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ADMINISTRATIVE LAW
IN THE PEOPLE'S REPUBLIC OF CHINA, 1990 - 1998:

A PROCESS OF JUSTICE
ADMINISTRATIVE LAW
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Abstract

This dissertation examines the system for redress of administrative grievances in China that was established by the Administrative Litigation Law in April 1989. The law added a new dimension to state-society relations that enabled ordinary people to use the legal system to challenge administrative decisions of administrative organs. The process of making an administrative appeal is examined, beginning with the imposition of an administrative penalty by an administrative organ, progressing through administrative review which is a departmental procedure, and ending with administrative litigation by the courts and possibly an appeal for compensation. The subject matter is explored with reference to three types of administrative organs: public security, land administration, and industry and commerce organs. The roles of the players such as the applicants, the administrative organs, the courts and lawyers are canvassed. And the characteristics of administrative appeals in the context of political campaigns are assessed.

In terms of academic disciplines, this study straddles the fields of politics and its sub-field of public administration/public policy, and law. The primary thesis explored is political in nature. The dissertation argues that the system of administrative law as it operated throughout the 1990s is a genuine attempt to offer limited redress to plaintiffs while further developing the justice and legality of the administrative process. The system is not an empty claim to legitimacy, or a shabby attempt by the state to strengthen its waning control over society. The system provides measurable redress for some plaintiffs, although these cases are usually selected carefully from the range of appeals and tend to support the state’s political or economic goals. In the final summation, however, the system tends to reinforce the power of administrative organs.
I hereby declare that this dissertation has never previously been submitted for any degree, and is the result of my original work. The thesis contains no material previously published or written by another person except where due reference is made in the dissertation itself.

R. Marshall

Robyn Marshall

1 September 2003
ADMINISTRATIVE LAW
IN THE PEOPLE’S REPUBLIC OF CHINA, 1990 - 1998:
A PROCESS OF JUSTICE

民告官

Robyn Marshall

This dissertation is submitted in fulfilment of the requirements for the Doctor of Philosophy at the Australian National University
For La Loba
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There are some formal and informal debts to be paid at this point. Like anyone who undertakes a Ph.D dissertation, the final product is a bit like the tip of the iceberg; the years of undergraduate study, the teachers, mentors, friends, acquaintances and family are all there beneath the surface. Without them, the final product would never have emerged, and may even have melted into the ether by now.

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And I should make a special mention of Max, whose boy-ish good looks, golden charm and enthusiasm taught me the real meaning of life: play with your biscuits at morning tea time, howl loudly at big noisy things that frighten you, and dance like a maniac around those you love.

The mistakes and soggy thinking that remain herein, I must claim as my own. I hope this work makes a positive contribution, and that readers will catch some of the excitement I felt for this subject during the entire project.

Canberra, August 2003
### Abbreviations and Glossary

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<td>SCL</td>
<td>State Compensation Law</td>
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<td>PRC</td>
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<td>NPC</td>
<td>National People’s Congress</td>
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- **budang** 不当 improper
- **beigaoren** 被告人 defendant
- **caijue shu** 裁决书 decision or finding form
- **chaoyue zhiquan** 超越职权 excess of authority; ultra vires
- **falufagui** 法律法规 laws and regulations
- **fuyi** 复议 departmental review
- **gongtongsusong** 共同诉讼 joint litigation suit
- **guanli lun** 管理论 “management theory”
- **guizhang** 规章 administrative rules
- **hefa** 合法 legal; lawful; legitimate
- **heli** 合理 equitable; fair; justified
- **jianju** 检举 impeach; inform authorities of violations of law
- **jianyi** 建议 suggest
- **konggao** 控告 charge; accuse; complain
- **kongquan lun** 控权论 “control of power theory”
- **lanyong zhiquan** 滥用职权 abuse of authority
- **min gao guan** 民告官 people sue officials
ABBREVIATIONS AND GLOSSARY, continued

peichang shenqing shu 赔偿申请书 compensation application form
pingheng lilun 平衡理论 “balance theory”
shensu 申诉 appeal; complain; petition
sifa jianyi 司法建议 judicial recommendation
susong 诉讼 litigation; lawsuit
tiaozheng 调整 adjust; regulate; revise
xietiao 协调 coordinate; harmonize
xinfang 信访 letters and visits
xingzheng chufa 行政处罚 administrative penalty
xingzheng chufen 行政处分 administrative disciplinary sanction
yuangaoren 原告人 plaintiff
CHAPTER ONE

INTRODUCTION

In the Beijing winter and early spring of 1989, as Chinese university students were meeting in groups on their campuses to discuss problems facing the nation,¹ the final touches were being made to a piece of legislation that was soon to come before the National People’s Congress. The Administrative Litigation Law of the People’s Republic of China (ALL) (中华人民共和国行政诉讼法) was passed by the Congress on 4 April 1989.² In hindsight, the timing was significant. If this piece of legislation had not been passed by the Congress at that point — prior to Hu Yaobang’s death and the escalation of public demonstrations — then it is likely that it would have been delayed for several years.³

As it turned out, the National People’s Congress (NPC) passed the legislation in the Great Hall of the People, which sides the western edge of Tiananmen Square, barely two weeks before the square began to fill with mourners for Hu Yaobang.⁴ Hu was a former Communist Party general secretary and a noted reformer, and his death was the catalyst for what turned out to be prolonged public demonstrations on Tiananmen Square at the heart of Beijing. Students had a range of grievances to air, chief among them the corruption of the regime and the general lack of opportunities for citizens to participate in government affairs. Within a couple of months the regime enforced its will violently against the students and workers who had subsequently joined the demonstrations. By this time the new law that enabled citizens and other legal entities to sue the government in court for certain types of alleged illegal administrative decisions appeared to be stillborn.

Against the backdrop of violent action by the state, the concept of ‘people sue

¹ For an account of these “salons” see Craig Calhoun, Neither Gods nor Emperors - Students and the Struggle for Democracy in China (Berkeley: University of California Press, 1994), Chapter One.
² People’s Daily, 10 April 1989, p.1.
³ Interview with a member of the Chinese Academy of Social Sciences Law Institute, Beijing, 1998.
officials' (民告官), which the new litigation law allowed, appeared anomalous. This dissertation draws together these two apparently divergent strands: the development of an administrative grievance system that allows citizens limited redress against illegal or unfair administrative decisions that have been imposed by a regime that is still authoritarian.

