

# ADMINISTRATIVE LITIGATION IN CHINA: PARTIES AND THEIR RIGHTS AND OBLIGATIONS

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*The rights and obligations of the parties involved in an administrative litigation in China are important for realizing the targets, to protect the individuals' rights and to limit the public powers set up by the Administrative Procedure Law, 1989. According to the law in China, a plaintiff refers to an individual, a legal person or other lawful organizations, whose rights have been directly affected by a defendant, viz. a public authority or its employee exercising public powers. This position has, however, experienced reformation and expansion by the Supreme People's Court's interpretation of law and the introduction of public interest litigation. A plaintiff is now guaranteed the right of access to a court, right to counsel, right to motion for conflict out, etc. These rights are to be exercised lawfully and should comply with the rules and instructions laid down by the courts. Since all the parties are equal before law, a defendant or a third person is guaranteed similar rights and also subject to similar obligations. A few differences, however, exist among them as well. In the course of this paper, I will undertake a thorough analysis of this subject to reveal the inconsistency between the norms and the reality, thereby showing that the realization of the rule of law in China still has a long way to go.*

## I. INTRODUCTION

The promulgation of the Administrative Procedure Law of the People's Republic of China, 1989<sup>1</sup> ('Administrative Procedure Law, 1989') was hailed in China as "a milestone of democratic and legal construction."<sup>2</sup> Regarding this law, the famous Chinese jurist, Professor Luo Haocai stated

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<sup>1</sup> Adopted by the 7<sup>th</sup> National People's Congress at its second session on April 4, 1989. It came into effect on October 1, 1990.

<sup>2</sup> Kevin J. O'Brien & Lianjiang Li, *Suing the Local State: Administrative Litigation in Rural China*, 51 THE CHINA JOURNAL 75 (2004).

in an interview that “in the history of China there were not any working ‘subject or citizen v. governmental officer’ institutions. The promulgation and enforcement of the Administrative Procedure Law, 1989, however, made things thoroughly different, a brand new judicial system was hereby established to supervise the public authorities in order to ensure their compliance with the law and to guarantee the lawful interests of citizens. It is noteworthy in the legal history of China.”<sup>3</sup> According to the statistics of the Supreme People’s Court (‘SPC’), from the day the Administrative Procedure Law, 1989 came into effect until the end of 2009, courts of first instance at all levels have handled 1.52 million cases of which the private party has won in more than 30 percent of the cases.<sup>4</sup>

This seems to be true to some extent. The contribution of the Administrative Procedure Law, 1989 to the modernization of China especially in relation to the protection of human rights, however, is still modest. One who makes a deeper and wider investigation is bound to be surprised by the defects in the Administrative Procedure Law, 1989 and would conclude that it is being ignored by both the local courts and the executive functionaries. In a similar attempt that was aimed at guaranteeing the lawful interests of the individual, juristic persons and any other organization, the State Liability Law of the People’s Republic of China, 1994<sup>5</sup> (the State Liability Law, 1994) was introduced. The last 15 years, however, bear witness to its ineffectiveness in protecting the human rights of individuals; the State has only paid about RMB 50 million Yuan for the losses and injuries caused over the last 15 years and only a few victims were paid in time.<sup>6</sup> Therefore it has been nicknamed by most lawyers and scholars as the “State Compensation?-No way!” law. This may be significant in order to understand the legal reality in China. For these reasons, scholars and lawyers have been crying hoarse over amending the Administrative Procedure Law, 1989. Their criticisms target not only the procedural provisions, but also, *inter alia*, the jurisdiction of the people’s courts and the scope of the rights and obligations of the parties.

<sup>3</sup> ZHANG Wei, *1.5 Million Cases to Promote Legal Construction in China: On the 20<sup>th</sup> Anniversary of the Promulgation of the Administrative Procedure Law*, LEGAL DAILY, September 30, 2010; LUO Haocai, *Development of Administrative Litigation System with Chinese Characteristics*, 3 ADMINISTRATIVE LAW REVIEW 6 (2009).

<sup>4</sup> ZHANG Wei, *id.*

<sup>5</sup> Adopted by the Standing Committee of the 8<sup>th</sup> National People’s Congress at its 7<sup>th</sup> session on May 12, 1994 and came into effect on January 1, 1995, and amended by the Standing Committee of the 11<sup>th</sup> National People’s Congress at its 14<sup>th</sup> session. The amendments will come into effect on December 1, 2010. It is necessary to point out that the official translation for the title of the Law is “the Law on State Compensation of the People’s Republic of China.” It may, however, lead to some misunderstandings since the word “compensation” has various interpretations. I tend to use ‘the State Liability Law’ here since the law is similar to the *Staatshaftungsrecht* in Germany.

<sup>6</sup> LI Xiujiang LI Ya’nan, *The New State Liability Law is Far From Being Perfect*, XIAOKANG, July 15, 2010, available at <http://xkzz.chinaxiaokang.com/xkzz3/newsview.asp?id=4318> (Last visited on June 15, 2011). To read this as evidence indicating the good performance of the public authorities and their civil servants is to ignore the reality in China.

This study will focus on the scope of the parties' rights and obligations in China. In Part I, I will briefly introduce the scope of the plaintiff, defendant and third party; in Part II, I will proceed to discuss the rights and obligations of the plaintiff; in Part III, the rights and obligation of the defendant will be analyzed, and finally, in Part IV, the rights and obligations of the third party will be discussed.

## II. PARTIES IN ADMINISTRATIVE LITIGATION

### A. PLAINTIFF

#### 1. General Introduction

The scope of the plaintiff in administrative procedure is defined by §§2 and 24(1) of the Administrative Procedure Law, 1989 and §12 of the SPC's Some Explanations on the Application of the Administrative Procedure Law of the People's Republic of China by the Supreme People's Court, 2000, and the SPC's Explanations on the Administrative Procedure Law, 2000. According to these provisions, the plaintiff is a private party, a citizen, a legal person or an organization, who alleges that his lawful interests<sup>7</sup> are violated by a specific administrative act undertaken by a public authority and its civil servants or who has certain legal interests in a particular administrative act, and hence files a suit before a people's court. This, however, should not be read to mean that only a Chinese citizen, legal person, or organization is entitled to the right to file administrative suits. The Constitution of the People's Republic of China, 1982 ('the Constitution, 1982'), also guarantees the legal interests of foreign citizens,<sup>8</sup> and enterprises and industries<sup>9</sup> in China. Therefore foreigners, foreign legal persons, and organizations in China as well as stateless persons could also be applicants in case their rights are violated by a specific administrative act undertaken by a public authority and its civil servants.<sup>10</sup> In fact, they enjoy the same rights and incur the same obligations as the Chinese citizen.<sup>11</sup> The only exception to this situation is where a Chinese citizen, legal person or any other organization's litigation rights are restricted by the government or the laws of the plaintiff's homeland in respect of which the principle of reciprocity is applicable.<sup>12</sup>

<sup>7</sup> The term "lawful interests" has always been criticized since it implies some kind of presumption of illegality in a rule of law state, which is apparently in conflict with the distribution of burden of proof. This inversion of burden of proof has been established by the Administrative Procedure Law, 1989 itself.

<sup>8</sup> The Constitution, 1982, Art. 32(1).

<sup>9</sup> The Constitution, 1982, Art. 18.

