CSCanada
Studies in Sociology of Science
Vol. 6, No. 6, 2015, pp. 5-11
DOI:10.3968/7673

ISSN 1923-0176 [Print]
ISSN 1923-0184 [Online]
www.cscanada.net
www.cscanada.org

The Application of Administrative Innovation and the Principle of Law Reservation

WANG Yali[a],*

[a]Ph.D. Candidate, Law School, China University of Political Science and Law, Beijing, China.
*Corresponding author.

Received 11 September 2015; accepted 5 November 2015
Published online 26 December 2015

Abstract

Administration innovation means the breakthrough and reform of the existing system, while the law reservation, with its specific functions, imposes restrictions on the administrative innovation and keeps it within the framework of the rule of law. However, due to its own limitations, law reservation will restrict the innovation in administration which could not play the role of positive administration. Law reservation's function of right protection should be given full play and the scope of the current law reservation should also be expanded so as to bring administrative innovation on the track of rule of law. At the same time, give full play to the law's function of stimulation and as for the beneficial administrative act, relax properly the restrictions of law reservation. In order to meet the practical needs of a service administration era, law reservation has to make moderate adjustments when necessary to realize the lawless administrative innovation and make sure administrative innovation could achieve the unity of formal rule of law and substantive rule of law through the principle of proportionality and public participation.

Key words: Administrative innovation; Law reservation; Right protection; Service administration

Wang, Y. L. (2015). The Application of Administrative Innovation and the Principle of Law Reservation. *Studies in Sociology of Science, 6*(6), 5-11. Available from: URL: http://www.cscanada.net/index.php/sss/article/view/7673
DOI: http://dx.doi.org/10.3968/7673

INTRODUCTION

We are now in an era when functions of administration are constantly changing, and in such an era, administration is not only the guardian of people's right, but also the promoter of people's benefits. It has to directly face various governance problems accumulating during the period of social transformation, and also needs to take active actions to enhance public welfare. To solve problems, government usually actively or passively conducts administrative innovation, while the principle of law reservation stays on high alert for executive power, which restricts the government action. On the other hand, to obtain the lasting vitality, administrative innovation cannot do without the guarantee of rule of law. How to eliminate this paradox and conflict in the reform practice is an important issue calling for serious study.

1. THE PRACTICE OF ADMINISTRATIVE INNOVATION AND THE QUESTIONING ABOUT ITS LEGITIMACY

At present, we are in an era of administrative state which is in the process of great changes, facing too many local and realistic problems that need to be solved. This requires the administration to achieve goals through taking active action. Under such a circumstance, administration is receiving more and more supervision, and the reality is getting increasingly complicated. Only through self-innovation could administration undertake the responsibility for governing the society.

As system changes quicken up, the topic of legitimacy has ups and downs during the process of government administration. At present, there have been many types of administrative innovation, and questions about its legitimacy arise all the time. The following cases could be examples.

Example 1: phone tracking and calling system called "calling you to death" to deal with the problem of adlet on streets

In Chinese cities, street adlet put up, scribbled or sprayed illegally could be seen everywhere. These small

ads have seriously affected the city appearance and damaged urban civilization. It is hard to totally get rid of this problem. In 2003, the administrative law enforcement department of city management in Nanjing carried out the cooperation with a high-tech development company in Nanjing and jointly developed an informationized city management system called "calling you to death". It collects and targets the phone numbers printed on the illegal ads, and then the dedicated telephones in the system will call those numbers in turn and force those who put up adlet illegally to turn off their phones. Even since "calling you to death" came out, controversies and doubts have never been stopped. Theorists usually entertain the view that "calling you to death" system violates the law and thus they do not support it. The reason is that no law means no administration, and if means have not been prescribed by law, administrative organs shall not separately invent new means. Besides, such law enforcement means infringe upon citizens' right of communication freedom. From the perspective of law enforcement department, developing the "calling you to death" system is to give a clean and civilized city back to the public, which is a good intention. So is "calling you to death" feasible in law?

