

On the application and regulation of administrative punishment discretionary standards

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Abstract: *As one of the most suitable tools of power control, the discretionary benchmark should shine brightly in practice, but there are problems of rigidity and abuse in practice. After proving the legitimacy of escape behavior under case justice, combined with the formulation status and applicable rules of escape clause, analyzing the existing situation of omission and arbitrary contradiction of escape behavior in practice, we can draw a conclusion that escape should be considered in the special circumstances of the case discretion benchmark. However, the escape application of discretionary benchmark is not arbitrary. In view of the escape behavior may lead to the risk of power abuse and damage the value of power control by rules, it is necessary to establish a set of mechanisms to strictly restrict the pre-initiation, in-process operation and post-supervision of escape behavior, so as to ensure that escape behavior can better play its value.*

Keywords: *Administrative punishment; Discretionary benchmark; Benchmark escape; Escape norm; Case justice*

1. Introduction

The central aspect of previous research on discretion is how to prevent abuses of power, and the two seem to have become artificially inseparable. Schwartz argues that administrative law is a control law about discretion. [1] However, due to the lack of domestic legislation on discretion and the lack of judicial review, there has been a trend of transformation of administrative discretion from the outside to the inside, and an internal administrative law concept that emphasizes the paradigm of good behavior within administrative organs and improves the government's self-control system has become increasingly popular. [2] With the deepening of this concept and the continuous revision and improvement of China's laws, the most suitable discretionary benchmark as one of the control tools came into being, and the discretionary benchmark entered the era of administrative self-control, similar to the emergence mode of most new control tools, the discretionary benchmark has experienced the process from local fixed-point experiments to legislative system layout in China. The newly revised Administrative Punishment Law stipulates that "administrative organs may formulate discretionary standards for administrative punishments in accordance with law", which is the focus of the new law in the process of discretionary standards and rule of law, and changes the normative change of the obligation to set discretionary standards from "should" to "may". [3]

It is true that the administrative punishment discretionary benchmark system has excellent control value and is of great significance to the promotion of a rule-of-law country and a rule-of-law government. Under the current background of the rule of law, there are still problems such as arbitrary exercise, broad provisions, and inadequate supervision of administrative punishment power, and the role of the construction of the rule-based control logic should be emphasized. [4] There are many problems in the application of discretionary standards, on the one hand, some discretionary standards have conflicts between norms, lack of scientific and practical loopholes, etc., making it difficult for administrative law enforcement personnel to choose, or even abandon the application of discretionary standards; On the other hand, extremely detailed discretionary provisions will inevitably lead to excessive constraints on the internal constraints of the discretionary benchmark, resulting in the lack of provisions for adaptation of individual cases. Based on this, in order to alleviate the contradiction between discretion and rules in the application of administrative punishment discretionary standards, on the basis of adhering to the status of the best control tool, and constructing a discretionary standard system for escape application under special circumstances, the normal application of norms is actually feasible. If it is difficult to

achieve justice in the case by applying the discretionary standard in handling a case with special circumstances, the law enforcer may, proceeding from the legislative purpose and the original intention of the discretionary standard, reasonably adapt the discretionary power in his hand and choose to escape the application, so as to make appropriate punishment decisions in accordance with other superior laws. By affirming the meaning and value of discretion in this way, there is a improvement of the discretionary standard system, so as to avoid the cumbersome administrative punishment discretionary standard text becoming a stumbling block to the construction of the rule of law, and realize the flexible use of administrative punishment discretion.

In practice, cases related to escape application occur from time to time, such as the "Zhou Wenming v. Wenshan County Traffic Police Brigade" case, which has attracted much attention in recent years,[5] the court of second instance recognized the legality of escape application. [6] For example, some scholars believe that "any mechanical and rigid application of discretionary standards, regardless of the efficiency of law enforcement and the justice of individual cases, is unacceptable and should be severely criticized", [7] some scholars believe that "administrative organs still have the obligation to consider individual circumstances for matters not disclosed by the discretionary standards" ,[8] there are only a handful of specialized studies on the setting criteria and methods of application of escape clauses. [9]

Based on the above background, this paper intends to take the application and construction of discretionary standards as the research object, explore the basis of legitimacy, analyze the existence of escape norms, spy on the application rules of escape clauses in discretionary standards, and put forward some immature personal views based on the omissions and arbitrary two defects of escape application in reality, hoping to contribute to the implementation of discretionary standards.

