

AUFsätze

The Role of Courts in Settling Disputes between Society and Government

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1. Introduction

One of the new features in Chinese society brought about by the reform process of a quarter of a century is the method of making complaints and settling conflicts. The old ways have not disappeared by any means¹ but new mechanisms have been added and are becoming more prominent. This relates not only to commercial or civil disputes, but also to disputes between citizens or firms on the one hand, and governmental agencies on the other.

That law-courts are involved in settling this kind of disputes is one of the more surprising phenomenon in present China. Not that the people would sue the government in any exaggerated manner: Of the about six million cases Chinese courts had to deal with in the last year, only 2 % were related to a conflict between citizens and administrative agencies.² However, the access of persons aggrieved by an administrative decision to the courts has enriched Chinese legal culture with a new ingredient: The traditional and seemingly unchangeable *guan guan min* (that the officials govern the people) has been supplemented by an attempt, as feeble as it may be, to *min gao guan* (to letting the people sue the officials).

From the very beginning of conceiving a system of administrative litigation the idea of social stability had been pre-eminent. One scholar writing in 1987 ascribed to administrative litigation two functions, both contributing to social stability: (1) By applying proper legal procedure to the request of a person aggrieved by an administrative decision, the courts may release resentment and discontent through providing more effective remedies as the traditional way of *shangfang* or *laifang-laixin* (making complaints and appeal for help by the higher authorities by making visits or sending letters). In other words: The frustration reflected in the saying that "the officials sue the people is

just normal, but there is no effective way for the people to sue the officials"³ could be reduced; (2) by reviewing and correcting illegal activities of the state agencies by a specialized device outside of the administration the courts may achieve unity of the administrative legal system and protect administrative efficiency.⁴

After a few years of limited experimentation the breakthrough for administrative litigation came in 1987 when the Law on Administrative Penalties for Public Security went into force. Since police-detention and especially fines by the police are abundant, the provision of this law that in the case of a person punished not agreeing to this decision is entitled to bring a lawsuit to the court (art. 39), opened the way to judicial review concerning the decisions of that administrative agency closest related to the everyday life of the people. Still today, "*min keyi gao guan*" to a great deal means suing the police because of illegally imposing administrative sanctions.

The importance the Chinese leadership did ascribe to administrative litigation is reflected in the fact that in the legislative history of the PRC it was only the third time that a draft-law was published for the general public: The drafts of the 1954 and 1982 constitutions, and in November 1988 the draft of the Administrative Litigation Law (ALL). When the law was finally promulgated in 1989 and went into force in October 1990 the scope of the courts' jurisdiction in administrative matters broadened considerably, and succeeding "Interpretations" of the Supreme Court in 1991 and 1999 continued to open the gate to the courts even further. In the following I will first summarize the basic structure or features of the system of administrative litigation as based on the law of 1989 and the Supreme-Court-Interpretations (2), then deal with the main types of conflicts involved (3), and finally summarize achievements and problems of the role of the courts in settling administrative disputes (4).

2. Scope of Administrative Litigation

The central notion of any system of administrative litigation is the scope of appeal or the courts' jurisdiction. The legislator has to answer the question: Who may sue which administrative decision? In continental European countries like France and Germany "access to administrative courts is accorded in all public law disputes ..." (art. 40 I of the German Law of Administrative Court Procedure), thus to all disputes between citizens and the government, as long as the plaintiff claims that the contested administrative act unlawfully infringes on his or her rights (art. 113 I).

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¹ See e.g. Kevin J. O'Brien/Lianjiang Li, The Politics of Lodging Complaints in Rural China, in: The China Quarterly 143 (Sept. 1995), p. 756 et seq.

² As compared to nearly 25 % in Germany (including cases concerning fines [Bußgeldverfahren], financial and social litigation).

³ Guan gao min yige zhun, min gao guan mei you men.

⁴ YU An, Social Stability and Administrative Litigation (Shehu anding yu xingzheng susong), in: Fazhibao, Sept. 16, 1987.

Such a “general-clause” has not been established by the Chinese ALL. Instead it takes the approach to single out for review only certain types of “concrete administrative acts”.⁵ “Concrete” means that the administrative act is directed against a specific person outside the administration. These reviewable administrative acts are enumerated in art. 11 sec. 1 of the ALL; sec. 2 provides in a catch-all-clause that other laws may allow for further types of concrete administrative acts to be sued in the courts. The enumeration contains the following types which also may be said to represent the types of conflicts between society and government which are reviewable in the courts: (1) Administrative penalties⁶ such as detention, fines, revocation of licences or an order to suspend production or business activities; (2) administrative compulsory measures⁷ as restricting personal freedom (as shelter for investigation) or the movement of property (as sealing up or freezing of property); (3) administrative acts infringing on the lawful business autonomy⁸, permitting suits against agencies illegally interfering in enterprise operations and management; (4) administrative acts denying licences or permits, as e.g. denials of business operating licences; (5) refusal by an administrative organ to perform its statutory duties, as to protect personal or property rights; (6) failure to properly pay pensions; (7) requests by administrative authorities to perform certain obligations to be in breach of the law, which means that all duties imposed must have a legal basis.