<sup>10</sup> The Administrative Procedure Law, 1989, §70; ADMINISTRATIVE LAW & ADMINISTRATIVE PROCEDURE LAW 334 (JIANG Ming'an ed., 1999) ('JIANG Ming'an').

<sup>11</sup> §71(1), *id.*

<sup>12</sup> §71(2), *id.*

The requirement of standing in the Administrative Procedure Law, 1989 is similar to that in German law. In most cases, the plaintiffs are the private parties involved in an administrative legal relationship. In other words, they are those persons whose rights have been directly affected or infringed by an administrative action or omission.<sup>13</sup> In case a victim (the qualified plaintiff) dies before he is able to carry out a suit or at any time during the litigation before the closing of the oral defense, however, his right is then shifted to his close relations, listed in the order of spouse, parents, children, sisters and brothers, grandparents, grandparents-in-law, then grandchildren, and grandchildren-in-law,<sup>14</sup> who may carry out or continue such a suit.<sup>15</sup> It was soon found that the scope of possible substitutes was limited, and as a result, “other close relations that have relations of fostering, supporting and maintaining with the plaintiff” was added.<sup>16</sup> But the term “other close relations” might lead to some misunderstanding due to its inconsistency with the traditional understanding of “close relations”, either as a kindred relation or a relation formed through marriage. In this regard, it is necessary to point out that such a relation may be formed regardless of kindred or marital relations.

Similarly, the SPC has further concretized the scope of the plaintiff as a legal person or any other organization through §§14, 15, 17 and 18 of the SPC’s Explanations on the Administrative Procedure Law, 2000. For the purpose of protecting an individual’s right to property, it extends the scope of the plaintiff to cover the following individuals, legal persons and other organizations:

- (1) A partnership enterprise may file a suit on its own behalf and be represented by the executive partner. In case of other partnership organizations which are not enterprises, all the partners could act as co-plaintiffs.<sup>17</sup> The primary organizers may represent other organizations that are not legal persons or partnerships. In case there are no such persons, it may be represented by one who has been so elected.<sup>18</sup>
- (2) Each party of a joint enterprise may file a suit on its own behalf.<sup>19</sup>
- (3) In case a private enterprise is deregistered, abolished, merged or acquired mandatorily, sold, divided or of which the membership is

<sup>13</sup> Comparing M.P. SINGH, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE, 214 (2001) with §§2 and 24 (1) of Administrative Procedure Law, 1989.

<sup>14</sup> The SPC’s Explanations on the Administrative Procedure Law, 2000, § 11.

<sup>15</sup> The Administrative Procedure Law, 1989, §24.

<sup>16</sup> The SPC’s Explanations on the Administrative Procedure Law, 2000, § 11(1).

<sup>17</sup> *Id.*, §14 (1).

<sup>18</sup> *Id.*, §14 (2).

<sup>19</sup> *Id.*, §15.

changed, the enterprise or its legal representative may file a suit on its behalf.<sup>20</sup>

- (4) The shareholders' meeting, the representatives of shareholders' meeting and the Board may file a suit on behalf of a Corporation Incorporated.<sup>21</sup>

## 2. Special Consideration: Public Interest Litigation ('PIL')

It is noteworthy that recently in the field of environmental protection, the standing of the plaintiff in civil litigation has been enlarged by the introduction of the PIL. In 2009, some courts in Zhejiang Province and Yun'nan Province granted leave to the All-China Environmental Protection Federation, which did not have either direct or reflective interest in an environmental case, to file a suit against the polluting industries and companies.<sup>22</sup> It is expected that in the near future, the standing of the plaintiff in an administrative litigation will also be extended to entitle a citizen, legal person or any other organization to file a PIL against the abuse of powers by the public authorities.

### B. DEFENDANT

#### 1. General Introduction

§25 of Administrative Procedure Law, 1989 provides that the following organs could be defendants before a court:

- (1) An administrative organ that undertook the specific administrative act, in case that a citizen, a legal person or any other organization, brings a suit directly before a people's court;
- (2) An administrative organ that initially undertook the act, in case that the organ that conducted the reconsideration sustains the original specific administrative act;
- (3) An administrative organ which conducted the reconsideration, if it has amended the original specific administrative act;
- (4) Administrative organs that have jointly undertaken the act, if two or more administrative organs have undertaken the same specific administrative act;

<sup>20</sup> *Id.*, §17.

<sup>21</sup> *Id.*, §18.

<sup>22</sup> QIE Jianrong, *First Leave to Public Interest Litigation of Environmental Case Granted by Wu-xi Court*, LEGAL DAILY, July 9, 2009; *Special Government Foundation Established by Kunming City Against Environmental Pollution*, LEGAL DAILY, September 22, 2010.

- (5) An organization that is authorized to undertake a specific administrative act by the law or administrative regulations or an entrusting organ, in case a specific administrative act has been undertaken by an organization as entrusted by the organ; and
- (6) An administrative organ that exercises the functions and powers of an abolished organ, in case the administrative organ has been abolished.

In 2000, §25(4) of the Administrative Procedure Law, 1989 was amended by §§20 and 21 of the SPC's Explanations on the Administrative Procedure Law, 2000 that inserted the word "decree" into the phrase "administrative regulation, law". As a result, the scope of the defendant was expanded and the internal organs, agencies or representative organs, as well as other organizations that carry out a specific administrative act without the authorization of the law or administrative regulation but with the authorization of a departmental or local decree could be taken to court. Before the amendment, the appropriate defendant in such a case would have been the maker of the decree, or in other words, either the departments or the department-like organs of the State Council, the provincial governments or the government of the municipality directly under the Central Government, the provincial capital governments, the special economic zones government or the governments of the so-called "Bigger City" approved by the Central Government.<sup>23</sup>

## 2. Special Considerations

### *a. Could the State Council be sued?*

The answer to this question would always be in the negative for the following reasons: Firstly, unlike in the West, the doctrine of checks and balances has not found a place in the polity and constitutional design of China.<sup>24</sup> If the State Council were to be sued before a court, it would be subject to a final decision made by the SPC or any other inferior people's court. This would appear to make the judiciary superior and is almost certainly constitutionally unsustainable.

Secondly, if the State Council were placed in the defendant's shoes, would the SPC or any other court be competent to handle such a dispute? The answer to this question would always be in the negative because traditionally, the Prime Ministers are the second or third senior-most members of the Standing Committee of Political Bureau of the Ruling Party while Chief Justices of the State are not even members or may only be candidates for any

<sup>23</sup> The Legislation Law, 2000, Part 4, Local Autonomy and Special Regulations and Decrees.

<sup>24</sup> XU Chongde, "Judicialization of Constitutional Law" *Rebutted*, 11 CHINA PEOPLE'S CONGRESS (2006).

vacancy in the Political Bureau. This would indicate that within the party hierarchy, they are inferior to the Prime Minister. In such a context, even if the Chinese Communist Party ('CCP') was to be tried in the court, a fair and just decision would not be practicable.

Thirdly, a more persuasive and formalistic argument would be that the State Council unlike other public authorities seldom performs a specific administrative act that directly affects the legal interests of a private party. The business of the State Council, in accordance with the Constitution, 1982, is to make regulations and policies that will be concretized and enforced by the lower levels of government.<sup>25</sup>

Fourthly, it seems unlikely taking into account §§5 and 14 of the Administrative Reconsideration Law of the People's Republic of China, 1999<sup>26</sup> which runs as follows: "A citizen, legal person, or any other organization that refuses to accept a specific administrative act of a department under the State Council, or the people's government of a province, an autonomous region, or a municipality directly under the Central Government, shall apply for administrative reconsideration to the department under the State Council, or the people's government of the province, the autonomous region, or the municipality directly under the Central Government that undertook the specific administrative act. The applicant who refuses to accept the administrative reconsideration decision may bring a suit before a people's court, or apply to the State Council for a ruling, and the State Council shall make a final ruling according to the provisions of this Law." This provision may be read to mean that the decision by the State Council is final and hence would not be subject to judicial review.

