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Like Throwing an Egg Against a Stone? Administrative Litigation in the People's Republic of China

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On April 4, 1989, the National People's Congress of the People's Republic of China (PRC) passed the Administrative Litigation Law (ALL).[1] This law allows PRC citizens to sue government officials who violate the law in the course of administrative agency activity. The possibility that millions of government officials may be forced to defend their actions in court represents a sharp departure from traditional Chinese views toward the relationship among government, courts, and law. For example, the ALL may expand judicial authority, curb administrative discretion, and provide important new procedural rights to natural and legal persons in China.

This article will examine the PRC administrative litigation system which was modeled after other legal systems, but still embodies distinctive features of China's current political structure. The first section outlines the historical background of administrative litigation in China, while the second section analyzes the ALL and traces its legislative history.

I. HISTORICAL BACKGROUND OF ADMINISTRATIVE LITIGATION

Administrative litigation was introduced to China as part of the late Qing constitutional and legal reforms at the beginning of the twentieth century.[2] In 1908, the Imperial Throne authorized the

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1. Zhonghua Renmin Gongheguo Xingzheng Susong Fa (Administravtive Litigation Law of the PRC) (promulgated April 4, 1989) Renmin Ribao [RMRB], April 10, 1989, at 2, *trans. in* CHINA LAW AND PRACTICE, June 5, 1989, pp. 37-57 [hereinafter ALL].

2. *See, e.g.*, CHI'EN TUAN-SHENG, THE GOVERNMENT AND POLITICS OF CHINA 257 (1961). These reforms were the result of the 1906 imperial mission to Japan during which visiting Chinese officials were introduced to the 1890 Japanese Administrative Litigation Law modeled on German and Austrian laws.

Those charged with the responsibility of drafting the law in Japan visited France, Ger-

drafting of legislation to establish an administrative court.[3] However, the Qing Dynasty was overthrown before the legislation was promulgated.[4]

In 1914, the Yuan Shikai government in Beijing promulgated laws[5] establishing a Court of Administrative Justice, an Office of Supervision, and a disciplinary board for government officials.[6] The Court of Administrative Justice, which was separate from the judiciary, was authorized to hear cases involving unlawful administrative actions. Cases were accepted on appeal from the highest level of administrative agencies and the Court had power to uphold, annul, or change the administrative determination, but not to award monetary damages. Officials from the Office of Supervision could bring actions in the Court of Administrative Justice in the name of injured private persons, and could bring impeachment actions against wayward officials. However, few people knew that the new Court of Administrative Justice existed.[7]

The Nationalist government in 1932 promulgated a second law establishing an Administrative Court and administrative litigation procedure.[8] This Administrative Court had jurisdiction over all cases where an injured party appealed an administrative agency's ruling. Despite the breadth of the 1932 legislation, the impact of the Court was limited. Its judges were reluctant to make decisions adverse to

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many, and Austria to investigate Western administrative systems, and retained two German jurists as advisers. F. Li, The Administrative Litigation System in Taiwan: Its Structure, Operations and Role in Protecting Fundamental Rights of the People n.233 (Dec. 1980) (unpublished S.J.D. thesis available in Harvard Law School Library).

3. F. Li, *supra* note 2, at 28. The legislation followed the Japanese law closely.

4. The legislation would have established a court of administrative justice to hear four types of cases: tax assessments; denial or revocation of business licenses; irrigation and public works; and determination of land ownership between public authorities and private persons. Access was available to those with grievances against the cabinet, central ministry, provincial governmental-general, or imperial commissioner, or cases which had been appealed to the highest possible level. The court would have had three chambers, with five justices sitting en banc. *See generally, id.* at 77-81.

5. I. HSU, THE RISE OF MODERN CHINA 571 (1970). In March 1914, the Beijing government promulgated an "Order for Organization of a Court of Administrative Justice," and in May, 1914, also by executive order, a "Statute on Administrative Litigation Procedure." F. Li, *supra* note 2, at 34 n.58, 35 n.58, 63. The Statute on Administrative Litigation Procedure was reformulated in July of that year under the title "Law of Administrative Litigation Procedure." F. Li, *supra* note 2, at 36 n.66.

6. F. Li, *supra* note 2, at 37.

7. For the discussion of this section, *see generally, id.* at 37-40; WOQIV ZHONGZI, MINGUO SHINIAN GUANCHANG FUBAISHI (A History of Bureaucratic Corruption in the First Ten Years of the Republic of China) 60-62 (1923).

8. F. Li, *supra* note 2, at 44 n.97. The influence of the Japanese models is considerably less in the 1932 legislation.

the administrative agencies.[9] Like the earlier Court of Administrative Justice, the Administrative Court could not award damages,[10] and most citizens were either unaware of the Court's existence or did not have the resources to make the necessary appeals.[11] Moreover, due to prevailing political conditions including civil war, warlord control of certain regions, and the Japanese occupation, the Court was rarely used.[12] One knowledgeable observer described the Court as "an institution of indifferent value. . . . [T]o say that it, representing the judicial power, has been able to protect the rights of the people against the executive power would involve some exaggeration."[13] Thus, prior to 1949, institutions for administrative review did not function effectively.

After the founding of the PRC in 1949, the new leaders abolished the fundamental laws of the Nationalist regime, including the law establishing the Administrative Court and administrative litigation procedure.[14] During the early years of the PRC, the court system used a combination of new laws and ad hoc regulations and decrees. In 1953, Chinese leaders set out to develop a formal legal system with the help of China-based Soviet legal personnel and Chinese students and officials trained in the U.S.S.R. By 1954, the PRC promulgated a constitution, which embodied the Soviet-style judicial system. Concurrently, the National People's Congress (NPC) began drafting criminal and civil codes. Although the 1954 Constitution authorized the

9. The Law of Organization of the Administrative Court required that justices of the Administrative Court show that they had thoroughly studied the principles and doctrines of the Kuomintang, and had served for at least two years by presidential appointment in an agency under the Kuomintang government. *Id.* at 46. Mao Zuquan, a member of the Central Committee of the Kuomintang, was appointed the Chief Justice of the Administrative Court. *See id.* at 46 n.103.

10. *See generally, id.* at 46-51.

11. According to Chi'en Tuan-Sheng, "ordinary individuals who have inadequate legal knowledge and are afraid of the authorities generally do not dare to bring an administrative appeal to the Executive Yuan. It is usually done only by important persons who know that they can resort to an appeal to protect themselves against maltreatment by administrative agents." CH'IEN, *supra* note 2, at 258. Ch'ien described the judiciary under the Kuomintang regime as of "generally poor quality." He ascribed the causes as being an insufficient number of trained personnel, unattractive nature of a judicial career (because of low pay and difficulty of transfer to more important posts), and party (Kuomintang) and bureaucratic interference in judicial proceedings. *Id.* at 254-55.

12. During the several years preceding the start of the Sino-Japanese war, the Court's caseload varied from 178 cases in 1933 to 307 cases in 1936, and then steadily declined during the war. F. Li, *supra* note 2, at 187-88.

13. CH'IEN, *supra* note 2, at 259.

14. Zhongguo Renmin Zhengzhi Xieshang Huiyi Gongtong Gangling (Common Program of the Chinese People's Consultative Conference) (adopted Sept. 29, 1949 by the Chinese People's Consultative Conference, 1st session), 1 ZHONGYANG RENMIN ZHENGFU FALING HUIBIAN, 1952 (Collected Decrees of the Central People's Government, 1952) 17, 21 (1982).

state to compensate citizens when their rights were violated by government officials, it appears that the administrative courts were in fact prohibited from taking such cases by internal judicial directives.[15]

There were several methods available to resolve administrative grievances during the early 1950's. Individuals could appeal directly to one of several government agencies which monitored the legality of administrative agency actions. It was more likely, however, that individuals would initially register a complaint with the *xinfang* (ombudsman) offices, which still exist today and are attached to local, provincial, and national government offices.[16] The *xinfang* office could handle the case in any of three ways. First, the *xinfang* office could transfer the case to the Procuracy which prosecuted criminal and civil cases for the government and supervised the legality of government actions. Procurate monitoring of administrative agencies was a target of severe criticism, however, during the 1957-58 anti-rightist movement, when it was charged that rightists "tr[ied] to change this weapon into an instrument by means of which bourgeois rightists can attack state organs and cadres."[17] Alternatively, the *xinfang* office could transfer the case to supervision offices, which were successful in uncovering government misconduct until they were abolished in 1959. Finally, the *xinfang* office could return the com-

15. Article 97 of the 1954 Constitution provided "[people] suffering loss by reason of infringement by persons working in organs of state of their rights as citizens have the right to compensation." Zhonghua Renmin Gongheguo Xianfa (Constitution of the People's Republic of China) art. 94 (1954) [hereinafter 1954 PRC Constitution]. Hiroshi Oda states that such cases were one of the "five major rejections," i.e., the judicial practice which prohibited courts from accepting a certain category of cases including suits against the state for infringement of citizens' rights, transnational civil and commercial cases, and cases that resulted from the state's pursuit of a certain policy. Oda, *The Procuracy and the Regular Courts as Enforcers of East Asian States*, 61 TULANE L. REV. 1339, 1348 (1987).

