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THE AMENDMENT OF THE ADMINISTRATIVE PROCEDURE LAW OF CHINA

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The amendment of the Administrative Procedure Law of the People's Republic of China should especially emphasize the principle of protecting citizens' legitimate rights and interests. It should establish this principle of completing the system of the administrative procedure. Regulations that do not meet the requirement of this purpose should be revised, such as extending the scope of jurisdiction, removing the restriction of qualifications of plaintiffs, increasing certain types of litigation, encouraging flexible methods of adjudication, raising the level of jurisdiction, simplifying the procedure of litigation, and adopting more stringent enforcement measures.

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I. PRINCIPLE OF THE AMENDMENT OF THE ADMINISTRATIVE PROCEDURE LAW

The Administrative Procedure Law of the People's Republic of China (promulgated in 1989 and effective in 1990) is greatly achieved in establishing the legal system of "people sue government (officials)," announcing the law-based administration, improving the system of administrative law, and promoting the protection of administrative counterpart since 1990. However, with the acceleration of legal system construction and economy development (promoted by various social reforms), how to make the protection of the civil rights more effective and how to amend the Administrative Procedure Law has become a hot issue.

The amendment of the Administrative Procedure Law is a significantly systematic project. The principle of the protection of citizens' legitimate rights and interests as the priority should be followed. Article one of the Administrative Procedure Law announced three purposes: (a) to ensure that the courts hear cases without delay; (b) to protect the legitimate rights and interests of citizens, legal persons, and other institutions, and (3) to monitor the executive to practice administrative power legally.

However, the administration influenced the judicial branch in the name of "to maintain and monitor the executive to practice administrative power legally in practice." The second purpose "to protect the legitimate rights and interests of citizens, legal persons and other institutions" was stressed less. The fundamental purpose of the Administrative Procedure Law is "the protection of the legitimate rights and interests of citizens, legal persons, and other institutions." The other two purposes shall be in a secondary position and be the approach and method to realize the primary purpose. The amendment of the Administrative Procedure Law shall be reflected in this aspect.

It is necessary to learn the advanced legal systems of other countries, which not only can comply with the requirement of globalization and Chinese opening policy, but also can be the driving force of the development of Chinese law. It is appropriate for a country to make law according to its traditions. Traditions, however, should not be the synonymy of unchanging rules. Inferences can be drawn from the experiences of others.[1]

[1] Rene David, 当代主要法律体系 (Les Grands Systemes de Droit Contempora), Zhusheng Qi trans., Shanghai Translation Publishing House (Shanghai), at 2 (1984).

After the Second World War, the trend of other countries' administrative procedure law systems lay in the following aspects: "(a) strengthening the protection of rights, (b) increasing the categories of litigation, (c) enlarging the scope of administrative jurisdiction, and (d) the judicialization of administration."[2] The first three aspects are guiding principles of further improvement of Chinese administrative procedure law. New development of other countries' practice reminds me more in accelerating Chinese legal reform.

In my view, the Administrative Procedure Law should be improved in the following measures: to extend the applicable scope of jurisdiction; to remove the restrictions of qualifications of plaintiffs; to increase certain kinds of litigation; to encourage flexible methods of adjudication; to raise the level of jurisdiction; to simplify the procedure of litigation; to adopt more stringent enforcement measures. Based on such arrangements, other countries' positive experiences can thus be appropriately applied to Chinese legal reform, and promote the protection of civil rights.

II. CONTENT OF THE AMENDMENT OF THE ADMINISTRATIVE PROCEDURE LAW

A. Extending the Scope of Jurisdiction of Administrative Litigation

The Administrative Procedure Law regulates its jurisdiction by listing different types of litigations in its provisions. As a result, the administrative counterpart in some cases cannot find legal grounds in the Administrative Procedure Law because some specific administrative actions are not covered by the list. Besides, there is also another problem regarding the administrative jurisdiction scope in that it could not cover all civil rights.

Political rights and education rights as confirmed by the Constitution could not be effectively tackled with in administrative litigation. If other law and regulations did not authorize the right of litigation, there would be a "vacuum of law" because no law (incl. Administrative Procedure Law) could protect the aggrieved party. According to the standard of the admissibility of cases of the Administrative Procedure Law, only specific administrative actions were included, and abstract administrative actions were not. Therefore, there were a large number of administrative actions that did not fall into the purview of the

[2] Zhifang Cai, 行政救济与行政法学 (一) (Administrative Remedy and Science of Administrative Law), vol. 1, San Min Book Co., Ltd. (Taipei), at 10 (1993).