Yet, upon considering the sections of the Administrative Reconsideration Law, 1999, §§25(4) and (5) of Administrative Procedure Law, 1989 and §§7(4) and (5) of State Liability Law, 1994, these questions still remain open. First, §14 of the Administrative Reconsideration Law, 1999 provides persons who are dissatisfied with the administrative reconsideration decision with the choice of filing a suit before a court or making a complaint to the State Council, the decision of the State Council being final and binding. The Administrative Reconsideration Law, 1999, however, does not take into consideration the possibility of an omission on the State Council's part. Therefore, what will happen if the State Council takes no action? Should the omission of the State Council be regarded as a negative decision or merely an omission in a narrow sense? If it is viewed as a negative decision, then the private party is bound by the decision. If viewed as an omission in the narrow sense, the question that may be asked would be: will §19 of the Administrative Reconsideration Law, 1999 and §22 of the SPC's Explanation on the Administrative Procedure

<sup>25</sup> The Constitution, 1982, Art. 89.

<sup>26</sup> Adopted by the Standing Committee of the 9<sup>th</sup> National People's Congress at its 9<sup>th</sup> session on April 29, 1999 and came into effect on October 1 of the same year.



Law, 2000 apply? If so, then the private party can sue either the concerned public authorities or the State Council before a court. But it should be noted that the Administrative Reconsideration Law, 1999 does not provide a time limit for the State Council to make a decision. Accordingly, such an analogy is not supported in law.

Second, the State Council could be sued as an entrusting organ according to §4 of Administrative Procedure Law, 1989. Though it is true that most of the business of the State Council is to make regulations and policies, the law does not permit the State Council to perform specific administrative acts or entrust to some organization the power to conduct specific administrative acts on its behalf. Moreover, although the State Council being the state's executive organ should only enforce laws made by the legislature, with the development of modern society, it has been increasingly assuming public powers that are not prescribed by the law.

Third, according to the State Liability Law, 1994, the State Council could also be sued before a court in case it removes some of its departments or department-like organs, which are the appropriate defendants in a case and takes over the latter's powers and functionaries. There is, however, a gap to be filled. During the transformation of China from a planned economy to a market economy, some of the departments under the State Council were removed or were scheduled to be removed, and therefore, the powers and functions thereof have perished or will perish on removal. In such a case, whom should the private party sue? The Administrative Law, 1989 provides no hints. The last sentence of §7(5) of State Liability Law, 1994, however, offers a clue. It provides that in case the powers and functionaries of an abolished organ are also abandoned, the one to abolish the organ is to act as the obligatory compensation organ. Since the confirmation of illegality of an administrative act is to some extent regarded as the basis for making a claim for state compensation, in such a case, the latter organ could also be a defendant. In other words, the State Council could be sued before a court.

*b. Could the Disciplinary Commissions of CCP be sued?*

Whether the disciplinary commissions of the CCP can be sued according to the Administrative Procedure Law, 1989 or the State Liability Law, 1994 is an urgent question that needs to be settled in China. For political reasons, this question is seldom seriously discussed. This problem is seriously raised with regard to the so called inner-party disciplinary regulations of



*Shuang-gui* or *Shuang-zhi* of the CCP. These regulations target the corruption of civil servants, especially higher officers who are members of the CCP. *Shuang-gui* or *Shuang-zhi* refers to “two specifications”, which orders a suspected party member to go to a specified place at a specified time to make explanations and confessions on certain issues. Considering the length of the term and the limitation imposed on an individual’s personal liberty, however, it is quite similar to detention or house arrest. In some cases, the so-called internal-party measures were abused and applied to common people, and sometimes, even caused death or disabilities.<sup>27</sup> Such a victim, however, is not qualified to bring a suit before a court and receive state compensation. In *WANG, Jinying v. The People’s Procuratorate of Bao-di County*, the First Mediate Court of Tianjin City ruled that: “It’s true that WANG, Jinying has been taken into custody for 8 days, from August 25 to September 1, 1997. Accordingly, his personal liberty has been infringed. The process was, however, led by the Disciplinary Commission of CCP but not the People’s Procuratorate which acted as a coordinator. While the Disciplinary Commission is an internal organization of the CCP but not a public authority defined by the Public Torts Law, therefore WANG is not entitled to a state compensation.”<sup>28</sup>

The leading opinions on this topic vary greatly from the court’s “public authority” argument that denies the claim for damages on the ground that a Disciplinary Commission of CCP is not a public authority or state organ for the purposes of the Administrative Procedure Law, 1989. Most would, however, still agree with the decision of the Court. Most of the published notes or articles on the issue are unanimous on the impossibility or unsuitability of challenging the aforesaid commission in a court.<sup>29</sup> The first alternative argument for denying a victim the right to challenge the Disciplinary Commissions of CCP is not only unreasonable but also shameful. It holds that according to the party regulations, there is an absolute prohibition on imposing limitations on personal liberty or torture and hence, there is no possibility that such an infringement or violation could ever occur. It is shameful that such proponents have confused “ought to” and “is” and remain completely blind to the realities of China, especially the abuse of such powers by some party members.

The second argument that introduces the doctrine of special power relationship seems to be a little more persuasive. It is argued that there exists a special power relationship between the CCP and its members. The power to discipline a party member falls within the autonomy of the CCP and hence

<sup>27</sup> For example, LIANG Yun-cai, the former Chairman of the Board of International Trust and Investment Co., Ltd. of Heibei Province. He was beaten to death during the term of “Shuang-gui”.

<sup>28</sup> WANG, Jinying v. The People’s Procuratorate of Baodi County, decided on December 21, 1999 by the Mediate Court of Tianjin City.

<sup>29</sup> LI Yongzhong, *Shuang-gui: A special Organizational Measure and Investigation Approach*, 12 DANG ZHENG GAN BU WEN ZHAI 20 (2003); LU Weiming, *Shuang-gui and Shuang-Zhi Is Not only Legal but Also Legitimate*, 8 CHINA REPORT 56 (2009).

is unchallengeable.<sup>30</sup> This may be acceptable to some extent. Even assuming that the Disciplinary Commission of the CCP has the autonomy to discipline a member of the CCP, this does not mean that the Commission would have the power to limit a party member's personal liberty. Regarding the restraint of personal liberty, the Constitution, 1982 has provided a reservation in law (*Vorbehalt des Gesetzes*) and a reservation for the judge or prosecutor (*Richter- oder Rechtsanwaltsvorbehalt*). Art. 37 of Constitution, 1982 provides: "The freedom of person of citizens of the People's Republic of China is inviolable. No citizen may be arrested except with the approval or by decision of a people's procuratorate or by decision of a people's court, and arrests must be made by a public security organ. Unlawful deprivation or restriction of citizens' freedom of person by detention or other means is prohibited; and unlawful search of the person of citizens is prohibited." The article was further reiterated and concretized by §§8 and 9 of Legislation Law of the People's Republic of China, 2000 (the Legislation Law, 2000).<sup>31</sup>

### *c. Public (Power) Organization or Association*

According to a leading textbook on administrative law and Administrative Procedure Law, a public organization or association should also be incorporated to some extent into the concept of a subject of administrative law.<sup>32</sup> Therefore, it would be possible for a counter-party to bring an administrative suit against it before a court. Presently, the ongoing debates focus on the nature of the sports associations, such as football or basketball associations, and industrial associations. It is well known that they do have some public functions, i.e., the power to regulate admission, disciplinary powers and the power of dismissal of a football team, a basketball team or a certain industry. The relationship between the associations and its members or potential members is a hierarchical one that is similar to an administrative law relationship. In this regard, classifying this relationship as a civil law relationship, does not serve the purpose of protecting the rights of a private party. Courts may, however, refuse to accept the case as either a civil law case or an administrative law case.