According to the catch-all-clause of art. 11 sect. 2 the courts “may hear other administrative cases as provided for by law.” The only example I could find in this regard are the rules concerning notaries promulgated by the Sichuan People’s Congress; according to these rules notarial decisions (as for example a certification of a last will) are reviewable by the courts, without respect to the fact that the relevant State Council regulations (the Regulations on Notaries) do not contain such a provision.

According to Chinese law these decisions or concrete administrative actions are possible objects of judicial review, they concern the possible conflicts in which the courts may play a role. Since these types of decisions are all related to property rights⁹ and personal rights¹⁰ other conflicts between citizens and government agencies - not related either to *renshenquan* nor to *caichanquan* - cannot be reviewed by the courts. In order to find out where the courts cannot play any role in conflicts between society and government one only has to look into the second chapter of the Chinese constitu-

tion which deals with “Fundamental Rights and Duties of the Citizens”, and to compare the rights mentioned there with the enumerations in the ALL. So one will find, that interference of governmental agencies in the freedom of speech, assembly, publication, association, demonstration and of religious belief as well as in the right to work or the right to get an education are not covered by the jurisdiction¹¹ of the ALL.

Since the promulgation of this law, efforts have been undertaken to make administrative litigation more relevant to actual conflict solution, either by clarifying the statutory scope of jurisdiction or by extending the category of persons being capable of becoming a plaintiff and the organizations of becoming a defendant. In its “Opinion”¹² of 1991 “Concerning the execution of the ALL” the Supreme Court made clear that certain police decisions the courts had been reluctant to accept, as “detention for investigation”¹³ and “re-education through labour”¹⁴ as well as decisions of the birth planning administration are covered by the jurisdiction clause of the ALL. These Supreme-Court-Opinions further clarified that decisions of the land-administration concerning property-rights in land and mineral resources are reviewable by the courts.

Through its 1999 “Interpretations” of the ALL, the Supreme Court has continued to raise the relevance of administrative litigation by defining the capacity both of the plaintiff and the defendant. According to the ALL a person has standing to enter an action against an administrative agency as long as he or she claims that the concrete administrative act of this agency “infringed his lawful rights and interests”¹⁵ (art. 2). The Supreme Court clarifies in its “Interpretation” that also such persons have standing who have “a legal interest”¹⁶ in a concrete administrative act not immediately directed against them. This is e.g. relevant for neighbouring rights¹⁷ and for the right to fair competition.¹⁸ Concerning the last one, a court in Fujian province recently decided a case in which the plaintiff sued a city government because it instructed a corporation (owned by the city) to allocate certain raw materials preferentially to certain factories. The court held the opinion that this kind of business-promotion violated the principle of fair competition and thus the plaintiff’s right of business autonomy (*jingying zizhuquan*).¹⁹

On the other side, the 1999 Interpretation also clarifies the question of who can become a defendant in administrative litigation. According to the ALL the

¹¹ Shouan fanwei.

¹² Yijian.

¹³ Shourong shencha.

¹⁴ Laodong jiaoyang.

¹⁵ “Qinfan qi hefa quanyi”.

¹⁶ Falü shang de lihái guanxi.

¹⁷ Xianglinquan.

¹⁸ Gongping jingzhengquan.

¹⁹ Bulletin of the Supreme Court 2001, p. 211 et seq.

⁵ Juti xingzheng xingwei.

⁶ Xingzheng chufa.

⁷ Xingzheng qiangzhi cuoshi.

⁸ Jingying zizhuquan.

⁹ Caichanquan.

¹⁰ Renshenquan.

defendant is the administrative agency²⁰ which has made the concrete administrative act. For a long time it was held that schools and universities cannot be qualified as administrative agencies. A judgement of a court in Beijing-Haidian came to a new understanding and regarded a university as a proper defendant in administrative litigation. I quote from this judgement:²¹ "In the present situation in China the law confers to certain institutions (*shiye danwei*) and social associations (*shehui tuanti*), although they do not qualify as administrative agency, the right to exercise certain administrative competences. Appeals concerning conflicts resulting from exercising administrative functions are of an administrative and not of a civil nature. Even if the ALL calls *xingzheng jiguan* as defendants it serves to solve social conflicts and to maintain social stability when such *shiye danwei* get the capacity to become defendants in administrative litigation." This judgement was included into the Supreme-Court-Interpretation of 1999 and thus became generally applicable law.

