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Judicial Review in China: Promises and Challenges

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Abstract
China has embarked on a lot of reforms since the late 1970s up to date. The reforms have been in many areas including the reform of its laws. As recently as May, 2015 the National People's Congress enacted the Administrative Litigation Law for the People's Republic of China. This law is a noteworthy milestone in China's efforts towards comprehensive legal reforms in line with building a modern socialist state. This law therefore gives judicial review of administrative action a shot in the arm as it has further improved the legal regime for the search for administrative justice and rule of law in China. However, an undue focus on the law alone may be misleading because in China's judicial system, other factors play an equally important role in the outcome of administrative litigation. In this paper, I argue that even though the Administrative Litigation Law of 2015 is very satisfactory in creating a good playing field for the resolution of grievances against administrative agencies, a litigant ought to be aware of the whole gamut of factors both within and without the law/courts that can account for his success or failure at achieving administrative justice. The thrust of my argument is that the vulnerability of the Administrative Divisions of the people's courts to political influence peddlers is a major factor among others which may work either in favour of or against the litigant in his search for justice through administrative litigation.

***Keywords**: Judicial Review, Promises, Challenges*

I. INTRODUCTION

Constitutional judicial review does not exist in China. The Chinese courts, however, have the power of administrative judicial review of certain specific administrative actions. Administrative judicial review may not necessarily involve the top echelon of the ruling elite in China but it nevertheless forces the courts to go on a head to head collision course with political figures under whose authority or directives, administrative actions are undertaken. The Standing Committee of the National People's Congress passed a new Administrative Litigation Law this year to revise the rules by which citizens may seek justice in court against administrative agencies. The purpose of the 2015 Administrative Litigation Law has been stated as follows:

"*To ensure the impartial and timely trial of administrative cases by the people's courts, settle administrative disputes, protect the lawful rights and interests of citizens, legal persons, and other organizations, and oversee administrative agencies' exercise of power according to the law, this Law is developed in accordance with the Constitution."*[1]

Clearly, the above-quoted article shows that the National People's Congress (NPC) has entrusted the courts with so much power to hold administrative agencies in check against the violation of the rights of citizens, legal persons and other organizations. This begs the following question: how well-positioned are the people's courts to carry out such a mandate? In some countries, separate administrative courts are established to hear and determine administrative cases. In China, it is the Administrative Divisions of the people's courts that sit to hear administrative cases[2]. Notably, these are ordinary courts that sit to hear administrative cases under a different arrangement from when they sit to hear other civil and criminal cases. However, no matter the arrangement under which the Chinese courts sit to hear administrative litigation cases, the courts handling such cases are not completely independent from the local government organs at the same level as the courts and hence powerful political figures have the ability to bring pressure to bear on the courts and to produce a particular outcome[3]. The people's congresses, at the same level as the local courts, have the power to hire and fire the judges whose duty it is to adjudicate such cases. The political players in these people's congresses are not disinterested parties in the administrative litigation cases that must be filed and fought in these courts. This paper, therefore, examines the issues and challenges pertaining to administrative litigation in China by examining some of the little spoken of factors that may influence the outcome of administrative litigation in China.

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[1] *See Article 1 of the Administrative Litigation Law*

[2] *See Sida Liu, Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court, Law & Social Enquiry (Journal of the American Bar Foundation), Volume 31, Issue 1, 75 at 85 &91*

[3] *See Zhu Suli, Political Parties in China's Judiciary, Duke Journal of Comparative & International Law, Vol. 17:533, 540-543 (2007)*