## *C. THIRD PARTY*

A third party refers to any other citizen, legal person or any other organization who has interest in a specific administrative act under litigation and files a request to participate in the proceedings or participates in them when so notified by a court.<sup>33</sup> In general, the following citizens, legal persons or other

<sup>30</sup> LU Weiming, *id.*

<sup>31</sup> Adopted by the 9<sup>th</sup> National People's Congress on its 3<sup>rd</sup> session on March 15, 2000 and came into effect on July 1 of the same year.

<sup>32</sup> JIANG Ming'an, ADMINISTRATIVE LAW AND ADMINISTRATIVE PROCEDURE LAW 143 (2007).

<sup>33</sup> The Administrative Procedure Law, 1989, §27.

organizations may participate or be involved in an administrative litigation as a third party.<sup>34</sup>

- a. In case more than one private party's interests are directly affected by a specific administrative act undertaken by a public authority, only some of the private parties may bring a suit before the court. The others may either request to participate or be notified by the court proceeding as third parties;
- b. In case a private party is dissatisfied with a public authority's decision on a civil dispute to which he is a party and hence files an administrative suit before a court, a court must notify the opposing party who does not participate in the court proceedings as a third party to do so;
- c. In case a private party is dissatisfied with a decision co-made and signed by a public authority and non-government organization (for e.g., the Consumer Protection Association) and hence files a suit against the public authority, the latter should be notified of participating in the court proceeding as a third party since it is not suitable for it to participate as a defendant; or
- d. In case there is more than one potential defendant and the plaintiff only singles out some of them as defendants, refusing to take the court's suggestion to add such persons to the list of defendants, the court may notify those who have not been added to participate as third parties.

### III. RIGHTS AND OBLIGATIONS OF PLAINTIFF

#### A. RIGHTS OF THE PLAINTIFF

##### 1. Right to Access the Courts

The right to access the court has been recognized as a basic human right. Art. 41(1) of the Constitution, 1982 provides that "citizens of the People's Republic of China have the right to criticize and make suggestions to any state organ or functionary, and to make to relevant state organs complaints and charges against, or exposures of, violation of the law or dereliction of duty by any state organ or functionary...". It is further concretized by §3(2) of the Civil Procedure Law of the People's Republic of China, 1982 (the Civil Procedure Law, 1982)<sup>35</sup> which provides that "this Law also applies to the

<sup>34</sup> JIANG Ming'an, *supra* note 12, 341.

<sup>35</sup> Adopted by the 7<sup>th</sup> National People's Congress at its 4<sup>th</sup> session on April 9, 1991 and came into effect on the same day, further amended by the Standing Committee of the 10<sup>th</sup> National People's Congress at its 30<sup>th</sup> session on March 28, 2007 and the amendments came into effect on April 1, 2008.

administrative disputes which in accordance with the law fall within the jurisdiction of the people's courts." This right has been further recognized by the Administrative Procedure Law, 1989 and other special provisions, such as §6 of Administrative Punishment Law of the People's Republic of China, 1996,<sup>36</sup> and §7 of Administrative License Law of People's Republic of China, 2000.<sup>37</sup> On November 9, 2009 the SPC proclaimed the Supreme People's Court's Opinions on Protecting the Rights to Action of the Private Party in Administrative Litigation<sup>38</sup> requiring the courts not to reduce the administrative jurisdiction of the courts; therefore, requiring the courts to do something more than arbitrarily refusing to give leave to a private party. Instead, the courts are required to consider new cases, improve judicial attitudes and build a more just and fair environment for the private party filing an administrative litigation.

Moreover, in order to ensure the individual's right to access courts, the Measures on the Payment of Litigation Costs, 2006<sup>39</sup> notably provides a much lower fixed rate for administrative litigation compared to the rate imposed by the court for a civil litigation. §13(5) of this law provides that the litigation costs for administrative cases are as follows: a) RMB 100.00 Yuan per trademark, patent or marital case; and b) RMB 50 Yuan per other case. Such lowering of rates enables poor applicants to file suits against public authorities. Moreover, in separate state compensation litigation, payment of the fixed rate is exempted.

For some reason, however, the right to access courts is not guaranteed in practice, and sometimes even hindered. Firstly, unlike most constitutional states, no law in the mainland of China provides that a judge cannot refuse to make a decision without the prescription of a written law. Even worse, the judicial practices of the inferior courts are dominated by mechanical and dogmatic approaches. §11 of Administrative Procedure Law, 1989 has been interpreted to mean that the jurisdiction of the courts is only limited to cases in which a private party's personal or property rights are affected. Similarly, Part 2, Chapter 1 of the State Liability Law, 1994 has been read to mean that only damages related to a private party's personal or property rights are to be compensated. If, however, §11 is read with §§2 and 12 of the Administrative Procedure Law, 1989 and §§1 through 5 of the SPC's Explanation on the Administrative Procedure Law, 2000, the interpretation of the law could be quite different. It could be understood to mean that a private party is not qualified to bring a suit before the court in cases falling within the enumerated

<sup>36</sup> Adopted by the 8<sup>th</sup> National People's Congress at its 4<sup>th</sup> session on March 17, 1996 and came into effect on October 1, 1996.

<sup>37</sup> Adopted by the Standing Committee of the 10<sup>th</sup> National People's Congress at its 4<sup>th</sup> session on August 27, 2003 and came it effect on July 1, 2004.

<sup>38</sup> SPC (2009) 54. Adopted by the SPC on November 9, 2009 and came into effect on the same day.

<sup>39</sup> Adopted by the State Council at its 159<sup>th</sup> Standing Committee meeting and proclaimed on December 8, 2006 and came into effect on April 1, 2007.

categories which the legislature has intentionally excluded from the jurisdiction of the courts. In all other cases, he would be qualified to file a suit. Therefore, the interpretation of the law being undertaken by the courts has to some extent led to the ineffectiveness of human rights protection by the law.

Besides this, the increasingly popular ‘administrative reconciliation’ is of special concern. It is believed that the introduction of administrative reconciliation as an alternative dispute resolution method may help to resolve administrative disputes and save both the individual and the public authority from a costly and time consuming judicial process.<sup>40</sup> It would further promote stability and harmony within society. It must, however, be pointed out that such practices have been taken advantage of to hinder the individual’s access to the court.<sup>41</sup> Moreover, an administrative reconciliation should not be permitted during the process of an administrative litigation, i.e., from the time a court grants leave to a citizen to file a suit until the time a decision is reached. Otherwise, such a reconciliation would be *ultra vires* and hence, invalid because it is against the compulsory provision, §50 of the Administrative Procedure Law, 1989.