Administrative Procedure Law. As a result, the citizens, legal persons, and other institutions' rights and interests could not be protected by the Administrative Procedure Law if their rights were violated by abstract administrative actions.

The Administrative Procedure Law employed the listing approach because at the time that it was promulgated, the administrative law had just been applied. It was difficult to recognize the scope of administrative litigation. Legislators listed special categories of litigation, so that the executors would not evade their duties. The practice of administrative law has well developed since then, both academics and the practitioners have a gradual recognition of administrative law. Therefore, it is a good time to expand the scope of administrative jurisdiction.

In my opinion, public law disputes (*öffentlich-rechtlichen streitigkeiten*) regulated in the Administrative Law of Germany could be a good reference for the amendment of the Administrative Procedure Law because it includes abstract administrative actions in its jurisdiction.[3] It employs the approach of "definition plus exclusion," so that all the disputes in the public law could be included in the administrative litigation procedure, as long as it was not explicitly excluded. In this way the injured party's chances of getting remedies by making claims in accord with the Administrative Procedure Law could be increased significantly.

In short, it is believed that the amendment of the Administrative Procedure Law should firstly regulate the scope of jurisdiction recapitulatively, and list the cases that are not supported by the Administrative Procedure Law. Therefore, all the cases that are in the scope of jurisdiction (while not explicitly in the list of exclusion) could be applied to the Administrative Procedure Law. In this way, the limit of the old listing approach and the shortage of non-uniform standards can be avoided. The scope of jurisdiction could be more unambiguous.

Furthermore, abstract administrative actions should be gradually included into the Administrative Procedure Law. The abstract administrative actions (represented by the lawmaking of administrative regulations) influenced the administrative counterpart greatly. However, the proceedings of lawmaking lacked of external review and participation. By the time it developed into the abstract administrative actions, or specific administrative actions, it is likely that the administrative counterpart has already suffered heavy losses. Those abstract administrative actions should be included into the Administrative Procedure Law, and the lawmaking actions of local government regulations and department decrees should also be included gradually. By expanding the scope of administrative jurisdiction, the legitimate rights of the administrative counterpart can be protected in time.

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[3] Verwaltungsgerichtsordnung der Bundesrepublik Deutschland (Law of Organization of Administrative Court of the Federal Republic of Germany), § 40.

B. Removal of the Restrictions of Qualifications of Plaintiffs

In the Administrative Procedure Law, three aspects are related to the qualifications of plaintiffs: article 2 on the right to appeal, article 24 on the scope of plaintiffs, and articles 37 to 41 about the proceedings of bringing and accepting lawsuits.[4] From years of practical experiences, it is shown that the regulations about qualifications of plaintiffs face problems in the following aspects: (a) The scope of plaintiffs was too narrow to protect the legitimate rights and interests of citizens, legal persons and other institutions; (b) due to lack of regulations about public interests litigation, and state interests and social public interests could not be safeguarded effectively. Therefore, the amendment of the Administrative Procedure Law should remove the restrictions of qualifications of plaintiffs, and add public interest litigation.

1. Expanding the Scope of Plaintiffs. — Expanding the scope of plaintiffs is the trend of administrative litigation as well as lawmaking requirement from long-term practical experiences. Taking other countries' regulations and experiences as references, it is appropriate to legally define plaintiffs as persons and institutions that are related to legal interests of the sued administrative actions. In this definition, the plaintiffs should include administrative counterpart.

The reason to initiate the administrative litigation relies on direct and indirect damages that administrative actions bring to administrative counterpart, including negative influences. It should also include in article 12 of the regulations in the Interpretations of Certain Issues related to the application of the Administrative Procedure Law of China: "If citizens who have legal interests of the specific administrative actions refuse to accept it, they are entitled to appeal for an administrative litigation." Considering the requirement of increasing public interests litigation, it is suggested that the Administrative Procedure Law should regulate that the qualification of plaintiffs of public interests litigation should not be subject to the restrictions stated above.