II. THE PROMISES OF ADMINISTRATIVE LITIGATION

A. Open Government Policy

As part of the multifarious reforms that China is currently embarking on, the General Office of the CPC Central Committee and the General Office of the State Council acted in concert in 2000 to announce measures aimed at opening up government information to make it available to citizens who may desire it to pursue their interests[4]. Further guidelines on this open government policy and easy access to government information by potential litigants was given a further boost in 2004 when the State Council announced further guidelines on the publication of government information[5] for public consumption. The sustained efforts of these state organs toward the reform efforts of the government gave birth to the Regulation on the Disclosure of Government Information (04/05/2007). These regulations came into force in 2008 and they have since laid a foundation for citizens to gain access to government information with which to fight for their rights against the wrongful actions of administrative agencies. These regulations make openness to government information the rule and secrecy the exception[6]. Of course, prior to the enactment of these regulations, there were other rules of law that provided for the publication of government information and hence formed the basis upon which citizens could gain access to government information and to dwell on such information as the springboard to pursue administrative litigation in the courts to vindicate their rights on the basis that administrative agencies had failed to act in accordance with the law[7]. The virtues of the 2008 Regulation on the Disclosure of Government information are that they have opened up more space for citizens to gain access to such information and secondly, they come on the background of an enhanced government policy to open up to provide such information to the citizenry. This thus enables citizens to compare the treatment they received from administrative agencies to the official standard set by the government as well as the laws. Such analysis certainly helps an aggrieved citizen to properly decide whether he has a case worth pursuing and if so, whether his case will be better couched as a merit review or a legality review. Even though, access to official government information is more likely to assist in the proper assessment of a litigant's case in a merit review since such a review dwells so much on the facts of any particular case, the free access to information can also impact positively on judicial review of administrative action in the nature of a legality review. Surely, it is true that a legality review is much more concerned with whether the action being challenged is consonant with or contrary to law but a court cannot properly assess a legality review without a clear understanding of the facts that form the background to such a complaint. Thus, the free access to information holds out a big promise to administrative litigation in China irrespective of the nature of the review under consideration.

B. Presumption of Irregularity of Conduct of Administrative Agencies

Besides easy access to official government information for the purposes of instituting administrative litigation, another promise that the law holds out to potential litigants for judicial review of administrative action is the provision in the 2015 Administrative Litigation Law to the effect that the burden of proof as to the legality of administrative action is on the defendant. Article 34 of the 2015 Administrative Litigation Law provides as follows:

"The defendant shall have the burden of proof for the administrative act it has undertaken and shall provide the evidence and normative documents in accordance with which the action has been undertaken."

Obviously, the defendant in any administrative litigation case is an administrative agency which has undertaken a particular administrative action or decision which has aggrieved the plaintiff and hence necessitating the suit by the plaintiff. Therefore, the above-quoted article essentially means that in the adjudication of administrative cases, the Administrative Divisions of the people's courts must adopt the following posture: that administrative actions and decisions are presumed to be contrary to the law unless the defendant (i.e. the administrative agency) can prove that it acted in accordance with the law. This places the plaintiff in a very much advantageous position especially when this is considered against the background of his free access to credible and official government information which he

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[4] *See Circular on the Overall Pushing Forward of Open Government System of State and Party Organs at the Township (Town) Level. This circular was jointly issued in December, 2000 by the General Office of the CPC Central Committee and the General Office of the State Council.*

[5] *See the Implementation Outlines for Overall Pushing forward the Administration by Law as published and distributed by the State Council in 2004.*

[6] *See articles 9-12 of the Regulation on the Disclosure of Government Information.*

[7] *See such pieces of legislation as the Legislation Law, the Administrative License Law and the Regulation on the Urgent Handling of Public Health Emergencies*

can use to assess his case very well before commencing his suit. The plaintiff is therefore able to build a strong narrative against the administrative agency after which the said agency must prove that it did act in accordance with the law based on the facts of that particular case. The failure of the agency to do so will mean automatic victory for the plaintiff.

Notably, this presumption of irregularity against administrative actions in the trial of cases under the Administrative Litigation Law is not a novel creation. In fact, it existed in the 1989 Administrative Litigation Law as well. The 2015 Administrative Litigation Law merely gave life to the continuous existence of this provision which has been in the law since 1989. Even before the enactment of the 2015 Administrative Litigation Law, Jiang Huiling commented on the 1989 Administrative Litigation Law as follows:

"In administrative litigation, administrative agencies are responsible for providing evidence to demonstrate the legality of concrete administrative acts, ***which puts opposing parties in administrative litigation on substantially equal footing***[8]*." (The emphasis is mine)*