It was another year before the new litigation law was to become legally effective, but in practice the first cases to be tried in court under this law did not emerge until early in 1991. The administrative grievance system was further bolstered by the promulgation of the Administrative Review Regulations (ARR) (行政复议条例) in November 1990, which allowed individuals and other legal entities to use the legal system to appeal directly to an administrative organ that has made a concrete, as opposed to an abstract, administrative decision that the recipient regards as illegal or unfair. The organ in question then has the legal duty to follow a set procedure to reconsider the administrative decision. In many cases, if no satisfaction is gained the plaintiff then has the right to appeal to the court under the ALL. The ARR have subsequently been rescinded by the issue of the Administrative Review Law (ARL) (中华人民共和国行政复议法), promulgated on 29 April 1999.

The dissertation was written in 1999 and uses material available to the end of 1998, thus the discussion is based on the ARR, not the ARL. However, to avoid the work being overtaken by events, the provisions of the ARL will be considered in Chapter Three along side those of the ARR. As Chapter Four contains a detailed study of the process of administrative review, the potential effects of the new law will also be considered therein.

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5 1 October 1990.
6 People's Daily, 28 December 1990, p.3. These regulations were subsequently modified on 9 October 1994 to account for some initial problems that had developed in the early implementation period. See People's Daily, 16 October 1994, p. 5. Hereafter these regulations are referred to as the ARR.
7 The provisions of the legislation discussed in the dissertation are clarified in Chapter Three.
8 "Plaintiff" is a legal term denoting the individual, organisation or legal entity that lodges the complaint. When it is used in the dissertation it has this meaning. "Defendant" is used to denote the administrative organ that has been accused of an illegal or unfair administrative decision.
9 Legal Daily (internet version), 30 April 1999, p.3.
The time lapse is not yet large enough for sufficient case material to emerge that reflects the impact of the ARL, thus conclusions as to its efficacy can only be speculative.

The ALL, the ARR and the ARL, together with some aspects of the State Compensation Law (中华人民共和国国家赔偿法), stand at the heart of the new system of administrative law in the People's Republic of China (PRC), and we will deal with their contents more fully in Chapter Three.

A new approach

To lodge a suit under the ALL is an activity that challenges an arm of the state. It is a formal process involving applications, submission of evidence, laws, and possibly a court hearing. It may also involve informal processes of mediation and negotiation between the parties. Literature on this topic is dominated by legal scholars who naturally tend to focus on questions of interest and application to legal practitioners. Such writings are often limited to the administrative litigation process. Other approaches include quantitative analysis of the number of cases that occur, and these too only examine administrative litigation.

This dissertation takes a broader purview of the procedures that begin with the imposition of an administrative penalty on a citizen, travel through administrative review in the administrative organ, may involve administrative compensation, and end with administrative litigation in court. Rather than just focus on issues of interest to the legal profession, the dissertation endeavours to contribute to our understanding of administration in China and the state's interaction with its citizens.

The development of this new system of administrative law is not an attempt by the state to make an empty claim to legitimacy or to strengthen its repression over society. My research persuades me that it is a genuine attempt to offer some limited redress to

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11 A full review of literature follows below.
plaintiffs while further developing the justice and legality of the administrative process. Its significance is to be understood in the context of the varied pressures posed by reform, the retreat of politics, the development of the legal system, internationalisation, and the continued push for modernisation and professionalisation. The starting point is to ask: what is it like for an individual or enterprise to use this new system to challenge an administrative decision? What are the obstacles? Who or which institution holds the power to adjudicate? How do the power holders interact along the path of dispute resolution? And is it worth using the system?

The dissertation is presented as a study in one aspect of the changing nature of state-society relations in the PRC. Although it may be debated whether the state under Mao was totalitarian, what is not doubted is that its relationship with society has changed dramatically during the reform era. Politics is in retreat, economics is hegemonic, the state has lost part of its capacity but at the same time has colonised society in different ways. Just what the final relationship will settle into is not yet known, but in the meantime numerous developments that feed into this relationship can be examined. This new system of administrative law is one of these.

In terms of academic disciplines, this study straddles the fields of politics and its sub-field of public administration/public policy, and law. It will not take a technical legal approach or address purely legal questions. Nor will it deal purely with Chinese public administration, as that topic tends to focus on the issues of personnel, finance, and management. What it will do is examine the process of administrative review and administrative litigation from a political science perspective of state/society relations. In institutional terms this will involve a number of distinct overarching administrative systems (系统), as this analytical framework, widely used in China, is the best way to categorise Chinese government institutions. Administrative institutions have two distinct roots — politics and management — that mesh with each administrative organ's distinct culture to affect the handling of disputes with citizens or enterprises. The judicial system itself is another, operating with distinct features that affect the handling of administrative
Administrative law regulates the relationship between citizens' rights and state authority. The implementation of government and Party policy by the bureaucracy is essentially political action in the PRC, and given the Party's claim to overall policy guidance, citizens and enterprises have not previously had much legal redress against government actions. What is the role of the new system of administrative law in controlling bureaucratic action? By this we mean "law" in the large sense as including both the bureaucracy's own methods of handling administrative appeals as well as the influence of the courts on administrative appeals. Chinese courts have not been, and are not, independent actors in the system of Chinese government. Nevertheless, they do play a role in this new administrative law system. What is it intended to be and how does it work out in practice? My starting point for this dissertation covers all these discipline-specific questions.

Due to the overwhelming dominance of the Communist Party of China, the field of state/society relations in the PRC is heavily influenced by political considerations. But the nature of politics in the PRC is changing, and perhaps never more than in the years that straddled the close of one century and the arrival of the next. Law increasingly influences government action in the PRC, so we must account for this in any analysis of the political structure of the state. But the way in which law is shaping the Chinese state is perhaps best understood by considering the social and political implications of law. This study attempts to hold all these issues in mind while exploring the new administrative grievance system in the PRC.