16. Zhengwuyuan Guanyu Chuli Renmin Laixin he Jiedai Renmin Laifang Gongzuo de Jueding (Government Administration Council [predecessor to State Council] Decision Concerning Receiving People's Letters and People's Visits) (adopted June 7, 1951). ZHONGYANG RENMIN ZHENGFU FALING HUIBIAN 16 (1953); *Guanyu Jiaqiang Chuli Renmin Laixin he Jiedai Renmin Laifang Gongzuo Zhishi* (Improving the Technique of Receiving People's Letters and Visits), 6 ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN (Compilation of Laws and Regulations of the People's Republic of China) 579 (1957); *Dangzheng Jiguan Xinfang Gongzuo Zhanxing Tiaoli* (caoan) (Provisional Regulations of the Party and Government Concerning Letters and Visits (draft)) SIFA SHOUCE 657-662 (1983). *See also* Shen & Fan, *Lun Xinfang Zai Xingzheng Susong Zhong de Diwei* (Discussion of Letters and Visits in Administrative Litigation), 4 FAXUE ZAZHI 4-5 (1987). Chang, *Shitan Jianli Juyou Zhongguo Tese de Xingzheng Susong Zhidu* (A Tentative Discussion of an Administration Law with Chinese Characteristics), 4 ZHENGFA LUNTAN 70, 71 (1986), suggests that the ineffectiveness of letters and visits offices led people to feel they had no forum for their grievances and that "officials support one another."

17. Tan, *Absorb Experience and Teaching, Impel a Great Leap Forward in Procuratorial Work*, 3 ZHENGFA YANJIU 34-37 (1958) *trans.in*, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-63 381, 383 (J. Cohen ed. 1968).

plaint to the bureau against which the complaint was filed. However, this method often failed adequately to compensate the complainant and frequently led to reprisals against the complainant.[18]

The widespread violation of individual rights, the arbitrary and capricious actions taken by officials, and the general collapse of law and order which took place during the Cultural Revolution, led the post-Cultural Revolution leaders, many of whose own rights had been violated, to decide that a fundamental change in the means of resolving administrative grievances was necessary. The Third Plenum of the 11th Central Committee in late 1978 laid the foundation for this change. With Deng Xiaoping leading, the members of the Central Committee called for the establishment of a legal system to provide an efficient mechanism to promote economic and political modernization. Peng Zhen, the Chairman of the NPC Standing Committee, subsequently stated that law and legal institutions were necessary "to protect the democratic rights of the people, develop socialist democracy, enhance stability and unity, maintain public order and ensure the smooth advance of socialist construction."[19]

An important corollary of the decision to modernize the legal system was the decision to promulgate laws governing state administration. In 1980 Deng Xiaoping deemed the sub-standard operation of state agencies and their personnel as a road block to modernization: "For a long time we have lacked strict administrative regulations . . .[and] clear stipulations regarding the competence of each organ and even each person; whatever the matter, more often than not there have been no regulations to follow. . . ."[20]

The 1982 Constitution provided the legal foundation for the reform policy by setting forth a hierarchy of legal norms. According to the Constitution, national law can be promulgated only by the NPC or its Standing Committee.[21] The NPC and its Standing Committee are authorized to annul those State Council administrative rules and regulations (*xingzheng fagui*) that conflict with national laws or the Constitution.[22] In addition, the Standing Committee can invalidate local regulations (*difangxing de fagui*) passed by provincial legislatures, autonomous regions, and centrally administered munici-

18. H. HARDING, ORGANIZING CHINA 79-80, 85, 189 (1981).

19. Peng Zhen, *Report on Work of the N.P.C. Standing Committee*, BEIJING REVIEW, Nov. 29, 1980, at 12.

20. DENG XIAOPING, *Dang he Guojia Lingdao Zhidu de Gaige* (Reform of Party and Government Leadership) *in* DENG XIAOPING WENXUAN (Selected Essays of Deng Xiaoping) 280, 288 (1983).

21. ZHONGHUA RENMIN GONGHEGUO XIANFA (The Constitution of the People's Republic of China) art. 58 (1982) [hereinafter PRC CONSTITUTION].

22. *Id.* art. 67(7).

palities if these local regulations conflict with State Council administrative rules and regulations, national law, or the Constitution.[23]

In response to the official violations of individual rights that occurred during the Cultural Revolution, article 41 of the 1982 Constitution gives citizens the right to remonstrate the government and seek redress for grievances.[24] This article is generally regarded as providing the constitutional basis for judicial review of administrative decisions.[25]

Since the promulgation of the 1982 Constitution, two broad trends have led towards the establishment of a system of administrative litigation. The first trend is the continuation of the policy of legalization, i.e., the policy of establishing a legal foundation for the operation of the Chinese state, economy, and society. This trend is evident in the NPC's promulgation of a large body of laws. As part of the national commitment to legalization, legal institutions have been developed and expanded, including the court system, Procuracy, and most recently, the Ministry of Supervision, which was established in 1986. Additional efforts have been made to publicize citizens' legal rights and duties.[26] Among the many laws drafted since 1982 are provisions allowing aggrieved persons to challenge administrative actions or decisions in court.[27]

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23. *Id.* art. 67(8).

24. *Id.* art. 41.

25. *Id.* art. 41 states:

> Citizens of the People's Republic of China have the right to criticize and make suggestions to any state organ or functionary. Citizens have the right 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; but fabrication or distortion of facts with the intention of libel or frame-up is prohibited.
>
> In cases of complaints, charges or exposures made by citizens, the state organ concerned must deal with them in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposures, or retaliate against the citizens making them. Citizens who have suffered losses through infringement of their civil rights by any state organ or functionary have the right to compensation in accordance with law.

26. In 1985, the Ministry of Justice and Propaganda Department of the Communist Party Central Committee set forth a five-year plan and the Standing Committee of the National People's Congress issued a decision concerning popularizing legal knowledge. *See* Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Zai Gongminzhong Puji Falü Changshi de Jueyi (Standing Committee of the National People's Congress Resolution on Dissemination of Legal Knowledge) (promulgated Nov. 25, 1985) ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN 23 (1985). In July 1986, the Party Secretariat organized lectures on law in Zhongnanhai for the nation's leaders. ZHONGGUO FALÜ NIANJIAN (Law Year Book of China) 42 (1987).

27. For example, in 1982, judicial review provisions were included in article 38 of the provisional law on food hygiene. *See* the Provisional Law of the People's Republic of China on Food Hygiene, art. 38 (adopted Nov. 19, 1982) 2 CHINA LAWS FOR FOREIGN BUSINESS: BUSINESS REGULATION para. 16-540(41) (1988) [hereinafter CHINA L. FOR. BUS.: BUSINESS REG-

The second trend leading towards an administrative litigation system has been the reform of the economy. Because of economic reforms, many people now have a financial interest in challenging unfavorable administrative sanctions or decisions. Over the past six years, millions of individual household businesses have gone into operation.[28] In addition, many people have established collective business or service operations for private profit. In the state-owned sector of the economy, many smaller enterprises have been leased out to individuals or groups.[29] Under the reforms, state enterprises no longer submit all their profits to the state, but must pay taxes instead, and are allowed to retain a portion of the remaining profits.[30] In addition, foreigners, most of whom are accustomed to having a legal forum for challenging administrative sanctions, have established a palpable presence within the Chinese economy in the form of joint