In my humble opinion, I cannot agree with Jiang Huiling when he contended that the presumption of irregularity against administrative actions in administrative litigation implies that the opposing parties (i.e. the plaintiff and the defendant) have been placed on an equal footing in such a trial. Of a truth, the more appropriate imagery is to view the plaintiff having been placed on top of a hill whilst the defendant (i.e. the administrative agency) has been placed at the bottom of the hill with a heavy burden tied around its shoulders after which it is asked to climb uphill to meet the plaintiff for the fight. If it fails to make a successful climb to the top of the hill, the plaintiff must be declared the winner of this battle. Of course, once the defendant successfully climbs to the top of the hill, the plaintiff must lose the case because, in the scheme of things, the defendant is always invariably a government agency and for that matter when compared to the typical plaintiff in administrative litigation, the defendant can be likened to a giant who is engaged in battle with a plaintiff who can be likened to a dwarf. In such an unevenly matched dwell, the plaintiff stands no chance at all if he has to fight such a giant on an equal footing. Little wonder, therefore, that the Standing Committee of the NPC has tipped the scales unfavourably against the giants in such cases.

To ensure fair play, the administrative agencies are forbidden from hunting for *ex post facto* pieces of evidence in order to cover up for their lapses after the plaintiff has commenced his suit[9]. This creates a good assurance for the plaintiff that the administrative agencies cannot stage a cover up to kill an otherwise good case presented against these agencies.

However, it is very much sobering to note that this presumption of irregularity against administrative actions and decisions is limited to the procedure for the trial of cases in the Administrative Division of the people's courts. Outside the trial of cases in the Administrative Divisions of the people's courts, an opposite presumption prevails: that administrative actions and administrative decisions are properly undertaken in accordance with the law until they are adjudged by the people's courts as not being done in accordance with the law. Therefore, the law provides that even if an administrative action or decision is challenged in the courts, this challenge shall not lead to the suspension of the execution of the said action or decision until the court has issued an order for the said suspension of execution[10]. In other words, an administrative agency can carry on an administrative action to completion despite the fact that the said action has been challenged in court and as a result of which there is a case pending in the courts against such an action.

Of course, there are instances in which the demands of justice would require that administrative agencies suspend the execution of their actions or decisions until the final determination of a pending administrative litigation in the Administrative Division of the people's courts. The following exceptions to the rule have thus been stated in the Law[11]:

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[8] *See Jiang Huiling, Chapter Five: Judicial Reform, CHINA'S JOURNEY TOWARD THE RULE OF LAW, 119 at 229, Edited by Cai Dingjian and Wang Chenguang, (Brill, Leiden/Boston, 2010)*
[9] *See article 35 of the 2015 Administrative Litigation law of the PRC*
[10] *See article 56 of the 2015 Administrative Litigation Law of PRC*
[11] Id

a. Where the suspension is considered necessary by the defendant. That is where the administrative agency itself has decided not to carry on with the execution of its action or decision for reasons best known to the agency itself;
b. Where suspension of execution is ordered by the people's court at the request of the plaintiff because, in the view of the people's court, execution of the specific administrative act will cause irremediable losses and suspension of the execution will not harm public interests;
c. Where the court considers that the execution of the disputed administrative action will cause serious harm to state and public interests; and
d. Where in any particular case, the suspension of execution is required by the provisions of a statute or provisions of some regulations.

The above exceptions aim to strike a balance between competing needs: on the one hand the need to ensure that citizens do not use the courts to unnecessarily halt and stifle the completion of administrative actions that will inure to the benefit of the entire populace. On the other hand, there is the need to rather swing to the side of the plaintiff in cases where the plaintiff's interest is rather in line with that of the masses of the people.

III. THE CHALLENGES OF ADMINISTRATIVE LITIGATION IN CHINA

The above promises or allurements should make any potential plaintiff happy to proceed to the people's courts to seek judicial review against administrative agencies in the hope of obtaining a favourable decision as long as the said agencies are not able to rebut the presumption that they have acted in accordance with the law in their dealings with the plaintiff. However, there are challenges which are just equally as unattractive as the promises are attractive to him. We now turn to these.

