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Chinese “Administrative Suit Law Amendment” Review

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Abstract

Chinese Administrative Suit Law that enacted in 1989 conducted the first modification in 2014. But result is not satisfactory. This article will introduce the modifications of several major aspects, especially its shortcomings. In this process, This paper will put forward their views on relevant issues.

Key words: China; Administrative suit; Law

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INTRODUCTION

“People’s Republic of China Administrative Procedure Law Amendment (Draft)”, which was deliberated by the Standing Committee of the National People’s Congress in December 2013, August 2014 and October 2014 and approved on November 1, 2014. Although the revision was quite efficient, but considering the lack of substantive changes, the amendment itself was disappointing. By introducing the important contents, this essay will review the relevant provisions, and put forward distinctive views on the future implementation.

1. THE ACCEPTION OF ADMINISTRATIVE SUIT CASES

Court’s reluctance to accept suits is one of the major problems encountered in the implementation of China’s

administrative suit, and leads directly to part of the administrative dispute can not enter the administrative suite. Obviously, the insufficiency of independence is the main cause of this dilemma. In practice, the reality of the reluctance is based upon court’s “self-protection”. As relevant cases might come out with unfair judgment which were improperly interfered by the executive and communist party organs, the unfair judgment is likely to drag the court into the vortex of dispute. lead to the court in the dispute of the vortex, No court can bear endless petition.

However, it is not only administrative suit but criminal and civil litigation suffered a lot from insufficient independent status in China. As a matter of fact, improper intervention is external factor, the internal factors are court’s irresponsibility and dereliction of duty. Some judges point out that very seldom cases were intervened directly. The truth is court themselves want to keep “harmonious coexistence” relationship with other executive organs. Although the judiciary and the executive are separate organs in accordance with the provisions of the law, but the public power they all hold generate strong identity recognition which can be traced back to ancient China’s long tradition that Judicial and executive powers are not distinguishable. Even if the court can access to independent legal status through judicial reform, the situation above might not be able to get a good solution. As a law professor put forward, Nowadays, nearly every government department will murmur at their low legal status, lack of staff and expenses. But after the situation has improved these issues, they still did not perform their duties actively and they do not appreciate the effort which has been made to improve the situation.

In order to fix the problem of accepting suits, we must focus on refining the system to restrict the Court. The new APL stipulates,

People’s Court shall guarantee citizens the right to sue of citizens, legal persons and other organizations, and shall accept

legally admissible administrative cases. administrative organs and their staff shall not interfere with, hinder the people's court accepts an administrative case.

"Peoples Court should register sue on file." Such provisions seem harsh, but exist a serious legal loophole. There is no implementation mechanism for liability of breach of duty. This provision is a typical "no operational program" (Chen, 2010, p.23). People's Republic of China Criminal Procedure Law has similar provisions for meets the rights of lawyers, but it has become a dead letter.

The new APL also provides that, if the court does not accept the suit and do not rule on the case not filed, the plaintiff can sue to a higher court. In practice, many courts neither accept nor issue any written document for prosecution. The key effect of the provision above is that the plaintiff can prove the previous sue. But nowadays, court gets guarded to ensure safety. Audio, video equipment and other equipment that does not pose a threat to security are also not allowed into the court which making the plaintiff unable to obtain evidence for prosecution. The writer suggests that, for administrative litigation, allowing plaintiffs to bring the device to obtain evidence related to maintenance their legitimate rights and interests.

2. NO DIRECT PROSECUTION OF ABSTRACT ADMINISTRATIVE ACTION SYSTEM

In China, the abstract administrative actions are decisions and orders with general binding force formulated by administrative organs and are not aimed at specific events and specific people. In contrast, the specific administrative action refers to an administrative decision for specific events and people, such as issuing licenses to citizens. The administrative specific actions are often based on abstract administrative action rather than law. Accordance with the provisions of the old APL, the plaintiff cannot sue abstract administrative action directly, but specific administrative act. The new APL made the same provisions.