## 2. Right to Counsel

The right to counsel or to be assisted by counsel is regarded by scholars as an indispensable constituent of the right to a fair trial.<sup>42</sup> In order to guarantee the individual’s right to counsel, §29 of Administrative Procedure Law, 1989 provides that: “Each party or legal representative may entrust one or two persons to represent him in litigation. A lawyer, a public organization, a near relative of the citizen bringing the suit, or a person recommended by the unit to which the citizen bringing the suit belongs or any other citizen approved by the people’s court may be entrusted as an agent *ad litem*.” As Mark Twain, however, put it, “the law is a system that protects everybody who can afford to hire a good lawyer.”<sup>43</sup> This is also true for the Chinese legal system. The price for hiring a lawyer is always too high for individuals who are poorly paid. Accordingly, a poor person may be reluctant to file a suit against the public authorities even if his/her right is infringed. The state does not provide legal aid in such cases. Though there are some legal aid organizations and associations available to individuals, few would like to be involved with a dispute against

<sup>40</sup> MINAMI Hiromasa, *Jurisprudence of Reconciliation in Administrative Litigation*, GLOBAL LAW REVIEW 88-89 (2001).

<sup>41</sup> ZHANG Jisheng, *Concerning Administrative Reconciliation Should Be Put on Hold*, 23 JOURNAL OF SHANXI POLITICS AND LAW INSTITUTE FOR ADMINISTRATORS 106 (2010).

<sup>42</sup> TANG Weijian, CIVIL PROCEDURE LAW: PRINCIPLES AND CASES, 91 (2006).

<sup>43</sup> The Law Office of the Southern Centre for Human Rights, *Right to Counsel*, available at, [http://www.schr.org/counsel?order=field\\_publication\\_value&sort=desc](http://www.schr.org/counsel?order=field_publication_value&sort=desc). (Last visited on June 20, 2011).

the government. This is understandable as the saying goes, “To win an administrative litigation but to ruin a whole life”.<sup>44</sup>

### 3. Right to Choose among Appropriate Courts

According to the first paragraph of §20 of the Administrative Procedure Law, 1989, the plaintiff’s right to choose among appropriate courts may be exercised when two or more people’s courts have jurisdiction over a suit. For example, in case the public authority has taken a decision of administrative punishment or has undertaken a compulsory measure targeting both the personal liberty and property of a private party, the latter may choose to file a suit against the public authority before the appropriate court where the plaintiff or the defendant is located.<sup>45</sup> To enforce this right, a challenge to the court’s jurisdiction is allowed. A plaintiff may challenge the jurisdiction of the court within 10 days after receiving a notification calling for responses to the action.<sup>46</sup>

To guarantee the plaintiff’s right to choose among appropriate courts, to some extent, is to prevent regional protectionism. It prevents a biased court from favoring the decision of a public authority and ensures the justness and fairness of the court’s decision.

### 4. Right to Motion for Conflict-Out

The ancient doctrine that “no one can be judge in his own case” finds its counterpart in the traditional institution of withdrawal (or conflict-out) in China, which came into conception in the Western HAN dynasty.<sup>47</sup> The institution plays a role in ensuring the justness and fairness of a decision made by either by an executive branch or a court.<sup>48</sup> All three procedural laws have given special attention to this doctrine.<sup>49</sup>

<sup>44</sup> LI Yun, *On the Abnormal Withdrawal of Administrative Case*, 142 PEOPLE’S CONGRESS STUDYING 36 (2003).

<sup>45</sup> The SPC’s Explanations on the Administrative Procedure Law, 2000, §9.

<sup>46</sup> §10, *id.* Whether a plaintiff is entitled to challenge the jurisdiction of the court is controversial. It may not be appropriate to entitle a plaintiff to such a right since to file a suit before a certain court indicates that he/she is willing to subject himself/herself to the decision of that court. It is, however, also true that most people, especially peasants, may have little knowledge of the laws and the legal system in China and hence, to deny them such a right may endanger their right to a just and fair decision. See CHEN Qinglian, *The Plaintiff in the Administrative Procedure’s Right to Challenge of Jurisdiction*, 2010 (8) KEJIAOWENHUI 197.

<sup>47</sup> WANG Shiwei, *Institution of Conflict-out in Civil Services in China: Historic Experiences and Its Future*, 6 CHINA SOCIAL SCIENCES 139 (1996).

<sup>48</sup> TANG Weijian, *supra* note 42, 115.

<sup>49</sup> The Administrative Procedure Law, 1989, §6; The Criminal Procedure Law, 1997, §§28-31; The Civil Procedure Law, 1991, §10.

§§47(2) and (3) of the Administrative Procedure Law, 1989 provides that if a member of the judicial personnel, a court clerk, an interpreter, an expert witness or a person who conducts inquests considers himself/herself as having an interest in the case or to be otherwise related to the case, he/she shall apply for a withdrawal. To protect the individual's rights and reinforce this provision, §47(1) of the same law further entitles the plaintiff to the right to motion for a conflict-out regardless of the will of the persons mentioned above.

## 5. Right to Use One's Native Spoken or Written Language

China is a unitary multinational state that is created jointly by the people of all her nationalities. All the nationalities in China are equal,<sup>50</sup> especially in the eyes of the law.<sup>51</sup> In order to ensure the equality of all of her nationalities and people, to protect the lawful rights and interests of the minority nationalities, and to uphold and develop a relationship of equality, unity and mutual assistance among all the nationalities, Art. 4(4) of Constitution, 1982 provided that "all nationalities have the freedom to use and develop their own spoken and written languages and to preserve or reform their own folkways and customs." This was further reiterated by Art. 134 of the Constitution, 1982 which provides that: "Citizens of China's nationalities have the right to use their native spoken and written languages in court proceedings. The people's courts and people's procurators should provide interpretation/translation for any party to the court proceedings who is not familiar with the spoken or written languages commonly used in the locality. In an area where people of a minority nationality live in a concentrated community or where a number of nationalities live together, court hearings should be conducted in the language or languages commonly used in the locality; indictments, judgments, notices and other documents should be written, according to actual needs, in the language or languages commonly used in the locality."

§8 of Administrative Procedure Law, 1989 along with the Civil Procedural Law and the Criminal Procedural Law has further concretized the constitutional provision, 1982 as follows: "Citizens of all nationalities shall have the right to use their native spoken and written languages in administrative proceedings. In an area where people of a minority nationality live in concentrated communities or where a number of nationalities live together, the people's courts shall conduct adjudication and issue legal documents in the language or languages commonly used by the local nationalities. The people's courts shall provide interpretation for participants in proceedings who do not understand the language or languages commonly used by the local nationalities."

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<sup>50</sup> The Constitution, 1982, Art. 4(1).

<sup>51</sup> The Constitution, 1982, Art. 33(2).



The realization and guarantee of the right also plays an important role in promoting justice in certain areas by subjecting the court proceedings and decisions to the supervision of the local people. In this regard, it is significant that in some regions, commonly used dialects are also allowed in court proceedings, though such dialects may not be considered to fall within the concept of the so-called official languages.<sup>52</sup>

## 6. Right to Waive, Alter or Add Claims

The right to waive, alter or add claims is also guaranteed by law. Unlike the Civil Procedure Law, 1982, however, both the Administrative Procedure Law, 1989 and the SPC's Explanation on the Administrative Procedure Law, 2000 have set more limitations on this right.