Lower courts even attempted to break through the statutory framework of jurisdiction in order to protect rights which are neither *renshenquan* nor *caichanquan*. In 1997 an intermediate court in Fujian decided a case in which a teacher of a middle school appealed against the personnel office²² of a city requesting to cancel a decision to prematurely retire him and to re-employ him. The court considered this decision to be in violation of the plaintiff's constitutional right to work²³ and held that it is authorized to review this decision.

A similar case, in which it is very problematic whether the court has jurisdiction is that of a handicapped student suing a commercial school because of infringement of his right to receive an education:²⁴ The plaintiff, being handicapped after suffering polio, participated in the entrance-examinations for vocational schools in Henan. Although he received higher marks than needed for entering the school of his choice, he was not accepted because of his physical condition. The plaintiff claiming that his right to an education provided for in the Handicapped Persons' Protection Law was violated, brought an administrative law suit requesting the court to reverse the decision of the school. After the court had accepted the case, the school voluntarily reversed its decision and accepted the plaintiff as a student.

²⁰ Xingzheng jiguan.

²¹ Bulletin of the Supreme Court 1999, no. 4, p. 141.

²² Renshiju.

²³ Laodongquan.

²⁴ Supreme People's Court Legal Research Section (Ed.), Renmin fayuan anlixuan (Collection of Cases of People's Courts), vol. 25 (1998), no. 65.

3. Main Types of Conflict

Let us look now in a more systematic way at the types of conflict which actually are of concern to the administrative tribunals of the courts.

When the ALL was drafted in the second half of the eighties the discussion about the need for such a law concentrated mainly on three areas of widespread conflict: Conflicts concerning administrative sanctions such as fines, detention and revocation of permits; conflicts concerning local cadres at will interfering with agricultural take-over-contracts, collecting fees and assigning work; and thirdly conflicts regarding the denial of business operating licences or the slow treatment of applications.

Still today these three areas of conflict represent a great deal of the administrative cases pending at Chinese courts. Of the about 87,000 cases the courts had to deal with in the year 2000 the share of public security and land administration was about 15 % each, followed by city planning with 10 %, industry and commerce administration, tax administration with 3 to 4 %, birth planning and health administration about 2 %.²⁵ Unfortunately, the statistics available from Chinese publications only indicate the origin of the disputed administrative act, they say nothing about the legal nature of these acts. However, it is clear that the overwhelming majority of administrative acts in question are still administrative sanctions. This is reflected by the cases collected in the Selected Cases from the People's Courts series,²⁶ which is edited by the research office of the Supreme Court since 1992. Looking only to the cases collected in the twelve volumes (27 to 38) for the last three years (1999 to 2001), we find that from the 153 cases more than 30 % concern administrative sanctions,²⁷ about 12 % are related to rights to land-property, and about 10 % relate to the neglect of properly exercising statutory duties as protecting personal or property rights or issuing licences or permits, as denials of business operating licences and even the decline to issue a permit to travel abroad. Next follow cases concerning infringement of the statutory business-autonomy of industrial enterprises or agricultural take-over-contracts. Other cases refer to the request of administrative agencies to fulfil obligations which have no basis in law, e.g. an incorrect tax-assessment or compelling peasants to payments not required by law.

Throughout the 1990s²⁸ the courts in dealing with administrative cases emphasized their function to stabilize economic reforms by consequently reviewing

²⁵ Falü nianjian 2001, at 1258.

²⁶ Renmin fayuan anli xuan.

²⁷ The agencies involved are not only the police (*gong'an ju*), but also agencies for industry and commerce, public health, birth planning, traffic, environmental protection etc.

²⁸ For the following: Falü nianjian 1991, p. 21; 1993, p. 84; 1994, p. 100; 1995, p. 96; 2001, p. 165.

cases concerning infringements of business-autonomy, in other words, the courts rejected infringements of administrative agencies, mostly the Agency for the Administration of Industry and Commerce,²⁹ in the rights of the enterprises to make decisions on production, management, investment, marketing etc. By their reviewing work the courts lay claim to assist the large and medium state enterprises to transform their "business mechanism", in other words: to help them to adjust to market behaviour.

