrative organizations with administrative authorities and their personnel shall still be regarded as administrative organs and their civil servants, and also belong to the objects of administrative legal supervision. Other organizations or individuals without administrative powers, such as state organs other than administrative organs, enterprises, institutions, social organizations and citizens in general, etc., are not part of the objects of administrative legal supervision.

1.3 Specific Content of Supervision

The content of administrative legal supervision is the administrative acts made by administrative organs and their civil servants which do not constitute a crime. Because administrative acts are guaranteed by the national compulsory force, and are able to generate legal consequences regarding specific rights and obligations of administrative counterparties, they must be conducted under monitoring. There are two issues need to pay attention: Firstly, the content of administrative legal supervision is limited to administrative acts, and non-administrative acts, even if are made by administrative organs or their civil servants, such as civil act or personal non-official act, does not belong to the scope of administrative legal supervision; Secondly, there is a difference between illegal administrative act and administrative crime. An act which constitutes a crime belongs to the study scope of criminal law, and should not be included in the content of administrative legal supervision.

1.4 Acts of Legal Supervision

Administrative legal supervision emphasizes to take legal criteria to examine and determine administrative acts, implement supervision in strict accordance with legal procedures, and generate certain legal consequences. This is the difference in the supervision made by political parties, people's organizations, public opinion upon administrative organs and their civil servants. The latter is not a legal supervision, and does not belong to the scope of administrative law study. For example, the ruling party's supervision upon administrative acts occupies a very important position in real life, but it still belongs to the scope of politics. In addition, some people think that government inner supervision is an internal function, and only related with the normal operation of administrative organs, whose purpose is to regulate the relations inside administrative organs and improve

administrative efficiency. Strictly speaking, it is a purely internal organizational activity, and should be placed in the study scope of management science or administration management, rather than the scope of administrative law. In fact, not only the Constitution and Organization Law, but also Audit Law, Administrative Reconsideration Law and a series of other laws and administrative regulations set up strict procedural requirements on government internal supervision, and entrust with explicit legal effect.

2. NECESSITY OF ADMINISTRATIVE LEGAL SUPERVISION

Almost without exception, modern countries pay great attention to the supervision of administrative acts, which are mainly due to two considerations: (a) Administrative power imbalance. Administrative power has a dual nature, namely: Firstly, political characteristics. Administrative power reflects the requirement of the ruler on social governance. Secondly, sociality. Administrative power is also required to maintain social stability and meet the living needs of the ruled. The dual requirements interact and coexist. A partiality on either side will lead to administrative power imbalance, thereby causes social unrest, social adjustment and damages to rulers and ruled. (b) Administrative power variation. An unilateral, predetermined and mandatory administrative power, under the joint influences of politics, society and other factors, is likely to vary, changing public power to be private power, and changing "public servants" of people to be "masters" of people. Especially due to the differences in personal qualities and values of civil servants, administrative power is likely to departure from its original purpose from time to time, causing damages to national interests, public interests and the legitimate rights and interests of citizens. In order to prevent the imbalance and variation of administrative power, we need to take effective supervision over it. This is the main purpose of administrative legal supervision.

3. MODE OF ADMINISTRATIVE LEGAL SUPERVISION

In the past one hundred years, the development of foreign political systems represented two obvious characteristics: Firstly, administrative power has continued to expand the social and economic development; secondly, supervision and control over administrative power have been constantly strengthened and improved. Many countries have established supervision system upon administrative authority based on the theory of separation of powers. On the one hand, they have set up the system to separate power-holders and power-exercisers, on the other hand they have established the system to enable mutual restriction and balance among various powers.

3.1 State Supervision Mode of Separation of Powers

This legal system includes:

(a) Parliamentary supervision. It was originated from the British parliamentary government, and has been adopted by Italy, Belgium and many other countries. Parliament is responsible to organize and supervise the government.

(b) Constitutional supervision. The objective of constitutional supervision is mainly to review government regulations and orders, decide whether its decisions conform to the Constitution, accept actions of unconstitutionality and decide disputes concerning authorities among state organs, etc.

(c) Supervision upon delegated legislation. Government has legislative power in accordance with delegated legislation, which should be strengthened supervision. In Britain, the high court and parliament supervise delegated legislation, and the court has the right to declare a legislation which is beyond the scope of authorization invalid according to the *ultra vires* principle. The parliament requests that the laws and regulations developed by the government must be referred to the parliament for future reference, and the Joint Committee of both houses will review delegated legislation authorization act and the laws and regulations developed in accordance with the authorization act.