2. Including the Public Interests Litigation. — The actions of administrative institutions may harm state interests and social public welfare, but no direct and specific counterpart can bring a lawsuit against them. Therefore, regulations dealing with administrative public interest litigations are needed.

The procuratorial organ should be the leading protagonist, while others (incl. natural persons, legal persons, and institutions) shall play supporting roles. If the

[4] Ming'an Jiang (ed.), 行政法与行政诉讼法 (Administrative Law and Administrative Procedure Law), Higher Education Press and Peking University Press (Beijing), at 505 (2007).

administrative actions harmed state and social public interests, they should apply to the procuratorial organ for public litigation. If the procuratorial organ decided not to sue the administrative institutions because of objective and/or subjective reasons, other subjects may sue in their own names.

Considering complex problems that a public litigation might cover, no single subject can bring a lawsuit randomly. For example, in Germany, the sole exception of the plaintiff of injuries from administrative actions was *Verbandsklage* (the community litigation). If the administrative action was illegal and harmed certain recognized communities' interests, the community can be the plaintiff. However, such lawsuits were not regulated by their administrative procedure law or the rules of the administrative court, but by the precedents.[5] The community litigation can protect limited interests. For example, in environmental litigation of highway construction, the lawsuit is against increased expenses on noise cancellation, not on the protection of natural landscape.[6] Article 19 of the Constitution of Germany also defines the premise of subjective rights, which rigidly limit public litigation. As a result, the pure objective lawsuits are not easy.[7] The Federal Administrative Procedure Act of the United State did not regulate public interests litigation as well.

Public interests litigation was proposed by scholars (incl. Abram Chayes), and formed in precedents. These lawsuits are still immature and controversial.[8] Therefore, one needs to be prudent in regulating public interests litigation. The community litigation like the German *Verbandsklage* can serve as a good starting point, and recognized organizations and associations to sue against administrative actions should be allowed. As proposed scholars, "In order to make public interests litigation from legal persons and other institutions, litigation regulations should be related to the constitution of the association and its business, and the sued administrative actions are related to group interests. This condition is necessary."[9] In my view, the above suggestions are acceptable.

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[5] Friedhelm Hufen, Guanghua Mo trans., 行政诉讼法 (Verwaltungsprozessrecht), 5th edition, Law Press (Beijing), at 437 (2003).

[6] Susan Rose-Ackerman, *American Administrative Law under Siege: Is Germany a Model?* 107(6) Harv. L. Rev. 1279, 1299 (1994).

[7] Karl-Peter Sommermann, *Der Inhalt der Verwaltungskontrolle durch die Verwaltungsgerichte* (The Content of Administrative Control through Administrative Court), 52(7) Special: *Les transformations dela juridiction administrative en France et en Allemagne* (Transformations of Administrative Jurisdiction in France and Germany), La Revue Administrative (Administrative Review) 60, 60–62 (1999).

[8] Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117(4) Harv. L. Rev. 1015, 1016–27 (2004).

[9] Huaide Ma, 《行政诉讼法》存在的问题及修改建议 (Problems of Administrative Procedure Law and Suggestions for the Amendment), 25(5) 法学论坛 (Legal Forum) 29, 33 (2010).

3. Canceling the Final Administrative Verdict. — On the Accession to the WTO Agreement (Protocol on the Accession of the People's Republic of China), China agreed that "if the initial right of appeal is to an administrative body, there shall in all cases be the opportunity to choose to appeal the decision to a judicial body. Notice of the decision on appeal shall be given to the appellant and the reasons for such decision shall be provided in writing. The appellant shall also be informed of any right to further appeal." It means that Chinese judicial body hosts judicial review, which is the authority to decide final verdict.[10]

There were final administrative verdicts on patent and trademark in China, but were cancelled since the amendment of the Patent Law and the Trademark Law. With the acceleration of Chinese legal system, it has become a trend of final judicial verdicts on administrative disputes. However, article 13 of China's Administrative Review Law still admits final administrative verdicts, which is not a rational provision of protecting citizens' legal rights and interests.

The principle of final judicial verdict requires that in all cases the administrative counterpart can sue the judicial body. Therefore, the inconsistent provisions in the Administrative Procedure Law need to be amended. It is suggested to add a provision into (original) article three of the Administrative Procedure Law, that "the court is the final adjudication body of administrative disputes between administrative institutions and administrative counterpart." This rule can guarantee the administrative counterpart has an opportunity of judicial adjudication and judicial review, apart from the scope of applicable cases. This rule will let administrative institutions respect judicial authority, so that it can further protect citizens' legitimate rights and interests.

