Review of Administrative Decisions of
Government by Chinese Courts

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*The Administrative Procedure Law of the People’s Republic of China* (hereinafter referred to as APL) and the relevant *Interpretations of the Supreme People’s Court on Some Issues Concerning the Implementation of the Administrative Procedure Law* (hereinafter referred to as the Judicial Interpretations of the Supreme People’s Court) define the jurisdiction, trial proceedings and power of judges concerning the administrative litigation in China.

I Jurisdiction—the court exercises overall jurisdiction over government decisions, but with exceptions

The administrative litigation system of China was established out of nothing, and the scope of administrative cases that can be accepted by the courts is expanding too. Before the implementation of APL in 1990, a plaintiff can only bring an administrative lawsuit according to the provisions of special enactments and proceed with it according to the provisions of the Civil Procedure Law of the People’s Republic of China. The scope of cases that can be accepted by courts was rather narrow at that
time. Only suits against government decisions which are clearly listed in the law can be accepted by the court for handling.

APL brings a change to such situation. The title of the Chapter II is “Scope of Accepting Cases”. In order to avoid the possible omission by simple listing, Article 2 of the Law makes an general provision that “A Citizen, A legal person or other organizations have the right to litigate a lawsuit to the people’s courts in accordance with this Law once they consider that a concrete administrative action by administrative organs or personnel infringe their lawful rights and interests.” Article 11 of the Law provides 7 kinds of suits that the people’s courts shall accept in any of the following specific administrative acts: administrative sanctions, compulsory administrative measures, infringement upon one’s managerial decision-making powers, refusal by an administrative organ to issue a permit or license, refusal by an administrative organ to perform its statutory duty of protecting one’s rights of the person and of property, acts of not issuing pension according to law or illegally demanded the performance of duties. And from the provisions made in article 11 item (8), we may say that the people’s courts shall accept almost all the administrative suits about the infringements on the rights of the person and of property by the governments in China.
Yet, Article 12 of APL also provides that the people’s courts shall not accept the suits against the following 4 kinds of government decisions: (1) acts of the state in areas like national defense and foreign affairs; (2) administrative rules and regulations with general binding force formulated and announced by administrative organs; (3) decisions made by the administrative organs on awards or punishments for their personnel or on the appointment or relief of duties of its personnel; (4) specific administrative acts that shall, as provided by law, be finally decided by the administrative organ.

Generally speaking, as far as the scope of accepting cases is concerned, many judges and scholars hold different opinions on the 4th provision that the government has the right to make final decision on certain issues so as to avoid the judicial review. After China’s accession to WTO, many laws which give the administrative organs the right to make final decisions are amended. For example, the Patent Law, amended in 2000, and the Trademark Law, amended in 2001, delete the provisions which give the right to the patent review committee and the trademark review committee to make final decisions. Nowadays, if a party refuses to accept the decisions made by the above mentioned review committee, he can file an administrative lawsuit. In China today, only a few laws, like 2 or 3, still make the provisions that the government organs have the right to make
final decisions under very special conditions.

Also about the scope of accepting cases, most arguments concentrate on the understanding of sub-paragraph (2) of Article 12. The reason why the arguments focus on this paragraph is because the administrative proceeding in China only examine the specific government decisions (i.e. specific administrative acts), and it will not examine an abstract administrative act directly. However, there are always different views on the difference between an abstract administrative act and a specific administrative act. Different people have different understanding on the terms provided in Article 12 of APL of “decisions and orders with general binding force formulated and announced by administrative organs”. For example, a government organ announces a decision to collect an extra fee of RMB100 yuan for each vehicle entering into a historic site under protection. In China, this government decision is deemed as an abstract administrative act because it is not aimed at a certain person, and it is generally binding and can be applied repeatedly. Therefore, the residents nearby can not bring a suit against this decision. However, it doesn’t mean that the court can not review the lawfulness of this decision. When a resident pay the money after drive a car into the site, he can make a claim against the fee-charging act; or make a claim against the government’s decision not allowing him to drive his car into the site after he has been
rejected to enter the site. When the court review the lawfulness of the
government decisions of these two kinds which are called specific
administrative acts by the scholars, it is inevitable that the court has to
review the decision of the government on the collection of the RMB100
yuan.

II Handling Procedures

In addition to the scope of accepting cases, APL also makes provisions for
the qualification of the plaintiff and the defender, the conditions for a party
to bring up a suit, the criteria for a court to accept a case, the handling
procedures and the varieties of judgment and ways of making a judgment.

