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Judicial Proposal: The Practical Review and System Evolution of Extended Jurisdiction

FAN Fei[a],*

[a]Faculty of Marxism, Southwest University, Chongqing, China.
*Corresponding author.

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Abstract

The court judicial proposal has been used in the administrative justice practice more and more widely, but there is an obvious gap between the ideal prospect of system construction and the real effect. Based on the summary and analysis of the problems with the operation of the judicial proposal system in the administrative justice, this paper makes a deep reflection and discussion on the system itself, and then puts forward the approaches to promote the judicial proposal system in the administrative justice.

Key words: Judicial proposal; administrative judgment; System perfection

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INTRODUCTION

Currently, the extension of jurisdiction through the judicial proposal, as an important means of the court to cope with the rapidly increasing social contradictions in the transitional period, has received unprecedented attention in the judicial practice, and has been more widely used in various types of trial activities. However, for a period of time, under the flourishing appearance of the judicial proposal in administrative justice, its potential problems have become increasingly apparent. Therefore, the paper studies the difficulties and embarrassment of the judicial proposal in administrative justice in the practice and seeks the approach to further improvement.

1. PRACTICE DILEMMA: THE GAP BETWEEN THE IDEAL PROSPECT OF THE JUDICIAL PROPOSAL SYSTEM IN THE ADMINISTRATIVE JUSTICE AND THE REALITY

1.1 Imbalance Between the Legal Functions and the De Facto Functions of the Judicial Proposal

Under the current institutional framework, the functions of the judicial proposal in the administrative justice can be classified into the legal functions and the de facto functions. Its legal functions include such four aspects as the guarantee of implementation, the maintenance of rights and interests, the punishment for the violation of laws and the promotion of reconciliation. Meanwhile, with the development of justice practice and the complex of judicial needs, a series of de facto functions have developed. These de facto functions mainly include: (a) The supervision function. Mainly by the means of pointing out the problems such as the problems in administrative normative documents, the defects and irrationality in administrative acts and making suggestions, the court exercises the supervision over the administrative organizations. (b) The function of dispute resolution. For the disputes beyond the purview of the administrative justice, especially those involving the formulation of public policies and the solutions to the problems of a specific party, in which the court should not directly involved in, the court presents specific problems and corresponding solutions to the relevant administrative organizations to promote the effective solution of social conflicts. (c) Prevention function. As the center of various types of administrative disputes, the court can discover

the drawbacks or loopholes in the social management through handling administrative cases, and timely put forward the judicial proposal to the administrative organizations, and urge them to improve the management, plug the loopholes, eliminate hidden dangers and prevent the occurrence of similar disputes. (d) Communication function. Through the judicial proposal, the court informs the administrative organizations of the characteristics, movement, tendency, etc., of administrative violation of laws in related areas, and communicate with them about the problems in response to suits, in order to promote positive interaction between the administrative justice and administrative law enforcement.

From the practice of administrative justice, the legal functions of the judicial proposal, the guarantee of implementation in particular, have been ignored to some extent, with the trend of being marginalized. And because policy basis is principled and flexible, the de facto functions of the judicial proposal in the administrative justice expand rapidly, and quickly take the absolute dominance. And their unlimited reinforcement increases the risk of system operation, because the judicial proposals without a formal legal basis are likely to be ignored and even boycotted, thus eroding the institutional authority of the judicial proposal.

1.2 Imbalance in the Development of Policy-Making Judicial Proposals and Non Policy-making Judicial Proposals

For the ever developing judicial proposals of different forms and types in the administrative justice practice, the senior court officials undoubtedly pay more attention to and have more expectations for the policy-making judicial proposals which can indicate the activeness of court's participation in the social management more directly. Observing carefully the policymaking and direction of public opinion related to the judicial proposals, it is easy to find that the court puts more emphasis on the policy-making functions, which are reflected in the development of relevant policies and media publicity. For instance, as for its effect, in recent years some mainstream media have almost invariably favored and emphasized the experience that the judicial proposals facilitate the policymaking (Wei, 2009).[1]

As for the form of judicial proposals, the favor of the Annual Report system for the administrative justice, i.e. "White Paper", is undoubtedly due partly to value the normativity and authority of its form. However, the more important reason is probably that, in the content, the universality of problems mentioned, comprehensiveness, profoundness and foreseeability of problem analysis can be more conducive to the administrative decision.