### *a. Right to Waive Claims*

Before a court announces its judgment or order in an administrative case, if the plaintiff applies for withdrawal of the suit, or if the defendant amends its specific administrative act and, as a result, the plaintiff applies for the withdrawal of the suit, the people's court shall have the discretion to grant approval in such cases.<sup>53</sup> It has been criticized that compared with the provisions of the Civil Procedure Law, 1982, such a limitation may not seem appropriate for restricting the free will of the plaintiff. This restriction, however, is justified in view of the legal reality within China. The reason the law-makers have set such a limitation is similar to the reason for the prohibition of reconciliation in administrative litigation. They were afraid that a plaintiff could be induced, by threat or force, by the executive body to waive their claims.<sup>54</sup> If so, not only is the individual's right to a remedy but also the purpose of the Administrative Procedure law, 1989 in promoting the rule of law in China, endangered. In this regard, it is necessary for the court to interfere with the making of such a decision, especially in view of the doctrine of "no one should be twice harassed for the same cause" prescribed by §36 of the SPC's Explanation on the Administrative Procedure Law, 2000.

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<sup>52</sup> In case of the languages used by the minorities in the mainland of China, there are about 54 written languages used by 29 minor nationalities, November 19, 2004, available at [http://www.edu.cn/min\\_zu\\_850/20060323/t20060323\\_111262.shtml](http://www.edu.cn/min_zu_850/20060323/t20060323_111262.shtml). (Last visited on June 15, 2011) According to §§2 and 8 of the National Standard Spoken and Written Language Law of China, a dialect without written form (scripture) used by HAN people is not a language in the narrow sense. However, it is very interesting that Cantonese, which is not a language in the narrow sense but a dialect, is used as an official language in HK. If in the future the nation is to be united as it once was, it is out of question that Minnanese (or Taiwanese) will also be used as an official language in Taiwan or Fujian.

<sup>53</sup> The Administrative Procedure Law, 1989, §51.

<sup>54</sup> LIU Jin'gang, *Unsuitability of Reconciliation in Administrative Litigation Reconsidered*, 4 ADMINISTRATIVE TRIBUNE 71 (2009).

Considering the rate at which cases have been waived in administrative litigation for last few decades, however, it seems that this particular restriction does not function well enough.<sup>55</sup> The court in which the case is pending (a pending court) seldom rejects such an application although they are supposed to scrutinise the application before making a ruling.<sup>56</sup> The causes thereof are self-evident: the pending courts are unwillingly to be involved in administrative disputes, particularly when they are directly in collision with the administrative authorities, and hence, courts are eager to get rid of the hot potatoes.<sup>57</sup>

### *b. Right to Alter or Add Claims*

The right to alter or add claims is also limited by §45 of the SPC's Explanations on the Administrative Procedure Law, 2000. In accordance with this provision, an application to alter or add claims without appropriate reasons will always be denied by a court after a copy of the indictment (statement of charges) is delivered to the defendant. Neither the law nor the SPC's interpretation of the laws provides a detailed analysis of the term "appropriate reasons", which means that the decision to approve such an application will be left to the discretion of a pending court. The provision itself has been under serious attack for its ambiguity about the term "appropriate reasons" which seems to empower a court to reject a plaintiff's application arbitrarily.

## 7. Right to Production of Evidence and Oral Defense

A plaintiff's right to production of evidence and oral defense is guaranteed and protected by the Administrative Procedure Law, 1989 and the SPC's Explanations on the Administrative Procedure Law, 2000. §30 of the Administrative Procedure Law, 1989 provides that: "A lawyer who serves as an agent *ad litem* may consult materials pertaining to the case in accordance with relevant provisions, and may also investigate among and collect evidence from the organizations and citizens concerned. If the information involves state secrets or individual's privacy, he shall keep it confidential in accordance with relevant provisions of the law."

§29 of SPC's Explanations on the Administrative Procedure Law, 2000 further provides that if a plaintiff, a third party or his/her attorney(s) has obtained the clues to certain evidence but is unable to bring them to the court, or is unable to provide copies of such evidence, he may request the court to act *ex officio* and carry out the investigation and collect such evidences. This

<sup>55</sup> HE Haibo, *On Case Waiving in Administrative Litigation (1987-2008)*, November 30, 2010, available at [http://article.chinalawinfo.com/Article\\_Detail.asp?ArticleID=51777](http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=51777) (Last visited on June 15, 2011).

<sup>56</sup> ZHANG Xianwei, *On Judicial Review of Nol. Pros. Application in Administrative Litigation*, 3 ADMINISTRATIVE LAW REVIEW 41 (2009).

<sup>57</sup> *Id.*

plays an important role in the protection of the plaintiff's right to production of evidence since it is possible that the public authority could interfere with the collection of evidence by the plaintiff.

Besides these safeguards, the law also provides that, in case evidence may be destroyed, lost or is difficult to be obtained at a later stage; the plaintiff could request the people's court to preserve the evidence.<sup>58</sup> Taking the lack of legal consciousness among the common people in China into consideration, the law is further reinforced by providing that the people's court may also, on its own initiative, take measures to preserve such evidence to ensure a speedy, fair and just trial.

Concerning a plaintiff's right to oral defense, §30 of the Administrative Procedure Law, 1989 provides that each party in an administrative case has the right to oral defense. Naturally, a plaintiff's right to oral defense is guaranteed. To read this provision with §29 of the Administrative Procedure Law, 1989, which provides the plaintiff with the right to counsel, and §31(1) of the SPC's Explanations on the Administrative Procedure Law, 2000 which provides for the inadmissibility of unexamined evidence, it is implied that a plaintiff can either exercise the right to oral defense himself or ask lawyers to do so on his behalf.

## 8. Right to Cross-Examination

A plaintiff's right to cross-examination in court proceedings is also guaranteed though the law does not make a clear provision for the same. The right may be derived from §4 of the Administrative Procedure Law, 1989 which provides that "in conducting administrative proceedings, the people's courts shall base themselves on facts and take the law as the criterion", read with §§29 and 30 mentioned above. The right to cross-examination in administrative litigation specifically entitles a plaintiff to question the witnesses, expert examiners and inspectors on the defendant's side. This right plays an important role in ensuring a just and fair trial since the defendant is given the advantage of collecting evidence and getting witnesses, expert examiners and inspectors in its favor.

## 9. Right to Access and Correct the Documents

The right to access and correct the documents guaranteed by §30 of the Administrative Procedure Law, 1989 plays a significant role in ensuring the plaintiff's right to file a suit, build a defense and receive a fair and just decision.

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<sup>58</sup> The Administrative Procedure Law, 1989, §36.

## 10. Right to Appeal and Withdraw an Appeal

In case a plaintiff is dissatisfied with the decision of the court of first instance, he has the right to file an appeal to a higher court. In case of a ruling, he should file the appeal within 15 days from the day the judgment is supposed to reach him. In case of an order, the appeal should be filed within 10 days.<sup>59</sup>

## 11. Right to Apply for Compulsory Execution

Whether the plaintiff is entitled to a right to apply for compulsory execution is a little questionable. Firstly, although §§65 and 67 of the Administrative Procedure Law, 1989 provide a process for carrying out compulsory execution, these provisions are primarily concerned with situations in which the plaintiff fails to discharge his liabilities. It is true that §65(3) is also concerned with the defendant's failure to discharge its liabilities, however, a plaintiff's right to apply for compulsory execution cannot be read into §65(3) which reads: "in case a public authority fails to enforce a people's court's final rule or order, the court may undertake the following measures...". Such a provision could only be understood as empowering or authorizing the court to carry out compulsory measures against the public authority if it does not follow the ruling or order of the court but cannot be read as entitling a plaintiff to the right to apply for compulsory execution. Accordingly, although it is true that a plaintiff is not prevented from requesting the court to do so, the court is not obliged to undertake a compulsory execution in favor of the plaintiff.