2. Justification of the Act of Escape

Whether in legislation, law enforcement or justice, the pursuit of fairness and justice is always the ultimate goal of the construction of the rule of law. While pursuing efficiency, law enforcers naturally need to apply the discretionary standards of administrative punishment in order to take into account the realization of justice in individual cases, and escape is enabled under the premise and certain limits of special circumstances. [9] It is therefore necessary to seek the theoretical basis for the justification of the act of escape on the basis of the premise of justice in individual cases.

2.1 The Need to Fill Loopholes in the Rules

As a rule rule, [10] discretionary benchmarks have their own inherent insurmountable limitations of the rules themselves. In practice, there will always be inappropriate discretionary benchmarks, which are not beneficial to the realization of discretionary purposes, and loopholes in the rules are inevitable. First of all, the discretionary benchmark, on the premise of ensuring general justice, will inevitably omit the realization of justice in certain cases, which makes the law enforcer choose to comply with the requirements of the norm. Second, the certainty and stability of the rules make it impossible for the discretionary benchmark to fully cover all existing and future situations, and in this sense, no discretionary benchmark is perfect. Finally, in practice, the number of discretionary benchmarks has soared, and the number of benchmark texts has been increasing, and the rules to be followed will inevitably be selected when the enforcer is not fully familiar with them, resulting in the de facto expansion of the discretionary space.

There is a gap in the discretionary benchmark, and human involvement is needed to fill that gap. When a case has special circumstances, the outcome of the discretion and the legality of the discretionary basis and process play an irreplaceable role in closing legal loopholes, and the handling of the case is essentially an exception to the rule norm, so it is necessary to affirm the legitimacy and reasonableness of the discretionary benchmark in order to make the correct discretion within the discretionary space obtained. Law enforcement personnel shall not refuse administrative actions because of loopholes in the rules, but should instead apply discretionary standards in complex and difficult cases to fill the loopholes to the greatest extent and safeguard justice.

2.2 Requirements for Administration in Accordance With the Law

One of the administrative principles according to law is the principle of protecting the trust interests of the counterparty, and if the discretionary standard is also one of the object forms of protection of the principle,[11] then the law enforcement party should be refused to apply the discretionary standard to

make administrative punishments. Accordingly, the administrative organs have no choice but to strictly abide by the discretionary standards and protect the counterparty's recognition of the benchmark text, so as to maintain order. However, whether this view can be established is debatable, some people point out that the principle of trust protection is not necessarily the basis for the binding force of the discretionary benchmark, and any rigid application of the discretionary standard based on the protection of the trust interests of the counterparty is worthy of criticism.[12] and some scholars point out that "there is no actual relationship between the principle of trust protection and the discretionary standard of administrative punishment". [13] Therefore, we believe that the principle of protecting the trust interests of the counterparty does not have absolute effect on the application of the discretionary standard, the basis of the counterparty's trust is unreliable, and in order to maximize the realization of the national and public interests, we should be cautious about the counterparty's claim on this ground. One of the purposes of the administrative standard is to flexibly achieve discretionary justice, which is also the essence of the principle of administration according to law, and it is particularly important to allow the application of discretionary standards to escape. Imagine, under the special circumstances of difficult and complex cases, if the law enforcer is still rigidly required to strictly abide by the discretionary standards, blindly insisting on the protection of undetermined trust interests, and ignoring the justice of the case, this is obviously contrary to the original intent of the enabling legislation. Therefore, when a special case arises, administration according to law is the primary consideration, and priority is given to applying discretionary standards rather than insisting on relying on the interests of the counterparty.

