

轉型法院與法治主義¹： 論最高行政法院對違法行政命令審查 的積極趨勢*

葉俊榮

美國耶魯大學法學博士，
台灣大學法律學院專任教授

張文貞

美國耶魯大學法學博士，
台灣大學國家發展研究所專任助理教授

行政訴訟法於民國八十七年底大幅修正，行政法院的組織也於翌年初重新調整。面臨轉型的行政法院，是否因此一制度變革而產生判決取向的變更？而此一變更是否對司法院大法官的釋憲機能產生影響？基於行政命令的審查涉及法治主義的落實與權力部門間的互動與制衡，本文選擇以最高行政法院對行政命令的審查為研究對象，利用判決電子化之便，跳脫傳統的指標判決評釋方法，對行政法院判決進行量化分析以掌握判決趨勢。

本文發現，最高行政法院於改制之後，對行政命令的審查與拒絕適用明顯轉趨積極。在轉型脈絡中，法院展現「司法積極主義」，不僅合乎國內外先例，也能適時建立法院的威望，值得肯定，惟行政院所顯露的司法積極主義，卻帶有強烈「形式法治主義」色彩。行政法院應擺脫形式法治主義，從實質理念與程序溝通著眼，強化判決的訊息釋放功能，真正擔負起司法監督行政、保障人民權益的功能。

關鍵詞：轉型、法院、法治主義、司法積極主義、憲法政治、權力分立、行政法院、行政命令、司法審查

Transitional Court and the Rule of Law: On Judicial Activism of the Supreme Administrative Court in Reviewing Administrative Rules

Jiunn-rong Yeh

Professor of Law
College of Law
National Taiwan University

Wen-chen Chang

Assistant Professor of Law
Graduate Institute of National Development
National Taiwan University

ABSTRACT

The Law of Administrative Litigation Procedure was revised substantially in the end of 1998 and as a result, the Administrative Court was reorganized in the spring of the next year. It is therefore intriguing whether and how the Administrative Court has responded to such a profound institutional change with its court decisions and styles of legal reasoning, and whether such reorientation of the Administrative Court has affected the judicial review function of the Grand Justices of the Judicial Yuan. This Article discusses the Supreme Administrative Court's review of administrative rules, as it is concerned with constitutional principles of the rule of law and checks and balances of governmental branches. With the electronic database created by the Judicial Yuan, the authors employ an empirical method, instead of the traditional leading case approach, to analyze the changing patterns of court decisions.

This Article finds that after the reorganization, the Supreme Administrative Court (the Court) has become both active in reviewing administrative rules and straightforward in rejecting unlawful rules in individual cases. In a transitional context, a court's display of judicial activism not only is consistent with similar experiences exhibited by other courts, at home and abroad, but also can enhance greatly the institutional respect of a court. Judicial activism shown by the Court, however, has been

colored with legal formalism. The authors suggest that the Court may leave behind legal formalism and shift the focus to substantive rights and procedural concerns. By strengthening the message-sending function of court decisions, the Court may actually play an active role in the protection of human rights and the supervision of administration.

Key Words: transition, court, rule of law, judicial activism, constitutional politics, separation of powers, administrative court, administrative rule, judicial review