Because administrative policies and administrative normative documents[2] in most cases are the two sides of the same coin—"administrative normative documents, in essence, is an administrative measure or administrative policy" (Qiao, 2000, p.272), and administrative normative documents are almost ubiquitous in social management, to study the relationship between the judicial proposals in administrative justice and the formulation and adjustment of administrative normative documents has a strong mirroring function. From the administrative justice practice in courts of two levels in the jurisdiction of the Intermediate Court in a municipality, there is a big gap between the reality of policymaking judicial proposals presented by the court and the Supreme People's Court's emphasis and expectation that the judicial proposals facilitate the administrative decisions. This is manifested in the fact that there are a small number of policymaking judicial proposals in which the administrative organizations are suggested to formulate normative documents to regulate the matters of administrative management in a certain area and to correct and adjust the content of the existing normative documents, while the majority is the non-policymaking judicial proposals, in which the administrative organizations are informed of the problems such as illegal situations or behavior flaws in the administrative enforcement of law and improper judgments and are suggested to make improvements and amend the content of specific administrative acts. Objectively speaking, a small proportion of judicial proposals can finally lead to administrative decision and be transformed into administrative normative documents. Therefore, its influence on the administrative decisions is rather limited.

1.3 Imbalance Between the Supply of Judicial Proposals and the Practical Demand of Administrative Organizations

The operation of the judicial proposal the in administrative justice is "a two-way interaction" between the court and the administrative organization. On the one hand, the court put forward the proposal; on the other hand, the administrative organization responds to it. Therefore, whether the proposal supply meets the demand becomes a decisive factor in the realization of its value. Generally speaking, in recent years, the work regarding the judicial proposal in the administrative justice has been carried

[1] *The Fujian Higher People's Court Conducts Administration of Justice Actively to Resolve Administrative Disputes, the Judicial Proposal Caused the Active Response of the General Administration of Customs.* Administrative Law Enforcement and Administrative Justice fourth edition, 2010, p.126.

[2] In the Administrative law, administrative normative documents has a specific meaning. It is the general term for the universally binding rules, decisions, orders, and notices, etc., which are formulated and issued by the national administrative organs in the legal jurisdiction for the enforcement of law and implementation of policies, except the administrative regulations and rules.

out with great intensity in the judicial system.[3] However, the high enthusiasm and ideal vision of the court putting forward judicial proposals is in stark contrast to the indifferent attitude of the administrative organizations towards them. It is difficult for a large part of judicial proposals to get the response from the administrative organizations. The phenomenon that the proposal does catch any attention "like a stone dropped into the sea" begins to take shape. As to realise the value of judicial proposals, it makes people feel that the court is self-serving and unilaterally moves forward. In practice, "low rate of responses," of the administrative organizations to the proposals greatly dampened the enthusiasm of the court, thus forming a kind of helpless circle: the fewer responses, the fewer proposals; no replies, on proposals (Xiao, 2010). The potential worries for the prospect of the system are thought-provoking.

In the trial practice, the rate of written responses to the proposals is generally less than 30%. Due to the lack of effective tracking and supervision, the court generally does not know whether the proposals have been adopted and implemented unless specifically making a return visit. In addition, some courts' enthusiasm for putting forward the proposal has also decreased significantly, so that some courts have even issued regulations determining the hard targets for the number of proposals that every intermediate and primary court must present each year.

2. THE CAUSE ANALYSIS - MULTIPLE PROBLEMS WITH THE JUDICIAL PROPOSAL SYSTEM IN THE ADMINISTRATIVE JUSTICE

2.1 Confusing Understanding of the Intrinsic Properties of the Judicial Proposal in Administrative Justice Limiting Its Applicability