2.3 The Inevitability of Substantive Rule of Law

Formal rule of law focuses on the form and source of law, advocates that power needs to be rationally regulated, and the discretionary benchmark under the rule-based control framework has obvious formal rule of law. Formal rule of law requires the same situation to be treated the same, which is contrary to the substantive core of discretionary standards to ensure civil liberties and limit government power, and runs counter to the fairness and justice it pursues. Step-by-step observance of the law has never been an end of the law, but only a way to uphold universal fairness and justice. Adhering to the concept of substantive equality of differential treatment, law enforcers are allowed to escape the application of discretionary standards and pursue the realization of substantive justice in individual cases, which is not equivalent to breaking the rules, nor is it the cause of the abuse of discretion, but puts forward higher legal and moral dual requirements for law enforcers themselves to ensure a more reasonable application of administrative discretion. One of the fundamental purposes of the discretion granted to law enforcers through legislation [14] is that law enforcers can analyze the specific problems of individual cases in practice.

3. Practical Contradictions in the Application of Escape Behavior

After the legitimacy of escape behavior has been preliminarily demonstrated, it is still necessary to peek into the different status quos, applicable rules and law enforcement situations of escape behavior as a whole, clarify the complex and diverse contexts, and explore the possible methods for the construction of escape behavior norms.

3.1 Current status of Fugitive Norm Setting

In general, the escape clause is not directly reflected in the benchmark text developed by the authority that formulates the discretionary benchmark, in order to expect law enforcement officials to fully comply with the text. Through the Internet search for terms related to discretion and punishment, among the thousands of administrative punishment standard texts, the number of standard texts that clearly have escaped the applicable provisions is very small, which shows the attitude of the formulating authority. Most escape clauses are not directly stipulated in the benchmark text, which is a common phenomenon in local administrations and contributes to the culture of inaction in the mechanical application of discretionary standards.

Although there are few direct provisions for escape application, a large number of provisions in the local standards texts provide for changes in circumstances and exception clauses that lay the groundwork for law enforcers to indirectly escape the application of discretionary standards, and these provisions seem to be supplementary content to the law, adding a high degree of uncertainty to whether the discretionary standards applied by law enforcement in practice are escaped. Administrative organs may flexibly apply the provisions on change of circumstances in the process of law enforcement, so as to

accumulate practical experience for the improvement of discretionary standards. As for the exception clause, which itself is a special exception, the administrative organ may apply discretion exceptionally on the premise of stating the reasons for the special circumstances. [15] In addition, changes in circumstances and collective discussion provide certain possibilities for the application of discretionary standards to escape, but the lack of reasonable presuppositions and escape procedures subtly increases the risk of abuse of arbitrary escape.

The strict prohibition of any escape application is the mainstream view in the current process of formulating the discretionary standards, which is adopted by administrative organs at all levels and reflected in various discretionary benchmark texts. Directly stipulating that non-implementation of the discretionary standards or non-compliance with the provisions shall be subject to deduction of points, sanctions given, [16] and even administrative evaluations shall not be evaluated as qualified [17], etc., in order to avoid such serious consequences, who will sacrifice their careers and prospects in pursuit of justice in individual cases, such provisions push the application of discretionary standards to the abyss of rigidity.

3.2 Escape Clauses Apply Rules

3.2.1 Pre-start Rules

It can be seen from the above-mentioned status quo of the designation of escape norms that most of the discretionary standard texts formulated by administrative organs at all levels do not directly set up escape application clauses, and still contain the meaning of escape application, from which it can be concluded that "escape is the exception and compliance is the principle". An escape clause is activated only when a particular case occurring in practice deviates significantly from other similar cases. In addition to administrative organs or law enforcers ex officio finding that the conditions for the application of the start-up escape clause are met in individual circumstances, other entities may also actively inform the administrative organs or law enforcers of the fulfillment of the conditions for start-up, not limited to in-person notification, but also through handling subsequent appeals, complaints, administrative reconsideration or administrative litigation. In the case of an administrative act that has already been made, which is legally effective both procedurally and de facto, it should also be allowed to activate the escape clause and to achieve the negation of the validity of the previous administrative act by means of the existing system of administrative "withdrawal", "modification" and "annulment". [9] This normative model can be found as a reference in the Administrative Licensing Law, [18] In addition, regardless of which method is proposed, whether the conditions are met needs to be reviewed to ensure the legality of the commencement.