A court in China is usually established with criminal, civil and
administrative tribunals for handling criminal, civil and administrative
cases respectively. In civil proceedings, a judge will usually adopt the
adversarial system, which means, he will not take the initiative to seek
evidence, in stead, he will ask the plaintiff and the defendant to bear the
burden of producing evidence for their claims. But in administrative
proceedings, the court will adopt the mode which is actually a
combination of the adversarial system and the inquisitorial system. What
has been considered by the Chinese legislature here is that, as compared
with the government organs which have free access to the strong administration powers, the plaintiff of an administrative litigation is usually put on a much weaker position, especially when most of them are poor farmers. If a court handles an administrative case totally on a neutral standing without seeking evidence actively, and fully rely on finding the truth trough the oral debate and competition carried out by the plaintiff and the defendant before the court, the seemingly-fair institutional arrangement will put the plaintiff in a very disadvantageous position. Therefore, Article 5 of APL provides that “in handling administrative cases, the people’s courts shall examine the legality of specific administrative acts.” This means, even if a plaintiff can not substantiate his claim, where there is a violation of law in the government’s decision, the court shall not back up the government’s decision. For example, a plaintiff comes to a court claiming that a penalty imposed on him by the government was too harsh. He wants the court to mitigate the penalty for him. During the litigation process, due to his limited legal knowledge, he does not point out that the government also violates relevant statutory procedures. The court, however, after its review, finds out that although the claim of the plaintiff about the too heavy penalty is untenable, the government did violate the legitimate procedures when making the decision. Under such circumstance, the court may still repeal the government’s decision on the ground that the government has breached
the proper procedures, although this point has not been brought forth by the plaintiff in his claim.

One thing to which special attention shall be given is that in China, it is not the plaintiff that needs to prove that a government’s decision is against the law; it is the government organ charged that has to prove the legality of its decisions. If a government organ can not prove that its decisions are lawful, Normally the decisions will be presumed to be against the law. Article 32 of APL provides that the defendant shall bear the burden of proof for the specific administrative act he has undertaken and shall provide the evidence and regulatory documents in accordance with which the act has been undertaken. Many Chinese scholars believe that such inversion of the burden of proof is a special feature of China.

Considering that the administrative cases may concern the important issue of application of laws, all administrative cases are handled by a panel of judges instead of a single judge. However, some scholars do suggest that for simple cases, summary procedures may be tried, and the cases can be handled by a single judge. When the professionalism of judicial practices is maintained, in order to realize the democratization in judicial system, improve the understanding of the citizens on court practices and their supervision on the trial procedures, jurors may be invited to attend in a
collegial panel of the court. But generally speaking, jurors can only take part in the handling of cases of first instance.

In principle, all administrative cases of first instance shall be heard on an open court. The parties involved shall exchange evidence before the court session, and carry out an oral debate later before the court to present their opinions and claims. Up to now, there is no such provision which requires a prosecutor to attend an administrative proceeding. However, many people have suggested that the laws shall be amended, and the people’s procuratorate shall be authorized to attend the administrative proceeding, especially in the administrative litigation for public welfare. It may play the role of a plaintiff to start an action.

It has long been a headache for judges and scholars to determine who is qualified to become a plaintiff in an administrative lawsuit. The provisions in laws as far as this is concerned are clear in words yet obscure in terms. Article 2 of APL provides that “if a citizen, a legal person or any other organization considers that his or its lawful rights and interests have been infringed upon by a specific administrative act of an administrative organ or its personnel, he or it shall have the right to bring a suit before a people’s court.” Article 12 of the Judicial Interpretations of the Supreme People’s Court also provides that where a citizen, a legal person or any
other organization that has a legal interest relation with a specific administrative act is not satisfied with the act, he or it may bring an administrative lawsuit according to law. Such provisions can solve problems for most cases as far as the qualification of the plaintiff is concerned. For example, if a resident thinks that a house built by his neighbor upon the approval of an administrative organ affect the ventilation and lighting of his own house, he may bring a suit as a plaintiff; business operators may become a plaintiff because their right to fair competition is infringed upon due to the monetary subsidies paid by the government to certain persons. But people are still bothered by the terms in Article 12 of the Judicial Interpretations of the Supreme People’s Court. How to interpret the term of “has a legal interest relation with a specific administrative act” is quite a problem. For example, can the parent of a deceased son make a claim to the court, as a plaintiff, that the marriage between their son and their son’s wife is invalid because their marriage registration with the civil department violates the law; can the travelers from the north of China who go to spend their winter holidays in the south of China make a claim to the court, as a plaintiff, that the government’s approval to establish entertainment facilities in the natural protection zone is in violation of the law? Can an economic professor sue the departments of finance because his request, out of education or research purpose, to the departments of finance at the provincial level throughout the country to
provide to him the local fiscal expenditure information in the form of the format designed by himself is turned down by them, notwithstanding he may download the relevant information from the government’s website? In such cases, people always have different opinions with regard to the qualification of the plaintiff. It is very difficult to reach agreement as this is concerned.