The courts further contributed to strengthening market structures by stopping behaviours like establishing cartels³⁰ or arbitrarily imposing fines and fees³¹ on enterprises. In 1994, the Agency for the Administration of Industry and Commerce of Qingdao lost a suit to 472 *geti gongshanghu*-plaintiffs who fought successfully against the decision of the *gongshangju* to strip them of their business-licences (*jingying zhizhao*).³²

Since the middle of the 1990s, cases concerning city-construction or city-planning have grown strongly. Also cases concerning arbitrary infringement of personal freedom through administrative detention, detention for interrogation and re-education through labour are growing in number by an average of 10 to 20 % percent yearly. Recently, cases on social insurance payments and minimum living fees have become more prominent.³³

More spectacular, however, are cases concerning relationships between students and colleges as well as between teachers and school-administrations. Here the limits of the jurisdiction clause of art. 11 ALL are attempted to be overcome, as I illustrated by the cases of the teacher and the handicapped student.

A special kind of litigation relates to administrative torts based on the State Liability Law³⁴ of 1994. Plaintiffs who suffer harm as a result of improper administrative actions have the right to claim compensation in tort. If damages are awarded, they are to be paid from the public funds of the administrative organs involved, possibly these organs can seek indemnification from the official at fault if he acted under intention or gross negligence. The State Liability Law adds to the authority of the courts over administration organs. Many cases aim at compensation because of illegal "detention for investigation" or "re-education through labour", at an illegal revocation of a licence or an order to suspend production, at illegal infringements of business autonomy or at compensating damages suffered because an agency did not fulfil its statutory duty to protect the property

or personal rights of a plaintiff. So, for instance, in May 1998 a Shanghai court compensated the bereaved of a person in police-jail³⁵ who died of illness because he did not receive medical treatment in due time.³⁶ The sums paid in administrative torts cases grew from 24 million yuan in 1992 to 170 million yuan in 1994. Although this seems to reflect a healthy development of the courts' controlling function, there are many problems with the execution of the State Liability Law, as I will show later on.

Whereas we can say that concerning illegal³⁷ actions of administrative agencies the State Liability Law makes available a legal system for attaining compensation, this is not the case when damage has been caused by an agency acting *legally*. How to deal, for instance, with the damages suffered by peasants and enterprises in the Jiujiang area when during the 1998 Changjiang flood disaster the government decided to drain off the water, having to accept the flooding of villages and small towns "in order to save Wuhan"? The State Liability Law does not apply. It also does not apply in a case where a city government in emphasizing environmental protection decided under a new local regulation³⁸ to close and afforest a quarry in which several companies have been awarded long-term licences by the city to exploit the stone material. Compensating damages caused by this kind of non-illegal acts is an open question. Some authors suggest to supplement the State Liability Law³⁹ accordingly, others are more in line with legal doctrine when requesting the promulgation of an extra State Compensation Law⁴⁰.

4. Problems and Achievements

Let me summarize the problems and achievements of the courts in dealing with citizen-government-disputes.

The Chinese novelist Ha Jin makes the protagonist of his novel "In the Pond" (1998) express his hope, that "though it was said that under heaven all crows are black, there had to be a place where he could let out his discontent and find justice." Do the Chinese People's Courts provide this role the man "in the pond" is dreaming of?

That the courts in the whole country during the last three years dealt with only 80 to 90,000 cases annually⁴¹ seems sufficient to justify the conclusion that administrative litigation as a legal instrument to pro-

²⁹ Gongshang guanliju.

³⁰ Luan she ka.

³¹ Luan fakuan, luan shoufei.

³² Falü nianjian 1995, p. 96.

³³ Falü nianjian 2001, p. 165.

³⁴ Guojia peichang fa.

³⁵ Zhi'an juliu.

³⁶ Renmin fayuan anlixuan 36, no. 64.

³⁷ Weifa.

³⁸ Difangxing fagui.

³⁹ Guojia peichangfa.

⁴⁰ Guojia buchangfa.

⁴¹ Less than the number of administrative cases the courts of the German State of North-Rhine Westphalia had to deal with.

vide judicial relief is not very successful. The reasons are manifold. First, there are the three "being afraid":⁴² Citizens and firms do not dare to sue, because they are afraid of retaliations by the agency sued; agencies are not willing to become defendants because they are afraid to lose authority, and courts hesitate to accept cases because they are afraid to spoil their relations with the government. These fears have their roots not so much in any old-fashioned psychology inherited from the past, but in the Chinese constitution which does not accept a separation of powers. The courts are therefore not only not independent from the executive but in practice very dependent, because they are funded by the government at the respective level and not directly by the central budget of the Supreme Court or the Ministry of Justice.

