



The Revelation of Administrative Case System in Taiwan to the Transformation of Administrative Case Guidance System in Mainland China

INSPIRATION DU GUIDE DE LA TRANSFORMATION DU SYSTEME: VISANT SUR DES CAS DE LA JURISPRUDENCE ADMINISTRATIVE DE LA CHINE CONTINENTAL PAR LE SYSTEME ADMINISTRATIF DE TAIWAIN

ZHAO Jingbo^{1,*}

¹School of Law, Changchun University of Science and Technology, Changchun, China

JD, associate professor in the School of Law of Changchun University of Technology. Main research interests include the administrative law and jurisprudence.

*Corresponding author.

Address: School of Law, Changchun University of Science and Technology, Changchun, Jilin, 130022, China

Email: zhaojingbo@gmail.com

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Abstract

Compared with legal systems in other countries and regions, Cross-Strait legal systems are more portable and referential to each other because of the impact of civil law and the homology of law culture. The administrative case guidance system in mainland China is facing a need of transformation and reformation. The administrative case system in Taiwan has played an important role in the development, improvement and innovation of the administrative law theory. It will delineate a revelation to the construction of administrative case guidance system in mainland China, including mode selection, properties, efficacy and other aspects.

Key words: Administrative case system; Administrative case guidance system; Cross-Strait

Résumé

Le système juridique du détroit, basée sur l'impact de la loi civile et la culture juridique de l'homologie, par rapport à d'autres pays et régions, le système juridique plus portable et peut apprendre de la nature. Système de guidage administratif en Chine fait face à la nécessité de changement et de transformation. Système de Taiwan le droit administratif dans la théorie le cas du développement administratif, l'amélioration et l'innovation a joué un rôle énorme, il sera en Chine du mode de sélection des cas le

système administratif, la nature, l'efficacité et d'autres aspects de la construction de notre inspiration.

Mots-clés: Système de décision d'administratif; Système de Guidage des affaires administrativen; Détroit

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Although the actual system and specific rules of Cross-Strait legal systems are different in various aspects, both law systems are influenced by the concepts and construction of civil law and the homology of Cross-Strait law culture. Therefore, they are more portable and referential to each other compared with the legal systems in other countries and regions. The case system in Taiwan will undoubtedly have a huge impact on the design of legal system in mainland China in terms of the sources of law, judicial interpretations and applications. Therefore, I will delineate the revelation of administrative case system in Taiwan to the transformation and reformation of administrative case guidance system in mainland China.

1. THE FUNCTION AND DEVELOPMENT OF ADMINISTRATIVE CASE SYSTEM IN TAIWAN

1.1 The Definition of Administrative Case

According to general conception of Taiwan scholars, administrative case is a set of typical judicial decisions published by the Administrative Court (used to be renamed as "the Supreme Administrative Court") through a selection process from the case decisions made over the

years, which can be cited as precedents.

Debates remain on whether the administrative case has normative binding force and whether it can be used as a source of law. From the objection point of view, the case only has “de facto binding force”. That is to say, based on the principle of equality, the case has a qualification to be respected in other similar cases. From supporting point of view, the position of case in the sources of law has been confirmed, which is equal to an Act. First, it is the opinions of the Supreme Court and the Administrative Court. The consequence against cases has same effects as that against the Act [the Supreme Court case No.170 (1970), Taiwan]. The ground for the Administrative Court is same. Secondly, the Council of Grand Justices believes that the case against the Constitution is same as the Act against the Constitution. Therefore, people can apply for an interpretation of the Constitution according to the Act of the Council of Grand Justices, which is presently named as the Case Hearing Act of the Council of Grand Justices. Theoretically, the scholars in Taiwan have no objection about the existence and legitimacy of the administrative precedent, and most of them admit the legal binding force of the administrative precedent. Practically, the law and the judicial interpretation by grand justices have affirmed the administrative precedents as a source of law. Although the legal system in Taiwan belongs to civil law, most people admit that the judicial decisions of the administrative court or precedents have a considerable great legal binding force. For example, the Administrative Court Case No. 610 (1962) has admitted that the case has properties of a regulation so that it can be considered as a source of law. The Council of Grand Justices Interpretation No. 154 has elaborated the reason why the unconstitutional case is same as unconstitutional law, namely the final decisions that can be cited as a legal order or the equivalent in terms of law or order for judicial decisions according to the second paragraph of first section in Article 4 of the Council of Grand Justices Act regarding of the applicable law or order for final judicial decisions. According to the Court Organization Act Article 25, during the case hearing at the Supreme Court, if the interpretation of the law is different from the precedents made by the Supreme Court or other courts, the president of the court should apply to the Council of Administrative Court and convene a meeting to reach the final decision for the changed case. The Administrative Court Service Regulation Article 24 also demonstrated that during court hearing, if the interpretation of the law is different from precedents, the president of each court should apply to the Council of Administrative Court and convene a meeting to reach the final decision for the changed case”. Therefore, the Supreme Court and Administrative Court precedent has a binding force before it is changed, which can be cited to make final decisions in courts at different level. If the case is unconstitutional, it should be applied to the second paragraph of first section in Article 4 of