(d) Judicial review. Common law countries stress the judicial review system upon government, especially the representative United States judicial review of government. The court has the right to review the government's orders, decisions, rulings and other abstract and specific administrative acts. The United States is mainly based on the Due Process Clause of the Constitutional Amendment and the 1946 *Federal Administrative Procedure Law* to review the legality of government act procedures, and is based on federal court cases to review government abuse of powers. British, on the other hand, based on the *ultra vires* principle and natural fair principle, authorizes the court to review the government's procedure illegality, *ultra vires*, statutory obligation nonfulfillment, abuse of power and legal error in records, but not for all government acts. The scope of review is narrower than the United States.

(e) Administrative litigation. Administrative litigation system began in France and is one of the legal systems to implement administrative supervision. Among administrative courts of civil law countries, some courts review the government's abstract administrative acts and specific administrative acts, while some only examine the government's specific administrative acts.

(f) Parliamentary supervisory commissioners. The commissioners' supervisory targets are the employees of all public authorities and criminal authorities other than the heads of governments, ministers, chief justice and parliamentarians. Their authorities are to supervise

the execution of laws and decrees, especially fair and lawful execution of government powers. Parliamentary supervisory commissioners are elected by the representative organs, and are normally held by qualified legal experts of law enforcement. The commissioners supervise the governments and judicial authorities by means of criticism, suggestions, parliamentary annual reports and other forms of public opinion. Today, the countries of this system utilize the recommendation way to conduct supervision, including announcements, corrections and guidance. The commissioners discharge their duties as reminding offenders, advising the authorities to change their decisions, requesting to correct errors or amend certain regulations. Once such criticisms and suggestions are open in annual report, they will be widely circulated in politics and have tremendous impacts.

(g) Audit supervision. Many countries have established audit institutions. Britain, the United States and Canada, etc. have set up audits organs independent of the government and responsible to the parliament. France, Italy and Spain, etc. have set up courts of audit to exercise part of administrative jurisdiction. Germany and Japan, etc. have set up audit institutions which are relatively independent, neither subordinate to the parliament nor responsible for the government. India, Malaysia and Pakistan, etc. have established audit institutions responsible for the head of the state. Sweden, Thailand and Saudi Arabia, etc. have established audit institutions responsible for the government or the head of government, and report to the government, parliament or head of state.

(h) Appeal. Appeal refers to administrative reconsideration, which is also a legal system supervising of administration. Many civil law countries have established this system.

(i) Disposal of grievance. Grievance treatment system has been established by Japan where Administration Supervision Bureau of the Management and Coordination Agency, Administrative Discussion Committee, Human Rights Protection Bureau and Human Rights Protection Commission of Ministry of Justice, discussion rooms of local public organizations, public hearing departments and other agencies accept people's dissatisfactions or complaints concerning administration. Such a system conducts supervision to administration and is especially useful to correct adverse administrative acts.

(j) Other supervisions upon administration. Supervision of the superior to the subordinate within the administrative organ is absolutely necessary. The Inspector General system of the United States, Ministerial discipline inspection commissions of Austria, etc. are also important supervisions inside administrative system.

3.2 Mode of China's State Supervision

(a) Supervision of state authorities. The Constitution provides that all state powers belong to the people, and

the people elect representatives to exercise state powers. Governments are produced by state authorities. They are responsible for and report to the state authorities, and are subject to the supervision of the state authorities.

(b) Supervision of people's procuratorate. Prosecutor, as the legal supervisory authority, implements judicial supervision. Procuratorial authority has the right to supervise the legality of official acts of administrative organs and their employees, and implement a vertical leadership system.

(c) Supervision of court. This supervision is mainly implemented by means of hearing administrative cases.

(d) Supervision of Communist Party of China. CPC implements a direct supervision upon the government. This is the most powerful supervision and ensures the ruling party's guidelines, routines and policies to be effectively implemented by the government.

(e) Supervision of the Chinese People's Political Consultative Conference

(f) Combination of top-down supervision and down-top supervision. Supervision upon administrative activities, whether inside or outside administrative organs, are just from the superior to the subordinate, which should also be carried out from the subordinate to the superior and be complemented with the former. The subordinate has the right to put forward criticisms, comments and suggestions, etc. to the superior. This is a system clarified inside and outside CPC.