A. Playing the Political Chess Game Vis-À-Vis Judicial Review

The main headache of any potential litigant who is desirous of using administrative litigation to seek justice is the fear that political influence peddling may be used to snuff out his hopes. Such fears are not unjustified. It has been found out by Xin He that in administrative litigation in China, there is an interplay of forces that may shape the outcome of the case and that it is not just the letter of the law alone that may be the sole determinant of the outcome of the case. Dominant in this power-play dynamics is the prominent role of the Chinese Communist Party. Xin He makes the point that in cases of administrative litigation in the people's courts, politician considerations like the priorities of the local Party-state play a significant role in the outcome of such cases[12]. His views come on the back of similar concerns raised earlier about the fact that political influence peddling plays a significant role in the determination of the outcome of cases in the Chinese courts[13]. However, this view has been countered. The counter view is that whilst it is true that the Party has the capability to intervene in cases pending before the courts, such an intervention is always used in a manner that inures to the benefit of the national interest of China and not for the private gain of particular individual political players[14]. It has thus been contended that it is against Party disciplinary rules for anyone to use his privileged position in the Party hierarchy to interfere with the judiciary and its adjudicatory work for personal interest[15]. The logical conclusion from such a position is that if such influence peddling for personal gain is contrary to Party disciplinary rules, then it stands to reason that such influences can be resisted successfully and the interferers are supposed to be punished to serve as a deterrent. However, it has been shown that any such attempts at resistance by the judiciary or the procuratorate have not always achieved the desired result[16].

However, it must not be supposed that the plaintiff is always the one to lose out in any case where there is such influence peddling. Of course, if the influence takes the form of the Party really pulling the strings to achieve a particular outcome, it is often for the benefit of the larger society and such influences may take the form of the Party

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[12] *See Xin He, Judicial Innovation and Local Politics: Judicialization of Administrative Governance in East China, THE CHINA JOURNAL, No. 69 (January 2013) where at pp. 37-38 the author opined that the priorities of the local Party-state or the judicial environment is a very much relevant factor that can help determine which way the pendulum may swing in a case before the people's courts.*
[13] *See Minxin Pei, "Can Economic Growth Continue Without Political Reform?", in Ashley Tellis and Michael Wills (eds) Strategic Asia 2006-07: Trade, Interdependence, and Security, No. 303 (Seattle: National Bureau of Asian Research, 2006), p. 315*
[14] *See Zhu Suli, note 2 supra at 540-541*
[15] *Id*
[16] *See Zhu Suli, SENDING LAW TO THE COUNTRYSIDE: RESEARCH ON CHINA'S BASIC LEVEL JUDICIAL SYSTEM (2000), at 129-31*

merely issuing a statement[17]. It may also take the form by which "in order to attract foreign investment, a local Party organization, the local government, or government agencies may instruct (*zhishi*) the local court to 'take care of' (*zhaogu*) a foreign investor in a particular case."[18]

Aside the political influence, there are other influences at play even though the actors may have political connections which they are tapping into in order to achieve their aims.[19] In all this, the clear fact is that influence peddling tied to political control of the courts is a very much strong determinant of success or otherwise in administrative litigation in the people's courts. This is not surprising at all when account is taken of the fact that the people's congresses at the same level with the courts are in charge of the appointment as well as the removal or dismissal of judges for the people's court at the same level. Additionally, the local government at the same level as the people's court is responsible for the funding of the courts. The people's courts have thus been placed in a weaker position in relation to the very administrative agencies that they are supposed to hold in check and this makes it difficult for the courts to stand up against administrative agencies in cases of administrative litigation.[20] In the end, litigants in judicial review proceedings may very well have to brace themselves up to play a political chess game if need be because the game of winning or losing a case in the Administrative Division of the people's court is not just a simple matter of ascertaining the official information from the government agencies and using same to do a proper assessment of one's case after which one files the case and merely relies on a favourable presumption of irregularity against administrative officials whilst quoting the law and arguing out one's case on the basis of the law and the presumption.