3.2.2 Run Rules in the Event

The rules for the operation of escape clauses are divided into the rule of explanation of reasons and the rule of limited disclosure, and the rules of limited disclosure are divided into the disclosure of escape clauses and the disclosure of escape cases.

In criminal, civil and administrative cases, the treatment of some exceptions often requires a justification and a backup record for review, and the application of escape clauses is no exception. From different perspectives, scholars believe that the reasons for explaining reasons are different, but they all advocate the necessity of stating reasons. Professor Zhou Youyong believes that from the perspective of ensuring the fair exercise of discretion, equal treatment and trust protection, administrative organs must have reasonable reasons for making judgments that are different from the discretionary standards. [19] According to the Rule, when the law enforcer applies the discretionary standard to deal with difficult and complex special situations, he can escape the application of the discretionary standard by explaining reasonable and sufficient reasons to his superior after the treatment, so as to ensure that the justice of the case is achieved as much as possible and prevent arbitrary escape. In practice, a preliminary consensus has been formed that the reasons should be sufficient and reasonable, and it has been presented in the discretionary benchmarks in some places. As for the object, content and subject matter of the explanation, the existing legal provisions do not form a unified understanding, and such issues are trivial in specific operation and are therefore not discussed here. Furthermore, with regard to the limited disclosure rule, escape clauses generally depend on the general disclosure of the discretionary benchmark, which is different from the discretionary standard. The existing provisions on administrative punishment do not stipulate that the administrative punishment decision must be published, but only the provisions and basis for the punishment used, as well as some law enforcement procedures. Since ordinary administrative punishment cases do not have to be fully publicized, special cases handled under escape clauses can of

course not be fully disclosed, and at the same time, escape behavior undermines the value of discretionary standards as a rule rule.

3.2.3 Ex-post Supervision Rules

After the completion of the escape behavior, it is equally important to supervise the escape clause after the fact, and the ex post supervision is mainly the judicial review and supervision system for the legality of the act. Authorizing administrative organs to formulate discretionary standards within the scope of existing discretionary standards is legally justified. With power comes supervision, and administrative self-control does not guarantee that the discretionary benchmark is properly operated every time, so it needs to be supervised by external judicial forces. In addition, the discretionary standard has external effect, and when there is an improper application of the discretionary standard, the specific administrative act may suffer from the lack of legality, making the escape clause the object of judicial review. When an escape clause enters the perspective of judicial review, the court should focus on the application of the escape clause in the process of reviewing legality. After discovering the existence of arbitrary application of escape clauses, it is first necessary to distinguish between the reasons for the abuse of administrative law enforcement or the fact that the discretionary benchmark text is too backward to be applicable to the current reality, and then the court may initiate a substantive review in the former case and an incidental review of the issue in the latter case.

3.3 Current Status of Escape Law Enforcement

3.3.1 Escape Inaction

Administrative inaction has occurred repeatedly in life, and once became a talk after tea, but with the progress of the rule of law and the improvement of the quality of administrative personnel, this dysentery has been effectively solved, but it has not been cured. Penalties were decentralized, the number of discretionary benchmark texts proliferated, and more and more escaped inaction emerged. The reason is either that the text specifications are redundant and difficult to use, or that they respect the authority of the text-making authority, or that they are based on the consideration of the administrative responsibility system and the assessment system, resulting in rigid application of discretionary standards to make punishment decisions, and for the circumstances that should be applied, they know that they should escape and after multiple considerations, they give up partial escape or even completely abandon escape.

The essence of escape inaction is administrative laziness, ignoring the realization of justice in individual cases, and having no time to determine the realization of the purpose of setting benchmarks. The number of unfair cases caused by inaction in daily life is increasing year by year, which not only erodes the trust of the general public in the fairness of law enforcement, but also harms the personal interests of administrative counterparts. For example, in the "Lin Muyin and Haikou Traffic Management Bureau Case", in the process of making the administrative punishment prosecuted in this case, the Municipal Traffic and Port Law Enforcement Detachment failed to impose a penalty within the prescribed range of 30,000 yuan to 100,000 yuan after comprehensive consideration of the circumstances of Lin Muyin's violation and the degree of social harm, but instead imposed a fine of 100,000 yuan according to the top level. Escape inaction greatly undermines the foundations of the discretionary benchmark system, and it is necessary to incentivize escape in special cases.