It should be noted that in some situations "may" is read as "should".<sup>60</sup> Accordingly, though such a provision does not lay down a mandatory rule, it is not an arbitrary exercise of discretion.<sup>61</sup> Hence, in situations which warrant compulsory execution, a court is obliged to undertake such measures regardless of whether or not a plaintiff makes an application.

Secondly, it is also worth pointing out that even if the law did provide a plaintiff with such a right, it would still be ineffective since the law does not provide a practical process to exercise the right. This point may, however, be rebutted considering the fact that no law provides for every possible situation that may arise. Moreover, in practice, the compulsory execution provision has been applied in cases against public authorities, though not as often as it should be. §§83 and 84 of the SPC's Explanations on the Administrative Procedure Law, 2000 further concretized this provision making it clear that in case a public authority fails to undertake a ruling or order of a court, an individual, legal

<sup>59</sup> The Administrative Procedure Law, 1989, §§42, 58.

<sup>60</sup> *C.f.* LIU JIANLONG, JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS: INDIA'S EXPERIENCES 65 (2010).

<sup>61</sup> *Id.*

person or any other organization may request the court to undertake compulsory execution measures.<sup>62</sup> In case the applicant is a natural person, the right should be exercised within one year from the time the public authority fails to fulfill its obligation; otherwise, the right should be exercised within 180 days.<sup>63</sup>

## *B. OBLIGATIONS OF THE PLAINTIFF*

### 1. To Exercise Litigation Rights Lawfully

A plaintiff is supposed to exercise his/her right to litigation in accordance with the law and avoid abusing them, especially when the exercise of this right may infringe upon the freedom and liberty of another citizen, legal person or organization. This is not only a legal obligation but also a fundamental obligation laid down in Art. 51 of the Constitution, 1982 that provides: “Citizens of the People’s Republic of China, in exercising their freedoms and rights, may not infringe upon the interests of the State, of society or of the collective, or upon the lawful freedoms and rights of other citizens.” Art. 52 further provides: “Citizens of the People’s Republic of China must abide by the Constitution and the law...”. This means that a plaintiff’s right ends when the interests of the state, the society or the collective, or when the lawful freedoms and rights of other citizens are affected.

### 2. To Comply with Rules and Instructions of a Court

A plaintiff is obligated to follow the discipline and instructions of the court; otherwise, he/she may be punished. Though there is no law on contempt of court in China, §§49(1)(e) and (f) of the Administrative Procedure Law, 1989 provide that: “If a participant in the proceedings or any other person commits any of the following acts, the people’s court may, according to the seriousness of his offence, reprimand him, order him to sign a statement of repentance or impose upon him a fine of not more than 1,000 Yuan or detain him for not longer than 15 days; if a crime is constituted, his criminal responsibility shall be investigated:

...

(e) using violence, threats or other means to hinder the personnel of a people’s court from performing their duties or disturbing the order of the work of people’s court; or

(f) insulting, slandering, framing, beating or retaliating against the personnel of a people’s court, participants

<sup>62</sup> The SPC’s Explanations on the Administrative Procedure Law, 2000, §83.

<sup>63</sup> §84, *id.*

in proceedings or personnel who assist in the execution of duties.”

### 3. Obligation to Comply with and Enforce a Court’s Final Decisions and Orders

A plaintiff is bound by the final decision or order made by the court and is obligated to enforce it.<sup>64</sup> If he or she fails to do so, the concerned public authority could either directly or *ex officio* undertake a prescribed compulsory execution measure or request the concerned court for compulsory execution.<sup>65</sup>

It is, however, notable that in certain cases, despite the infallibility of a court’s final decision, the latter is subject to criticism, especially in cases where the independence of the court is in question. The authority of a court is therefore endangered since its final decision could be superseded either by writing letters to or visiting a higher officer. Some make complaints regardless of the latter’s position, i.e., by using the so-called letter and visit process or petition, or by motioning for a retrial.<sup>66</sup>

## IV. RIGHTS AND OBLIGATIONS OF DEFENDANT

### A. RIGHTS OF THE DEFENDANT

Some of the rights enjoyed by the defendant are similar to those enjoyed by the plaintiff, such as: 1) the right to motion for conflict out;<sup>67</sup> 2) the right to challenge of jurisdiction;<sup>68</sup> 3) the right to counsel;<sup>69</sup> 4) the right to oral defense;<sup>70</sup> 5) the right to cross examination;<sup>71</sup> 6) the right to access and correct

<sup>64</sup> The Administrative Procedure Law, 1989, §65(1).

<sup>65</sup> The Administrative Procedure Law, 1989, §65(2); The SPC’s Explanations on the Administrative Procedure Law, 2000, §83.

<sup>66</sup> The Administrative Procedure Law, 1989, §§62, 63; The SPC’s Explanations on the Administrative Procedure Law, 2000, §§36, 63, 73-81.

<sup>67</sup> The Administrative Procedure Law, 1989, §47; The SPC’s Explanations on the Administrative Procedure Law, 2000, §48.

<sup>68</sup> The SPC’s Explanations on the Administrative Procedure Law, 2000, §10.

<sup>69</sup> §29, the Administrative Procedure Law, 1989; §25, the SPC’s Explanations on the Administrative Procedure Law, 2000.

<sup>70</sup> The Administrative Procedure Law, 1989, §§4, 9; The SPC’s Explanations on the Administrative Procedure Law, 2000, §28.

<sup>71</sup> The Administrative Procedure Law, 1989, §§4, 9; The SPC’s Explanations on the Administrative Procedure Law, 2000, §31.

the documents;<sup>72</sup> 7) the right to appeal and to withdraw an appeal.<sup>73</sup> In addition to these rights, the defendant also has the following rights:

## 1. Right to Production of Evidence

The defendant's right to production of evidence is guaranteed by law. This can be derived from the right to oral defense clause,<sup>74</sup> and the right to equality before the law clause,<sup>75</sup> of the Administrative Procedure Law, 1989. Besides these clauses, §28 of the SPC's Explanations on the Administrative Procedure Law, 2000 provides that in case (1) the evidence collected before a specific administrative decision has been made, is unavailable due to *force majeure*; or (2) a plaintiff or a third party comes out with new reasons or evidence that have not been raised earlier, the defendant, with the permission of the pending court, may collect additional evidence.<sup>76</sup> §36 of the Administrative Procedure Law, 1989 further provides that if evidence is in danger of being destroyed, lost or may become difficult to obtain at a later stage, the defendant is entitled to the right to request the people's court to preserve the evidence.