If the plaintiffs cannot sue the abstract administrative action directly, the problems in practice can not be solved in China. In practice, many illegal abstract administrative actions are deliberately made by the executive. The writer has more than once heard the executive leadership said, "This abstract administrative act must be made even if illegal". In practice, a township government regulates that the farmers must apply for a license and pay deposit before harvesting crops. In China, the township government has no authority to make such provision, However, in accordance with the provisions of the new APL, relevant farmers cannot sue directly on the township government regulations, unless the license was issued and the deposit was paid. This fact makes the

farmers in a dilemma which in writer's view is similar to *Sin dell V. Abbott Laboratories*. It's a pity that the new APL dose not open the door for relevant parties sues abstract administrative action directly.

3. WITH REGARD TO SOCIAL ADMINISTRATION NOT EXPLICITLY INCLUDED IN THE SCOPE OF ADMINISTRATIVE SUIT

In China, industries usually set up associations as the Bar Association and Football Association. The residents committees and villagers committees established among urban and rural residents on the basis of their place of residence. These social organizations are not government departments, but fulfilled certain administrative duties by the law. The administration of such organizations is called Social Administration. For a long time, there is a narrow interpretation in for autonomy in. The general idea is that judicial power should not intervene into the scope of autonomy. But this concept caused serious problems in practice.

Firstly, we take a look at Bar Association. China lawyers' association is a social organization as legal person and self-disciplinary organization of lawyers. According to the Chinese Lawyer Law, if you want to be a lawyer you must go through the internship stage first. Bar Association is responsible for managing internships and interns assessment. This responsibility concerns intern's legitimate rights and interests in case there is no judicial oversight toward Bar. In practice, according to the provisions of the Bar Association, Trainees must be interviewed by the Bar Association within one year interns internship period. But the interview does not have any specific predetermined assessment criteria. Some trainees have been identified failing only for their speech speed. The interviewer is often partners of big law firms. It is not fair obviously. Most fundamentally, trainees can not sue if they are not convinced by interviewer's decision. In this case, trainees can only apply for the interview again which is not enough to protect e their rights. What is worse, some of the Bar Association staff take advantage of their work to accept bribes. Moreover, under the Chinese Lawyer Law, a lawyer must be a member of the Bar Association. In accordance with the provisions of the Lawyers Act,

A lawyers' association shall perform the following functions:
a) Safeguarding the practice of law by lawyers, and protecting the legal rights and interests of lawyers; b) Summarizing and exchanging the work experience of lawyers; c) Making a professional code and disciplinary rules; d) Organizing the lawyer practice training and the education on professional ethics and practicing disciplines, and conducting the practicing assessment of lawyers; e) Organizing and managing the internships of persons applying for the practice of law,

and conducting the assessment of interns; f) Rewarding or disciplining a lawyer or law firm; g) Accepting a complaint or report on a lawyer, mediating disputes arising out of the practice of law by a lawyer, and accepting a petition by a lawyer; and h) Other functions as provided for by laws, administrative regulations and rules and articles of association of a lawyers association.

Based on the functions above, Bar Association conducts public authority. Such power must be subject to administrative suit.

Then we take the villagers' committee for example. According to the China's Organic Law of Villagers' Committees, A villagers' committee is a mass organization of self-government at the grassroots level, in which villagers administrate their own, educate themselves and serve their own needs. As the election is conducted, administration maintained and supervision exercised by democratic means. A villagers' committee shall manage the public affairs and public welfare undertakings in the village, mediate disputes among villagers, help maintain the public order, and convey villagers' opinions and demands and make suggestions to the people's government. A villagers' committee shall be responsible and report to the villagers' assembly or the villagers' representatives' assembly. Although there is Chinese Village Committee Organization Law as a basis, but there are no legal means to resolve dispute. Open Village Service information has been implemented for many years in China, but the effect is very unsatisfactory so far. The China's Organic Law of Villagers' Committees stipulates,

the villagers committee shall apply the system of open administration of village affairs. The villagers committee shall accept supervision by the villagers through publicizing the following matters a) matters decided on through discussion by the villagers assembly b) plans for implementing the State policy for family planning; c) handing out of relief funds and goods; and d) the condition of that Villagers' committees assist the work of the people's government e) other matters that involve the interests of the villagers and that all the villagers are concerned about. Matters in the preceding paragraph, the general matters at least once every quarter released; more collective financial transactions, financial revenue and expenditure shall be published once a month; matters affecting the interests of the villagers should be published at once. The villagers committee shall guarantee the truthfulness of what is publicized and subject itself to inquiry by the villagers.