The judicial proposal itself does not have a coercive force, and lacks the legal force with judgment documents, which are the inherent attribute of judicial proposals. The Administrative Procedure Law sets up the judicial proposal as the implementation of protection system, with the attempt to resolve the often-criticized "difficulties of enforcement" with judicial proposals officially prescribed by the law, which undoubtedly overlooked the separation and conflict between the intrinsic properties of judicial proposals and guarantee of coercive force in the enforcement. Under the situation that the coercive measures such as the penal punishment are still not enough to ensure the enforcement, it is somewhat wishful thinking to have hope for the non-coercive judicial proposals. Article 65 of the Administrative Procedure Law has been negated by scholars because of the little effect due to lack of enforcement (Yang, 2003; Hu, 2007). In the administrative justice practice, because of the doubt about the non-coercive force of judicial proposals, the court basically takes the evasive attitude to the judicial proposals for enforcement guarantee. On the other hand, based on the conventional thinking that judicial proposals is not coercive, when some judicial proposals may have certain enforcement function due to the explicit stipulation in the law and the special status of the court (Dai, 2007) —judicial proposals can make parties and the public find illegality in the acts of administrative organizations, and urge people to fight for their legitimate rights through other channels—in order to avoid "giving the parties an excuse," and triggering the bother with the administrative organizations, the court will be quite cautious and restrained to make statutory judicial proposals. The contradiction and confusion in understanding about the force of the judicial proposal affect the normal performing of its statutory functions.

2.2 The Development Model Driven by Policies Impacting the Quality Promotion of the Judicial Proposal in Administrative Justice

"Litigation is a barometer of a country's politics." it cannot be denied that in the political context of innovation in social management, for the large number of judicial proposals in the current practice of administrative justice, policies promoting are the main driving force. However, when the significance of political publicity goes beyond the development of its own functions, the judicial proposal is often reduced to work for the occasion. And its development is likely to be stuck in the situation that "more attention has been paid to the quantity rather than the quality and making proposals rather than putting them into practice". As a result, "the legal activities become more political, thus impacting the advantage of rule by law. And the rule of law is the really valuable social product" (Posner, 2002, p.42). In the practice of administrative justice, the common drawbacks of judicial proposals are as follows: (a) on the type of proposals, there are more proposals for specific cases and less for general cases, more separate ones and less comprehensive ones, and more for the improvement in the way of law enforcement and less for the policymaking, more for correction and less for prevention. (b) On the contents of the proposals, they lack the deep analysis of the problems, and improvement measures are abstract, general and inapplicable. In

[3] According to the current judicial policies, some courts issue normative documents intensively to strengthen the work of judicial proposals in administrative justice. Some courts take the number of judicial proposals as the important index of the evaluation of the administrative justice and innovate and enrich the forms of daily judicial proposal, and actively implement the administrative trial annual report system (white paper system), and the special report system. Some courts actively improve the mode of judicial proposals in the administrative justice, change the traditional approach of putting forward "afterwards proposals" after the adjudication, and timely put forward the "ongoing proposals", and try to put forward the "forward proposals".

particular, a considerable number of proposals are confined to notify of illegal and faulty administrative acts, which is called "improvement suggestions", but actually the repetition of the judicative paper. (c) On the operation mechanism, it is on the low level of normalization and institutionalization. The procedure and form of the proposal are not paid enough attention. It is random to present, examine and send the proposal without the strict procedural norms. The feedback mechanism is not perfect, without effective supervision and urge.

2.3 The Limited Capability of the Proposal Subject Constraining the Intellectual Support of the Judicial Proposal for Administrative Justice

Bourdieu stressed that in the scientific research we should not only make the object objectified, but also the subject objectified, and we should always have a clear understanding of the limitations of the research tools and methods and have the critical attitude (Bourdieu, 2006, p.102). Although the judicial proposal for administrative justice is put forward in the name of the court, after all it embodies the intellectual abilities of the judge in charge, e.g., legal knowledge, theoretical knowledge, trial experience, social experience. To make valuable judicial proposal, it requires that the judge not only to have an insight into the deep-seated problems exposed in individual cases while dealing them, but also to have comprehensive knowledge of the implementation situation of policies and laws in order to provide argument on the pertinence and necessity of the proposal. As for the proposal subject, its objective limitations are in the following two aspects. The first is the knowledge structure. It is only an ideal to require the administrative law judge to be a master of all laws in the administrative management area. The second is "the heavy load of work". It makes excessive demands to expect the front-line judges, who have long been under the intense pressure of handling cases, to think and analyze deeply for the proposal.