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ULATION]. *See also* Marine Environmental Protection Law of the People's Republic of China, arts. 41, 42 (adopted Aug. 23, 1982) 2 CHINA L. FOR. BUS.: BUSINESS REGULATION para. 14-620(41), (42); Trademark Law of the People's Republic of China, arts. 36, 39 (adopted Aug. 23, 1982) 2 CHINA L. FOR. BUS.: BUSINESS REGULATION para. 11-500(38)-(41); Maritime Traffic Safety Law of the People's Republic of China, art. 45 (adopted Sept. 2, 1983) 2 CHINA L. FOR. BUS.: BUSINESS REGULATION para. 15-600(47); Patent Law of the People's Republic of China, art. 60 (adopted March 12, 1984) 2 CHINA L. FOR. BUS.: BUSINESS REGULATION para. 11-600(62); Water Pollution Prevention and Control Law of the People's Republic of China, art. 40 (adopted May 11, 1984) *in* L. ROSS & M. SILK, ENVIRONMENTAL LAW AND POLICY IN THE PEOPLE'S REPUBLIC OF CHINA 306-12 (1987); Forestry Law of the People's Republic of China, art. 39 (adopted Sept. 20, 1984) *id.* at 343-50; Law on the Administration of Drugs, art. 55 (adopted Sept. 20, 1984) 2 CHINA L. FOR. BUS.: BUSINESS REGULATION para. 16-545(56); Law of the People's Republic of China on Controlling Foreigners Entering and Leaving the Country, art. 29 (adopted Nov. 25, 1985) 2 CHINA L. FOR. BUS: BUSINESS REGULATION para. 19-510(30); Grasslands Law of the People's Republic of China, arts. 6, 21 (adopted June 18, 1985) *in* L. ROSS & M. SILK, *supra*, at 379-82; Regulations of the People's Republic of China on Dumping of Wastes at Sea, art. 22 (adopted March 6, 1985) *id.* at 339-40; Law on Postal Services of the People's Republic of China, art 39 (adopted Dec. 2, 1986) 2 CHINA L. FOR. BUS.: BUSINESS REGULATION para. 19-532(41); Customs Law of the People's Republic of China, arts. 46, 53 (adopted Jan. 22, 1987) CHINA LAWS FOR FOREIGN BUSINESS: CUSTOMS para 50-300; Regulations of the People's Republic of China on Price Control, art. 32 (adopted Sept. 11, 1987) 2 CHINA L. FOR. BUS.: BUSINESS REGULATION para. 16-580(32).

28. In rural areas, the number of household businesses increased from 961,000 in 1981 to 10,342,000 in 1987. The total number of persons employed in rural household business increased from 1,218,000 in 1981 to 16,660,000 in 1987, with a total business volume of 70.23 billion yuan and retail sales of 48.7 billion yuan (8.4% of national retail sales). The number of urban household businesses increased from 868,000 in 1981 to 3,383,000 in 1987, employing 1,056,000 in 1981 and 4,923,000 in 1987. State Statistics Bureau, *Facts and Figures: The Individually Owned Economy*, BEIJING REVIEW, Feb. 27, 1989, at 23-24.

29. Before 1979, all commercial enterprises were state-owned and managed. As of early 1989, 81.9% of China's 87,000 small and medium-sized commercial enterprises are run as contracted undertakings, have been leased out, or have had their ownership transferred. Qiangmin & Liu Jianjun, *Taking Stock of Commercial Reform*, BEIJING REVIEW, Dec. 26, 1988, at 17, 18.

30. Gao Shangquan, *China's Economy After 10 Years of Reform*, 38 CHINA RECONSTRUCTS 1, at 13-14 (1989).

ventures and wholly foreign-owned enterprises. As a result of these changes in the structure of the Chinese economy, the number of business operators having a personal interest in challenging unfavorable administrative sanctions has increased.

In addition to these general legal and economic trends, scholars and government institutions have focused on developing a system of administrative litigation. Leading legal advisers to the government, such as Tao Xijin, criticized existing institutions as being inadequate to solve the problems of administrative agencies, and advocated the establishment of a legal framework for administrative litigation.[31]

Major advancement toward developing a system began in 1986, when the Legal Affairs Committee of the Standing Committee of the NPC commissioned a research group to research and prepare a preliminary draft of an administrative litigation law. The group completed the draft by August 1987.[32] This preliminary draft was then circulated to interested officials and scholars and to the relevant ministries. Concurrently, administrative litigation legislation was imple-

31. *See, e.g., Jianyi Zhiding Xingzheng Fa he Xingzheng Susong Fa* RMRB, Aug. 11, 1986, at 4. In the interview, Mr. Tao states, "currently, along with economic development, the number of administrative disputes and administrative cases is continuously increasing. If these disputes and cases are not handled in a timely and appropriate manner, it is bound to cause disorder in social-economic life, making it impossible for administrative management to be carried out smoothly." He was voicing the views of many legal scholars regarding the necessity of establishing administrative litigation in China. Beginning in 1982, legal academics focused increasingly on administrative litigation.

See also Zhou, *Jixu Zhiding Xingzheng Susong Fagui*, XINGZHENG FA 126-135 (1984); Jiang, *Jiaqiang Xingzheng Lifa Wei "Sihua" Fuwu*, Zhongguo Fazhibao, Aug. 6, 1982 at 3, *reprinted in* 8 ZHONGGUO RENMIN DAXUE SHUBAO ZILIAOSHE FUYIN BAOKAN ZILIAO: FALÜ (China People's University Book and Newspaper Center, Photocopied Periodical: Law) 37 [hereinafter RENDA ZILIAO]; Zhu, *Shi Lun Woguo de Xingzheng Susong* 4 FAXUE YANJIU 14-20 (1984); Piao, *Renmin Fayuan Youquan Dui Xingzheng Chufa Zuochu Zuizhong Caijue*, 5 ZHENGZHI YU FALÜ 21-22 (1984); *Xingzheng Susong*, 2 ZHENGZHI YU FALÜ 19 (1985); *Guanyu Jingji Xingzheng Anjian Panli Wenti*, Zhongguo Fazhibao, May 27, 1985, at 3. In 1986 and 1987, the volume of newspaper and journal articles concerning administrative procedure increased. *See, e.g.*, Zheng, *"Xingzheng Susong" Hanyi de Bianxi*, 2 FAXUE YANJIU 79-80 (1986); *Jianyi Zhiding Xingzheng Fa he Xingzheng Susong Fa, supra*; Shen, *Zhiding Xingzheng Susong Fa he Shezhi Xingzheng Shenpan Jigou de Biyaoxing*, Zhongguo Fazhibao, Oct. 8, 1986, at 3; Zhu, *Woguo Yingdang Jianli Duli de Xingzheng Susong Zhidu*, 3 ZHENGFA LUNTAN 54-59 (1987); Tao, *Jiaqiang Xingzheng Fazhi Jianshe Shi Dangwu Zhi Ji*, 3 FAXUE JIKAN 3-6 (1987); *Jiejue Xingzheng Zhengyi yu Wanshan Xingzheng Susong Zhidu*, 4 FAXUE JIKAN 45-48 (1987); Yang, *Dui Jianli Woguo Xingzheng Susong Zhidu de Sikao*, 8 FAXUE 5-8 (1987).

32. Zhou Changxin, *Woguo Xingzheng Susong Zhidu zai Yannan Qibu*, Fazhi Ribao, Jan. 28, 1989, at 1.

Chinese writers on administrative law take differing approaches to the definition of "administrative litigation." Six are listed in ZHONGGUO XINGZHENG SUSONG JIAOCHENG (Textbook of Chinese Administrative Litigation) 1-2 (Xiong Xianjue ed. 1988). *See also* XINGZHENG SUSONG ZHISHI SHOUCE (Handbook of Administrative Litigation) 1-2 (Ying Songnian ed. 1988).

mented in Chongqing, Sichuan Province, on an experimental basis, in order to test the proposed legislation.[33] The opinion of the Supreme People's Court regarding the law was solicited,[34] and the Court also began preparations for administrative litigation within the court system.[35]

By early 1987, the Supreme People's Court issued an order establishing, on an experimental basis, administrative divisions in people's courts in various parts of the country.[36] The purpose of creating the divisions was to designate the judges who would bear primary responsibility for handling administrative cases.[37] In July 1988, Ren Jianxin, the President of the Court, publicly announced that approximately one-third of China's 3,000 courts had set up administrative divisions.[38] Ren then called for the institution of administrative panels within all intermediate and higher people's courts by the end of 1988, and institution within all basic level courts on a more gradual basis.[39] By September 1988, the administrative division of the Supreme People's Court was prepared hear administrative cases.[40]

The Standing Committee of the NPC published a revised draft of the ALL in November 1988 in order to publicize the law and solicit public comments.[41] Scholars and officials held conferences and meetings between November 1988 and March 1989 to help prepare a final

33. *See* Chongqingshi Xingzheng Susong Zhanxing Guiding (Chongqing Municipality, Administrative Litigation Provisional Regulations) (approved Sept. 4, 1987) SICHUAN SHENG DIFANGXING FAGUI HUIBIAN 118 (1987) [hereinafter Chongqing Regulations]. "Test-marketing," i.e., selecting one or more cities to try out legislation prepared for national promulgation, is the Chinese practice for controversial legislation.

34. Interview conducted by author (February 1989).

35. These preparations included the compilation of statutes with provisions permitting court review for court personel. XINGZHENG SHENPAN SHOUCE (Manual for Administrative Adjudication) (1987).

36. Late in 1986, the People's Court in Guluo County, Hunan Province, established an administrative division. The first case tried involved a local pharmaceutical company that disputed the penalty imposed by the local health department for manufacturing fake medicine. *Xingzheng Anjian Gaozhuang You Men*, Zhongguo Fazhibao, Nov. 8, 1986, at 1. Administrative divisions were also established in Beijing, Shanghai, Shenyang, Wuhan, Chongqing, and Shenzhen.