Example 2: Cars license plate auction in Shanghai to deal with the traffic jam

Since 2002, Shanghai municipal government has begun to carry out the system of license plate auction to cope with the congestion of urban road according to the local regulation called *Regulations on Motor Vehicle Administration of Shanghai*. Shanghai put in private car license plate in the way of auction, and most of the income are used for road construction and improvement of the traffic environment. The license plate auction system implemented for many years indeed has exerted effective control over the amount of motor vehicles. However, the auction price of the private car license plate continues to rise. At the beginning of 2013, it exceeded 90,000 yuan, daunting so many people who want to buy a car, and getting a license plate registered in other places is prevailing. The way of controlling the total number of motor vehicles through putting up private car license plate for auction has always been in dispute. One of the problems in the aspect of law mainly concerns the legitimacy of license plate auction.

Example 3: "Reform of coal mining enterprise" in Shanxi province.

In 2008, mine accidents occurred frequently, and under the great governance pressure, government of Shanxi province issued a series of regulatory documents to merge and reorganize the coal mine enterprises in Shanxi. Administrative means were adopted to force medium-sized and small coal mining enterprises to sell themselves to large coal mining enterprise or become a shareholder. Mineral resources were integrated to reduce the number of small-scale mines. Solutions to the issue of coal mine safety were sought to realize the scale and mechanized mining of the whole coal mining industry, thus reducing the mine accidents, improving the environment and increasing the production. These medium-sized and small coal mining enterprises all have legitimate qualifications, but the government forces them to be merged into other enterprises, which no doubt violate their property right. This comes down to an important law problem, that is, as for public power representing the public interest, whether its restrictions on private rights could be prescribed by regulatory documents issued by provincial government. How should law reservation be established and refined "so as to find the golden section ratio of indulging the governance of local government to abandoning the governance of local government?" (Luo, 2010)

Administration innovation could not violate the established law and has to follow the principle of law priority, namely, abiding by the law if there is law. However, when there is a lack of legal norms, the principle of law priority is of no help to restrict the administrative innovation. Seeing from the practice, much administrative innovation is carried out without the regulation of established legal norms, while the principle of law reservation stresses that administrative organs must acquire the authorization of law before carrying out activities, which are the core of administration by law. It could help us to determine what matters need to wait for the judgment of legislative body and what matters the administrative organs could make independent innovation in. Therefore, when determining whether the administrative innovation is legitimate or not, law reservation principle will provide more valuable consideration factors.

2. THE CONFLICT BETWEEN ADMINISTRATION AND LAW RESERVATION

2.1 Regulation of Law Reservation on Administrative Innovation

Law priority and law reservation are two important elements of administration according to law, and they both are aimed at restricting the executive power, but law priority suggests that administrative organs need to obey the will of legislative body in the first place and if there is law, it must be abided by, which reflects the negativity of law's restriction on administration. The principle of law reservation, however, requires that important matters involving citizens' fundamental rights must be reserved for the law to make stipulation, and administrative body shall not stipulate on behalf of the law, unless specifically authorized by law, otherwise, the legitimacy of its act will be questioned. This shows the positivity of law's restriction on administration.

When democratic politics was built in Germany in the beginning, to break the despotic power of the

administrative department led by the monarch and prevent the administrative power from willfully infringing upon individual rights, the parliament undertook the mission of fighting the despotic power. Against such a background, Otto Meyer, a great master in administrative law, came up with the system of "law reservation", trying to "reserve" the content of fundamental rights within the laws made by the parliament, which reflects the positivity of law's control over administration. Although the principle of law reservation has been part of German constitutionalism tradition, the theoretical circle and practice circle have not reached any consensus on its scope. From the early "theory of intervening reservation" to the later "comprehensive reservation" and to the final "important theory" proposed by the compromise school, which barely became the common theory, they were just disputes over what was "important".[1] At present, the law community in Germany still has great disagreement about the scope of law reservation. The intervention in citizens' freedom, life and property rights certainly fall within the scope of law reservation, and the focus of their disagreements is on what matters the law should also reserve.