**Administrative law**

Administrative law encompasses much more than one or two pieces of legislation, but I have limited the dissertation to examining the ramifications of the ALL and the ARR together with some reference to the State Compensation Law. This is for two main reasons: first, a dissertation in the social sciences cannot pretend to deal thoroughly with
the entire body of Chinese administrative law; second, the development of the ALL and ARR together form a highly significant change in state-society relations in the PRC. As we shall see when examining more closely the nature of administrative law in general, this new system in China fundamentally, in theory at any rate, alters the balance of power between state and society by giving citizens and other legal entities the right to sue the government over a limited range of alleged illegal or unfair administrative acts. This right has been granted before in the history of the PRC, but this time it has real, measurable benefits for citizens. It is not just another piece of political-legal rhetoric. There are real court cases involving real people who sometimes obtain real redress for their administrative grievances. I am not pretending the system is better than it is, or that practical justice in the PRC has taken a huge swing in the direction of defending citizens' rights. Problems are legion, as we would expect. Nevertheless, this new system is an improvement on what existed before and points to a path of development that, if continued, will radically alter the characteristics of the PRC state in the future.

One of the most well known expositions on the nature of administrative law is by an English jurist, H.W.R. Wade. I have chosen Wade's work to use at this point because his description is clear and unambiguous, thus it provides a helpful framework from which to examine China's administrative law system. It should be noted, though, that Wade's descriptions refer to the British system, which is echoed in the Australian and American systems but not in those of other European states such as France.

Wade defines administrative law as "the law relating to the control of government power". Administrative law is thus based on the twin premises that it is possible for a government to abuse its power, and that government power should be controlled. Wade describes another element of administrative law as "the body of general principles which govern the exercise of powers and duties by public authorities." Here Wade distinguishes between laws that define the composition and structure of governments

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13 Ibid, p.5.
which properly lies outside the scope of administrative law) and laws that govern the manner in which governments must carry out their functions. Administrative law, therefore, compels a government to act within the bounds of the law. As a branch of law it flows from constitutional law, which determines the structure and powers of the state. In summary, Wade ascribes to administrative law the role of balancing power between citizen and state in the quest for administrative justice.\textsuperscript{14}

Within this broad role there are specific areas that administrative law covers:\textsuperscript{15} administrative authorities such as the central and local governments, the police, and public corporations; administrative functions such as compulsory purchases of land, urban and rural planning, housing, and health; judicial control over the limits of administrative power; discretionary power which requires that government authorities act reasonably, with due relevance, and not arbitrarily; natural justice which requires independent and fair consideration before punishment is imposed; specific remedies and liabilities, which cover the mechanisms for quashing illegal acts and provision of compensation for damage caused by government action; and legislative and adjudicative procedures which cover actual laws, regulations and rules that in the British model may be overturned by a court if they are found to be unlawful.

The new system of administrative law in the PRC, comprising the ALL and the ARR, is more properly a system of administrative remedies. The system provides formal, legal avenues through which citizens may seek redress for wrong administrative acts. It is part of the supervision system over government organs and is firmly linked to the issue of government accountability. As Pitman Potter explains, the ALL "establishes general principles and a procedural framework for the exercise of judicial review over administrative action".\textsuperscript{16} It does not set out the procedures that administrative organs must follow when making decisions nor does it provide procedural protection for persons

\textsuperscript{14}Ibid, p.6.
\textsuperscript{15}Ibid, pp.7-11.
affected by government decision-making such as are found in the *Administrative Procedure Act* of the U.S.A. Administrative law in the PRC has not always had this focus. In earlier periods it was aimed more at the framework and organisation of government, and this has a direct influence on how the current system works. I will deal with this more fully in Chapter Two, which sets out the historical and institutional context of this new system.

Here it serves our purposes to note in broad terms what the thrust of the new system is and where it fits into the body of administrative law generally. It is a series of remedies that sets out the conditions under which administrative organs and courts may review administrative decisions and the procedures to be followed. Naturally, this function is impinged upon by many other aspects of administrative law, such as the administrative functions of government, the question of discretionary power, natural justice, and legislative and adjudicative procedures. But I will only touch on these issues as they affect some aspect of implementation of the new administrative law system.

**Impetus for development**

This new system is informed by, and has developed out of, the coalescence of a number of events and pressures during the reform era, many of which had their origins in the pre-reform era. The first is the general policy of economic reform, of which reform in the structure of state-owned enterprises is just one part. Enterprises are increasingly required to compete in the marketplace and are keen to reduce administrative interference. The ALL is a formal, legal framework through which administrative disputes can be resolved.

The second major change during the reform era that has given rise to this new system is

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the general trend to codify and legalise rights and powers as one aspect of constructing a solid, reliable legal system.\textsuperscript{20} Rule by law rather than "rule by man" in the form of the all-powerful Party secretary of the Maoist era is much touted these days in China. The laws governing administrative review and litigation are a part of this trend. Reopening the courts to receive cases, recommencing publication of legal journals and monographs, and strengthening legal education have all contributed to this.

But there is also a third factor that has given rise to the development of the new administrative law system in China: reform in the Chinese bureaucracy. Deng Xiaoping's administrative reforms included a reduction in the size of the bureaucracy, strategies to recruit better educated officials, and strategies to make the bureaucracy more efficient, responsive, and accountable.\textsuperscript{21} The old dichotomy of "red versus expert"\textsuperscript{22} finds an expression here as the state struggles to increase professionalisation as a perceived tool to modernisation and development, without losing the cohesion that was once provided by ideology.

A fourth factor is the trend throughout the reform era for PRC domestic political actions to be influenced, in part, by international opinion. This is particularly so in the field of commerce. International business wants a more regularised and reliable system of dispute resolution as part of the environment in which to conduct business with the PRC. The development of the Chinese International Economic Trade and Arbitration Commission (CIETAC), which has a good reputation, is a response to this. This body resolves civil disputes\textsuperscript{23} and cannot provide redress for illegal administrative acts by the government. The administrative dispute resolution system fills this gap in the system. Human rights is


\textsuperscript{21} Stephen Ma, Administrative Reform in Post-Mao China: Efficiency or Ethics (Lanham, MD: University Press of America, 1996).