the Council of Grand Justices Act. In Taiwan, there is no clear definition in the law regarding of the legal force of administrative precedents and administrative statute. When the law is not defined or even the law is defined but a considerable margin has been left for discretion, judges at each level will generally make final decisions based on precedents. If the law is defined clearly, the judicial decision should be referred to the law. In other words, the precedents and comprehensive law statutes are parallel. The former is supplementary to the latter. Generally, the case law can not be contrary to the principles and provisions of the statutes; otherwise it will be invalid. It is only the detailed interpretation, application, supplement and extension of the principles and provisions of the statutes.

1.2 The Function of the Administrative Precedents

1.2.1 The Contribution of Administrative Precedents to the Confirmation and Development of Basic Principles of the Administrative Law

In the administrative regulations, legislators have used a number of general terms and uncertain legal concepts, leaving the Administrative Court judges a very big margin of discretion in the fields such as the Police Law and the emerging Environmental Law and Technology Law in Taiwan. Thus, through the case hearing, the judges will make a description for uncertain legal concepts or apply and expand the basic principles of administrative law. According to the Supreme Administrative Court Sentence No. 138 (1991), there was an error in the special test paper for judicial officers so that the examinees were unable to answer questions. The proposition Committee and the Review Board made an appropriate adjustment to the question but the complainants believed that such kind of action violated the principles of equality and trust protection. Based on the nature of the events, the Supreme Administrative Court considered that an appropriate adjustment to the question was different from making an error in the special test paper. Therefore, it was not contrary to the principle of equality. According to the Supreme Administrative Court Sentences No. 1261 and 1211 (1991), for the tourists who bring foreign currency through the border of the country and violate reporting obligations, the confiscation stipulated by law does not violate the principle of proportionality, which specifically address the principle of proportionality. In addition, the Supreme Administrative Court Sentence No. 1302 (1991) is regarding of a case related to the disability compensation by Labor Insurance. Through the hearing about whether the compensation period determined by the competent authority was against the principles of legal reservation and authorized clarity, the court further explained and determined the principles of legal reservation and authorized clarity. Therefore, the basic principles of administrative law are often applied by

judges continuously as law statutes. Its effectuality is also formed through judicial decisions.

1.2.2 The Administrative Precedents Accomplish the Basic Theory of the Administrative Law

The administrative precedents in Taiwan have supplemented uncertain legal concepts and administrative discretion theory. The High Administrative Court Appeal No. 978 (1991) has extended the type of discretion defect in addition to the evidence of discretion existence and the regulation of discretion exercise, and included malfunctioning discretion into the scope of discretion defect. The High Administrative Court has also preliminarily identified the possibility and limitation of judicial review through the interpretation about uncertain legal concepts of public order and moral. Moreover, judicial practice has gradually applied and interpreted the type of judge's leeway. For example, the Council of Grand Justices Explanation No. 319 7, 4628, and 382 have provided interpretations. Meanwhile, the scope of judicial review about judge's leeway has been determined through court decisions such as the Supreme Administrative Court Sentence No 1588, 343 (1994) and Taipei High Administrative Court Appeal No. 752. In addition, under the circumstances of increased requests of disposition and relief and the concept of "the relief comes under the right", the importance of temporary right was affirmed when more and more rights are not clarified. The court will regulate such kind of condition through its judicial decisions such as the Supreme Administrative Court Rulings No. 1257, 1328, 1469, and 1513 (1991).