2.4 The Administrative Organizations' Arrogance Restricting the Recognition of the Judicial Proposal in Administrative Justice

On the one hand, because the judicial proposal in administrative justice is not coercive, the administrative organization is the one who decides whether to reply and take the proposal. Therefore, some administrative organizations show the "arrogance of authority" to the court proposal. "The effectiveness of judicial proposal entirely depends of the mood the target organization, and the attention paid by its leader." (Dai, 2007) And the tolerance of the court also enhances the arrogance of administrative organizations. On the other hand, because of the partial and wrong understanding of the relationship between the judicial power and the administrative power and the functions and values of the judicial proposals, some administrative organizations hold resentment for them, and show "habitual prejudices". The prejudices are reflected mainly in the following three situations. (a) Some administrative organizations are not ignorant of the illegal and improper situations in the administrative acts. In fact, they do it deliberately. They ridicule the proposals "burn dayligh" in their heart. (b) Some administrative organizations are over conceited about the exclusive implementation of administrative power. As for the judicial proposals, they think there is the suspension that the judicature intervenes into the administration. It is against the judicial principle of passivity. It is "putting its finger in another's pie". (c) Some administrative organizations tend to evaluate the proposal from its utility. They think that its significance in form is over that in practice. The so-called extension of jurisdiction is only "self-entertainment" of showing the image of the court in the context of the social management innovation.

3. EVOLUTIONAL PROCESS: THE SYSTEM IMPROVEMENT OF THE JUDICIAL PROPOSAL IN THE ADMINISTRATIVE JUSTICE

3.1 Determine the Value of the Judicial Proposal in Administrative Justice Scientifically

3.1.1 Participate in the Formulation of Public Policies Actively

In modern society, the judiciary is a way of state intervention. Its function of regulating economic and social development has emerged. It has become a common phenomenon for the judiciary to participate in the formulation of public policies (Song, 2011). The administrative trial is not only the adjusting mechanism of interest conflicts between the government and civilians in some individual cases, but also monitoring and discovery mechanism of social management crisis and hidden dangers in a certain field. The court takes advantages of its trial resources, and studies the types, characteristics, causes, trends of cases and the universal problems with the administrative law enforcement, based mainly on the administrative cases. From perspective of judicial review, through the judicial proposal, the court urges the administrative organizations to pay close attention to the formulation of administrative policies in some fields, and assesses their risks in order to discover the social crisis and the risks that may occur. This helps the core body of social management, the administrative organizations to make scientific, specific and effective management policies. This policymaking function will make the judicial trial to go beyond the individual judgment and affect have an impact on the overall interests orientation and behavior patterns of social members, while solving the dispute of specific cases, thereby, amplifying the positive effects of the trial and reflecting the responsibility

and activeness of the judiciary to serve for the economic and social development.

3.1.2 Resolve Administrative Disputes Substantially

In the sociological sense, the source of social legitimacy of judicial proposal lies in how to display its social responsibility at the position of the society. In this process, it cannot just be a purely legal activity for the court to present judicial proposals. When making the proposal, the court must pay attention to the social needs. It must combine the independent judgment of the law and social mainstream willingness and bridge the communication between the judicial proposal system and the social structure. In view of the realities of the common occurrences of administrative disputes at present, and in the context of vigorously promoting social construction, as an important social factor, the substantial resolution of administrative disputes are gradually integrated into the value targets of the administrative litigation system. In practice, the coercive administrative adjudication can "decide the disputes", but the effect of "stopping the conflicts" is not obvious. There is still a long way to go before achieving the goal of "closing the case and ending the conflicts". However, to use the judicial proposal flexibly and guide disputes sides reached a consensus on the basis of mutual understanding, can be more conducive to the substantive solutions of disputes, leading to the unity of legal effects and social effects of administrative justice. Due to the practical needs for substantive resolution to administrative disputes, as the important means of court's responding to the social needs of the non-compulsory form, in the future there is broad space for development of the judicial proposal system for the administrative justice.