37. Document on file with author.

38. *Supreme Court Head Speaks at National Meeting*, Foreign Broadcast Information Service—Daily Report, China [hereinafter FBIS—China], July 19, 1988, at 26.

39. As of June, 1988, 21 of the nation's higher level courts had established administrative divisions (72.4%). As of September, 1988, 224 intermediate level courts had established administrative divisions (64.4%) and 1154 basic level courts had established administrative divisions (40.3%). Zhou Changxin, *supra* note 32. As of March 1989, the Shanghai Municipality Higher People's Court administrative division had no cases on its docket. Interview conducted by author with the Vice President of the Administrative Division of Shanghai Municipality Higher People's Court (March 1989).

40. *New Trial Court to Handle Administrative Cases*, FBIS—China, Aug. 25, 1988, at 28.

41. *Administrative Law Explained*, FBIS—China, Nov. 9, 1988, at 33.

draft for submission to the National People's Conference in March 1989. Summaries of the debate on the law appeared in the legal press, along with many articles commenting on or criticizing the draft law.[42] On April 4, 1989, the ALL was passed. [43]

The ALL creates the institutional framework necessary to develop an administrative litigation system in China. An array of obstacles, however, threatens to hinder effective implementation of the ALL. First, government leaders are ambivalent about the goal of administrative litigation and are concerned that it will result in judicial interference with state administration. Secondly, for a variety of reasons, which will be detailed below, judges trying administrative cases frequently find themselves under pressure to uphold administrative decisions.[44] Thirdly, officials are often hostile to the idea that they may end up as defendants in court.[45] Finally, many ordinary people remain unaware of the law, feel that officials protect one another, or believe that it is more dangerous to win such a lawsuit than to lose.[46]

In reality, it seems that most Chinese doubt that a court has the power to protect their legal rights. Researchers investigating administrative litigation in Chongqing found that ordinary people in the city, influenced perhaps by the enduring truth of the old proverb "officials always protect each other," reacted suspiciously to the idea that the administrative division could protect their legal rights.[47] The Chief Judge of the intermediate level people's court in Shenyang stated that some people feel that suing a government agency is like "throwing an egg against a stone,"[48] a proverb which implies that such a suit would be foolishly self-destructive. Citizens fear reprisals upon winning vindication in administrative litigation.[49]

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42. *See, e.g., Xiugai Hao Zhebu "Min Gao Guan" Fa*, Fazhi Ribao, Feb. 10, 1989, at 2; *Dui Xingzheng Susong Fa Caoan Jige Wenti de Jianjie*, Fazhi Ribao, Feb. 3, 1989, at 2.

43. The law was passed with 2662 votes in favor, 3 votes against, and 23 abstentions. *Jiu Xiang Jueyi de Piao Tongji*, Wen Hui Pao (HK), April 5, 1989, at 1.

Although the vice-chairman of the National People's Congress had asked for implementation of the law to begin on April 1, 1990, because of legislative concern that a longer preparation period was needed, implementation was delayed until October 1, 1990.

44. Zhou Changxin, *supra* note 32.

45. *Id.*; *see also, Juzhang Dang Beigao Bing Bu Diu Ren Xianyan*, Fazhi Ribao, March 6, 1989, at 1.

46. Zhou Changxin, *supra* note 32.

47. Yuan Yue & Tan Zongze, *Sifa Tizhi Gaige Zhong de Yi Xiang Tansuo Shiyan (Dui Chongqing Shi Tuixing Xingzheng Susong de Diaocha)*, 3 FAXUE JIKAN 65 (1987).

48. Hua Yucai & Zhang Xing, *Xingzheng Shenpanting Weihe Menting Lenglu*, LIAONING FAZHIBAO, June 20, 1987, at 3.

49. Zhou Changxin, *supra* note 32.

II. ADMINISTRATIVE LITIGATION LAW

The ALL gives Chinese citizens and organizations, as well as foreigners and foreign organizations, the right to initiate a court proceeding against any administrative agency which allegedly has infringed upon their rights. However, a litigant's rights under the law are not unlimited since not all administrative actions may be challenged and the authority of the court is limited. The ALL, discussed in more detail below, sets forth rules of jurisdiction, venue, and standing.

A. Administrative Litigation Thus Far

The amount of administrative litigation grew substantially in the years prior to the promulgation of the ALL. According to statistics of the Supreme People's Court, from 1983 to 1988 courts at all levels had accepted 12,914 administrative cases.[50] In 1987, administrative divisions of various level courts accepted 5240 cases for initial consideration, 4677 of which went to judgment.[51] In 1987, 1007 cases were accepted for appellate consideration.[52] Of the trial cases that went to judgment, almost half (2225) were public security administrative cases; 203 of these invalidated public security decisions. In 1987, of the 948 appellate cases, most of which were public security cases, only 75 invalidated the original administrative decision.[53] In 1988, out of the 8753 administrative cases accepted throughout the country, there were 3385 public security cases, 2719 land use cases, 433 zoning cases, 422 forestry cases, 250 food hygiene cases, 204 industrial and commercial cases, 94 weights and measures cases, and 87 environmental cases.[54]

B. Availability of Judicial Review

1. Jurisdiction

People's courts have jurisdiction to hear two categories of cases against administrative agencies: challenges to administrative action and tort (civil) actions seeking damages for infringement of rights. The greater part of the ALL concerns challenges to administrative actions.

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50. *Id.*

51. *Id.* In 1987, the administrative divisions of the Shanghai courts accepted approximately 200 cases, while those in Chongqing took 117 cases. Document on file with the author.

52. Zhou Changxin, *supra* note 32.

53. *Id.*

54. March 1989 document on file with the author.

a. Challenges to Administrative Action

Article 11 of the ALL places eight types of cases within the jurisdiction of the people's courts.[55] Initially, the drafters had considered setting forth a broad definition of actionable administrative cases,[56] allowing adjudication of administrative cases in which "the concrete decision of state administrative agencies affects the legal rights and interests of citizens and units."[57] Nevertheless, a more limited definition of jurisdiction was eventually adopted in the ALL. The November 1988 ALL draft circumscribed the court's jurisdiction by specifying five categories of cases that were to fall within the court's jurisdiction.[58] These restrictive provisions were substantially criticized,[59] and as a result, article 11, while retaining the enumerative approach, gives the courts jurisdiction over a larger number of cases than the November 1988 draft.

In the following circumstances, an aggrieved party may seek redress in the people's courts: (1) when the administrative agency levies fines or the Public Security Bureau detains an individual; (2) when the administrative agency has imposed compulsory measures such as freezing bank accounts, seizing property or restricting travel; (3) when the administrative agency infringes upon an individual's management rights; (4) when an administrative agency refuses to grant a license although the applicant has met the statutory requirements; (5) when an administrative agency is legally obligated to protect personal or property rights, but refuses to do so; (6) when an administrative agency fails to issue a pension, disability or death payment as required by law; (7) when an administrative agency demands that a person or organization perform obligations not required by law; and (8) when an administrative agency violates personal or property rights in any other manner.[60]

Article 3 of the Civil Procedure Law[61] provided the statutory basis for administrative litigation until the ALL went into effect this year. The article states: "[t]he provisions of this Law shall apply to

55. ALL, *supra* note 1, art. 11.

56. *See* Zhonghua Renmin Gongheguo Xingzheng Susong Fa (Administrative Litigation Law of the PRC (draft)) 1987 [hereinafter 1987 Draft ALL] (on file with author).

57. *Id.* art.4.

58. Administrative Litigation Law of The PRC (draft) art. 11 (published Nov. 9, 1988) *trans. in* BBC-SWB, Far East/0315, Nov. 22, 1988, at B2/1.

59. *See, e.g.*, Gao Heng, *Xingzheng Susong Lifa Yingdang Mianxiang Xingzheng Susong Shishi*, Fazhi Ribao, Jan. 16, 1989, at 3.