1.2.3 Administrative Precedent is a Practice Pioneer of Administrative Law Theory

After the 1990s, economic integration and globalization, and social high risk have a significant impact on the development of administrative law, which shows the trend of internationalization in administrative law, democracy in administrative decision-making, non-regularization in administrative acts, privatization in administrative tasks, the private law in administrative organization, and diversification in the relationship of administrative laws.

Administrative case system also responds quickly to the development of administrative law. According to the trend of the democratization of administrative decision-making, administrative decision-making process allows the people directly involving in the administration to prevent a great resistance to the implementation of administrative decision-making and ensure the potency of decision-making. However, the participation of public organizations is extremely important in the official-public cooperation system developed from the areas emerging environmental law, technology law and other, as well as the development permission system developed from Urban Development Act and dominated by officials-public consultation. In order to ensure the balance between public interests and personal interests and to prevent any benefit

exchange between executive authorities and beneficent groups and harms of public interest, the involvement of just people, non-profit public organizations and local communities is necessary for official-public cooperation and officials-public consultation systems. In view of this, the U.S. Supreme Court established two precedents in recent years, namely *Nollan v. California Coastal Commission* (1987) and *Dolan v. City of Tigard* (1994) to prevent its abuse.

2. RECONSIDERATION OF ADMINISTRATIVE GUIDANCE SYSTEM IN MAINLAND CHINA: TRADITIONAL OR REVOLUTION

From the end of 19th-century to the beginning of 20th-century, legal theories have gone through a process that the judge's discretion was produced from scratch and the confirmation of administrative precedent as a performance of administrative law was from "no" to "yes". And the interpretation of legal theories was characterized as a process from so-called "strict interpretation" to "liberal interpretation". In 20th century, the interpretation of legal theories was reconsidered on the basis of previous theory. Should the application of law adhere to the tradition or change? Is it mechanical or dynamic, extreme or conservative? The conservation of conceptualized law and the dynamics and radical of realistic law have left a great margin of judicial activities to judges. How can we achieve a balance and unity between stability and flexibility? How big is the space for administrative precedents? What is the relationship between administrative regulations and administrative rulings? Modern society has abandoned the concept of "machine judge", but also refused to accept the concept of "legislative judge".

As a big developing country that is becoming stronger and stronger, mainland China is facing a truth that it lacks of modern legal tradition and is trying to become a country with regulations. It is also undergoing a historic reformation of the legal and judicial systems. Since the establishment of New China, the Supreme Court has guided all levels of local courts to carry out trials through the enactment of judicial interpretation, judicial approval, and publishing typical cases in order to compensate the shortcomings in law construction. Throughout the legislative development in recent years, it can be found that a number of new types of cases have played an important role on the legislation establishment and interpretation, and the recuperation of loopholes in legislations. Since 1985, the Supreme People's Court Bulletin (hereinafter referred to the Bulletin) has published some typical cases on each issue, which can be cited by courts at each level when they make the decision for similar cases. From 1985 to 2010 (up to the 10th issue), the Supreme Court announced a total of 76 typical administrative cases, which have a great significance

in guiding the administrative adjudication. Because the guidance and reference significance of typical cases varies in different type of trial practices, it will result in two effects: First, the case has direct referent significance for administrative trials. The judge will cite the basic idea of cases in the trial but not show the source of cases cited. Secondly, the judge will not directly cite the basic idea of cases but only cite a typical case to analyze the present case. There two reasons why typical cases produce the above effects. On one hand, we have yet clarified the legal status of cases. The existing “guidance” and “reference” roles themselves lack of a binding force so that a typical case actually provides an applicable-choosing right to the lower courts, thereby directly leading to a difference in case selection. On the other hand, because the understanding and interpretation of a typical case by different judges are different, it inevitably results in a diverse application of cases in practice. In order to reverse such kind of situation, the Second Five-Year Reform Program of People’s Court has demonstrated that we should establish and improve case guidance system, and emphasize the role of typical cases on the unification of legal standard, guiding the trial in courts at lower level, and the enrichment and development of legal theories, etc. The Supreme Court has developed normative documents on case guidance system and set the standard and procedure of compilation, releasing method, and guiding rules of typical cases. From the appearance to gradual reformation and emphasis of typical cases by the Supreme People’s Court, it shows the role of typical cases in the activities of legal trials. From the recent legal system reformation, we can infer that typical administrative cases in the Bulletin have actually been offered a same judicial authority as the judicial interpretation by the Supreme Court though these cases have not been given the name of administrative precedent. These so called typical cases are in fact a real prototype of administrative precedents. They are producing a huge impact on the commencement of administrative litigation and the development of administrative law and relevant research in China.