3.1.3 Promote the Construction of Coordinative Judiciary

"Administrative justice, based on the stability of the law, the strictness of the procedure and the relative independence of the judicial power, can make a more durable impact of the exercise of administrative power." (Jiang, 2011) It is in the hope of achieving the restriction and counterbalance of judicial power on the administrative power through the limited ways of judicial review, that in the development of administrative, a closed and confrontational mode of administrative justice has once come into being. Although this model had a brief period of glory, in the "strong administrative, weak judicial" system structure, its advantages have gradually evolved into a "short slab." Its embarrassing reality is that many local governments do not recognize the function of the administrative justice, people do not think it plays a big role in protecting their legitimate rights and interests, and the court, including the judges also often complain about the poor legal environment, and the greater pressure from the administrative intervention. In recent years, courts began to actively advocate "the establishment of positive interaction between the administrative justice and the administrative law enforcement" and other new policies and measures, which reflects a modest adjustment to the traditional administrative justice mode, and embodies judicial senior official's intention to seek the development of administrative justice under the current system, and their eager expectation for the establishment of an open cooperative judiciary (Zhang, 2011). The judicial administrative justice proposals of different functions, as the platform of communication and collaborative interaction between the judiciary and administration, will no doubt carry more important tasks in the changes of the traditional administrative justice mode.

3.2 Integrate the Legal Basis of the Judicial Proposal in the Administrative Justice

The first is to unify the legislative stipulation. Currently, the stipulations concerning the judicial administrative justice proposal, scattered in the Administrative Procedure Law and its judicial interpretation and policy documents, should be combed through and unified. Considering the factors such as the path dependence of the institutional change, changes cost and effectiveness, we can adopt the model of modifying the Administrative Procedure Law and complementing it with operational norms, to specify the legal basis of the judicial administrative justice proposal. (a) We should clarify the understanding of the effectiveness of the judicial administrative justice proposal. Based on its intrinsic properties of non-coerciveness (Huang & Ding, 2010)[4], we should modify the stipulations in existing administrative procedural law, concerning the judicial proposal as the measure of implementing guarantee. (b) We should accurately decide the functions of the judicial administrative justice proposal. We should integrate the stipulations in the judicial interpretation of current administrative procedure law and judicial policies, concerning the statutory functions and factual functions of the judicial proposal. The condition, subject and types of judicial proposals should be stipulated as a principle in the form of a special chapter in the Administrative Procedure Law, in order to change the embarrassment of "applicability outside of the law" of the factual functions of the current judicial administrative justice proposal. (c) Relevant documents supporting the system should be stipulated, to regulate the specific scope, operational procedures, and operational mechanisms of the judicial proposal in detail, and to unify practical operations. Secondly, we should regulate the applicability of the law. On the basis of legislative improvement, strengthen the applicability of laws. The judicial proposal should specify the formal legal ground and the legal provisions cited, so that the proposal can be lawfully proved,

[4] Some scholars believe that the judicial proposal should be given the weak power of enforcement to ensure its effectiveness.

reflecting the legal seriousness and authority of the judicial proposal.

3.3 Promote the Quality of the Judicial Proposal in the Administrative Justice

The intrinsic properties of the judicial administrative justice proposal determine that its vitality lies in relevance, effectiveness and usefulness. Through upgrading its intrinsic quality, to obtain recognition and appeal is the key to achieving tangible results. To promoting its quality, not only requires, in the content, to pose problems to the point, analyzed them thoroughly and resolve them with good policies, but also requires dealing with three types of relationships with great efforts: (a) The relationships between the judicial proposal and the administrative judgment. The goal of carrying out the administrative justice is to give the final judicial judgments to the administrative disputes. With its flexibility, the judicial administrative justice proposal, has a special function in the prevention and resolution of administrative disputes, but in the dispute settlement system it still cannot rival the dominant position of administrative judgment, only to supplement and extend the content of the judgment. So, we cannot replace the administrative judgment of the judicial administrative justice proposal, to avoid abuse of the judicial proposal. Meanwhile, as for those administrative acts which have evaluated clearly in the administrative adjudication, it is not proper to judge them again in the form of judicial proposal, if there is no need to add the content, for fear of impacting the authority and credibility of the adjudication. (b) The relationship between judicial activism and judicial restraint. While practicing the active judiciary, the judicial administrative justice proposal cannot deviate from the judicial rules and the principle of neutrality and passiveness. In the judicial proposal, the court should cautiously deal with the relationship between judicial power and administrative power and avoid direct involvement of administrative affairs, and replacing the administrative organizations to make administrative decisions in judicial thinking mode. After all, the management of social affairs will not only be a single matter of law. It more often needs the administrative organizations to judge comprehensively and adjudicate freely, according to the realities of political power structure, socio-economic development situation and traditional cultural values and the operating mechanism of their powers. The court, as an external person or an expert of law, voices its opinions, but they should only be recommendations. (c) The proportional relationship between the proposals for specific case and macro policy-making proposals. It is true that the basic content of the judicial administrative justice proposal is to present improvement proposals for the specific administrative case to the administrative organizations, which highlight its corrective function. Aiming at the universal, group or tendency problems reflected in a certain period of time or a certain type of administrative cases, from a global point of view, the court presents macro policy-making proposals for systematically prevention and problem solution, in order to expand the administrative justice's functions of intervening the social management and serving the overall economic and social development, which can better show the importance of the judicial proposal. At the same time, compared with the "home truths" of corrective proposal, the advisory policymaking proposals can arouse sympathy of administrative organizations more easily. Increasing the proportion of macro policy-making judicial proposals is the direction of improving the quality of the judicial administrative justice proposal.