4. Classifying Different Kinds of Administrative Litigation. — The present administrative litigation of China is monotonous, which limits the full play of administrative litigation. Therefore, it is believed that it is better to classify different kinds of administrative litigation. Generally speaking, administrative litigation should be separated as the proceedings for individuals and the proceedings for public order.[11]

The proceedings for individuals should include litigation of revocation, litigation of obligations, litigation of payment, litigation of confirmation, and litigation of parties in action.

(1) Litigation of revocation. The administrative counterpart can apply to the court to revoke specific administrative actions that harmed his interests;

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[10] Huaide Ma & Bowei Ge, WTO 与中国行政诉讼制度的发展——兼论对现行行政诉讼法的修改 (WTO and the Development of Chinese System of Administrative Litigation: the Amendment of Administrative Procedure Law), 20(2) 政法论坛 (Tribune of Political Science and Law) 25, 27 (2002).

[11] See Zhiyuan Zhang, 现行行政诉讼法的修改势在必行 (Necessity of Amending the Administrative Procedure Law), (2) 政治与法律 (Politics and Law) 158, 158 (2003).

(2) Litigation of obligations. The administrative counterpart can apply to the court to enforce the administrative institutions to make specific administrative actions, or act with specific administrative decisions;

(3) Litigation of payment. The administrative counterpart can ask the court to enforce the administrative institutions to make property payment or other kinds of payments except for the acts of public authority. According to the object of action, the litigation can be classified as litigation of property payment and litigation of non-property payment;

(4) Litigation of confirmation. The administrative counterpart can ask the court to confirm or deny the validity of the sued specific administrative actions. The court should decide whether the sued specific administrative action is invalid or illegal, and whether the sued legal relationship exists;

(5) Litigation of parties in action. In the litigation of the confirmation and decision of legal relationships between the parties in action, one party in action is the defendant; otherwise, it is a litigation related to legal relationships of public law.

The proceedings for public order should include public interests litigation and institutional litigation.

Public interests litigation is for the maintenance of public interests. In these lawsuits, citizens can bring a lawsuit against illegal administrative actions although they have no direct legal interests with themselves.

Institutional litigation is for the disputes of different administrative institutions. The court should solve these disputes through litigation proceedings, and the amendment of the Administrative Procedure Law should involve kinds of litigation stated above and establish different proceedings to classify administrative litigation according to different reasons of litigation. In this way, legitimate rights and interests of litigants can be protected.

5. Completing the Types of Decisions of Administrative Litigation. — The decisions of administrative litigation in China include the following types: (a) decision of maintenance, (b) implementation, (c) modification, cancellation (incl. redo after cancellation), (d) confirmation, (e) compensation, and (f) decision to dismiss the case. The types of decisions are disconnected from claims of litigants that they cannot provide multiple types of judicial remedies. Therefore, it is necessary to complete the types of decisions of administrative litigation.

First of all, the amendment of the Administrative Procedure Law should cancel the decision of maintenance. This kind of decision weakened the protection of legitimate rights, and interests of citizens, legal persons and other institutions. The administrative litigation is supposed to provide another channel of remedies to the administrative counterparts when they are unsatisfied with the specific administrative actions and bring lawsuits to fight against those actions. The court as the impartial judge can dismiss the case if the reasons to overthrow

specific administrative actions are insufficient. The decision of maintenance, however, violates the impartial principle of "no trial without complaint." The decision also arrogates the court of the right to decide administrative actions.

Secondly, the amendment of the Administrative Procedure Law should extend the scope of application of alternative administrative decisions. According to article 54(1.4) of the Administrative Procedure Law, in changing a decision there are two pre-conditions: (a) The sued specific administrative action should be related to administrative penalties; (b) the administrative penalty is obviously unfair and unreasonable, and thus becomes illegal.

Article 55 of the Judicial Interpretation of the Administrative Procedure Law states that, "The court should not increase the punishment for the plaintiff except in the situation that the plaintiff includes the interested party. The court should not directly decide administrative punishment for the plaintiff who is not given administrative punishment by the executive." This regulation aimed to restrict the court's authority of changing administrative punishment. It was designed to distinguish between judicial authority and administrative authority, and to prevent the former overstepping its authority.