3.3.2 Escape Arbitrarily

In contrast to escape inaction, escape arbitrariness also often occurs. Law enforcers ignore the controlling role of the discretionary benchmark, arbitrarily choose the existing effective discretionary benchmark norms, and even arbitrarily escape the discretionary benchmark beyond the scope of their own power, so as to make administrative punishment decisions. Escape from arbitrariness will inevitably lead to the loss of the role of discretionary benchmark control, leaving the discretionary power in an unstable state of use, which is contrary to the original intention of the legislation and will also breed adverse consequences of abuse of power by the administrative organs.

In practice, some law enforcers will think that the discretionary standard is only an auxiliary reference standard, and does not need to be strictly observed, resulting in the phenomenon of escape arbitrariness. In addition, since administrative organs with discretionary power can set discretionary standards, the discretionary standards are chaotic and easily conflict with higher-level laws, conflict with other legal norms formulated by organs at the same level, and conflict with the application of other discretionary standards. We cannot expect that in the presence of such conflicts, it would be unrealistic for an enforcer to be aware of all the discretionary benchmarks and to correctly apply a particular discretionary

benchmark that should be applied in a particular case. It is precisely for this reason that these conflicts encourage law enforcers to escape arbitrariness, and when law enforcers are faced with multiple alternative enforcement bases, it is easy to think that "rather than not knowing which basis is completely correct, it is better to solve it with any one", and then the unbridled abuse of discretion. Although many escapes are not the intention of law enforcers, exploring how to regulate escape behavior is the key to solving this problem.

4. Construction of Escape Behavior Norms

In order to solve the two phenomena of escape inaction and escape in the practice and application, so as to ensure that the control value of the discretionary benchmark does not fall excessively, the following will try to construct an effective constraint and normative system to ensure that escape behavior exists in the discretionary benchmark system as a dynamic, exceptional and positive means.

4.1 Pre-escape Initiation Conditions

4.1.1 The Penalties in Individual Cases are Clearly Inappropriate

When applying discretionary standards to a case, if exhaustion of the relevant sources cannot find an applicable basis for discretion, consideration should be given to initiating the escape application of the discretionary standards to enable the enforcer to make a reasonable decision. In practice, the obvious impropriety of the handling result is the usual indicator of initiating the escape behavior, and judging whether the administrative punishment handling result made by the escape discretionary standard is appropriate can refer to the connotation of the principle of proportionality. First, if the act of escape does not achieve the goal of pursuing justice in individual cases, then its legitimacy is unstable. Second, if the purpose of resolving the case can be achieved by interpreting the relevant concepts in the discretionary benchmark text, then the application of the discretionary criterion should not be an option. Finally, the value of justice that can be achieved by the initiation of escape in individual cases is less than the adverse effect of the escape act on the legal order, and the general adherence to the discretionary standard is the first choice. Since escape is an exception to discretion, it is not improper to apply the manifest impropriety standard. The question of who should judge the degree of obviousness, then, becomes a major question. In order to protect their own interests, administrative counterparts will inevitably exaggerate certain aspects, while administrative organs will ignore some of these aspects in order to maintain administrative authority and efficiency. Therefore, only others who are able to break free from the above two shackles can express their opinion on whether the treatment of the discretionary benchmark is manifestly inappropriate. In reality, it refers to ordinary people and experts with specialized technical expertise in ordinary people who can maintain general neutrality. If such ordinary people and experts consider neutrally that the application of the discretionary benchmark would result in manifest impropriety, then the enforcer should give priority to the commencement of escape application.