In China, the parties to an action may submit their demand by themselves or through attorney. In some places, there are examples that a legal demand is submitted to the court using electronic technologies (Internet), but is not popular. The legal demand can be submitted both in written form and oral form. If it is the latter, the clerk of the court will be responsible to make a record. According to the laws of China, the court will exempt a litigant from his legal fees if he is in economic difficulties and the State will provide to him an attorney free of charge under a special legal aid program. Actually, as compared with their counterparts in the western countries, parties to an action in China are very lucky because what they need to pay for the suit is so cheap that one can almost overlook it. Sub-paragraph (5) of Article 13 of the Measures on Legal Fee Payment enforced in 2006 provides that a fee of RMB100 yuan (about 15 U. S. Dollars) will be charged for administrative cases concerning trademark, patent or maritime affairs, and a fee of RMB50 yuan (about 8 U.S. Dollars)
will be charged for all other administrative cases. This is to say, for most cases, the fee paid by a litigant to the court is almost the fee a very common person paid for one day’s living.

After a case is brought to the court, the court has the right to interrogate the government organ which is a not defendant of the case for relevant evidences which the plaintiff can use. The defendant of the case shall also provide all evidences to the plaintiff through the evidence exchange procedure before the court session. According to Article 1 of the Provisions of the Supreme People’s Court on Several Issues Concerning Evidences in Administrative Suits, if a government organ charged fails to provide all the evidences and legal documents on the strength of which its decisions have been made within 10 days since the day it receives the copy of the statement of complaint from the plaintiff, the decisions made by it will be deemed as having no correspondent evidences.

After a litigant brings a suit, whether the relevant administrative decision will still be executed depends on the nature of the case. Article 44 and 66 of APL provides that generally, during the time of legal proceedings, execution of the specific administrative act shall not be suspended. However, if a court believes that execution of the specific administrative act will cause irremediable losses and suspension of the execution will not
harm public interest, the court may deliver an injunction ordering the suspension of the execution of the decision. It is a similar practice as preliminary injunctions or provisional measures taken by courts of other countries. APL also provides that, if a plaintiff brings a suit, the court will no longer accept the application of the government organ for compulsory execution of a decision. This, in fact, suspends the execution of the decision made by a government organ which is not vested with the power of compulsory execution during the time of legal proceedings. The rights and interests of the plaintiff are therefore protected in a more effective way.

III  Powers of Administrative Judges

When handling an administrative case, the judge usually will not apply the international treaty directly. He will, however, adopt the “doctrine of consistent interpretation” to address the problem of applying international treaties in China. Article 9 of the Provisions of the Supreme People’s Court on Several Issues Concerning the Hearing and Handling of Administrative Cases on International Trade reiterates this principle: where there are two or more reasonable interpretations exist for a specific article in the laws or administrative regulations applied by the people’s court for handling administrative cases concerning international trade, if
one of the interpretations is consistent with the relevant provisions in an international treaty concluded or acceded to by the People's Republic of China, then such interpretation which is consistent with the relevant provisions in the international treaty shall be applied with exception of those on which China has made reservations.

In order to further clarify the rules and order of priority in application of laws, the Supreme People’s Court, in light of the relevant provisions in the administrative procedure law and legislation law, made provisions in 2004 in the Minutes of the Colloquium on Application of Laws and Regulations in Hearing and Handling of Administrative Cases to the effect that the people’s court shall hear and handle an administrative case in compliance with laws, administrative regulations, local decrees, autonomous decrees and special decrees and with reference to rules. When referring to a rule, the court shall examine the validity and lawfulness of the rule. Only the valid and lawful rules can be applied. This means: the court shall review the rules formulated by the departments subordinate to the State Council and other local governments before applying it. Only when it is sure that those rules are in compliance with the laws and regulations, can the court apply such rules.

The administrative organ of China is only vested with the right of final
interpretation over the administrative regulations and rules formulated by
themselves, and they don’t have right to interpret the laws enacted by the
National People’s Congress. Citizens usually can not bring a suit against
the legality of the administrative interpretations made by the
administrative department directly, because such administrative
interpretations are usually regarded as “abstract administrative acts” as
discussed in the first part. But the court still have the right to, indirectly,
while not directly, to carry out review on the administrative interpretations.
Only when these administrative interpretations are in compliance with the
basic principles of the laws and the interpretation rules will the court back
up such interpretations. And, of course, for some interpretations which
carry important government policies, unless it has sufficient reasons,
usually, the court will not reverse the interpretations made by the
administrative organs.