\textsuperscript{23} This means the dispute is between two or more parties of equal standing such as business partners. It does not involve a government administrative organ as one of the parties to the dispute.
another area in which international influence has modified (albeit slightly) domestic PRC political action. Until the granting of Permanent Normal Trade Relations with China, the USA's annual decision according MFN status was influenced by the PRC's human rights record. The new system of administrative law is seen by both the PRC and the international community as a positive step for the betterment of human rights in the PRC.

The introduction of administrative law legislation to facilitate the market economy and to improve the justice of the administrative process must be seen against this complex background. Law reform designed solely to facilitate market development will usually reduce the regulatory framework and the costs of administrative decision-making rather than increase them, so China's law reforms must be seen as multi-purpose.

LITERATURE
Research on administrative law in the PRC is a relatively new field and has been dominated by lawyers, who tend to address issues that are of applied interest to legal practitioners, such as the content and scope of the relevant laws. In order to place this dissertation in the context of the state-society relationship I have had to reach much more broadly than this and to cover literature from the fields of politics and society, and politics and law. As Chinese administrative law has not been handled extensively from these vantage points before, it is difficult to engage in direct debate with other scholars over issues of treatment, methodology, and so on. To overcome this I have explored the different themes from each field and then formed questions and hypotheses in response. I will deal with these in turn.

Politics and society
The different extant models for explaining Chinese politics and society have been determined, in part, by access to empirical information about the system, but also strongly by the prevailing ideology of the time. The early view of PRC politics as totalitarian was,

in the view of a recent study, "a child of the Cold War". Many of the influential earlier studies, though, such as those by A. Doak Barnett, admit the anomalies within the totalitarian model. These anomalies were observed not just at the elite level in the form of conflicting views about the nature and pace of development, but also at the local level, as studies about political participation revealed more varied behaviour than the monolithic model.

This led to a search for a more accurate paradigm, and the factionalism model emerged. The factionalism model draws our attention to different groups that operate across the political spectrum, but it tends to be elite focused. Ordinary people have little impact on administrative decision-making from the perspective of factional politics.

A more recent variation of factionalism is the clientelism framework proposed by Jean Oi and Andrew Walder. It has been suggested that the clientelism model, rather than only focusing on the elite political arena, encompasses elite-mass relations as well, in a way that allows the individual citizen to be seen as a significant political actor. This model may serve well as an analytical framework for examining factory or other group contexts, but it tends to separate the individual from the formal political-legal process. What of people who are outside a factory or workplace context? How do they seek to assert their views regarding some aspect of the state and to influence decision-making?

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Marc Blecher neatly captures these two dimensions of state-society relations in a study that aims to "reopen analysis of popular politics in Maoist China a decade after its demise." Blecher shows that the kind of politics that enables grassroots participation and influence vis-a-vis the formal system (Walder's could be described as such) is qualitatively different from the type of politics that is required to block or alter the implementation of state policies (factional politics could be described as such). Blecher makes the point that local participatory politics in Maoist China was primarily concerned with basic existential questions about food and daily life, and that this had virtually no impact on the formal policy process at the regional or national level. This can be said too of the contemporary state-society relationship to some extent, albeit not as much as in the Maoist era. The state retains the right to set policy direction, but there has been increased regularisation of modes of political participation that enable the citizen to more easily hurdle the gap between basic existential questions and the formal policy process. The new administrative law system is one of these.

In a study that helps make the link between these two modes, Alan Liu argues that public opinion has played an influential role in shaping major political outcomes in the PRC. Another study, by Tianjian Shi, demonstrates the diversity, complexity and depth of contemporary political participation in one Chinese city. Individual actors may, it seems, have influence on official policy and politics.

34 Tianjian Shi, Political Participation in Beijing (Cambridge: Harvard University Press, 1997). For an earlier study on political participation see James Townsend, Political Participation in Communist China (Berkeley: University of California Press, 1967). Townsend includes some elements of the legal system such as people's tribunals and people's assessors as forms of political participation, but does not discuss the ways in which individuals could modify government decision-making for their own benefit.
Studies also have focused on civil society and pluralist interest groups operating as political actors. Do these exist in any sphere of PRC society, let alone in administrative law in the form of class (or group) suits against the government? Generally there is little support for the civil society thesis in China, which is built on the premise of organised group activity. But this position must be balanced against the increasing amount of formal political participation that has been facilitated by new legal modes such as administrative law.

None of these studies accords much, if any, attention to the role of law in the state-society nexus. Tianjin Shi's work includes a chapter on appeals, but this covers all types of appeals, not just those relating to administrative grievances, so there is insufficient detail to give us a clear picture of how the new system of administrative law works to the benefit or otherwise of the citizen. However, based on the underlying assumptions of this body of literature, we can consider this question about contemporary China:

- If China is an authoritarian state, is the new system a ritualised form of political behaviour? Is it an avenue through which the state seeks to maintain control over society?

As the model of the authoritarian state insufficiently accounts for the diversity in political life, this is unlikely unless the new system forces its users into atomised roles, which affords the state significant opportunity to further its own aims at the expense of the citizen's. By way of contrast, the clientelism model draws our attention to the range of

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36 Kenneth Lieberthal takes a long view of how China has been governed in Governing China - From Revolution Through Reform (New York: W.W. Norton & Co, 1995) but the chapter on state and society is limited to traditional political variables such as cadres, human rights, incomes, gender, political inequality, and so on. Victor Falkenheim, on the other hand, includes a chapter on legal reform in the volume he edited, Chinese Politics From Mao to Deng, Professors of World Peace Academy Books (New York: Paragon House, 1989), pp.203-235, as does June Teufel Dreyer in China's Political System - Modernization and Tradition, Second edition (Boston: Allyn & Bacon, 1996), Chapter 8. Tang Tsou also mentions legality as one of the emerging principles of legitimacy, but he does not explore this in "Marxism, the Leninist Party, the Masses, and the Citizens in the Rebuilding of the Chinese State", in Stuart Schram (ed.), Foundations and Limits of State Power in China (London and Hong Kong: SOAS and Chinese University
opportunities that citizens have within their work places to further their own aims and assert their will on the state. Walder's neo-traditionalist theory, in his own words:

...posits a rich subculture of instrumental-personal ties through which individuals circumvent formal regulations to obtain official approval, housing, and other public and private goods controlled by low-level officials.\(^{37}\)

This may work to the advantage of citizens as they challenge the state bureaucracy, providing they have an institutional context within which to manoeuvre. But if they are outside the workplace system, or their workplace system fails to adequately maximise the individual's benefit, what options are left?