3.4 Develop the Publicity of the Judicial Proposal in the Administrative Justice

The publicity of the judicial proposal in the administrative justice is the key to the publicity of court trials and also the inevitable requirement of the administrative justice cause integrating into the social governance process. Especially in changing process of shaping collaborative administrative justice model, to show the pragmatic and open position and the positive attitude through the public mechanism of the judicial proposal in the administrative justice, helps to acquire the social understanding and support for the cause of the administrative justice, and to expand the social effects of judicial proposals. In practical sense, the publicity of the judicial proposal in the administrative justice can restrain the court as well as the suggested organization, which not only helps to promote the court's attention to improving the quality of proposals, but also to stop the "pride and prejudice" of the suggested organization, and promote implementation of proposals. Currently, the publicity of the judicial proposal in the administrative justice should focus on improving the following two aspects: (a) Promote the "white paper" system of the administrative justice, i.e., judicial review and reporting system of administrative cases. The specific approach is, on an annual basis, in the form of a normative and formal written report, to submit to the local party committee, the National People's Congress and governments or the relevant administrative organization, the report about the basic characteristics, state and trial results of administrative cases in the previous year, the main problems with the administrative law enforcement which are reflected by the lost cases, reasons for the problems , the basic evaluation on the level of administration by law, and the opinions and suggestions on how to improve the law enforcement. The report provides reference for the leaders to make decisions and improve their work. The practice of the courts in Shanghai, Zhejiang, Jiangsu proves that as "Big judicial proposal," the White Paper system of the administrative justice is an effective mechanism for court to win public understanding of the dilemma with the administrative justice and is the support for actively expanding its

service functions. (b) Publicize the situations that the administrative organizations refuse to implement the judicial proposal in the administrative justice within limits. The court should try hard to win the cooperation with the Party Committee, the NPC and the relevant departments, and promptly inform them the situations of implementing the relevant judicial proposals. It should especially fight for the entrance of reply, feedback and implementation of the judicial proposal into the evaluation index system of government' administration by law, thereby to strengthen the supervision and urge for the suggested organizations. Meanwhile, the court should strengthen the communication and contact with the news media and other social institutions, in order to increase the publicity of the judicial proposal. In particular, the court should publicize the situations that the administrative organizations refuse to implement judicial proposals within limits through the media and other channels, to show the arrogance and prejudice of the administrative organizations, and to supervise the implementation with the social forces.

CONCLUSION

At present, as an important way of the court to extend the jurisdiction moderately, after the practical evolution, the judicial proposal, has been deeply embedded in the governance process of the society in our country, and has become an important means of social management innovation. The realization of the value of the judicial proposal in the administrative justice not only requires the court's unremitting efforts, but also depends on the coordination of many external forces. Any short-sighted understanding and hesitative action of relevant parties may make this promising system" chicken ribs", in reality. Facing a variety of problems, all state organizations including the judicial and administrative organizations, should shoulder the historical mission and responsibility without hesitation

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