Supervisions from individuals and public opinion are common in almost every country. For example, the US *Government in the Sunshine Act*, *Freedom of Information Act* and *Privacy Law* all stipulate that government administration should be open, and provide strong legal safeguards for this supervision.

China's reporting system also belongs to the scope of such a supervision.

4. TYPE OF ADMINISTRATIVE LEGAL SUPERVISION

Supervision can be classified from different angles.

4.1 Classify According to Supervisory Subject

In the field of administrative legal supervision, in accordance with China's relevant laws, subjects with supervisory powers include state organs, judiciary organs and administrative organs, so classification can be made as: (a) supervision of state organs, namely the supervision from National People's Congress, its Standing Committee, local people's congresses and their standing committees. (b) Supervision of judiciary organs, including supervision from adjudicatory organs and procuratorial organs. (c) Government internal supervision, including hierarchical supervision, audit supervision and administrative monitoring.

4.2 Classify According to Supervisory Object

Objects of administrative legal supervision can be classified into two categories, namely administrative organs and civil servants. (a) Supervision focusing on administrative authorities, such as administrative reconsideration and administrative litigation. (b) Supervision focusing on civil servants, such as administrative monitoring. (c) Supervision upon both administrative authorities and civil servants, such as supervision of state organs.

4.3 The Contents of Administrative Legal Supervision

The contents of administrative legal supervision, generally speaking, include all administrative acts, and to be specific, include abstract administrative acts and specific administrative acts, concerning rationality and legality of administrative acts. (a) Supervision upon abstract administrative acts, namely state organs are authorized to implement supervision. (b) Supervision upon specific administrative acts, namely law restricts adjudicatory organs and organs of reconsideration to supervise specific administrative acts. (c) Supervision to the legality of administrative acts, which are also the basic way for adjudicatory organs to supervise administrative acts. (d) Supervision to the rationality of administrative acts. Because rationality concerns the scope of the discretionary power of administrative organs, so in principle, only administrative organs interior are authorized to conduct supervision.

4.4 Classify According to Supervision Procedures

In accordance with the law, the powers of the subjects of administrative legal supervision are not exactly the same. Some subjects can just implement supervision after the process, some can implement supervision before and during the process, while some can implement supervision before, during and after the entire process. (a) Post-supervision, such as administrative reconsideration and administrative litigation. (b) Prior and going-on supervision, such as inspections and suggestions of people's representatives organized by the state organs. (c) Prior, going-on and posterior supervision, such as hierarchical supervision within the government. If classify according to the nature of supervision procedures, it can also be classified into: supervision procedures of state organs, supervision procedures of judiciary organs, administrative monitoring procedures, audit supervision procedures and administrative reconsideration procedures.

In general, construction and improvement of the system of administrative legal supervision is of great significance for China's democratic and legal construction.

(a) It is an important symbol of realizing people being the masters of the country

The people are the masters of the country. Administrative organs and their employees are the servants of the people, and must represent the interests of the people. In order to make the administrative organs at all levels and their employees not depart from the state's nature and the people's interests when exercise the state administrative powers, we must strengthen administrative supervision and improve the administrative legal supervision system.

(b) It is an important guarantee to correctly implement the Constitution, laws and policies

Administrative organs and their employees, as the exercisers of administrative powers, must enforce the laws and resolutions approved by the state organs; must implement the guidelines, policies of CPC and the state. Therefore, administrative organs and their employees must carry out administrative activities in compliance with the Constitution and the laws, and must implement the guidelines and policies of CPC and the state. This requires to implement a wide range of top-down and down-top, internal and external supervision to the administrative organs and their employees. Administrative supervision is an important system to ensure that administrative organs and their employees administer in accordance with the Constitution, laws and policies.

(c) It is an effective guarantee of administrative efficiency

Modern countries request high administrative efficiency, including high administrative efficiency and

good administrative effectiveness. In order to achieve high administrative efficiency, we must take effective measures, such as reducing levels, simplify procedures and be strict with time limits, etc. Implementation of the measures cannot do without strict supervision as a guarantee, which can supervise the administrative organs and their employees to improve efficiency and ensure effectiveness.

(d) It is a powerful weapon to fight against corruption and build a clean government

Among various powers of a country, administrative power is the most likely to cause corruption. Therefore, we must strengthen the supervision of administrative power. It is a powerful weapon for the construction in a clean government.

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