4.1.2 Complete Escape Behavior Code

Under the special circumstances of difficult and complex cases, law enforcers should comprehensively consider relevant factors in order to escape the application of discretionary standards, which is not only a secondary power of administrative organs with discretionary power, but also an obligation assigned to administrative organs by law. In order to realize the rights and obligations of this right, a complete escape behavior norm is particularly important, and it is also a necessary prerequisite for the formulation of discretionary standards. A complete code of escape behavior should, first, have practical effect, and secondly, in the legal hierarchy, the discretionary standard to which the escape behavior norm belongs should be superior to the superior law, and the new discretionary standard designated by the same organ is due to the old discretionary standard. In the case of specific requirements mentioned above, the application of the discretionary standard for administrative law enforcement cases when the discretionary benchmark cannot be applied on the premise that all discretionary benchmarks are exhausted.

4.2 Escape Procedure in the Matter

4.2.1 State the Reason

As already described, it is necessary for the enforcer to escape the application of the discretionary criterion to justify the reasoning, otherwise one would not be able to know the reasons for such an

exceptional act, and failure to justify would not be consistent with the basic procedures of modern law enforcement. By explaining the reasons and making an escape decision publicly, the process not only ensures the counterparty's right to know, but also plays the role of supervising the administrative organs, which is in line with the rule of law principle of administrative discretion control. As an exception to ordinary discretion, escape behavior is itself suspected of affecting the control of the rules, and has the motive to raise doubts about fairness and justice, so the objects of escape behavior are more diversified and diversified. The escape behavior is related to the principle of leadership supervision at the administrative level and the interests of the administrative counterpart, so it is necessary to explain the reasons for not applying the discretionary standard to the higher-level administrative organ and the administrative counterpart. The design of escape clauses follows the principle of mitigating provisions, which requires that the design of escape clauses can only be developed in a direction favorable to the administrative counterpart, and escape clauses can only be set up when the legal effect is lightened. [9] Attributed to the explanation of escape behavior, when the escape behavior is carried out to reduce the burden of the administrative counterpart, the intensity of reasoning should also be reduced to light, on the contrary, if it is to increase the burden of the administrative counterpart, the intensity of reasoning should be increased.

4.2.2 Brainstorming

The collective discussion system runs through all aspects of decision-making in many departments in China, of course, administrative law is no exception, it is a characteristic system to achieve scientific decision-making and effective decision-making, and the introduction of collective discussion into the discretionary benchmark escape system can effectively prevent the abuse of discretionary power. On the one hand, due to the large number of participants, collective discussion can maximize the active role of each person, so that different people's insights and thoughts emit a spark of collision, compared with the rush and shallow personal opinions of administrative law enforcers when dealing with administrative cases, collective discussion can make the decision to deal with cases more legal and reasonable, and easy to be accepted by administrative counterparts, and can also effectively prevent administrative discretion from escaping arbitrariness. On the other hand, from the perspective of responsibility, collective discussion is of course the collective members are responsible for the results of the discussion, and the law enforcer only needs to put forward the opinions of the collective members on the discretion of escape, without worrying about the subsequent administrative responsibility bearing and assessment issues, so as to effectively prevent the discretionary defects caused by the escape inaction.

The collective discussion of escape behavior should take place at the departmental meeting, including both discussion and decision. First, the enforcer of the case informs the meeting members of the special circumstances of the case and the relevant considerations for the application of escape, after which the participants begin the discussion stage, and the participants are fully aware of the content of the above discretionary standards and adhere to the principle of neutral expression of opinions, and must not consider other irrelevant factors, nor meet with the relevant administrative counterparts in private to express their opinions at the meeting. Second, at the decision-making stage, the system of responsibility of the head of the administrative organ is followed, and the head of the administrative organ makes a decision to approve the application of the escape, not to allow the application of the escape, or to revise the opinions after the record of the collective discussion. Where differences of opinion or differences are large at the meeting, detailed records shall be made, and relevant experts may be invited to participate in the decision on escape behavior when necessary.