- Does the administrative law system serve as a link between factional elite-level political decision-making, workplace-based assertiveness, and widespread public opinion?
- Can citizens use the new administrative law system in groups, as in one type of civil society, or do their efforts remain atomised?

**Politics and law**

There are a number of themes commonly explored in debates concerning politics and law. The first is that the operation of any given legal system is highly dependent upon and connected to the state's political structure. This is, of course, one of the outstanding features of the Chinese judicial system. In the past it has been subject to intense political influence via, for example, the role of the Communist Party's Political Legal Committees (政法委员会), which were the structural link between the Chinese Communist Party and the court system. The court system has not been, and is not, independent of political influence.\(^{38}\) The Communist Party retains the right to lead all sectors of society,

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including the judicial sector. The weak position of the courts may have been somewhat strengthened, however, by reforms that attempt to make the bureaucracy more accountable, and by the general trend to codify and legalise rights in the PRC. Susan Finder explores this theme in relation to the PRC's Supreme People's Court and concludes that the reform period has brought a greater degree of autonomy to that court, so it is reasonable to expect this development elsewhere in the court system. An important question must be stated clearly here:

- Why would an authoritarian regime that has political control over its courts allow citizens to sue the government in these very courts? And if the redress gained is genuine in some cases, does this indicate an emerging role for the courts, or perhaps a disintegrating state?

A further aspect of the first theme is that in certain political circumstances judicial review or legal doctrine alone does not usually account for the greater part of the relationship between judicial and executive authorities. A study of preventative-detention laws in 16 British Commonwealth and former Commonwealth jurisdictions concludes that national power politics, the political history of the country, the nature of the regime, and the politics and culture of the judiciary are much more significant variables. In these situations, S. Greer's study claims that judicial review is designed to serve the interests of the state by creating a false impression that executive decisions are reviewed by an independent body. The value of judicial review thus depends upon political culture. In China there is no pretence that courts act independently of executive control; but this does not mean that the administrative law system is an empty attempt to create a false impression of justice, inasmuch as this would not promote the regime's integrity. William Alford expands on the theme of law in the PRC acting as a bolster to regime credibility, but by its very function therefore working to expose the regime's lack of integrity.

position isolates the PRC legal system from the variety of pressures that bear upon it and
tends to view it as too distinct from the political superstructure. I am working on the
premise that the new system is not a complete sham but neither does it effectively control
government power. So the question arises:

- What exactly is the courts' role in this new administrative law system if it is not to
  provide for independent reviews?

Another commonly researched question associated with this theme involves the ways in
which the characteristics of state and government structures affect the legal system. Issues
raised in this research as it relates to the Maoist period are often interspersed with
political science material on the organisation of the bureaucracy and policy-making. Terms such as "cellularity", "mutual interdependence", and "hierarchical" are often used
to describe the Party and state bureaucracies.

- Decision-making is both personalised and institutional, and is often influenced by the
  pervasive effects of personal connections. How does this affect the system
  of administrative redress?

Studies on the relationship between state structures and legal processes claim that in
circumstances where a state is hierarchically organised, disputes between state agencies
are rarely litigated, but rather are submitted to a common hierarchical superior for
settlement. China could be described as such a state, so an important issue to examine is
what happens to disputes that are similar in substance to administrative law disputes but
are not resolved through that procedure. This will give us further insight into the actual
role that administrative appeals are playing as an avenue for seeking redress.

- The other side of this coin is to ask how the new system of administrative law is
  affecting the political structure. Has it rendered the political structure less

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personalised and more institutionalised?

A second common theme in the politics and law debate is that particular regulations serve the economic or political interests of particular classes in society. Marx’s often quoted views about law being an instrument of class oppression reflect this idea. Edward J. Epstein, for example, argues that various fields of Chinese law have been used instrumentally by the regime to achieve political, social, or economic goals. He claims, for example, that mediation is a tool of ideological and social control, that economic contract law is a tool of planning, and that marriage law is a means of destroying the political form of the traditional family, while criminal law is a weapon against hostile political interests. Whether we agree with Epstein on all these points or not, it is generally accepted that law in China has primarily served Party/state instrumental purposes in the past.

- Does the new system of administrative law serve primarily as a top-down tool of state administration and as yet another way for the state to assert its dominance in administrative management over society?

But the instrumental view of law fails to seriously consider the texture and variations within the political-legal system, especially under the pressures of reform and internationalisation. The development of the new administrative law system forms part of a corpus of new legal reforms. Modern democratic states have a system of administrative law that seeks to protect individual rights from state encroachment and to circumscribe government power. China wants to be part of the modern, developed world and thus is slowly putting in place the various "pieces" that are perceived to be part of such a world.

Law in China is also said to function as ideology. Part of its role in legitimating state power must be to function ideologically by providing a common and widely accepted framework for dispute resolution. This notion has much to recommend it in considering

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legal reform in the PRC. The push for rule of law/rule by law rather than "rule by man" is receiving an increasing amount of attention in political-legal discourse in the PRC and is a significant trend that will likely endure. It has been further bolstered by amendments to the state Constitution to incorporate rule by law as one of the fundamental principles of the country.

- It is clear that the dominant norms of governance in China are moving away from arbitrary Party diktat and personal decision-making, which dominated the start of the reform era, to permanent recognition of greater institutionalisation in politics and law. What is the contribution of the new system of administrative law to this trend?