B. The Xinfang Institution and Administrative Litigation

The word *xinfang* is a coinage from the Chinese words *xin* which means "letters" and *fang* which means "visits". Therefore, the word *xinfang* literally means "letters and visits"[21]. The *xinfang* system is an old Chinese practice under which aggrieved citizens try to engage the intervention of political leaders towards the resolution of their grievances, especially where those grievances are against administrative agencies[22]. This traditional Chinese practice has survived the various revolutions that China has gone through and it has now been institutionalized in modern China. All government organs at various levels are required to have *xinfang* bureaus to receive petitions and visits from aggrieved citizens and to find ways of resolving their grievances or explaining to them why their perceived grievances have no merit. Therefore, there are *xinfang* bureaus at the national, provincial, and local levels throughout China and this includes *xinfang* bureaus established in the courts a well[23]. The *xinfang* system is very much popular in China and "[a]vailable statistics suggest that citizen use of petitioning practices and *xinfang* bureaus far exceeds that of formal legal channels."[24] It is, however, interesting to note that despite the reliance which the masses have in the *xinfang* system, "*xinfang* channels rarely yield results for the individual petitioners. According to a recent Chinese study, less than 0.2% of petitioners surveyed succeeded in having their complaints addressed through the use of the *xinfang* system".[25] This is because the *xinfang* system is structured not for the resolution of individual person's grievances but rather it is supposed to resolve political problems that are likely to degenerate into mass protests with a potential for the destabilization of the country. The various *xinfang* bureaus are therefore supposed to be the barometer for determining the kind of mass grievances which have such destabilizing potential and it is those types of grievances that the political figures are more interested in intervening in to have resolved in other to maintain social stability and harmony in the Chinese society[26].

In the light of the above stark statistics, it would seem that the masses have developed a misplaced trust in the *xinfang* system because the masses continue to place their reliance on this system even if their problems are capable of being redressed by the legal system. Petitioners continue to view the *xinfang* system as being a special power that is far

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[17] *See Zhu Suli, note 2 supra at 541*
[18] *Id*
[19] *Sida Liu, Lawyers, State Officials and Significant Others: Symbiotic Exchange in the Chinese Legal Services Market, The China Quarterly, 206, (June 2011) 276 at 287-288*
[20] *Xin He, note 11 supra at p. 25*
[21] *See Carl F. Minzner, Xinfang: An Alternative to Formal Chinese Legal Institutions, Stanford Journal of International Law, Vol. 42, p. 103 (2006) at 115*
[22] *Id p. 110-114*
[23] *Id at 105*
[24] *Id*
[25] *Id at 106*
[26] *Id at 107 & 117-118*

superior to administrative redress or seeking justice through the judicial system[27]. However, in some instances, the masses have no other option than to resort to the *xinfang* bureaus for justice. Among rural folk, recourse to judicial review of administrative actions is virtually nonexistent. As Xin He has noted, "[g]enerally speaking, in the less developed hinterland areas the courts receive fewer administrative litigation cases. In the literature on judicial innovation in administrative law, examples cited come mostly from more developed areas; when less developed areas are discussed, the situation of administrative law appears to be abysmal[28]." In the rural areas, aggrieved citizens have no other option than the use of *xinfang* in the hope that their grievances will get resolved somehow.

As Carl F. Minzner has noted, "[l]egal institutions such as the courts are also the targets of petitioning efforts. As a result, they have developed a wide range of institutional practices designed to handle citizen petitions."[29] It is therefore not surprising for litigants in judicial review proceedings to follow up with petitions in the hope that this will help generate the requisite influence to tilt the decisions of the courts in their favour. "Lawsuits under the Administrative Litigation Law are often 'preceded, accompanied, or followed' by collective petitions."[30] Finally, as Carl F. Minzner further notes: "Petitions to *xinfang* offices are generally brought by poor, less-educated individuals."[31] He continues: "This suggests more formal dispute resolution institutions remain primarily the province of the wealthier and more educated."[32]

IV. CONCLUSION

This paper has done a brief examination of the promises and challenges of judicial review under the administrative litigation law of the People's Republic of China. I have made the case that whilst there are promises handed out to litigants by the law in order to make it easy for them to access justice, the judicial terrain is fraught with dangers or pitfalls that may deny the litigant the opportunity which the law seeks to avail to him. My conclusion is that a wise litigant must learn not only the rules in the statute books and apply them to his case, but he must also keep his eyes on the factors outside the books and the court room. In short, a wise litigant must "learn to 'work the system'"[33] to his advantage as much as he can, else his search for administrative justice may very well be an exercise in futility.

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[27] *Id at 119*
[28] *See Xin He, note 12 supra at p.39*
[29] *Carl F. Minzner, note 20 supra at 136*
[30] *CONG.-EXEC. COMM. ON CHINA, ANN. REP. 81 (2004), at 74*
[31] *Carl F. Minzner, note 20 supra at 159*
[32] *Id at 159-160*
[33] *Id at p. 174*