Secondly, more concrete problems of administrative litigation have to do with its normative structure as such. For instance, the problem of distinguishing between concrete administrative acts which are reviewable and abstract administrative acts which are not. This often means an escape for administrative agencies: They use the form of an abstract act, which in fact is directed to an ascertainable group of persons, therefore in substance a concrete act; however, courts, looking to the form, are reluctant to accept such cases. Here lies the main reason why the courts play only a very weak role in one of the most urgent problems in the countryside: the tax-burden of the peasants. Cases are rare because the local governments impose taxes or assign works⁴³ on the basis of legal documents which the courts regard as "abstract administrative acts", and therefore do not accept any lawsuits in these matters.

This problem also has to do with the insufficiency of substantial administrative law. The nature of the concrete administrative act has not been defined by law. There is no clear understanding of what could be defined as a general order (*Allgemeinverfügung*), which could be sued in court, and a normative act against which an action could not be brought. This in turn is related to legal doctrine which has not yet elaborated reliable criteria to differentiate concrete administrative acts on the one hand, generally binding acts, internal acts, and acts of a non-compulsory nature on the other.

The main defect in dealing with administrative tort cases is also due to the normative structure of the relevant law. According to the State Liability Law (see also art. 67 II ALL) compensation claims must first be arbitrated by the administrative authority and only then can they be taken to court. This is contrary to most other administrative cases (and of course any civil

claim for compensation) which can be taken straight to court.

Considering the results of administrative litigation we come across another problem. During the 1990s the tendency that the plaintiffs withdraw the lawsuit became more and more obvious. Roughly spoken, 30% of the judgments maintained the administrative decision, in 15% it was revoked, and about half of lawsuits had been withdrawn by the plaintiff and in some years even up to 60% did so. The reasons for this may be a change of mind in the person of the plaintiff, pressure and even intimidation by the defendant, suggestion of the court in order to please the defendant, but also the strategy of a plaintiff himself to bring a suit with the implied intention to induce the defendant to agree to an out-of-court settlement. *Si-liao* or "private settlements" of administrative disputes seem to be very common. They are often perceived as more favourable for the plaintiff, since the conflict may be settled fast and, above all, the plaintiff may spare a good deal of trouble with the agency in the future.

All these shortcomings and preferences should, however, not lead to the conclusion that the role of the courts in settling administrative conflicts can be ignored. On the contrary, in spite of all obstacles, this role has become more prominent during the last few years. Some Chinese research undertaken two years ago in Jiangsu⁴⁴ found out that the influence of the courts became more important in the difficult field of birth planning. Litigation here relates mostly to administrative penalties imposed without legal basis or ignoring any legal procedure. The courts have restrained the arbitrary application of excessive fines, interference in personal freedom, confiscation of property and of completely extra-legal sanctions like the brutal demolishing of the houses of couples having violated birth-control-regulations. Besides sanctions, the refusal to issue a "One-Child-Certificate"⁴⁵ became an object in birth-planning related litigation.

Concerning the protection of the autonomy of business management the courts have continuously quashed decisions of local governments interfering into the freedom of contract, in the rights of enterprises to market their products, to decide about their investments, to fuse with other enterprises or to hire or keep their managers. Here and in other citizen-government-relations administrative litigation has proved to be an effective instrument in providing judicial relief to citizens and enterprises. With the improvement of the quality of the court personnel, the further development

⁴² Sange pa.

⁴³ Tanpai.

⁴⁴ FANG Ning, SUN Jing et al., The call of reason: Research report concerning the circumstances in implementing the "Administrative Litigation Law (Lixing de huhuan: Zhongguo 'xingzheng susongfa' shishi xiankuang diaocha baogao), in: Dongwei faxue 2001, p. 301 et seq.

⁴⁵ Du sheng ziniu zheng.

of the scope of jurisdiction, a stronger estimation of judicial independence by the government and finally by constitutional reforms which will be a main task of the next decade, the institution of judicial review of administrative action will gradually consolidate. Besides this, the role of the court is not only reflected by actual treatment of cases but also by the influence they extend to the work of administrative agencies because of the sheer possibility that "*min gao guan you men*", "the citizens may get a place to find justice." Therefore it is sometimes mentioned in Chinese studies that administrative litigation happens more often in underdeveloped areas (like Henan and Xibu), whereas in more advanced areas administrative agencies have become more used to doing their work according to law. The days seem to be over when the law was perceived only as a means to control the people. Although it is true to conclude that what actually has been achieved is something of a drop in the bucket, nevertheless the courts are looked at more and more as the citizens' most necessary and most likely protectors.