4.3 Ex-post Escape Supervision Mechanism

4.3.1 Filing Review

The inclusion of major administrative acts in the ranks of filing and review has become a common practice in China's administrative law enforcement practice, for obvious reasons, because it affects the major interests of administrative counterparts. The escape of the discretionary benchmark is an exception to the benchmark, which is of course closely related to the interests of the administrative counterpart, and it is natural that it should also be included in the scope of filing review. In particular, in the case of a lower-level administrative organ escaping from the basis of the superior law, the operating procedures in the process of escape, as well as the explanation of the reasons for escape or the details of the collective discussion exist within the administrative organ at the same level, and the reasons and the content of the discussion may be difficult to convey to the organ formulating the discretionary standard being escaped intact in practice, and the guidance or suggestions of the organ formulating the discretionary standard of the escaped shall hardly be adopted by the lower-level administrative organ, so it is very necessary to

regulate and constrain the application of the evasive behavior. The applicable organs are required to report the implementation of the escape to the formulating organ for the record, so that the formulating organ can have a more comprehensive and clear understanding of the case situation, conduct scientific and reasonable review procedures, and protect the interests of the administrative counterparty to the greatest extent.

In short, cases involving escape shall be submitted for the record, and the content of the filing shall be as detailed as possible, including materials such as the escape behavior filing form, the explanation of the reasons for the escape behavior, the detailed records of the collective discussion meeting, and how special the circumstances of the case are, but not limited to the above materials. After a comprehensive and strict review of the filing materials, the higher-level organ shall make a judgment and express an opinion, and if it is found that there are defects or proportionality in the application of the evasion conduct, it shall order the lower-level administrative organ to make corrections.

4.3.2 Judicial Review

Based on the consideration of the restrictive relationship between the judiciary and the administration, it is appropriate to conduct judicial review of certain procedures for the conduct of escape, and judicial review of discretionary interpretation has basically become a consensus. The judicial review of the escape clause mentioned above is reviewed by the judicial organ from the legality and practicality of the escape clause. Then, on the premise of fully respecting the initial discretion of the administrative organs, it is worth clarifying what level of review is required for the inaction of the escape case and the arbitrary judicial organ of the escape.

For escape omission, the judicial organ must first consider whether the administrative organ has the obligation to consider the special circumstances of the case, and then examine whether it has fulfilled this obligation when making the administrative discretion. For escapism, the judicial organs may conduct procedural formal and substantive content reviews according to the different degrees of influence of the case. For ordinary escape cases, in which the general person's point of view can determine whether the escape should be carried out, the judicial organ only needs to review the form of the escape procedure, that is, the escape act only needs to meet the requirements of the necessary procedure. For escape cases with serious social impact, judicial review shall enter the stage of reviewing the substantive content of the procedure, comprehensively judging the reasoning, collective discussion, opinions of opponents, and alternative options for the escape behavior. In cases of escape that clearly infringe on the administrative counterparty, if the administrative organ insists on escape, the judicial organ may, ex officio, require the administrative organ to perform administrative functions in accordance with discretionary standards.

5. Conclusion

With the release of the newly revised Administrative Punishment Law, the administrative punishment discretionary standard has become a research hotspot, among which there are few studies on discretionary escape, but the escape behavior has a great impact on the practical application of the discretionary standard, and also has a certain impact on the legal order, so it is necessary to study the application and normative constraints of the escape behavior. The study of escape behavior is inseparable from the general background of discretionary theory and discretionary theory, otherwise there is no objection on paper. Although the application of escape behavior has the risk of undermining the logic of rule control and causing the risk of arbitrary abuse of administrative power, it has never been the cause of the above risk in itself, on the contrary, as an adjuster for the discretionary benchmark of administrative punishment, it plays a great positive significance and role. In order to achieve justice in individual cases and to implement discretionary standards that are more in line with the original legislative intent, the act of escaping is necessary and justified. In practice, administrative organs have inaction and arbitrariness towards escape, so it is necessary to build a normative system for escape, so that the incidence of such defects is controlled to the lowest possible extent. How to perfectly control the degree between the compliance of the discretionary standard and the escape discretionary benchmark requires us to start from theory and practice at the same time, jointly contribute ideas, and adapt and independently master the system constructed in accordance with the theory.

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