The logical starting point of law reservation lies in the acknowledgement that citizens' basic rights cannot be restricted at liberty and only when public interest needs could they be restricted as an exception and such kind of restriction could only be exercised by law. If administrative organs need to restrict or intervene in citizens' fundamental rights, there should be rules expressly stated in the law (Hu, 2010). On the surface, law reservation is dividing the legislative power between the legislative body and the administrative body, expressing what issues should be left to law for stipulation, and what matters the administrative organ could make independent stipulation according to their functions and power. Behind such division of power lies the profound logic of power decentralization, which happens to constitute one of the key elements of rule of law, namely, administrative legislation is restricted through the representative organ's law-making to discipline the administrative power and make it comply with the requirements of rule of law. What is reflected more directly is its heightened alertness for the infringement of citizens' fundamental rights by administrative legislation and make

> administrative organs have a clear understanding of the scope within which they could restrict citizens' basic rights and the extent, and also make them grasp the basic constitutive requirement for the restriction on civil rights so that administrative organs could pay careful and close attention to citizens' rights and prevent any violation of citizens' fundamental rights in disguise. (Hesse, 2007)

At present, many activities of administrative innovation involve the restriction on citizens' rights and interest. Without the constraint of law reservation principle and out of the pressure of governance, government is more likely to directly issue various regulatory documents to make adjustments by themselves, but if so, the dignity of the law will be damaged, the constitutionalism's function of power decentralization will be lost and civil rights will not be guaranteed even more. Under the current rule of law environment in our country, it is hard to conceive that the innovation activities of administrative organs do not press civil rights excessively. For instance, using "calling you to death" to deal with the adlet imposes excessive restrictions on citizens' right of communication freedom. Through restricting communication freedom, "calling you to death" punishes the behavior of putting up adlet on the street, which is, in nature, administrative penalty and thus the principle of law reservation is applicable. The legal ground is *Law on Administrative Penalty*, but there has been no such kind of method in the statutory penalty patterns, therefore, it belongs to the self-invented punishment method which does not conform with the legal provisions, so it is illegal. It is very inadvisable to pursue innovation and ignore the law, not to mention it turns out this law enforcement method fails to achieve its desired result. Following the principle of law reservation helps to bring the innovation activities of administrative organs into the framework of rule of law and in the end, realize the goal of protecting human rights and even the administrative tasks through law innovation. This is also where the vitality and value of traditional law reservation lie.

2.2 The Constraint of Law Reservation Over Administrative Innovation

Law reservation requires that as for matters within the scope of law reservation, the executive power shall not take active actions without prior permission of the lawmakers. "Its internal mechanism consists in the creation of barriers to the launch of executive power," (Ye & Qin, 2008) thus it is likely to constrain administrative innovation.

First of all, starting from the era of order administration, law reservation embodies the profound concept of power control. However, with the arrival of service administration era, law should not just control administration, and it should also encourage the government to bring the

[1] The theory of intervention reservation maintains that legal provisions providing authorization are needed only when the executive power unilaterally restricts or deprive people of their rights like freedom or property, while for other administrative activities, dministrative organs could conduct activities according to their own judgment, even without the authorization of law. The theory of "comprehensive reservation" believes: In democratic countries, all administration must be conducted according to people's will, and there should not be fields reserved in public administration that could be carried out by administrative officials according to their own judgment. The theory of reserving important matters entertains the view that in modern countries, whether activities and behaviors of the administrative subject are harmful or beneficial, power-related or non-power-related, any important matter should be prescribed by law, but it is difficult to clarify what important matters are.

maximum of benefits to people. If it just focuses on the control over power, then what we build cannot be a modern government of the rule of law that could promote people's benefits. Traditional law reservation regards power control as its sole angle of view, thus it could not satisfy the realistic demand for administrative functions against the background of a service administration era.