However, the “case guidance” after all is still not a “case law”. It has many problems in trial practice. First, there is not any unified understanding about the “positioning” of case guidance. Because there is no legislation to guide the positioning of case guidance, some courts and judges completely deny the establishment of case guidance system in China on the grounds that China belongs to civil law countries so that case law should be excluded. Some courts and judges have a vague understanding and lack of knowledge about case guidance system. Therefore, they don’t circulate and study the typical cases promptly due to various reasons. Many judges get used to search relevant legal articles and judicial interpretation and seldom refer to the typical cases announced by the Supreme Court or higher courts while they are searching in the statute. As a result, these

typical cases can not play full effect as a guidance and reference in judicial practice. Secondly, some problems remain in these typical cases also affect their value as a reference, including limited number of cases available, low quality of cases, omission of applicable cases, lack of evidence in some published cases as a guidance, etc. Lack of review and summary of discipline of cases as an applicable law has affected their value as a reference to a certain extent. Finally, the number of typical cases is too few to guide administrative trial practice. The drawback of case guidance system has prompted us to think about how to improve this system. In recent years, the research ground of legal theories has changed from legislation-focused to justice-focus and the research content has changed from ontology to methodology. It prompts us to think about how to provide Chinese judges with appropriate model of thinking and judicial reference to make administrative decisions; whether a reformation of traditional administrative case guidance is necessary or not; and how to reform. In statute-leading civil law countries, common law case system gradually takes a place in their legal systems. Thus, under the globalization of law and based on our reality and actual situation, the inevitable choice for the construction of legal system is to promote judicial reformation actively and effectively and to establish a modern review model of judicial system, which is not only consistent to the general rules of human legal civilization but also has distinctive Chinese characteristics.

3. THE TRANSITION OF ADMINISTRATIVE CASE GUIDANCE SYSTEM TO ADMINISTRATIVE CASE SYSTEM

3.1 The Model Selection of Administrative Case System

Because of the historical background of legal development, legal culture and traditions, and the existing judicial practice, the legal system in mainland China has always carried on the tradition of the statute. It is also influenced greatly by legal culture and system construction in civil law countries. The successful practice of administrative case system in Taiwan has provided a developing space and path for judicial systems under the regulation of the statute. Regarding of case system construction in mainland China, a mixture model of using case law as a complementation to the basis of existing statute is undoubtedly the best choice. Theoretically, there are three specific approaches to establish administrative case system in China with civil law model. One is an imitation of legal systems in Japan and Germany, in which the precedents from higher courts have as effect of administrative case with a legal binding force for lower

courts. The second one is the system in Taiwan, in which the Supreme Court chooses a set of cases from its own meaningful precedents. The third model is to upgrade the typical cases announced in the Supreme People's Court Bulletin to administrative cases and offer them a legal binding force. These administrative cases may come from the decisions made by any level of court. Within the aforementioned approaches, the first approach is not feasible for us though it is a successful practice in civil law countries. The second approach has been approved by most scholars in mainland China because the mainland China and Taiwan have same background of legal traditions and culture so that it is realistic to adopt the practice in Taiwan. Indeed, our legal culture itself is a "hybrid" tradition. However, the tradition in models does not represent the necessity and feasibility in operating mechanisms. If we require the Supreme Court to identify administrative cases as precedents from abundant decisions at all levels of court, we can image how difficult and how big workload it would be. The third approach has certain feasibility in current establishment of administrative case system in China. First, the typical cases announced in the Bulletin have already played a role of authoritative guidance to the administrative litigation practice. Judges and lawyers have paid high levels of attention and trust the cases published. Secondly, the cases in the Bulletin have actually played an administrative role of administrative precedents. Therefore, it is undoubted that to upgrade the existing administrative cases to administrative precedents has the smallest resistance from either psychological endurance or cost-effectiveness point of view. However, we should also realize the shortcomings of this approach because the number of typical cases announced by the Supreme People's Court is too few to meet the need of administrative judicial practice. Even if the cases come from all levels of court, only a minority of decisions can be identified as precedents through legal procedures by the Supreme People's courts. Moreover, if the administrative precedent can be derived from lower courts, it will lead to a phenomenon that higher courts are bound by lower courts, which will result in a theoretical problem. In general, precedents can only bind the same or lower level of court. Therefore, to upgrade the existing typical cases in the Bulletin is only an expedient in the initial stage of case law construction. We should further develop on the basis of existing models and locate the Supreme Court and the Higher People's Court as the source of administrative precedents.