However, according to the provisions above, when a villager's committee fails to publicize the information as required, or the information publicized is inconsistent with the facts, villagers cannot sue the villagers' committee. This is not conducive to protecting the democratic rights of the villagers. The executive can not guarantee a neutral and impartial resolution of disputes because Villagers' committee assists its work.

The new APL does not explicitly include the social administration in scope of administrative suit. This is the same as with the provisions of the old APL. However, this

is not irreparable. Chinese administrative suit law does not expressly exclude social administration from the scope of administrative suit through interpreting the administration suit law, court can incorporate social administrative into the scope of administrative suit. Unfortunately, court's attitude is uncertain.

4. DECISIONS OF AN ADMINISTRATIVE ORGAN ON AWARDS OR PUNISHMENTS FOR ITS PERSONNEL OR ON THE APPOINTMENT OR RELIEF OF DUTIES OF ITS PERSONNEL

The new APL stipulates that the decisions above do not belong to the scope of administrative suit. This is the same as with the provisions of the old APL. For example, if an executive staff is subject to disciplinary punishment, he/she has no right to sue. Some people think this is to guarantee the effective exercise of the executive powers. Some scholars pointed out that the court should not interfere with the organizational issues of the executive branch, And "relevant laws and regulations have been prescribed the appropriate remedies and ways to resolve such disputes" (Jiang, 2007, pp.165-166). Administrative policy issues, administrative internal discipline and internal institutional issues involved in such disputes, the executive discretion of the administration helps to ensure efficiency.

The reasons above cannot be established. Because these decisions are "typical of the legal act" (Ma, 2009, p.169). And these decisions involve important legal rights and interests of the executive staff. According to Chinese civil servant law, A civil servant who is subject to disciplinary liability due to any illegal act or disciplinary breach shall be given a punishment. The punishments are divided into warning, demerit, gross demerit, demotion, dismissal from post and expulsion. A civil servant shall not enjoy any post promotion or rank promotion in the duration of punishment. In particular, the civil servant who is given a demerit, gross demerit, demotion or dismissal shall not enjoy any elevation of wage grade. The duration of the punishments are: warning, 6 months; demerit, 12 months; gross demerit, 18 months; demotion/dismissal, 24 months. Anyone who is given the punishment of dismissal shall be demoted according to relevant provisions. Where a civil servant is discontent with punishments concerned with himself, he may apply to the original organ that gives the personnel punishment for an administrative review within 30 days as of the date when he is informed of the said personnel punishment; where he is discontent with the result of the administrative review, he may appeal to the administrative department of civil servants at the same level or appeal to that on a level higher than the organ that gives the personnel punishment according to the provisions of the state; or, he may directly lodges an

appeal without any administration review within 30 days as of the date when he is informed of the said personnel punishment. In other words, civil servants have no right to access to the courts. This is contrary to the principles of a final judicial decision. This is not in line with the principle of no person shall make his own case judgement.

As a matter of fact, this is not only related to protecting the rights of the staff of the executive. More importantly, it relates to the "rule of law" and "rule of man" in China's administration. Decisions of an administrative organ on awards or punishments for its personnel or the appointment or relief of duties of its personnel are the most important personnel powers of executive. In the absence the legal way to resolve the dispute cases, senior executive administrator formed a strong control to the juniors. The lower officer must execute orders from their superiors, even if the command is illegal. In China's administrative practice, many illegal administrative acts are made by the executive leadership. A mayor even said: "I do not know levy law and did not perform according to Levy law." The subordinates of execution have to obey orders from superiors in fear of punishment. This is the watershed between "rule of law" and "rule of man" in China's administration.