Secondly, law reservation, in fact, implies the requirement for the legislators to make laws to actively and high trust in the law. Administration is carried out in accordance with the legal provisions, but as for matters left to law, if legislators do not make laws actively, the administrative organs will have neither legal provisions to abide by nor related authorization to make innovation when conducting administration, and if they actively make innovation, they will be blamed by the principle of law reservation. But if they just wait passively, it will be against the idea of a responsible government and social benefits may not be protected. At this moment, the consequence of no rules is worse than that of making rules.

Thirdly, law reservation means that, to a certain extent, the legislative body is leading social governance, but in the current complicated society, suck kind of concept is unrealistic. The coming of risk society requires the government to increase the breadth and depth of their intervention in society, but the democratic legislative machine law reservation depends on may neglect its duty of legislation. Even if there is law established, the problem is that some advantages of law sometimes could be disadvantages, because its stability often means conservativeness and hysteretic nature and its universality usually means abstraction and stiffness. "Therefore, legislators, at best, could only control matters possible to be generalized, and as for more individual phenomena involving public interest that cannot be generalized and the realistic immediate demand," (Huang, 2004) they could not intervene. While for government, they often face individualized matters and have to make administrative innovation according to circumstances and solve problems. At the same time, the law's universality makes them unable to find the law corresponding form, so there exists tension among the rule of law logic of law reservation, administrative innovation and the government's governance capacity.

The "reform of coal mining enterprise" in Shanxi province could typically explain the contradiction between administrative innovation and law reservation. Forcible merging and reorganization is a core measure in the "reform of coal mining enterprise" in Shanxi province, which obviously restricts the property right of medium-sized and small coal mining enterprises. But does this kind of behavior fall within the scope of law reservation? Could it be prescribed by the regulatory documents issued by government? The Article 8 of *Legislation Law* lists ten matters that must be reserved which include the expropriation of non-state-owned property. However, in the "reform of coal mining enterprises" in Shanxi, does the government's action of forcing merging and reorganization belong to state expropriation in nature? Expropriation is a kind of administrative act, and in practice, there may be many forms of manifestation. Seeing the characteristics, forcible merging and reorganization does not match state expropriation. In this event, the main body taking over the medium-sized and small coal mine includes state-owned large scale coal mining enterprises, privately owned coal mining enterprises and the mixed-ownership coal mining enterprises, and for the latter two types, it is hard to say that such takeover is nationalize the enterprise's ownership. If it is identified as beyond the scope of state expropriation, then such innovation certainly does not fall within the scope of law reservation, and public power's violation of private rights may not be under effective control; if it is identified as state expropriation and is brought into the scope of law reservation, while there has been a lack of legitimate resources provided by the existing law, and if according to this, the method is denied its legitimacy, then the reasonable part in this program is eliminated again, and the government will feel wronged. Waste of resources, damaging the ecology, frequent occurrence of mine accidents and breeding of corruption are four major sins of medium-sized and small coal mines, which are closely related to the coal production pattern of "large number, small scale, scattered distribution and disorder". Under such circumstances, government adopted administrative means, forced the plan of merging and reorganization and realized the scale and mechanized mining in the coal industry to reduce mining accident, save resources and improve the environment. If such kind of administrative innovation is totally repudiated on the ground of no direct legal basis, it may be unreasonable. This is the dilemma in which Shanxi municipal government is stuck: under the pressure of governance, they either choose to go against the legal principle or choose to do nothing and abandon their governance responsibility. Against the background of frequent occurrence of major mine accidents, apparently they cannot choose the latter.

> In a country where there still exists much blank in the legal construction, if actions taken by the government are all required to provide legal basis, then the legitimacy of administrative acts will be no problem at all, but the initiative based on active administration will almost be killed. (Yang, 2007)

administrative innovation is oriented to administrative goals. Facing specific problems, methods that are most effective in various aspects should be adopted to achieve the best administration. However, the deficiencies of law reservation could possibly restrict the administration. Therefore, there inevitably exists tension between the two. But the goal of law is

> not to deprive administration of freedom but to follow the principle of "suppressing the evil and advocating the good", keep in check its nature that might lead to infringement and carry forward its function of bringing benefits to people. (Liu, 2013)

Seeing from this perspective, law and administration are not against each other in nature. The design of law reservation system could follow the principle of "suppressing the evil and advocating the good" and infuse new blood into its traditional concept so as to promote the sound development of administrative innovation.

