

The Balance Theory in Chinese Administrative Law

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ABSTRACT. *The balance theory in administrative law is the key basic theory in the developing Chinese Chinese legal system. It aims at the balance of the executive power and individuals' rights during the governance. The paper introduces the core and absence of the balance theory, the dispute on the theory among the Chinese scholars, the influences of the theory both in academic circle and practical fields.*

KEYWORDS: *Balance theory, Chinese administrative law, Balance of power and rights*

1. Balance concept is introduced into the Chinese executive activities

1.1 Tracing Back the Source of "Balance" in Administration

The regulated object of administrative law includes the executive relationships, organizations, procedures, rule-making, executive enforcement and remedies imposed by the state. It aims at constraining governmental discretionary power, at protecting both the state and the participants' interests and benefits, at promoting democracy by maintaining the individuals' feeling that their case is of value, as well as at improving the continuous development of society. Studies on the subject have exhibited various orientations in different legal systems and in different historical periods as a result of a transforming and ever more complicated administration.

Administrative law crystallizes the constitution and its principles, for the ideology of the theorists have been shifting with the changes in the political and economic realms. Modern administrative law has been established on a separation of the powers, in which the legislative, judiciary and the administration are burdened with different functions in a state and the three authorities operate their responsibilities in accordance with the overall system of checks and balances. The pursuit of the legitimacy and legality of administrative activities has give rise to a continuous scrutinizing of the representation and delegation of officials, of the connection between the government and the citizens, of the discretionary power, and of the problem of how the constitutional regulations work in practice.

The conception of balance appears in administrative legal theory as an attempt to get over the antagonism between the governmental power and the citizens' rights, and in the competition between the public interests and individual interests in executive management. The theory of the legitimacy of the administration has been in a process of change, transferring from the red-light theory to the green-light theory, from the traditional controlling mode of normativism by Dicey and his successors in the United Kingdom to the structuring mode of functionalism by Duguit in the French administrative legal system. It should be noted that the two traditional theories all mention the concept of balance in the pursuit for the legitimacy of the administration. The first attempt considered, through deriving from the basis of Dicey's rule-of-law doctrine was, that the administrative law might have to change the traditional court-centred approach for controlling government. Accordingly, the purposes and functions of administrative law should maintain a rational balance between the power granted and the limitation of power, between the executive power and citizen rights, between managerial efficiency and individual freedom, between individualism and socialism. The restraint on the discretionary power ought to be a democratic supervision for a proper balance between the public and private interest. However, the balance concept before the 1970s in Western countries was never converted to a basic theory within the administrative legal mechanism so as to displays the purpose and function of administration law.

1.2 The Theory of Balance as the Basis of Administrative Law

After discovering the defects of the normativism and functionalism in administrative law, some Chinese scholars have investigated the "balance theory" for the infrastructure of the legality of administrative activities and for a basis of administrative law from the approach of a "relationship" perspective. According to the theory, the core of administrative law is the relationship between the subjects of the administration and the individuals. The functions of the executive mechanism were to confront the limitations of the system and the encouragement a participation system, which the

administrative regulations would restrain, and provoke both parties' activities by using the executive mechanism in order to obtain a balance of interests and benefits for the two parties. The administrative activities were to classify enforceability and non-enforceability, which were to be regulated for the realization of a dynamic equilibrium between the authorities and the agents during the implementation of the executive management. This balance did not mean the absolute equality of rights and agency obligations, nor was it that every administrative-law norm had to reflect this balance; rather what was in question was an overall balance between the administration and the concerned parties' rights and obligations. The real purpose was that of focusing on the justice and fairness in executive management.

Both power and rights have expansionary characteristics, which manifest that the dynamic nature of the subject in the administrative relationship possesses bilateral directions. The implementation of power was to follow the delegation of authority in principle. However, the positive executive measures were to be expressed in the service administration and welfare administration. The essence of administrative law lay in the constraints on the irrational expansion of the discretionary power and in an encouragement of rational activities. The interrelated mechanisms were to be investigated for rational development of legitimate administration, which should include a supervisory system, incentives and a coordination mechanism in administrative implementation.

1.3 Development of the Balance Theory in China

The balance theory has been continually under discussion since its introduction in China in the latter part of the 1990s. The Chinese administrative culture manifests different characteristics it compared with the Western model. The Chinese model appears to have an authoritativeness orientation in its implementation and the legitimacy of the administration seems to be pursuing a controlling system. The situation in the 1990s in China was also a phase for studying the Western legal theory and introducing Western legal culture as well as Western methodology. The consultation system in administration began to attract the Chinese researchers' attention. Based on the restriction of discretion and the stimulation of the administrative systems, Luo continued to investigate the system of the Chinese People's Political Consultative Conference (CPPCC), and to examine the system against the background of legal study. In practice, the advice from the CPPCC has had only trivial effects on policy-making and the final decision-making in the administration.