However, with the development of democracy and the necessity of further protection of citizens' legitimate rights and interests, as well as the requirement of controlling the abuse of discretion of the executive, the scope of applying alternative decisions by the courts should be gradually expanded. According to law, "If the defendant's administrative decision regarding civil disputes between equal subjects is illegal, and the related parties require the court to solve civil disputes together with the administrative disputes, the court can solve the civil and administrative disputes together."[12] The court's direct alternative decisions can reduce the time of litigation and improve efficiency, as long as the sued facts are clear and the related legal provisions can be applicable.

Thirdly, the amendment of the Administrative Procedure Law should include injunction, interlocutory judgment, and partial judgment, for the following reasons:

(1) The injunction is to forbid the executive of the implementation of certain acts. It can stop the ongoing illegal offense, and make up for the delay of remedy after the offense and the litigation of annulment.

(2) The interlocutory judgment is to make decisions on the independent contention in the proceedings, rather than make decisions on the object of litigation *per se*. The final judgment is bound by the interlocutory judgment.

(3) The partial judgment is to make final decisions on some matters of the object of litigation. The interlocutory judgment and the partial judgment are

[12] 最高人民法院关于执行《中华人民共和国行政诉讼法》若干问题的解释 (The Supreme Court on the Issues in the Implementation of the Administrative Procedure Law of the People's Republic of China), art. 61,

designed for the improvement of litigation efficiency since the decisions can be made for preliminary and partial matters of the object of litigation.

6. Making the Standard of Review Clear. — The present administrative procedure law does not regulate clearly the standard of review. As a result, the judges have too much discretion on the review of administrative litigation. In order to properly exercise administrative jurisdiction and maintain appropriate relationship between administrative and judicial authorities, it is better to establish a clear standard review through legislation.

Generally speaking, there are three influential causes of judicial review on administrative litigation, such as the nature of claim, the degree of administrative discretion, and the types of litigation.

(1) The nature of claim is to distinguish between legal and factual issues, and apply the standard of review in different degrees according to claims.

(2) The degree of administrative discretion is that whether the administrative actions are strictly, reasonably, respectfully applied or obviously illegal, which should be decided by courts (from low or moderate degree to high degree of administrative discretion).

(3) The types of litigation are different that the judge should apply different standards of judicial review. The judge should decide whether the administrative actions are reasonable, or obvious illegal, or completely legal on the factual issue; and whether the administrative actions are completely legal on the legal issue. The standard of the review on the administrative decision should be the same as the factual issue.[13]

However, on the standard of review, considering that China is civil law oriented, it is difficult to develop a set of "deterrence" standard of review (like American judicial tradition) from "hard-look doctrine" or precedents. If the continental law tradition is adopted as reference, which is, no specific standards is being made (technically, it is difficult to legislate the standards directly), the law itself becomes too abstract and broad to be applied specifically. Therefore a simple regulation on the standard is at least needed, so that the establishment and adjustment of the standard through judicial interpretation can be set aside.

7. Reforming the Jurisdiction System. — Problems of the jurisdiction system in the Administrative Procedure Law are reflected in the following aspects:

(1) For the level of jurisdiction, local courts exercise original jurisdiction over administrative cases. The original jurisdiction is therefore exercised by the district courts, which is not beneficial for the impartial exercise of judicial review on administrative cases. It is not conductive to the realization of legislative purpose of the Administrative Procedure Law.

(2) For the purpose of territorial jurisdiction, the plaintiff's litigation cost is increased by the principle of the plaintiff for defendant's convenience. On the

[13] See Zhang, fn. 11 at 159.

one hand, it is inconvenient for the plaintiff; on the other hand, the court and the defendant are in the same area, and the trial is inevitability influenced by local government, local people's congress, and local organizations legally or illegally. The court therefore faces great difficulties when dealing with administrative cases.

It is proposed to make improvement on the jurisdiction of administrative litigation in the following aspects:

(1) Transferring some administrative cases of the local court to the Intermediate Court, and use the latter as the court of first instance. The local court retains jurisdiction over simple administrative cases. Furthermore, the higher court shall have the jurisdiction over cases with defendants as departments of the State Council, or provincial governments, autonomous regions, and municipalities.[14]

(2) Expanding the plaintiff's scope of choices on territorial jurisdiction. Except for cases of real property, the court where the defendant is located, and the court where the plaintiff resides, shall both have jurisdiction. Therefore the plaintiff can have a choice between the court where he lives and that of the defendant's location.