3. THE REASONABLE APPLICATION OF LAW RESERVATION TO ADMINISTRATIVE INNOVATION

3.1 What the Law Reserves

What on earth the law reserves concerns the balance between administration's initiative and the constraints it is subject to. If law reservation covers too many matters, the law's hysteretic nature and stiffness may cost activities of the administrative organs the flexibility and the space for innovation will of course shrink, while if law reservation's coverage is too small, then it could not effectively restrict the executive power.

Article 8 of the *Legislation Law* in our country stipulates the scope of the matters within law reservation, but due to the need of flexibility of government's governance, the Article 9 cuts an "opening" and divides law reservation into two categories, namely, the absolute reservation and relative reservation.[2] Such division is more out of the observation of "China's national conditions" and is due to the consideration of the government's embarrassing governance capacity, therefore, it gives thought to softening the rule to ease the tension between institutional innovation and right protection, but the system design may not always successfully make up for the defects of absolute reservation. Affairs local government handle are often thick with local color. If the State Council takes over the matters and formulates administrative laws and regulations, they may not be suitable for other provinces, and the issuance of detailed administrative laws and regulations will make local government lose the opportunity of testing them in advance. There is a thick local color in the reform of coal mining enterprises in Shanxi province, and it may not be proper to make adjustments to the administrative laws and regulations which lay more emphasis on stability and universality. Therefore, the design of relative reservation only has limited effectiveness. This problem is related to the design of our country's law reservation system.

> The current law reservation system in our country is a uniline from the central to the local and it does not give much thought to the division of functions and power, so central affairs and local matters should be strictly separated, the scope of legislative power belonging exclusively to the central authorities must be expressly stated in *Legislation Law* which should also stipulate that matters beyond the scope of the central legislative power all fall within the scope of local legislative power, namely, the law reservation system should be built in accordance with the two-line standard of central legislative affairs and local legislative affairs. (Hu & Zhang, 2011)

This may be a better solution to the problems and of course, how to make the division and establishment is an issue requiring deep research.

What kind of theory does *Legislation Law* adopt to define the scope of "law reservation" and what kind of standard does it do so according to? There is no generalized standard in this law and it adopts with the method of listing one by one.[3] The protection of fundamental rights in the constitution is the original point of law reservation. Although fundamental rights stated in our country's constitution are very broad, Article 8 only involves three kinds of basic rights, namely, political rights, personal freedom and property rights, thus it can be seen that *Legislation Law*'s implementation of the law reservation principle is very limited. Although most of the administrative activities involve the restriction on citizens' fundamental rights, only matters concerning the great restriction or deprivation of citizens' fundamental rights should fall into the scope of law reservation, and in *Legislation Law*, there should be a general standard like this. But it is a pity that in the amendments to *Legislation Law* in 2015, there is not any change to that. The reason why it is not clear whether the project of forcible merging and reorganization in the reform of coal mining enterprises in Shanxi province is applicable to the principle of law reservation is that the legislation law adopts the method of listing and it has limited inclusiveness. Ways in which government restricts civil rights emerge in an endless stream, and behaviors in individual cases may not definitely be covered by the behavior types reserved in the legislation law. If there is a generalized standard, it could not only expand the system choice space when government copes with governance problems, but

[2] For matters stipulated in the Article 8 that have no laws made to comply with, National People's Congress and its Standing Committee shall have the right to make a decision and authorize the State Council to make administrative laws and regulations on part of the matters in advance according to the actual demand except those concerning crimes and penalty, coercive measures including deprivation of citizens' political right and restrictions on personal freedom and penalty and judicial matters. Matters specified as the content in law's absolute reservation could only be prescribed by law. Other matters in Article 8 belong to those of relative reservation and State Council could be authorized to make administrative law and regulations.