The third theme is a corollary of the second. Under some circumstances, law in the PRC has served instrumental purposes on behalf of the state, and the state is now in retreat from its prior efforts to control all aspects of society. We must consider whether there is room for citizens to use the legal system to assert their claims over the state. Studies have shown that in other historical circumstances, even when the state uses law hegemonically, the ruled classes also assert their right to use the law to defend or claim their rights. E.P. Thompson examined the passage of the Black Act in eighteenth-century England which introduced the death penalty for people caught stealing deer or timber from the local landowner's forest. Thompson concludes that although the penalties were severe and used to oppress the local peasants, the ordinary people also used the statutes to their own advantage to help define their use rights vis a vis land and property.

- We can similarly expect to find instances where citizens use the new system to defend and clarify their rights against state encroachment. In what specific types of cases does this occur?

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48 "The New Milestone of Socialist Democratic Legal System Construction", (Seeking Truth), 16 Nov. 97, No.22, pp.8-14.
Administrative law

The literature available on the topic of administrative law in the PRC can be divided into three broad groups: analytical work in the form of either journal articles or monographs; texts for teaching; and case material that can be found in monograph collections or interspersed with the teaching material.

The analytical work has mostly been carried out by Western scholars who are legal specialists and often focuses on issues that Western scholars would examine in their own countries' administrative law systems. Pitman Potter, for example, examines the scope and content of the provisions of the ALL, as does Epstein. Fred Burke made a good start on administrative law issues related to the Chinese State Bureau of Standards and alluded to possible instrumental use of the subdivisions for standards in managing international trade but had no cases or substance to back it up, most likely because his was a very early piece in this field.

Jianyang Yu examined the review process for patent infringement in the PRC and drew out the problems caused by the dual functions of the body responsible for patent administration: this body both supervises all parties to a patent application as well as acting as a dispute resolution body when disputes arise. Yu's article signals an important theme for this dissertation, which is that the new administrative law system must be analysed in the context of other options available to resolve similar disputes. Parties to a

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patent dispute may take their case directly to court, or they may take it to the patent administration authority, which has the power to act like an administrative court. The patent administration authority is able to provide more technical expertise than a regular Chinese court, and this is a significant factor in the dispute resolution process for all administrative disputes.

One of the finest analytical pieces on this topic to date is by Minxin Pei.\textsuperscript{56} Pei's basic theme is that the new Administrative Litigation Law does result in some effective redress for citizens. The strength of Pei's work is that it uses a quantitative approach: the reader is given lots of statistics about who sues whom, and so on. But Pei's paper does not entail qualitative assessment of the new administrative law system. This dissertation is attempting just that:

\begin{itemize}
  \item What is it like for an individual who tries to use the new system? What obstacles are encountered, what can be done to overcome them, and who or which institutions have the most power?
\end{itemize}

The teaching material, in both English and Chinese, has been prepared for law courses or by legal practitioners for a specific audience. This includes English-language material by Lin,\textsuperscript{57} Corne,\textsuperscript{58} Finder\textsuperscript{59} and Potter.\textsuperscript{60}

Similar Chinese-language material is found in books on administrative review, administrative litigation, or administrative law in general. These books contain lots of

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\textsuperscript{57} Lin Feng, \textit{Administrative Law: Procedures and Remedies in China}, The China Law Series (Hong Kong: Sweet & Maxwell, 1996).

\textsuperscript{58} Peter Corne, \textit{Foreign Investment in China: The Administrative Legal System} (Hong Kong: Hong Kong University Press, 1997).

\textsuperscript{59} Susan Finder, "Like Throwing an Egg Against a Stone".

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details about definitions, scope, concepts, penalties, participants, jurisdiction, and so on, and usually contain a section of illustrative cases.\textsuperscript{61} Some of these books provide answers to specific legal questions,\textsuperscript{62} but these tend to reiterate the concepts and ideas found elsewhere rather than probe difficult issues.

The illustrative cases provided in all of these latter books are useful as guides to the handling of cases, but should not necessarily be taken as an accurate record of the actual case in question. The cases are usually presented through an account of the events, followed by an editorial comment or explanation by the books' editors. These editorial comments are sometimes enlightening, especially as they state on occasion that the court's decision about the case in question was incorrect, and then proceed to explain what should have been the decision.

One of the problems with the law-related research in China is that court and agency records are not as comprehensive, systematic, or publicly available as court reports in the West. Actual cases must be collected from case compilations.\textsuperscript{63} This poses a problem when conducting case-based research, but I have tried to get around this by using fieldwork to interview Chinese administrative law scholars, teachers, officials, lawyers, and petitioners. Cases that are recorded in these sources cannot be taken as faithful records of the actual events, as they are compiled primarily for the purpose of teaching


\textsuperscript{63} Liu Tianxing (ed), \textbf{中国行政法行政诉讼法教学案例选编} (Selected Cases for Teaching Chinese Administrative Law and Administrative Litigation Law) (Beijing: The People's Courts Press, 1992); \textbf{人民法院案例选} (Selected Cases from the People's Courts) (Beijing: Supreme People's Court Press, annual volumes); High-level Judges Training Centre of China and Chinese People's University Law Institute (eds), \textbf{中国审判案例要览} (Important Chinese Trial Cases) (Beijing: Chinese People's Public Security University Press, 1992).
judges how to handle cases. To this end they may be extensively rewritten. This problem aside, the cases can be used as a guide to how the regime would like the administrative law system to work, and thus are valuable for our purposes.

Methodology and issues
At the outset, my aim was to examine the PRC’s new system of administrative law by following the process from the point where an administrative penalty is imposed, through to the court process of administrative litigation, and to compare and contrast the process in at least three types of administrative organs. The intention was to see how it was handled in different policy contexts but to also draw out the common elements.

One can never be sure how the fieldwork will proceed in the PRC, so I cast my net wide at first and covered material relating to four types of administrative organs: public security, land administration, industry and commerce, and environmental protection. I did not expect to be able to cover all four with equal depth when conducting the fieldwork. My preference was for the first two, public security and land administration, because these organs have the largest number of appeals lodged against them under the ALL. Industry and commerce organs were the third choice because their power, position, and functions, particularly in relation to public security organs, illustrate many important features of the new administrative law system. The dissertation also makes reference on occasion to other organs.