2. The Argument on the Balance Theory among the Scholars

2.1 Argument on the Word "Balance"

But, in any case, as a theoretical matter, the "balance theory" in China emphasizes the relationship between the principal and the agent. However, the term "balance" may arouse critical disputation owing to the uncertainty value of the word itself. The purpose of the law lies in practice and factual outcome instead of in a pure theoretical argument. Thus the theory of legal thinking on any law and regulations must seek the nature of law in the cases themselves. The first argument of the balance theory is that the implication of the terminology of "balance" has been interpreted ambiguously for the executing agencies when the public organs implement their duties and responsibilities. The executive authorities realize that they may encounter obstructions for balancing the interests and benefits of the concerned parties during the decision-making and rule-making activities. It is difficult to measure the equilibrium between the authorities and the individuals in reality when the former has power and the latter is under the administering of the executive activities. The measuring standard and measuring approaches may exhibit variety as a result of different status of these two elements, which in society are not easy to define so closely. The legality of the administrative activities should not coordinate the outcome of the measurement of the balance by awarding each side's interests with mathematical rigid in administrative activities. Faced with the ambiguous conception of "balance", the distinction between "balance theory" and "controlling theory" is still unclear so that it may produce a paradoxical conclusion. Both theories aim to pursue the protection of human rights and of a legitimate counterpoise between the authority and the people. Especially in one-party China, controlling mechanism for administrative discretion is prevailing over the consultation and advisory aspects for the interested parties. There should be many mechanisms, regulations and accountabilities for the public authorities to construct a reasonable, fair and just, acceptable and effective executive management.

2.2 Argument on the Balance within the Administrative Legal System

The second debate arises when the balance-theory encounters two questions about the administrative legal system: one is whether the system ought to be balanced or not; the other is whether the systematic is balanced or not. The theory is an attempt to explain how to allocate the roles of executive power and human rights and how to distribute the

public interests and individual interests in order to obtain a fair, just and impartial administration. The construction mechanism for a legitimate administration falls into the dilemma that the common consent on “balance” is difficult to achieve between the two competing parties (but the protection of the environment often is an exception). In addition, the evaluation-standard for balance in the allocation of interests suffers the same problem that the value-determination in the theory may run up against the positive situations in an administrative implementation, for the reason that the civil servants are inclined to rent-seeking when they hold power.

2.3 Argument about the Inadequate Analysis

The third argument against the theory is that it lacks an analysis based on reality in the Chinese situation, in short lacks a positive analysis and establishes itself on the basis of a normative construction. The Confucianism in traditional Chinese legal culture conveyed and is still affecting the thinking that obedience to the authority prevails over the pursuit on protection of private rights. The balance between the two oppositional parties in administrative affairs requires equality in quality and quantity in general, and that the legislatures should make an evaluation on the rights, interests and benefits, duties as well as power crystallization, when taking the regulations and provision into consideration. It is more difficult for the rule-making executive institutions to expand their executive competence when they formulate the regulations in their administering fields. The consequence is that the individuals’ interests and rights may be infringed when the regulations are implemented. The balance theory of administrative law challenges the difficulties of the operative technique and to define where the “balance point” is.

3. Conclusion

With the legal thoughts and sociology of law from the 20th century, the purpose of administrative law is transformed from the limitation of an administrative intervention into an individual’s affairs to the realization of the social and public interests in administration. With increasing pressure from the continuous development of the economy and technology improvement, the administrative organs assume more responsibilities, and simultaneously the relationship between the authority and the citizens is prone to cooperation and collaboration. The theorists pay close attention to safeguarding public participation, enhancing governmental accountability and transparency, facilitating the efficiency, fairness and effectiveness of the public service.

It is the inexorable trend of Chinese administrative law that the balance of public and private interests signifies the more responsibilities, more transparency, more understanding, more mutual trust, and more consulting as well as more rational supplement both to the executive organizations and to the individual parties. The balance theory in administrative law in China shall take consideration on the balance of government and economic market, the balance of the executive organs and the people, the balance of government and the society. The good governance requires the good protection of rights, the doctrine of the rule of law as well as the responsible government. Well, the theory of balance in Chinese administrative law implies the same thoughts, or the same developing trends.

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