[3] Seeing from stipulation of law's articles, standard should be the degree of importance of rights. Most important matters are listed as "absolute reservation" matters, and matters of secondary importance are listed as matters of "relative reservation".

also make the administrative organs keep heightened alertness for their restriction or deprivation of citizens' fundamental rights when making innovation.

In an era of service administration, law reservation should not just prevent government from imposing restrictions on citizens' fundamental rights or even depriving them of their basic rights, and it should even more promote the government to bring greater benefits to people and bestow necessary means of creating benefits and action space on government. Beneficial act under the idea of service administration has become the leading type of administrative acts, and administrative organs have much innovation in this aspect. If law reservation is applied to the innovation without exception, it will stifle government's active act and motivation for innovation. Therefore, if beneficial administrative innovation do not exert negative influence on citizens' rights and interest, restrictions of the law reservation principle could be properly loosened. In fact, in our country, there has been idea and provisions about promoting the government to make active acts in the field of Leistungsverwaltung.[4] But there is also limited to the relaxation of law reservation's control. In principle, whatever activity that is an important matter should have legal basis. It is just that for beneficial acts, restrictions could be properly loosened so as to give the government more innovation space in the field of creation of benefits.

3.2 Without Laws, Could Innovation Be Made

If there is law, innovation should be made according to the law; if there is no related law, for matters beyond the scope of law reservation, administrative organs could make rules according to their abstract responsibilities; but if there is no related law, for matters within the scope of law reservation, how to conduct administration? Under the traditional principle of law reservation, the exercise of executive power is passive, and its scope and manner are stipulated by the legislative body in advance, namely, "no laws mean no administration", but that is

> enough to meet all the expectations of traditional liberal country under the rule of law for the functions of administrative law, because traditional liberal country under the rule of law regard danger prevention and human rights protection as its basic task. (Zhu et al., 2013, p.53)

However, with the arrival of risk society, it requires the administrative power to take the initiative and make moves, taking the offensive instead of being on the defensive. Especially, against the background where public service has become the main content of government in modern society, administrative laws attach more importance to the effective provision of public service, changing from " no laws means no administration" to "there could be administration without laws", therefore, in the actual operation, administration often break free of the barriers of law reservation, so the principle of law reservation still needs to be followed, but proper adjustments could be made to adapt to the development of modern administration.

Firstly, if beneficial administrative innovation in conformity with the aims of laws and administrative goals does not restrict citizens' rights and interest, government could conduct active acts to promote people's welfare.

Secondly, if benefit-damaging administrative innovation causes great restrictions on or interference in civil rights, the principle of law reservation should be followed and wait for the issuance of laws. Legislative body should actively make laws and make amendments. But if it involves threat to safety of citizens' life, health and property, in order to prevent, stop or eliminate the threat, legal interpretation could be used to make administration take positive actions and undertake the mission as a responsible government. As for the purpose of laws, principles and even indefinite legal concepts, administrative discretion and norms will leave a large space for interpretation to law-executors and the method of active law interpretation could be adopted to endow rules or principles with rich meaning and vitality.

Some innovation matters are just reform experiments, which are not enough to launch the program of making amendments to laws or legislation, so law enforcers could request the related legislative authority to grant authorization of trial implementation. If there is authorization provided by the legislative body, then it cannot be regarded as arbitrary law enforcement. As has been mentioned above, about the program of forcible merging and reorganization in the reform of coal mining enterprises in Shanxi province, it is not necessarily proper to release administrative rules and regulations first, but the government could apply to the State Council for authorization of launching a pilot project, which leaves room for trial and error.

Through the efforts above, even if there exists consistency between administrative activities and requirements of law in form, legitimacy is still a main perspective to measure the necessity and reasonableness of administrative innovation, but it is not the only perspective, because on the premise of conforming to the formal rule of law, promoting the formation of good administration especially needs to pay attention to the specific operation of conducting administration in order to develop the best administration and realize the unity of formal rule of law and substantive rule of law.