Compared with the plaintiff's right to production of evidence, however, the defendant's right is strictly limited. Firstly, it has been provided that during litigation, the defendant is prohibited from collecting evidence from the plaintiff and the witnesses without the permission of a court.<sup>77</sup> Such evidence, along with the evidence obtained in violation of the due process of law, are not admissible in court.<sup>78</sup> This has been reiterated by the law, which provides that even evidence collected by a reconsideration organ in the process of consideration of a disputed administrative act is inadmissible.<sup>79</sup> Secondly, the law provides that in case a defendant does not turn all the evidence in to the lower court, any new evidence it turns in to the appellate court would become inadmissible and cannot be relied upon to repeal or alter the decisions of the lower court.<sup>80</sup>

## 2. Right to Compulsory Execution

A defendant's power and right to compulsory execution is authorized by the Administrative Procedure Law, 1989 and other specific laws

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<sup>72</sup> The Administrative Procedure Law, 1989, §30; The SPC's Explanations on the Administrative Procedure Law, 2000, §63.

<sup>73</sup> The Administrative Procedure Law, 1989, §58; The SPC's Explanations on the Administrative Procedure Law, 2000, §63(1)(c).

<sup>74</sup> The Administrative Procedure Law, 1989, §9.

<sup>75</sup> The Administrative Procedure Law, 1989, §7.

<sup>76</sup> The SPC's Explanations on the Administrative Procedure Law, 2000, §28.

<sup>77</sup> The Administrative Procedure Law, 1989, §33.

<sup>78</sup> The SPC's Explanations on the Administrative Procedure Law, 2000, §30.

<sup>79</sup> §31(2), *id.*

<sup>80</sup> §31(3), *id.*



regulating the powers of the defendant. As mentioned above, in case a plaintiff fails to perform either a final decision of a court or a final administrative decision which has been sustained or confirmed by a court, a public authority may, on its own initiative, either resort to compulsory execution if authorized to do so, or make a request to the concerned court to take appropriate measures.

## *B. OBLIGATIONS OF THE DEFENDANT*

As far as the obligations of the defendant are concerned, the following obligations of the defendant are similar to that of the plaintiff: the obligation to exercise litigation rights lawfully, the obligation to comply with the instructions of the court and the obligation to enforce the final decision of a court. In addition to these obligations, there are also other obligations of the defendant provided by the law.

### **1. To Respond to an Action in Time**

A defendant must respond to an action in time. §43 of the Administrative Procedure Law, 1989 provides that within 10 days of receiving the copy of the bill of complaint, the defendant shall provide the people's court with the documents on the basis of which a specific administrative act has been undertaken and file a bill of defense. If the defendant fails to do so, a trial will be carried out, in accordance with §26 of the SPC's Explanations on the Administrative Procedure Law, 2000, in favor of the plaintiff.

### **2. To Justify Decisions with Evidences and Reasons**

With regard to the distribution of the burden of proof, the legislature has made a praiseworthy provision that has been regarded as the most significant feature of the Administrative Procedure Law, 1989.<sup>81</sup> Unlike the distribution of the burden of proof in the Civil Procedure Law, 1982 and in the Criminal Procedure Law ("he who is affirming must prove"), §32 of the Administrative Procedure Law, 1989 has inverted the burden of proof. This was reiterated and reinforced by §26 of the SPC's Explanations on the Administrative Procedure Law, 2000. Accordingly, if the defendant does not provide the people's court with the facts and the legal basis for which a specific administrative act has been undertaken and file a bill of defense within ten days of receiving the copy of the bill of complaint, the court will then presume that the facts and legal basis for the disputed administrative act does not exist and that the act is invalid. Moreover, it has also been provided that after an administrative litigation is brought before a court, the concerned public authority

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<sup>81</sup> YANG Xiejun, *Administrative Procedure of Chinese Characteristics: Developments & Challenges*, 3 NANJIING UNIVERSITY LAW REVIEW 319 (2009).

is prohibited from collecting evidence from the plaintiff or any other witness without the permission of the court.

These provisions are of tremendous significance in promoting the Rule of Law in China. Firstly, most of the common civil servants, especially the ones at the local level, are not well-educated and often regard themselves not as civil servants but as rulers. Therefore, abuse of power, especially the abuse of police powers and the disregard of due process, is not unimaginable. Such provisions will to some extent force civil servants to be more deliberative before undertaking certain administrative acts. Secondly, compared with a private party, a public authority is always better equipped with the personnel, powers and resources required to collect evidences. In view of these facts, to shift most of the burden of proof on the defendant is hardly unreasonable.

### 3. Not to make the Same Decision as the one is denied by the Court

In case a disputed administrative act that has been undertaken by a defendant has been reversed by a court, it must not, based on the same facts and reasons, undertake a specific administrative act essentially identical with the one denied by the court.<sup>82</sup>

### 4. To Submit to the Supervision of the People's Procuratorate

The people's procurators are state organs for legal supervision over the acts of public authorities.<sup>83</sup> The public authorities must subject itself to the supervision of the appropriate people's procurators.<sup>84</sup>

## V. RIGHTS AND OBLIGATIONS OF THIRD PARTY

The rights and obligations of a third party depend on its material status in a specific administrative law relationship. In case it is a private party, its rights and obligations are the same as that of a plaintiff; otherwise, his rights and obligations are that of a defendant, as mentioned above.

## VI. CONCLUSION

To some extent, the promulgation and enforcement of the Administrative Procedure Law, 1989 has contributed towards improving rule

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<sup>82</sup> The Administrative Procedure Law, 1989, §55.

<sup>83</sup> The Constitution, 1982, Art. 129.

<sup>84</sup> The SPC's Explanations on the Administrative Procedure Law, 2000, §10.

of law and protecting human rights in China. The effectiveness of the law in controlling public powers and protecting human rights, however, is still modest. The causes, as I have already discussed above, are as follows: Firstly, the judiciary is not independent. Independence is not only an essential feature of a constitutional state and an essential element of rule of law but also a guarantee for an effective judicial system as well. The Constitution, 1982 and the three procedural laws have clearly specified that the courts exercise their trial powers independent of any interference from administrative organs, social organizations and individuals. In practice, the courts are vulnerable to and sometimes even dominated by such interference. For example, the actions of the CCP commissions in the courts and the so called CCP commissions for politics are outside the court's jurisdiction, though most of its members are not lawyers but instead administrative officers. These commissions have to a large extent ruined the independence of the courts, though they are not supposed to interfere with the judicial process. In this regard, it is necessary to guarantee the financial and personal independence of the courts and the judges.

Secondly, the mechanical dogmatic approach adopted by most judges has also hindered the development of the law and the protection of human rights in China. Such a tendency could be the result of poor education of the judges. Only forty percent of all the judges have finished their higher education and won diplomas.<sup>85</sup> If the so called diplomas from party colleges, part-time colleges and correspondence courses are excluded, the number of the judges with B.A. degrees would be even less.<sup>86</sup> Hence, improvement of the education level of the judges is of utmost concern. Besides this effort, it seems that the early retirement of those judges who are neither sufficiently educated nor trained for judicial practice could also provide a solution.

Finally, as already mentioned, the Administrative Procedure Law, 1989 came into force around twenty years ago. For the last two decades, great changes have been taking place the world over, especially in a country like China which has witnessed fast-paced development and growth over the last few years. Some of the provisions of Administrative Procedure Law, 1989 seem to be out of tune with the demands of contemporary society and need to be amended. This is also important in keeping the law alive.

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<sup>85</sup> ZHANG Zhiming, *On Retirement of Judges*, December 24, 2007, available at <http://www.chinafakao.com.cn/Article/rmht/200712/2993.html> (Last visited on June 15, 2011).

<sup>86</sup> *Id.*