3.2 The Property of Administrative Precedents

So-called the property of administrative precedent is the meaning of precedent in terms of characteristics, nature and classification. Because we have not accepted the legal status of the source of unwritten laws, the position of precedents in judicial decisions become the issue that has troubled us for a long time. It is also the basic

reason why we use typical cases rather than precedents. Over the years, we have been studying and discussing the problems in the introduction of case system. The question about the position of cases in legal sources has become an insurmountable obstacle. In other words, it has affected the progress of case system establishment to some extent. In fact, without modifying the existing law we can put aside the traditional understanding about the source of law, reposition judicial interpretations, further clarify the relationship between administrative guiding cases and judicial interpretations, upgrade typical cases in the Bulletin to precedents, and define administrative precedents as judicial interpretations. The reasons for doing these include: First, the Bulletin has a systematic effect. It is an official statement to guide the justice of local people's courts at each level. The Supreme Court has repeatedly demonstrated in documents that "if the internal documents released by the Supreme Court are inconsistent with the bulletin, it should refer to the bulletin", which emphasizes the importance of the Bulletin in the unification of administrative justice. Furthermore, typical cases in the Bulletin are repeatedly cited by various level of local People's court, hence they have a distinct demonstrative effect. Secondly, the innovative feature of typical cases in the Bulletin is same as administrative precedents. Administrative precedents are judicial interpretations with legal binding forces about relevant legal norms made by Chief Justices under certain circumstances, objects and places, which have characteristics and function of judicial interpretation for particular cases. According to their basic function and role, administrative cases in China should be therefore classified as a judicial interpretation, i.e., an explanation made by judiciaries about judicial concepts and terminology during the application of administrative laws and regulations.

3.3 The Effect of Administrative Precedents

Civil law countries are not generally considered as countries with a full sense of legal effects because they don't admit precedents as a formal source of law but offer administrative cases with certain legal effects. As we know, administrative precedent is a major source of administrative law in France. In Japan, precedents have been defined as a kind of customary law with an actual legal binding force. In Taiwan, the precedents published by the Supreme Administrative Court more likely have legal binding forces on similar incidents occurring in the future. Therefore, to establish our case system is an unavoidable issue.

First, the legal effect of administrative precedents should be clarified. The validity and the property of administrative precedents are closely linked. In this paper, the property of administrative precedents is defined as an administrative judicial interpretation, which has same power as judicial interpretation. Once a

new administrative precedent is confirmed, it should be followed by each level of local courts strictly; otherwise it will be contrary to the normativity and unity of laws and judicial interpretations.

Secondly, the effect level of administrative precedents and current judicial interpretations should be distinguished. In Taiwan, judicial interpretation and administrative precedent are considered as common sources of administrative law. Judicial interpretation is a unified interpretation of the Constitution and law by grand Justices in the Administrative Court. The effect of interpretation about the Constitution is same as the Constitution itself. Its interpretation about law has a binding effect on authorities and people. Each court should follow this to deal with different cases. Any precedent contrary to this interpretation will become ineffective. Administrative precedent is the decision or resolution of the Administrative Court. Its considerable binding force has been widely recognized. According to the Grand Justices Explanation No.154, the Supreme Court and the Administrative Court precedents without change have legal binding forces, which can be cited as an evidence for the decision in each level of court. We can learn from the practice in Taiwan and define administrative precedent and existing judicial interpretation as two different types of judicial interpretations. The former is a judicial interpretation for particular cases and the latter by the Supreme Court is an abstractive judicial interpretation. If they conflict or are inconsistent to each other, the effect of judicial interpretations is higher than administrative precedents. Finally, the effect of administrative precedents itself should be classified. The precedents from the Supreme Court decisions or other levels of the people's

courts that are released by the Supreme People's Court have the highest legal effect nationally. The decisions made by each High People's Court have legal effects in its region.

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