I spent nearly five months conducting fieldwork in Beijing, from April to August 1998. I was hosted by the Centre for Constitutional Law and Administrative Research in the Law Department at Beijing University. The head of the Centre, Professor Jiang Ming’an, was warm and generous with his time and greatly assisted my research by arranging introductions to colleagues, administrative officials, graduate students, lawyers, and judges. I am also indebted to Judge Jiang Huiling of the Supreme People’s Court of the PRC, who I had earlier met in Australia and who welcomed me as a friend and colleague. Judge Jiang greatly facilitated my research by arranging introductions to fellow judges
and by being generous with his own time and insights.

I was unable to gain the in-depth access to administrative organs and their departmental review processes that I had hoped for. I wanted to talk at length with the officials responsible for administrative review: that is, those whose daily work involved processing applications to review an administrative decision. This did not eventuate. For several types of organs — the land administration, environmental protection, and industry and commerce — I interviewed the directors of the legal affairs offices, but this did not yield the detail that I was seeking. Part of the problem with examining administrative review is that it appears not to be taken very seriously and many organs lack dedicated officers to handle it.

I did, however, gain good access to judges who know a great deal about how the litigation system operates. This is because members of China’s legal system take administrative litigation more seriously. I was also able to view an administrative litigation trial at a district court in Beijing which, despite the academic hazards of attending an officially approved trial, proved not to be too "cleansed of all injustice" and so was of benefit in filling in another part of the picture.

Despite the problems encountered in fieldwork, I was able to build up a picture of what it is like for an individual to use this new system to challenge the government. A combination of written case material, interviews, secondary sources, official documents and informal conversations with officials at all levels has been utilised. 64 Whilst in Beijing I collected many sources that had been published in recent years about the PRC’s new system of administrative law. The material on this subject increasingly reveals problems in the system and is slowly becoming more analytical rather than simply descriptive or formulaic, which renders it more useful for research. The judicial system has become better organised and more systematic in recent years in producing volumes of case records that are used as teaching materials for judges.

64 Records of interviews are kept on file with the author.
Public security organs

The PRC's public security organs are responsible for both investigating crime and conducting some elements of public administration. In general terms they are authorised to safeguard national security, maintain public order, protect the personal safety, freedom, and property of citizens, protect public property, and prevent, check and punish criminal activities.\(^{65}\) They are responsible for everything from household registrations (which are part of their administrative duties) to investigating serious crimes. A public security organ has the authority to handle what in the West would generally be seen as minor criminal matters by imposing administrative punishments, which may be a fine or a detention, without taking the case to court. Efforts to overturn administrative punishments, such as these, feature regularly in the administrative litigation system. In the course of a lifetime most people will deal with the public security organ at least several times because of its far-reaching role in regulating social life in the PRC, which also contributes to the high number of administrative litigation cases involving this organ.

The administrative powers of a public security organ enable the organ to detain a person for up to 15 days for minor criminal offences without a trial or any judicial investigation. This is a much-criticised part of PRC police powers. But these non-judicial powers also extend to detaining a person for up to three years under the re-education through labour (劳动教养) regulations. Technically speaking, these regulations are not an administrative punishment but are described as a coercive measure (强制措施).\(^{66}\) This measure can be imposed for a wide range of minor offences, especially for repeat offenders. Those penalised under this measure are permitted to challenge the decision in court under the ALL.\(^{67}\) There has been speculation that these regulations may be repealed.

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\(^{65}\) PRC People's Police Law, Article 2.


or modified, but for the present they remain in force.

The public security organs do not enjoy a good reputation when it comes to arrests, investigations, detention, and treatment of detainees. They are known for their frequent use of beatings, including the use of electric batons, other forms of torture, illegal detention, and generally poor treatment of those in custody. They are known to be lax towards proper administrative processes and frequently violate procedural correctness in favour of substantive justice. Some of the officers accept bribes, extort bribes, and engage in corruption. A different type of problem is that public security organs sometimes conduct business ventures in conjunction with local courts, which further undermines police and judicial impartiality.

**Land administration organs**

Land administration organs are another powerful group of bureaucracies that have wide-ranging powers. These organs draft policies, laws and regulations, conduct the administration of all aspects of land management, and act to settle land disputes. As all land in the PRC is notionally state-owned, these organs are responsible for issuing certificates of use rights to various state entities and individuals, including the procedures for transferring land from one user to another. They also have the important task of leading the coordination of a land management plan in conjunction with other less powerful organs that have functions related to the land, such as departments of agriculture, forests, fisheries, water resources, city construction and housing management.

These organs conduct land inspections to ensure that the land is being utilised for the purposes for which it has been allocated, a function that gives rise to many administrative

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disputes. A typical scenario is that a person has been allocated a piece of land for agricultural purposes, but builds a house on it instead. Other disputes arise when a person has been allocated a certain amount of land for the purpose of building a house, but occupies extra land. The land organs handle two types of legal disputes: civil and administrative. Civil disputes arise between two individuals over some aspect of land use, and in such cases the land organs provide arbitration to resolve the problem. Administrative disputes occur when a land management organ issues a decision in relation to a land management violation, and one of the parties to the dispute disagrees with the decision. These different roles and interests of the organs challenge the independence and fairness of the organs as they carry out their functions.

**Industry and commerce organs**

Industry and commerce organs supervise and manage the conduct of commercial markets. They draw up policies, laws and guidelines; supervise the registration of commercial enterprises; supervise the drafting and ratification of economic contracts; handle trademark applications and registration, as well as make final decisions on trademark disputes; regulate business practices; and supervise the advertising industry.70

Like all administrative organs, the industry and commerce bureaus have branches at municipal, provincial, county and local levels. They have the authority to issue fines, order closure of a business, seize fake products and take other measures to maintain order in the marketplace. Some of the regulatory functions associated with the marketplace bring these organs into contact with public security organs, and this causes jurisdictional problems that are sometimes settled during the course of an administrative litigation case. These organs have a military, authoritarian style; the market regulation officers wear a green army-style uniform, and some officials have been known to be violent when handling marketplace regulation.