The review on the administrative discretion is another difficult job for the
court to do. On one hand, the court needs to ensure its lawfulness and
reasonableness, on the other hand, the court needs to avoid over
interference in the administration carried out by the government on social
affairs. Article 54 of APL provides that if a government abuses its power
in making a decision, the court may annul or partially annul the decision.
The court will usually judge from the following aspects whether a
government decision has constituted the abuse of power: whether the purpose of making the decision can be justified; whether relevant factors have been properly evaluated; whether a same decision is applied to the same circumstance or there is different decision for different circumstance; whether the penalty is too heavy or too mild; or whether the proportion principle is violated, etc. For example, a citizen built a house 10 years ago without obtaining a permit. According to the provisions of the laws, the government organ may either impose a fine on him and order him to get a permit later or demolishes the house directly. These are, in nature, at the discretion of the administrative organ. However, the relevant government organ didn’t handle the case until recently when the city is undergoing demolition for reconstruction. In order not to make compensation for the demolition of this house or to make less compensation for this house, the government makes its decision to demolish the house. The court holds that the government makes such decision years after the house has been built when the place where the house is located is going to be demolished for reconstruction, the existence of this house didn’t affect the planning of the city, the purpose of the decision to demolish the house is inconsistent with the purpose of the provisions in relevant city planning laws, and the purpose of the decision is not to make compensation or make less compensation…therefore, the court determine that it is not reasonable for the government to make this decision and the decision constitutes the
abusing of powers, and in the end it repeals the government’s decision.

Except annulment of an administrative decision or dismissal of a claim, Article 54 of APL also provides for other means of judgment. In some cases, the court can change the government decision directly. For example, two men fight with each other and each bears almost same responsibility. The police detain one of them and impose a fine on the other without detention. The man to be detained brings a suit before the court. The court holds the opinion that the two persons are not treated in the same way, and it may change the detention into a fine directly. But, the court, of course, will consider the reasons and the background by which a decision was made when it tends to change the decision. It is prohibited for the court to make a new decision which put the plaintiff in worse situation.

Usually, the judgment made by a court of quashing a decision takes effect retroactively when the original decision was made. Once a court annuls a government decision, the decision is deemed as not existing from the very beginning, the decision totally loses the efficacy, and the plaintiff’s rights and obligations automatically resume to what they were before the decision is made. The judge will not fix another time for the government decision to become null and void. But, under rare circumstances, when the judge makes a judgment of repeal or annulment of the decision, he will fix
a time from which the repeal or annulment operates and he will make it very clear in the judgment paper that his judgment on the repeal or annulment of the decision takes effect only after the fixed time and will not take effect retroactively when the decision was made. For example, a plaintiff thinks that a business license issued to a third party by the government has led to the infringement upon his exclusive franchise. He makes a claim to the court for repealing the government decision by the court. After its review, the court holds that the claim of the plaintiff for repealing the government decision can be established. The government has violated the law in issuing the license; therefore, it shall be repealed. However, the third party has paid the relevant fee, and has started his business operation after he gets the license and before it is repealed by the court. Such operation, since it is authorized, is legal. Under such circumstance, the court may confirm that the government decision shall be repealed since the day fixed in the judgment, the business operation of the third party before the license is repealed is legal and effective. But after the court makes the judgment of repeal of the decision, he shall not continue to operate and the original license shall become null and void. In cases like this, judges will fix a time from which the annulment operates.

On the other hand, in some cases, even if the government decision is against the law, but if such decision has earned interest for the third party
which, under the rule of legitimate expectation protection, shall be protected according to law, and the rights of the plaintiff can not be restored to its original state, the judge may enter into a judgment ascertaining that the government decision is against the law without repealing it but ordering the government organ to take remedy measures or compensate the plaintiff for his loss.

Administrative judges have many ways to force a government organ to execute the judgment. Article 65 of APL provides that if the administrative organ refuses to perform the judgment or order, the court may take the following measures: to inform the bank to transfer from the administrative organ’s account the amount of the fine that should be returned or the damages that should be paid directly; or to put forward a judicial proposal to the administrative organ superior to the administrative organ in question asking the superior organ to deal with the matter and investigate the relevant persons for criminal liabilities. But according to what is happening in the country, there are cases that the administrative organ delays in performing the court’s judgment.

In the whole, although the administrative litigation system of China was established not very long ago, it has played a very important role in protecting the rights and interests of the citizens, supervising the
government’s acts, and pushing forward the nation’s progress in establishing a state governed by law. In China, this ancient country with long history, the establishment of this system is an important milestone in its legal construction. In the next several years, China will amend and improve APL to better promote the development of the administrative litigation system. China will, based on the specific situation of the nation, learn from the experience of other countries on the development of the administrative litigation system and we hope, we will have more opportunities in the future to strengthen the communication and cooperation with the administrative courts and tribunals of other countries.