60. ALL, *supra* note 1, art. 11.

61. Civil Procedure Law of the People's Republic of China (for Trial Implementation) (adopted March 8, 1982, implemented Oct. 1, 1982) art. 3 [hereinafter PRC Civil Procedure Law], *reprinted in* 2 CHINA L. FOR. BUS.: BUSINESS REGULATIONS para. 19-200.

those administrative cases which, as stipulated by law are subject to the adjudication of the people's courts."[62] This language led to confusion among the courts as to how much jurisdiction was conferred. In response to this uncertainty, the Supreme People's Court issued an advisory opinion in 1987 which stated that "as stipulated by law" means that courts were authorized to accept administrative cases arising only from laws passed by the NPC and its Standing Committee, administrative regulations promulgated by the State Council, local statutes passed by people's congresses (and their standing committees) of provinces and directly administered municipalities, and regulations passed by people's congresses of national autonomous areas.[63] The final paragraph of article 11 of the ALL codifies the court's advisory opinion by clearly stipulating that courts have jurisdiction only if a judicial review provision is included in national laws, local legislation, or administrative rules and regulations issued by the State Council.[64]

The ALL still leaves some cases beyond the reach of judicial scrutiny since the nature of the administrative action determines its reviewability. Article 12 specifically exempts four categories of cases from judicial review.[65] The first category exempts an administrative action involving national defense or foreign relations. The second category exempts complaints about regulations, rules, or other decisions formulated by administrative agencies. The third category exempts decisions regarding rewards, punishments, appointments, and the discharge of administrative agency personnel.[66] Finally, some administrative agencies are granted authority to issue final decisions and these decisions are unreviewable.[67]

b. Tort Actions

According to chapter IX of the ALL, people's courts have jurisdiction in civil (tort) actions against administrative agencies and personnel. This provision reiterates the principle set forth in article 121 of the 1986 General Principles of Civil Law of the People's Republic

62. *Id.* art. 3(2).

63. *Guanyu Difang Renmin Zhengfu Guiding Ke Xiang Renmin Fayuan Qisu de Xizheng Anjian Fayuan Ying Fou Shouli Wenti de Pifu*, 4 ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN GONGBAO 22 (1987). The opinion was issued in response to a request by the Guangdong Province Higher People's Court concerning the validity of judicial review provisions included in regulations on economic administrative cases issued by the Shenzhen Special Economic Zone People's Government.

64. ALL, *supra* note 1, art. 11.

65. *Id.* art. 12.

66. *See* XINGZHENG SUSONG ZHISHI SHOUCE (Handbook of Administrative Litigation Knowledge) 131 (Ying Songnian ed. 1988). Persons who dispute personnel sanctions may, under some statutes, appeal within the relevant agency.

67. ALL, *supra* note 1, art. 11.

of China (Civil Law): "[w]here a state agency, or workers in a state agency in the course of performing their official duties, violate the lawful rights and interests of citizens or legal persons and cause damage, there must be civil liability."[68]

The ALL provides that a person or organization may seek tort damages if an actual administrative act infringes upon and causes damages to a person's rights or interests.[69] Action may be brought for damages or in conjunction with a challenge to the administrative action. Article 67 of the ALL first requires an appeal to the relevant administrative agency. A lawsuit may be filed in court only after an unfavorable disposition by the administrative agency.[70]

2. Venue and Jurisdiction

Chapter III of the ALL concerns venue and jurisdiction.[71] It draws on, and supercedes relevant articles of the Civil Procedure Law, and certain regulations of the Supreme People's Court.

a. Jurisdiction

According to article 13 of the ALL, lower-level courts are the courts of first instance in most administrative litigation cases.[72] Intermediate-level courts will be courts of first instance in four types of cases: certain patent right cases; customs cases; "major or complicated" cases; and cases which concern national ministries and commissions, provincial governments and directly administered municipalities.[73] High-level people's courts can act as courts of first instance in major or complicated cases which arise within their jurisdiction.[74] The Supreme People's Court may act as an administrative court of first instance, in major or complicated cases that pertain to

68. Zhonghuo Renmin Gongheguo Minfa Tongze (General Principles of Civil Law of The People's Republic of China) art. 112 (adopted April 12, 1986, effective Jan. 1, 1987) *trans. in* Jones, 13 REV. OF SOCIALIST L. 357-386 (1987) [hereinafter PRC Civil Law]. The issue of civil liability of government agencies and officials for tortious conduct has been discussed by commentators. *See, e.g.*, Hu Jinguang, *Guojia Quanli Jiguan Yingshi Qinquan Xingwei de Zhuti,* 2 FAXUE JIKAN 27-28 (1985); Wu Yan, *Zhengfu Dui Qi Gongzuo Renyuan de Qinquan Xingwei Ying Fu Sunhai Peichang Zeren Chuyi,* 12 FAXUE ZAZHI 29 (1985); Zheng Xingfu, *Zhengque Renshi Guojia Jiguan Qinquan Xingwei ji qi Minshi Zeren,* 3 FAXUE 22-23 (1987); Zheng Zhongyan, *Jianquan he Wanshan Woguo de Xingzheng Peichang Zhidu,* 3 FAZHI JIANSHE 12-13 (1987); Zhang Feng, *Lun Zhiding Woguo de Guojia Peichangfa,* 1 ZHONGGUO FAXUE 15-20 (1987).

69. ALL, *supra* note 1, art. 67.

70. *Id.*

71. *Id.* chapter III.

72. *Id.* art. 13.

73. *Id.* art. 14.

74. *Id.* art. 15.

the entire nation.[75]

Article 23 adds "flexibility" in the area of jurisdiction, where none had previously existed. Higher-level courts may try cases in the first instance which normally would be tried by lower-level courts and higher-level courts may transfer cases within their jurisdiction to lower-level courts. Conversely, lower-level courts may request higher-level courts to try cases.[76]

b. Venue

Article 5 of the Civil Procedure Law used to be the only provision covering venue. It provided that any lawsuit brought against an agency falls under the jurisdiction of the people's court of the place in which the defendant agency is located.[77] This remains the general rule.[78] If a case has been reconsidered by a superior level administrative agency, the court in the area in which that superior level agency exists may also try the case.[79] The ALL is consistent with that part of the Civil Procedure Law which states that if an administrative case concerns real estate, the court in the area in which the real estate is located may exercise jurisdiction.[80]

In general, the venue rules in the ALL provide that an administrative case is tried wherever the administrative agency is located.[81] It is likely that such provisions are based on judicial convenience in trying cases, since Chinese courts often take an active role in investigating cases. An inevitable consequence of trying a case in the defendant's "home court," however, is the likelihood of local favoritism, increasing the already significant advantage of the administrative agency. The chances that officials of the defendant agency will exert pressure or otherwise interfere with the regularity of the litigation are also increased.

A legal challenge to a compulsory measure issued by an administrative agency may be made where either the plaintiff or the defendant is located.[82] A court which does not have venue or jurisdiction may

75. *Id.* art. 16.

76. *Id.* art. 23.

77. PRC Civil Procedure Law, *supra* note 61, art. 20. For a discussion of jurisdiction, see Fei Zongwei & Jiang Bixin, *Jianli Woguo Xingzheng Susong Zhidu de Ruogan Wenti*, 4 FAXUE JIKAN 4-5 (1987); Yuan Yue & Tan Zongze, *supra* note 47, at 66; Wang Qiguo, *Woguo Xingzheng Susong Teshuxing Tanxi*, 1 FAXUE 19, 20 (1987).

78. ALL, *supra* note 1, art. 17.

79. *Id.*

80. *Id.* art. 19; PRC Civil Procedure Law, *supra* note 61, art. 30.

81. ALL, *supra* note 1, art. 17.

82. *Id.* art. 18.

transfer a case to one that does.[83] A court may refuse to exercise jurisdiction for "special reasons" (perhaps because the case is politically difficult or the court lacks necessary resources.) In such an event, a court at a higher level may designate an alternate venue.[84] If courts dispute jurisdiction, the law suggests that the issue should be resolved through "friendly" consultation. If this fails, superior level courts will resolve the issue.[85]

3. Standing

a. Plaintiffs

The plaintiff in an administrative action must be a citizen, legal person or organization, or, under certain conditions, a foreigner, stateless person, or foreign organization.[86] If the citizen is deceased, a near relative may bring the action.[87]

Standing requirements under the ALL differ from those under the Civil Procedure Law. Not only natural persons and organizations with legal person status may bring suit, but "other organizations" may bring suit, as well. It would seem that this term is meant to include various other types of organizations such as separate factories of a single enterprise or partnership which do not have legal person status.[88]

Administrative litigation may be conducted as a class action. Although the November 1988 draft omitted any mention of such class action litigation,[89] the ALL, like Article 47 of the Civil Procedure Law, provides that lawsuits of a similar nature filed by similarly situated persons may be tried together with the consent of the judge.

As under the Civil Procedure Law, foreign nationals, stateless persons, and foreign organizations enjoy the same rights to bring administrative actions as Chinese citizens and organizations unless

83. *Id.* art. 21.

84. *Id.* art. 22.

85. *Id.*

86. *Id.* art.24. This article states that "[a] citizen, legal person or other organization who brings an action in accordance with this Law shall be a plaintiff."

87. *Id.*

88. Take the common example of a large state-owned enterprise with several factories, which has leased one or more factories to individuals. The enterprise itself is a legal person, but each factory is not. It would seem that if it is considered to belong to the class of "other organizations," the leased factory could engage in administrative litigation in the event that its rights have been infringed upon by an administrative organ. Under the ALL, an enterprise owned by a school or university (a common phenomenon) which is not an economically independent unit, could also bring an administrative action.