8. Reforming the Trial Proceedings. — The adopted ordinary trial proceedings of administrative litigation, regardless of the complexity of the cases, often leads to a waste of judicial resources because the related parties cannot get their remedies in time. It is supposed to add a summary proceeding and a system of conciliation and reconciliation into the amendment of the Administrative Procedure Law, which (in my knowledge) will offer timely remedies to the related parties and reduce the cost of justice.

(1) The summary proceeding. In administrative cases the rights and obligations between the plaintiff and the defendant are clear and the dispute is less controversial, a summary proceeding with an independent judge meets the basic requirement of justice, while at the same time reducing the cost of trials and promoting the efficiency of litigation. It is necessary to establish a summary proceeding of administrative litigation, and the amendment of the Administrative Procedure Law should be regulated clearly that: "[T]he local courts of first instance can apply a summary proceeding in the following administrative cases that, (a) the price of the object of the litigation is under RMB 1000; that cases of administrative penalties and permits; (b) the case may be dismissed because of procedural issues of preliminary examination; (c) the factual issues are unanimous but the application of law or procedures are controversial; (d) the cases against the executive's illegal requirement of obligations; and (e) both the

[14] See Hongfeng Li, 行政诉讼管辖制度现状及其对策分析 (The Situation of Administrative Jurisdiction and Its Relative Countermeasure Analysis), (1) 行政法学研究 (Administrative Law Review) 7, 9 (2003).

plaintiff and defendant agree to choose and apply a summary proceeding."[15]

(2) The system of mediation and reconciliation. Administrative litigation is initiated by administrative dispute, therefore a primary function of administrative litigation is to solve disputes. Mediation and reconciliation are two ways to settle disputes. These methods are based on the related parties' agreements in line with the economic principle of litigation.[16]

The Administrative Procedure Law emphasizes that the administrative institutions should not randomly give up or alter the authority, excluding the conciliation. However, a large number of cases are settled through mediation in practice. The related parties often agree to withdraw their cases after mediation. The courts also employed methods of mediation and reconciliation to deal with cases.

If the Administrative Procedure Law excludes mediation and reconciliation entirely, those disputes (that may be solved by mediation) may lose the chance of applying a soft and flexible problem-solving mechanism.[17] Those disputes (that may be well solved by mediation) may not also get good results through other ways. Therefore, it is supposed that the amendment of the Administrative Procedure Law can regulate clearly that "the court can apply mediation if both parties agree with the application of mediation, and the defendant has the discretion on the object of litigation, without prejudice to national and social public interests and the interests of a third party."

On the system of reconciliation, in the Supreme Court on the Issues of Withdrawing Administrative Cases (2008), the Supreme Court made positive development. It interpreted that the system of reconciliation can be included into the Administrative Procedure Law. The system of reconciliation is a feasible way to settle administrative disputes, which is supported by theory and proved by practices, especially when mediations are not clearly regulated and faced with external pressures.

9. Completing the System of Execution. — There are three kinds of execution in administrative litigation: (a) the implementation of specific administrative acts in the proceedings; (b) the implementation of the judicial decisions in

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[15] Yuchuan Mo, 公民合法权益保护优先是行政诉讼立法的重要原则——关于修改我国行政诉讼法的若干建议 (Protecting Citizens' Legal Rights at First Is an Important Principle for the Legislation of Administrative Litigation — Some Suggestions on Amending Administrative Procedure Law of China), (5) 中国人民大学学报 (Journal of Renmin University of China) 2, 8 (2005).

[16] Gangling Xue & Jixia Wang, 论行政诉讼制度的完善与发展——《行政诉讼法》修订之构想 (On the Perfection and Development of the System of Administrative Litigation — the Conception of Revising the Administrative Procedure Law), 16(1) 政法论坛 (Tribunal of Political Science and Law) 137, 144 (2003).