According to the Chinese civil service law, Where a civil servant, in the performance of official duties, deems that there is something wrong in the decision or order of his superior, he may make a suggestion on correcting or canceling the said decision or order. Where the superior refuses to change the decision or order, or requires immediate performance, the civil servant concerned shall carry out the decision or order. The superior shall be held responsible for the consequences of the performance of duties and the civil servant shall not be subject to any liability. However, where a civil servant carries out any decision or order that is obviously illegal, he shall be subject to the corresponding liabilities according to law. Although such a provision, subordinate usually do not dare to put forward different views in the absence of administrative suit.

Therefore, that including these personnel decisions in the scope of administrative suit can form bottom-up balance of powers. This is very meaningful to change centralization in China's administration. And it can prevent illegal administrative acts. The new law is still not included these personnel decisions into the scope of administrative suit and did not give any reasons. This is not convincing.

5. PART OF THE ADMINISTRATIVE CONTRACT INCLUDED IN THE SCOPE OF ADMINISTRATIVE SUIT

The new APL incorporate some of the administrative contract into administrative suit range, such as government

franchise contract, housing levy compensation contract. Administrative contract is the contract between executive, citizens, legal persons or other organizations.

However, in accordance with the provisions of the new APL, Citizens, legal persons or other organizations have the right to sue the executive, but the executive has no right to sue citizens, legal persons or other organizations in administrative suit. In accordance with Chinese Housing Levy Law, executive can sue the opposite party. In other words, the executive can only prosecute citizens, legal persons or other organizations in a way of civil action. Administrative suit and Civil Procedure are applicable to the disputes based on the same legal issue. This is very strange and will cause confusion on the law applicable.

Administrative contract disputes can be solved through civil litigation. It is unfavorable for citizens, legal persons or other organizations to resolve administrative contract dispute. For example, through civil litigation, the scope of compensation that executive compensation may include indirect losses. But through administrative suit, executive compensation may only be limited to direct losses.

6. AGENT IN THE ADMINISTRATIVE SUIT

In accordance with the old APL, each party or legal representative may entrust one or two persons to represent him in litigation. A lawyer, a public organization, a near relative of the citizen bringing the suit, or a person recommended by the unit to which the citizen bringing the suit belongs or any other citizen approved by the court may be entrusted as an agent ad litem.

The new law prohibited the citizens who be allowed by court from acting as agent in administrative suit cases. Therefore, the plaintiff can only choose agent in the scope of lawyer, grassroots legal service providers, their close relatives, citizens recommended by Community or social groups.

The Standing Committee of National People's Congress did not specify any reason about the modifications above. In fact, it similar to the modification on Civil Procedure Law. As far as I know, the court and the Bar Association put strong influence on the modification. The court held that some ordinary citizens as litigation proxy disrupt their trial order. The bar believes that ordinary citizens as a litigation agent has negative impact on the Lawyers' business and "Strongly urge the legislature to prohibit citizens as agent" (Song, 2012, p.54).

These reasons above are not convincing. If the citizen as an agent disrupt court order, court can punish them according to law. The real intention of the bar association is to protecting the interests of the Group itself. The interest of plaintiff are not their business. But the original intention of agent system is maintained plaintiff's rights.