[4] The State Council *Implementation Program of Comprehensively Promoting the Administration by Law* in 2004 stipulated: Administrative organs shall conduct public administration according to the stipulations of laws, rules and regulations; without the stipulations of laws, regulations and rules, administrative organs shall not make decisions that affect the legitimate rights and interest of citizens, legal person and other organizations or add obligations to citizens, legal person and other organizations. The implication is that the behavior of adding rights or reducing obligations does not necessarily have to provide the basis of laws regulations or rules.

First of all, follow the principle of proportionality. The principle of proportionality tests whether the intervention of organs of public power in rights is appropriate and whether its means and goals achieves a balance to ensure the legitimacy of administrative intervention or administrative restriction. At present, there are many kinds of administrative innovation that seem to be legal in form but actually are not scientific. To measure whether institutional innovation is scientific or not firstly needs to see whether such innovation could solve practical problems effectively, and then it has to weigh the advantages and disadvantages of the innovation, because innovation often leads to consequences when solving problems. For example, the problem of legality brought about by the auction of car license plate in Shanghai to deal with the traffic jam could be properly solved through the selecting application of the legal hierarchy. Seeing from the governance effects, it indeed achieves the purpose of controlling the total number of cars, but now a license plate, which is just a thin iron sheet, actually costs 90,000 yuan, so this system will bring about more and more unfair negative effects. As a transitional innovation measure, it should be back out in due course if having fulfilled its historical mission.

What is more, advocate public participation. When there has been a lack of explicit legal rules, administrative activities more depend on the discretion will of administration itself, and at this time, the procedural restraints seem to be important. Public engagement helps to increase the legitimacy and acceptability of administrative innovation. If hearing could be held in the event of coal mining enterprises reform in Shanxi province to respond to the demands of various interested parties, the rationality and acceptability of the forcible merging and reorganization could be greatly enhanced.

CONCLUSION

Within the scope of law reservation, before taking actions, administrative organs must wait for the judgment of legislative body. Outside the law reservation, administrative organs could make active innovations. During the process of shifting from negative administration that "no laws means no administration" to the positive administration that " administration could be conducted without the law", administrative organs observe all the rules and regulations that stipulate " what is not expressly stated in law is forbidden", which might discourage the enthusiasm for administrative innovation and does not help to increase the welfare of people; however, if we are obsessed with "what is not expressly forbidden in the law means people are at liberty to do them", namely, encouraging the arbitrariness of administrative innovation, it is to the disadvantage of right protection. The two extreme tendencies are both against the healthy development of administrative innovation. Therefore, law reservation in the new era should give full play to its function of suppressing the bad and advocating the good and make sure that administrative innovation could not only play the role of bringing benefits to people, but also respect and protect human rights to the utmost.

REFERENCES

Hesse, K. (2007). *Outline of the constitution of federal Germany* (p.266). In H. Li (Trans.). Beijing: Commercial Press.

Hu, J. M., & Zhang, X. Y. (2011). Several legal problems about the administrative restriction on property right—Taking traffic control through adopting the odd-and-even license plate rule in some cities of our country for example. *Law Science,* (11), 121.

Hu, R. (2010). A discussion on the value of law reservation. *Political Science and Law*, (9), 68.

Huang, X. X. (2004). A study on the principle of law reservation in the administrative law. *China Legal Science*, (5), 45.

Liu, Y. T. (2013). A discussion on the construction of positive administrative law—concurrent discussion on using law to promote administration. *Journal of Shandong University (Philosophy and Social Sciences),* (3), 57.

Luo, X. L. (2010). Public power, private rights and law reservation—using "reform of coal mining enterprises in Shanxi province" as the entry point. *Journal of Political Science and Law*, (3), 28.

Yang, J. S. (2007). *Administrative regulation and right protection* (p.111). Beijing: China Renmin University Press.

Ye, H. B., & Qin, Q. H. (2008). The changes of the law reservation function—concurrent discussion about the functions of China's law reservation system. *Law Review,* (4), 4.

Zhu, X. L., & Tang, X. L., et al. (2013). *The basic map of the reform of administrative law's basic theories* (p.53). Law Press.