89. A provision allowing group litigation is being tried in Chongqing, but does not resolve the question of whether the decision in the litigation is binding on persons who do not participate but later file their own suit. Chongqing Regulations, *supra* note 33, art.18.

relevant treaties provide otherwise or the courts of the foreign country restrict the rights of PRC citizens or organizations to bring administrative actions.[90] Foreigners and foreign organizations engaging lawyers to represent their interests in administrative litigation must hire PRC lawyers.[91] This is an improvement over the 1988 draft which foreign observers had criticized because it made no mention of the rights of foreigners and foreign organizations to engage in administrative litigation.[92]

b. Requirement of a "Concrete Act"

Under the ALL, only a concrete administrative act of an agency is actionable. However, current law does not define a "concrete administrative act."[93] Some legal scholars had suggested that the ALL should encompass "abstract administrative acts." They define this term to include rules and regulations with binding authority issued by the State Council or provincial governments, and administrative measures enacted by county governments.[94] According to one commentator, "in actual life, a great number of those acts that violate the rights and interests of citizens are abstract administrative acts . . . [if abstract administrative acts are not actionable] the rights and interests of citizens can not receive effective protection."[95] But according to Wang Hanbin, formerly vice-chairman of the NPC Standing Committee and director of the NPC legal commission, the ALL was intended to cover only a limited variety of disputes.[96]

c. Defendants

Under the ALL, administrative agencies which have performed qualified "concrete administrative acts" may be sued.[97] It would seem that agencies at any level are potential defendants.[98] The ALL,

90. ALL, *supra* note 55, art. 70-72. *See also* PRC Civil Procedure Law, *supra* note 61, ch. V.

91. ALL, *supra* note 55, art. 73.

92. Lubman & Wajnowski, *A Legal Opinion*, CHINA TRADE REPORT, Mar. 1989, at 5.

93. A January 1989 draft of the law defined a "concrete administrative act" as a unilateral act, committed by an administrative agency exercising administrative authority in regard to a specific citizen or organization and involving rights and obligations of the citizen or organization. Administrative Litigation Law of The PRC (draft) art. 67(1) (published Jan. 24, 1989).

94. Hu Jian, *Renmin Fayuan Shouli Xingzheng Anjian Fanwei Tanxi*, Fazhi Ribao, Mar. 8, 1989, at 3.

95. Zhang Suyi, *Gaishi Daowei de Shihou le*, Fazhi Ribao, Feb. 20, 1989, at 3.

96. Gu Chengwen, *Law to Sue Government Planned for Next Year*, China Daily, March 29, 1989, at 1.

97. ALL, *supra* note 55, art. 23.

98. The ALL specifies which agencies may be sued if a case has been reconsidered,

however, does not define "administrative agency" or "administrative organ." Can semi-official organizations be sued? Can universities be sued under the ALL? These important questions remain unresolved. The law does not specify whether the agency must be a legal person. Under previous law, a branch of an administrative organ or agency could not be a party to a suit; the parent agency would serve as defendant.

Under the ALL, administrative organs, but not Communist Party organizations, are subject to lawsuits.[99] In practice, it is often Party organizations which formulate administrative decisions. Although the Party is obligated to act within the law, there is no relief for parties aggrieved by Party decisions under the ALL.[100] This failure in has rarely been addressed by Chinese legal scholars, undoubtedly due to its political sensitivity.[101]

In practice, government departments and officials are unaccustomed to being defendants in administrative litigation. The concept is foreign to them because in their experience officials are accountable only to superiors and Party discipline committees. A 1987 study done by a team of researchers at Peking University found that "government departments are extremely reluctant to be defendants. Their refusal to appear in court . . . [is] not unusual."[102] Similarly, two researchers who investigated the newly established administrative divisions of the Chongqing municipal courts, found that officials did not want to "condescend" to go to court on an equal basis with ordinary citizens.[103] A prominent Shanghai lawyer writing in a recent issue of *Guangming Ribao* pointed out that some departments refuse to answer lawsuits or deliver files to the court; some even destroy incriminating materials.[104] Many officials lack familiarity with law, and regard the regulatory infrastructure with which they work as inadequate. In addition, many either engage in favoritism or encounter it in their work. A recent survey of the level of legal knowledge of heads of departments and sections of Shanghai government agencies

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administrative authority has been delegated to another organization, two or more agencies have jointly made the same act, or the original administrative agency has been abolished. *See* ALL, *supra* note 55, art. 23.

99. *Id.*, ch. IV.

100. *Id.*

101. An exception is Yuan & Tan, *supra* note 47, at 68. Discussion of whether the Party should be subject to suit is almost nonexistent in the public press.

102. Wang Gangyi, *Court Can Check Government Power*, China Daily, Jan. 26, 1988, at 4.

103. Yuan & Tan, *supra* note 47, at 68.

104. Yao Xuandong, *Yishen Xingzheng Anjian Buyi Shumian Shenli*, Guangming Ribao, Feb. 21, 1989, at 3.

(relatively well-trained in comparison to officials in much of China) found that "their legal knowledge, especially of administrative law, was extremely deficient."[105] The Shanghai report also found the following aphorisms applicable to administrative activity: "*wufa keyi*" (no law on which to rely); "*youfa nanyi*" (available law is difficult to apply); "*zhifa buyan*" (law is not applied strictly.)[106]

d. Third Parties

Article 27 of the ALL allows legal persons or other organizations with a direct interest in the disputed concrete administrative act to participate in the litigation as third parties.[107] In addition, the Procuracy may exercise supervision over administrative litigation.[108]

C. Exhaustion of Remedies and Time Limits

1. Exhaustion of Administrative Remedies

The ALL encourages but does not require potential litigants to exhaust administrative remedies before filing suit unless otherwise required by law.[109] The degree to which litigants must first exhaust administrative remedies varies according to the law or regulation concerned. Some of the statutes which require appeal of the decision within the relevant agency before filing suit include the tax, patent, and foreign exchange control laws.[110] It may be surmised that the policy behind the requirement of exhausting administrative remedies is to have each agency resolve disputes involving its own work. Chinese judges generally lack any background in the areas of finance and

105. Zhang Shixin, et al., *Dui Guojia Xingzheng Gongzuo Renyuan Jinxing Xingzhengfa Zhishi Jiaoyu Shizai Bixing*, 2 ZHONGGUO FAXUE 9, 10 (1987).

106. *Id.* at 11-12.

107. ALL, *supra* note 55, art. 27.

108. *Id.* art. 10.

109. *Id.* art. 37. The question of exhaustion of administrative remedies has been a controversial one for the drafters of the law. An early draft of the law revealed that the majority of drafters favored a scheme according to which persons who dispute an administrative decision must first appeal the decision to the next higher level within the relevant agency before filing suit. 1987 Draft ALL, *supra* note 56. A minority of drafters favored establishing a multileveled appeal procedure, which would require an aggrieved person to make administrative appeals upward from the county level all the way to the relevant ministry in Beijing. Draft ALL, *supra* note 56.

110. *See, e.g.*, Income Tax Law of the People's Republic of China Concerning Joint Ventures with Chinese and Foreign Investment, (promulgated Sept. 10, 1980) art. 15 CHINA L. FOR. BUS.: BUSINESS REGULATIN, *supra* note 27, para. 33-500; Detailed Implementing Regulations Governing Violation of Exchange Control of the People's Republic of China (approved Mar. 25, 1985, promulgated Apr. 5, 1985), CHINA L. FOR. BUS.: BUSINESS REGULATION, *supra* note 27, para.8-675; CHINA L. FOR BUS.: BUSINESS REGULATION, *supra* note 27, para 33-500; Patent Law of the PRC (adopted March 12, 1984, promulgated April 1, 1985), CHINA L. FOR. BUS.: BUSINESS REGULATION, *supra* note 27, para. 11-600.

banking and would rather defer to experts in such matters to resolve related disputes. A plaintiff who brings a civil suit for monetary damages, however, need not exhaust administrative remedies.

The drafters of the ALL, anticipating that administrative agency officials may be reluctant to reconsider their decisions, have included a provision requiring such "reconsideration decisions" to be issued within two months of appeal, unless otherwise stipulated.[111] If the agency refuses to issue a reconsideration decision within the allotted time, the aggrieved person may file suit with a court within fifteen days of the expiration of the time limit for issuing the reconsideration decision.[112]

Requiring exhaustion of administrative remedies does allow the agency an opportunity to resolve the dispute before facing a hearing by a court which may lack the necessary technical background, but as of yet most agencies lack legal guidelines for considering administrative appeals.