Under the new APL, the plaintiff will encounter more difficulties in engaging agent. First of all, plaintiff certainly wants to entrust a lawyer because lawyers can provide professional legal services. However, the lawyers' fee is expensive. Most of the plaintiff can not afford the fee. According to China's law, the legal aid department may provide legal assistance for the poor citizens. But the legal aid department is managed by the executive branch. In administrative suit, the defendant is the executive branch. So in this case, it is unable to establish trust between the plaintiff and the lawyer. And trust is the core of the agency relationship. Secondly, it is difficult for the plaintiff to choose proper person from his close relatives. According to the law, close relatives only include spouses, parents, children, siblings, grandparents, grandchildren, grandchildren. These close relatives often do not have the specialized legal knowledge. The third point, while the residents "committees and villagers" committee are socially autonomous organizations in the legal sense, but they often need to assist the executive administrative management. According to the China's Organic Law of Villagers' Committees, Villagers' committees shall assist the work of the people's governments of the townships, minority ethnic townships and towns. In housing and land expropriation, they are often part of the chain of interest. In Chinese news reports, one can often see that members of the villagers committee corrupted levied compensation. Therefore, in the land and housing levy and similar cases, the residents "committees and villagers" committee probably will not recommend an agent for citizens. Because "recommend" is equivalent to "agree" in law. On the other hand, residents and villagers' committees may use this power to extort citizens.

Therefore, the new law on *ad litem* is a retrogression.

7. THE OBLIGATION OF THE PRINCIPAL OF THE ADMINISTRATIVE TO ATTEND THE COURT

The new APL provides that: "the person in charge of the executive should attend the court. If they can not, they shall appoint the executive staff to attend the court." In the practice of administrative suit in China, if government department is indicted, it often does not appoint its staff to attend court. The absent of executive staff makes trouble to facts finding. Some of the executive branch just sent lawyers to attend court. We can figure out easily that the executive does not take administrative suit seriously. So the new APL stipulate an obligation of the executive to attend the court.

Based on the experience of two years' administrative suit lawyer, the author often participating in administrative suit as agent of executive branch. In the case of the absence of the executive staff, the author

often cannot answer the judge's inquiry because it's impossible for agent to understand things that are not recorded in the case file. In this case, as a lawyer can only remain silent. It is very embarrassing. So it makes positive significance to stipulate the obligation of the executive staff to attend the court. But this positive significance is limited.

8. ADMINISTRATIVE RECONSIDERATION ORGAN AS THE DEFENDANT IN ADMINISTRATIVE SUIT

In China, interested person may apply to a higher level administrative organ or to an administrative organ as prescribed by the law or regulations for reconsideration. Anyone who refuses to accept their consideration decision may bring a suit before the people's court, an interested person may also bring a suit directly without reconsideration.

In accordance with the provisions of the old APL, If the organ that conducted the reconsideration sustains the original administrative act, the administrative organ that undertook the act initially shall be the defendant; if the organ conducted the reconsideration has amended the original administrative act, the administrative organ which conducted the reconsideration shall be the defendant.

In the practice of administrative suit, the organ that conducted the reconsideration often sustains the original administrative action in order to avoid being the defendant in administrative suit. It's seriously violated the purpose of the Administrative Review System. So the new APL made appropriate changes. The new APL stipulates if the organ's reconsideration sustains the original administrative act, both of the organs shall be the defendant.

Before the new APL making such modifications, academic debates on this issue are fiercely. Some scholars do not support such modifications, because they consider the administrative reconsideration system as quasi-judicial acts, and the organ that conduct the reconsideration as a neutral authority to rule on administrative disputes. On the contrary, some scholars believe that the administrative reconsideration system is an internal supervision system in the executive power. The writer agrees with the latter view. The organ that conducted the reconsideration and the administrative organ that undertook the administrative act initially is all executives, so it's difficult for the organ conducted the reconsideration making a fair ruling. The practice of China's administrative reconsideration has proved this point. So this change in the new APL is positive. Such a provision could make a real difference for administrative reconsideration and reduce the burden on the courts. And there are distinct advantages for administrative reconsideration. For example, the applicant is not required to pay a fee.

CONCLUSION

Although there is some progress in new APL, but these advances are very limited. I’m pessimistic about that the new law could break the plight of China’s administrative suit. Even so, I still hope that China’s courts have entrepreneurial spirit and actively promote administrative suit. Because administrative suit has a very important significance for the realization of China’s “rule of law”. China’s administrative power should be strictly restricted by the law and this is only way for China to achieve the rule of law.

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