[17] See Zhongle Zhan et al., 行政调解、和解制度研究——和谐化解法律争议 (A Study of Administrative Mediation and Reconciliation — In the Settlement of Legal Disputes Harmoniously), Law Press (Beijing), at 116 (2009).

administrative litigation; and (c) administrative enforcement. The Administrative Mandatory Law had relative regulations on the third execution; and the first two kinds of executions need to be further protected.

Firstly, it is suggested to stop the implementation of the sued controversial administrative acts in the judicial proceedings. According to article 44 of the Administrative Procedure Law, in principle, the implementation of the sued administrative acts is not stopped in the judicial proceedings. This regulation is for the continuity and efficiency of administration. However, the great disparity between the plaintiff and the defendant in an administrative case exists. If the law does not stop the implementation of administrative acts, it may cause irreparable damages to the plaintiff's interests.

In the Administrative Procedure Law of Germany (*Das Verwaltungs-verfaHrensgesetz der Bundesrepublik Deutschland*), stopping the implementation of administrative acts is the principle (while the implementation is the exception). It is suggested to refer to German experiences, and make regulates in the Administrative Procedure Law that "in the judicial proceedings, all sued controversial administrative acts should be stopped, except the non-stop implementation regulated clearly in law and administrative regulations."

Secondly, the implementation of the decisions of administrative cases is a difficult problem. The present regulations on "penalty" and "providing judicial opinions to administrative institutions" can hardly resolve the difficulty of implementation. The main reason is that the court lacks judicial independence and authority, and there will be no consequence at all if the defendant resists the court's decisions.

It is suggested that the Administrative Procedure Law shall be amended in the following aspects in order to improve the implementation of judicial decisions: (a) To raise the level of the court, that the implementation of administrative cases are transferred to the higher-level court than the sued administrative institutions; (b) to regulate that refusing to execute judicial decisions constitutes a crime and that the chief of the administrative institution should be legally obliged. In China, the head of the administrative institution should be responsible for all the conducts of the institution. In this way the administrative acts are closely connected with the supervision of responsible persons, so that the complete implementation of judicial decisions on administrative cases can be reached.

III. COORDINATION OF THE AMENDMENT OF THE ADMINISTRATIVE PROCEDURE LAW AND JUDICIAL INTERPRETATIONS

The coordination of law and judicial interpretations is a significant character

of Chinese modern legal practices because it reflects the harmony of "hard and basic" framework and "flexible and specific" application of law. Reviewing judicial interpretations in the recent 20 years after the promulgation of the Administrative Procedure Law, generally speaking, they were well applied.

The amendment of the Administrative Procedure Law, of course, should absorb some regulations of judicial interpretations, including the trend of reform such as the generalization of the scope of jurisdiction, variety of judicial decisions, and successful practices such as the system of reconciliation. The judicial interpretation should also develop with the amendment of the Administrative Procedure Law as well.

In principle the legislation should regulate normal issues, while judicial interpretations should be in charge of the specific issues. However, from the practice of the Administrative Procedure Law, it is found that judicial interpretations already established many pivotal systems and even reasonably changed old legal framework (e.g., the system of reconciliation is a typical example). It is believed that Chinese judicial interpretation does not take a pure textualism position, but have instead gone for a certain route of contextualism.[18]

Therefore, it is necessary to intentionally make some room for judicial interpretation in legislation. The legislative organs can make rudimental regulations and abstract but flexible standards for those regulations that could not be specified at present, so that the regulations may be enriched by judicial interpretations later. But those rigid regulations should be clarified, for example, the scope of judicial review and the raise of trial level. If legislators believe that those systems are pivotal, they should not leave them for judicial interpretations. The coordination of the law and judicial interpretations is a technical legislative problem.

In short, the amendment of the Administrative Procedure Law and the overall reform of the administrative litigation system is a huge and arduous project. Much of the administrative litigation system need to be further reformed. It is necessary to update the ideals and beliefs on completing the system of administrative law and its procedures. Therefore, in the amendment of the Administrative Procedure Law, it is better to strengthen citizens' legitimate rights and interests, but also notice reasonable ways to break realistic constraints, to make possible changes in the reform of administrative litigation system, and to achieve good result by rule of law.

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[18] Contextualism is a legal hermeneutic method that is the opposite of textualism. It focuses on legal social effects and chooses the best interpretation of legal texts through social effects of law. However, it does not take unconstrained style for judge-made law like extra-textualism.