2. Stay of the Administrative Decision

The ALL specifies that execution of the administrative decision will not be suspended during the course of a court appeal, unless provided by relevant law.[113] A court may suspend execution on its own initiative if the court decides that execution of the decision will cause irreparable harm to the plaintiff and not harm the public interest,[114] or may suspend execution upon application by the plaintiff or the defendant agency.[115] The law favors implementation of the administrative decision, but enables courts to protect parties from suffering any consequences.

3. Timing

If a plaintiff appeals to the agency for reconsideration of its origi-

111. *Id.* art. 38.

112. *Id.*

113. *Id.* art. 44.

114. Previously, legal scholars disputed whether a court trying an administrative case had the legal authority to stay an administrative decision if the relevant statute lacks such a provision. One group of scholars held that courts could not willfully suspend administrative decisions. At least one legal scholar stated that courts inherently have such authority, which he argued followed from the proposition that the judicial powers have a certain restrictive function in relation to the executive powers. Zhu Xingyou, *Shilun Renmin Fayuan Zhongzhi Xingzheng Caijue Zhixing de Jueding Quan*, 2 XIANDAI FAXUE 48 (1988). Zhu also mentions views of other scholars who reject his own views. He says that because the judiciary can restrict the executive actions within legal boundaries and can protect affected persons from suffering harm, a court has the authority either by application of the plaintiff or on its own initiative to suspend improper administrative decisions. *Id.*

115. ALL, *supra* note 55, art. 44.

nal administrative decision, the agency has a maximum of two months to make the reconsideration decision (unless otherwise provided by law.)[116] Absent a provision to the contrary, the applicant then has fifteen days after the issuance of the reconsideration decision to file suit with a court.[117] If no administrative reconsideration was required, the plaintiff has three months after learning of the administrative act to file suit.[118] Given the current communication and transportation system, as well as the relatively slow pace of affairs in China, fifteen days is a very short period for an aggrieved party to engage a lawyer or other representative to aid him in challenging an administrative decision.

A party filing suit against an administrative agency seeking compensation for damages is subject to more liberal time limits. The General Principles of Civil Law provide that the statute of limitations for bringing a civil suit is two years (unless the law provides otherwise)[119] and that the limitation for a person seeking compensation for bodily injury is one year.[120]

D. Adjudication of Administrative Litigation

1. Nature of Adjudication

The ALL requires that an administrative lawsuit meet four conditions in order to be accepted by a court: the plaintiff must be an organization, legal person, or citizen; there must be a specific defendant; there must be a concrete claim and a factual basis; and the courts must have jurisdiction over such cases.[121] A court must make a decision whether to docket a case within seven days of receipt of the complaint.[122] If the court refuses to accept the case, the plaintiff may appeal the decision.[123]

The ALL specifies that courts shall try administrative cases in a collegiate bench, consisting of an odd number of three or more judges or "people's assessors."[124] All administrative cases shall be tried publicly, except those involving state secrets or personal affairs.[125] Previ-

116. *Id.* art. 38.

117. *Id.* Some laws stipulate time limits which range from five days to three months.

118. *Id.* art. 39.

119. PRC Civil Law, *supra* note 68, art. 135.

120. *Id.* art. 136.

121. ALL, *supra* note 55, art. 41.

122. *Id.* art. 42. A recent commentary in Fazhi Ribao noted that courts often receive "orders" (from local officials) not to docket cases. Gao Heng, *supra* note 59.

123. *Id.*

124. *Id.* art. 46. In addition, the ALL provides for recusal of court personnel, and also permits a party to request a judge or other judicial personnel to disqualify himself. *Id.* art. 47.

125. *Id.* art. 45.

ous drafts of the law, including the November 1988 draft, would have allowed adjudication based solely on written documents or "paper trials."[126]

The final version of the ALL does not allow use of mediation, the informal resolution of disputes with the aid of a third party. Mediation is favored in the resolution of civil disputes, except in tort cases.[127] Earlier drafts of the ALL allowed limited use of mediation.[128]

2. Court Investigation and Compilation of Evidence

According to the ALL, the court has the authority to obtain evidence from relevant parties and units.[129] Article 31 sets forth what will be considered as competent evidence.[130] The law places the responsibility upon the defendant administrative agency to provide evidence concerning its challenged decision, as well as the factual and legal basis for its decision.[131] The plaintiff's access to relevant documents of the defendant depends on whether the plaintiff is represented by a lawyer. Only the plaintiff's lawyer may consult relevant materials, investigate, and collect evidence from the organizations and citizens concerned.[132]

Apparently anticipating that defendant agencies might not always comply with their legal obligation to provide evidence relating to the disputed administrative decision, the ALL imposes penalties upon those who destroy or refuse to provide evidence, retaliate against judicial personnel, or otherwise obstruct justice.[133] The law also forbids the defendant to seek evidence from the plaintiff.[134] These provisions were absent from earlier drafts of the law.

3. Scope and Standard of Administrative Adjudication

The ALL provides that courts shall try administrative cases independently according to law, subject to no interference from administrative agencies, public organizations, or individuals.[135] This means

126. *See, e.g.*, 1987 Draft ALL, *supra* note 58, art. 28.

127. ALL, *supra* note 55, art. 67. Article 6 of the Civil Procedure Law states: "The people's courts shall stress mediation; when mediation efforts are of no avail, the court shall pass judgment without delay." PRC Civil Procedure Law, *supra* note 61, art. 6.

128. Draft ALL, *supra* note 56, art. 6.

129. ALL, *supra* note 55, art. 34.

130. *Id.* art. 31.

131. *Id.* art. 32.

132. *Id.* art. 27.

133. *Id.* art. 49.

134. *Id.* art. 33.

135. *Id.* art. 3.

that judges should adjudicate cases according to law, not according to orders from government officials, Party cadres, or other powerful persons. Although the Civil Procedure Law, under which administrative cases have been tried, contains a similar provision, the political realities of China do not accord with this exhortation forbidding tampering with judicial activity.

Recent newspaper articles have suggested that judges are often inherently partial to government officials. In addition, they are often pressured or even threatened by such officials. It has been suggested that administrative cases have been improperly decided due to outside pressure on the judges.[136] The reason suggested by commentators is that "funds, material resources, and even powers of courts are controlled by such officials."[137]

Another source of pressure is the political and legal work committee of the local Communist Party, whose members often include the local Party secretary and the head of the local public security bureau. According to recent articles, these committees often actually decide all aspects of court cases.[138]

Prior to the promulgation of the ALL, the standard for determining the legality of the challenged administrative act was provided by the Civil Procedure Law: "in trying a civil case, the people's court shall base its decision on the facts and take the law as the criterion."[139] The ALL sets forth the same standard as the Civil Procedure Law.[140]

The vagueness of the above provision left open for debate the appropriate standard by which courts should determine the legality of administrative actions. The focus of this debate by legal academics and officials was whether and to what extent courts were bound by regulations issued by administrative agencies at either a national or local level. In the debates, the position maintained by most officials[141] as well as Zhang Zhangzuo, president of the Administrative Law Society of China,[142] was that agency regulations had to be used as a

136. One commentator notes that some judges are subjected to so much pressure from local officials that the majority of their decisions uphold administrative agencies. The masses call these meetings "upholding meetings." Zhou Changxin, *supra* note 32.

137. Chen Xiao, *Making Law Work for the Little Guy*, China Daily, Jan. 13, 1989, at 4. *See also* Gao Heng, *supra* note 59.

138. *See, e.g.*, a recent article in *Minzhu yu Falü* by Yang Yintang, of the Intermediate People's Court in Huaiyin, Jiangsu Province, which is summarized in: *End of 'Conviction Before Trial' Urged*, China Daily, Sept. 5, 1988, at 4.

139. PRC Civil Procedure Law, *supra* note 61, art. 5.

140. ALL, *supra* note 55, art. 4.

141. Chen Xiao, *supra* note 138.

142. *Dui Xingzheng Susong Fa Caoan Jige Wenti de Jianjie*, *supra* note 43.

basis for deciding cases. This position was based on the argument that such regulations have the status of law (legislation approved by the National People's Congress and its Standing Committee), and that unless regulations are considered to be "law," local governments will have no legal basis for carrying out their authority and as a result will be rendered powerless.[143]

The second view held by some scholars, judges, and at least one member of a provincial legislature was that courts are not legally bound by agency regulations. This view was based on the argument that, although both national law and local regulations have normative value, "law" may be promulgated by legislative organs of the central government or organs to which it has delegated such authority. Moreover, most local regulations are not publicly distributed and are issued by the agencies themselves. Therefore, according to this argument, using such regulations as the basis for court decisions would be detrimental to the protection of citizens' rights and interests.[144]

In the end there was general agreement among those involved in drafting and commenting on the legislation that the courts were bound by national regulations, administrative regulations of the State Council, and local legislation. These views are incorporated into article 52 of the ALL.[145]

Article 53 of the ALL represents a compromise position in the debate over the appropriate standards for determining the legality of administrative regulations. In referring to local regulations, a court must make an initial determination whether the regulations issued by provincial governments are inconsistent with those issued by national ministries and commissions, or whether the regulations issued by various national ministries and commissions are inconsistent with each other. Although the court is not bound to apply the regulations, it does not have the authority to invalidate the offending regulations. Rather, ALL article 53 directs the court to ask the Supreme People's Court to request an interpretation or decision from the State Council.[146] This provision demonstrates the limited scope of judicial review in China.

E. Scope of Review

Article 54 of the ALL sets forth the scope of authority of a

143. *Falü Yizu bu Yixi bu Heshi Yi*, Renmin Ribao, Sept. 5, 1988, at 4.

144. *Xiugai Hao Jiebu "Min Gao Guan" Fa*, Fazhi Ribao, Feb. 10, 1989, at 2.

145. ALL, *supra* note 55, art.52.

146. *Id.* art. 53.

reviewing court.[147] The administrative decision should be upheld if the evidence on which the administrative act is based is conclusive and the agency's application of relevant laws and regulations is correct.[148]

A reviewing court may set aside an administrative decision, in whole or in part, or order a reconsideration of a decision by the administrative agencies if it makes one or more of the following determinations: principal evidence is insufficient; application of law and regulations is erroneous; legal procedures were violated; a decision exceeded authority; or an agency abused its authority.[149]

During the drafting of the ALL there was considerable controversy as to whether courts should have the authority to modify agency decisions.[150] The November 1988 draft limited a court's authority to modify administrative sanctions to those which were basically appropriate but either too harsh or too light.[151] As the law now stands, a court can modify an administrative sanction which is obviously unfair.[152]

1. Conflicts of Law

The ALL has no provisions guiding a court on what it should do if it determines that relevant local legislation conflicts with national law or rules promulgated by the State Council. The Supreme People's Court has issued some guidance to lower courts on this issue. In a 1985 notice on economic adjudication, the Court informed lower courts that if local legislation conflicts with either the Constitution, national laws (passed by the National People's Congress or its Standing Committee) or administrative regulations (promulgated by the State Council), the courts should report the conflict to the local People's Congress and its standing committee.[153] The notice does not fur-

147. *Id.* art. 54.

148. *Id.*

149. *Id.*

150. Interview conducted by author (February 1989).

151. Draft ALL, *supra* note 58, art. 36(4). An early draft of the law provided that courts could not modify decisions made by administrative agencies within the scope of the agency's legal authority. However, several exceptions were made to this rule, including authorizing courts to modify agency decisions concerning ownership rights as well as those reconsideration decisions concerning compensation of damages. Another exception was made for instances in which the agency decision is "clearly inappropriate" or in which outside persons or institutions interfered with the normal decision making processes of the agency and as a result the plaintiff was affected unfavorably. 1987 Draft ALL, *supra* note 56, art. 22.

152. ALL, *supra* note 55, art. 54(4).

153. *Guanyu Jiaqiang Jingji Shenpan Gongzuo de Tongzhi* (Dec. 9, 1985), *reprinted in* XINGZHENG SUSONG ZHISHI SHOUCE (Handbook of Knowledge of Administrative Litigation) 206, 209 (Ying Songnian ed. 1988).

ther specify how such courts should act nor what result might be reached.

The 1985 notice has been interpreted by at least one Chinese scholar as suggesting that the Supreme People's Court is declaring its authority to invalidate local laws that contravene the Constitution.[154] A more orthodox interpretation of this provision is that "reporting" means that a court may send a report to the local legislature pointing out the apparent conflict between the local law and national law or the Constitution or for information as to what the legislature meant. It is this latter interpretation which is adhered to by those administrative division judges with whom the author has spoken.[155]

The November 1988 draft law provided that in the case of a conflict between local legislation or rules promulgated by the State Council and national law, national law would take precedence.[156] No such provision appears in the final text of the law.

2. Enforcement and Appeal

The ALL gives courts a three month period, extendable in special circumstances, to issue judgments in administrative cases.[157] If in the course of adjudication, a court considers that government officials have committed crimes or other violations, it may forward relevant materials to the procuracy or other relevant authorities.[158]

After the judgment of a court becomes legally valid, both parties are obliged to implement it.[159] The necessity for including such a measure in legislation was shown in a recent study by a Peking University professor and his colleagues, who found that government defiance of court rulings that are not in their favor is "not unusual."[160] Other legal commentators have noted that one of the crucial issues in administrative litigation is that court decisions in administrative cases often cannot be implemented.[161] Government officials often refuse to return plaintiff's property, impose similar or more severe penalties (based on the original facts) on the plaintiff, or even illegally detain the plaintiff or otherwise restrict his movements.[162]

154. Liu Nanping, *"Judicial Review" in China: A Comparative Perspective* (manuscript to be published in the REVIEW OF SOCIALIST LAW).

155. Interview conducted by author with members of the administrative division, Shenzhen Special Economic Zone People's Court (December 1988).

156. 1987 ALL Draft, *supra* note 56, art. 4(2).

157. ALL, *supra* note 55, art. 57.

158. *Id.* art. 56.

159. *Id.* art. 65.

160. Wang Gangyi, *supra* note 103, at 14.

161. Gao Heng, *supra* note 59, at 67.

162. *Id.*

There are a variety of reasons for such defiance. For many government officials, it is a new and strange experience to find themselves in court justifying their actions. It is even more peculiar for them to be told by a court, which the officials do not perceive to be an institution of equal status, that the decision they have made is invalid. Involved officials may feel that they have personally been shamed by losing the lawsuit and want to avenge themselves.

Article 65 of the ALL gives a court several options in enforcing its decision against an administrative agency.[163] The court may order the appropriate bank to transfer the amount of the fine or compensation to be paid to the plaintiff from the defendant's account; the court may impose a fine of 50 to 100 yuan per day upon an agency that does not implement the judicial decision within a specified period; the court may present the judicial opinion to the administrative agency's superior level, which shall be obliged to comply with the court ruling; and if the circumstances warrant, the chief administrator(s) and the persons directly responsible shall be investigated and possibly criminally prosecuted.[164]

Under the ALL, a party who contests the decision of the court of the first instance has the right to appeal to the court at the next higher level.[165] The law limits litigants to two adjudications with the second adjudication being final.[166] According to Article 61, the court of second instance shall review the facts and legal basis for the initial judgment.[167] In doing so, the court may act either as an appellate court and remand a case in which the evidence is unclear, or act as a second trial court by making an investigation of the facts and then issuing a ruling.[168]

III. CONCLUSION

While the concept of administrative litigation is derived from foreign legal systems, an examination of the Administrative Litigation Law reveals that the Chinese legislation is not merely a transplanted foreign law. Rather, adoption of the ALL reflects the recognition by the Chinese leadership of its potential utility in resolving the increased number of disputes between administrative agencies and Chinese or foreign individuals, corporations, and partnerships.

The ALL may prove to possess far greater potential than

163. ALL, *supra* note 55, art. 65.
164. *Id.*
165. *Id.* art. 58.
166. *Id.* art. 6.
167. *Id.* art. 61.
168. *Id.* art. 61(3).

expected. First, the ALL may serve to include within the ambit of judicial scrutiny an increasingly broad range of administrative activity. Second, the ALL has the potential to influence significantly the power balance between the individual, the local government, and the national government. Local and national government officials have exercised enormous, and generally unchallenged, power over the economic and personal lives of individuals through their authority to issue licenses, permits, and confiscation orders, and to impose fines and other administrative penalties. By enabling individuals to challenge the validity of such administrative actions in court, the ALL theoretically places individuals and government organs on more equal footing. By providing for open trials, the ALL has the potential through press coverage to facilitate increased public monitoring of official behavior.

The implementation of the ALL faces significant obstacles. Generally, the judiciary has a low level of professional competence, faces pressure from local administrative officials, and is subject to Party interference. State employees, whose activities are in many cases not governed by detailed or effective legal guidelines, often possess only a vague awareness of relevant laws and are unaccustomed to operating according to any legal standard. Similarly, many ordinary people, who are unfamiliar with law, are doubtful that either courts or law will protect them.

The success of the ALL in achieving its objectives depends on the further development of Chinese judicial and administrative institutions and an increased readiness among the Chinese people to seek protection of their rights in court. A well-educated judiciary is imperative as is a larger number of legally trained judiciary personnel. It is of vital importance that government officials in the bureaus and offices throughout the country become well-versed in Chinese law and recognize its authority in governing their activities. Regulations governing judicial proceedings must be expanded to ensure the independence of the judiciary. Finally, the Chinese people must become aware of their right to challenge administrative decisions and gain confidence that they will receive justice in court. Although the passage of the ALL is a significant piece of legislation, the paucity of cases thus far indicates that many Chinese people believe administrative litigation is like throwing an egg against a stone.