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70 This information is derived from a booklet distributed by the SAIC to explain its functions: 中华人民共和国国家工商行政管理局概况 (A Brief Introduction to the State Administration for Industry and Commerce of the People's Republic of China).
Structure of the dissertation

The primary thesis to be explored is political in nature. The system of administrative law as it operated throughout the 1990s is a genuine attempt to offer limited redress to plaintiffs while further developing the justice and legality of the administrative process. It is not an empty claim to legitimacy or a shabby attempt by the state to strengthen its waning control over society.

Chapter Two sets the historical and institutional context of the new administrative law system. It briefly recounts the purposes and functions of law in the early PRC, highlighting the systems of redress of grievances that were available to citizens, some of which survive today, such as the letters/visits office. The roles of the state’s Ministry of Supervision and the Party’s Discipline Inspection Commission are touched upon to explain the behaviour of state officials. The stages of development of the new administrative law system are discussed, as this draws out some of the problems with its current operation. A brief account is given of the alternatives to the new administrative law system that citizens may utilise: administrative review (which is sometimes part of the process of administrative litigation, and on other occasions is the only option available for redress); the letters/visits system; the media; big character posters; mediation; and administrative litigation, which forms part of the new administrative law system.

Chapter Three examines the theoretical and policy background to the new administrative law system, and then explains the provisions of the Administrative Litigation Law, the Administrative Review Regulations and the State Compensation Law. The paradigm used by Chinese legal scholars to describe the new system is examined, together with discussion of the political ideas expressed at the time the ALL was promulgated.

Chapter Four examines the process of administrative review by following in the steps of an applicant. Examples of the application forms used in the process are provided and analysis made of how applications are handled by the reviewing organ. Numerical data on the handling of the formal process shows that there is an extremely slim chance of
success for the applicant, and that the system aims more at improving the regularity and accuracy of the administrative process than in providing an effective avenue of redress.

Chapter Five explores the role of compensation in gaining redress for administrative grievances. Applications for compensation are filed either before or in conjunction with administrative litigation applications. The effect of mediation at this stage of the process is shown to be especially detrimental to the applicant’s chance of success. Administrative organs frequently use this phase of the process to pressure the applicant to withdraw an application to the court for administrative litigation.

Chapter Six explores the environment in which administrative litigation applications are made. The role of administrative litigation as part of the system of judicial supervision is canvassed. The criteria used by courts to determine the legality of a specific administrative act are shown to have particular interpretations in the context of the new administrative law system. Most importantly, the influence of the various players in the system is examined: courts and judges, administrative organs, lawyers and the applicant.

Chapter Seven examines the final step in the applicant’s pursuit of justice. This chapter shows that the application for administrative litigation is probably the most crucial phase of the process, as courts play an extremely important role in determining which cases to accept. An account of an administrative litigation trial is given, the purpose of a judicial recommendation is explored, and the effect of court fees on the process is shown to be a weak point. Numerical data are used to weigh the outcomes of the administrative litigation process.

Chapter Eight revisits the list of hypotheses/issues/questions introduced earlier in Chapter One and draws conclusions about what the new administrative law system tells us about state-society relations in the PRC.

H.R.C. Wade has noted that it is in the implementation of administrative law that the
principle of rule of law is most visible. That is to say, any instrumentalist rhetoric or insincerity on the part of a state in relation to its claims to be ruled by law will be most clearly visible in administrative law, as this is where state power and law directly interact. This dissertation will help illuminate this important aspect of state power and citizen rights that in the coming years will underpin legal and political development in the PRC.

CHAPTER TWO

THE HISTORICAL AND INSTITUTIONAL CONTEXT OF THE NEW ADMINISTRATIVE LAW SYSTEM

One of the universal problems of government is how to ensure the accountability of, and control over, those who implement government policy. Administrative law, as noted in Chapter One, can operate from a number of angles to tackle this problem. It may regulate the structure of the government and its administrative organs, it may regulate the processes which officials must use to implement policy, and it may provide remedial mechanisms that can check policy implementation after the event. The new administrative law system in the PRC is a remedial mechanism designed to check on policy implementation after the event. It is the third attempt the PRC state has made during the twentieth century to institute a legal framework that allows citizens to directly challenge the government's administrative decisions in court.

The fact that it is the third attempt to institute a legal remedial system, not to mention the maintenance of other forms of control such as supervision by other parts of the government or Party bureaucracy, informal complaint mechanisms for citizens, and political controls in the form of campaigns to eliminate bribery, corruption and other problems, raises a few questions for this dissertation:

- How is the new system different from its predecessors?
- Has the new system been introduced because the previous ones did not work?
- What is the dispute resolution context in which the new system operates, and if other types of controls still operate what is the advantage or significance of the new system?

In examining what went before, we are concerned mainly with locating institutions that may have fulfilled similar functions to those of the new system of administrative law. These institutions need not be "administrative litigation" systems in the proper sense, nor
do they need to involve a court as a reviewing body. The essence of what we are looking for involves options available to individuals to challenge government administrative action. Further, we are looking for institutions that remedied government decisions that, in substance, are similar to today's specific administrative decisions. Broadly, these include administrative penalties imposed by the state's police system; regulatory decisions relating to taxation or business operations; and instances where an administrative organ of the state infringes on the personal or property rights of an individual. In this task we are hampered by the lack of sufficient empirical materials on earlier institutions, particularly case records. There is, however, enough information available to warrant a brief look at the earlier periods of the People's Republic, followed by a more detailed look at the reform period.


The revolutionary ideology held by the Communist Party when it came to power in 1949 was the basis for wide-ranging political, legal, economic and social reforms. The regime, intent on establishing its power networks, gave little serious thought to providing avenues of redress through which citizens could challenge government decisions. The prevailing ideology was that the revolution was to benefit the proletariat through radically transforming China, a concept that allowed little room for individuals who might oppose government decisions. Indeed, any opposition was interpreted as politically motivated and therefore subject to political repression.

The regime implemented a variety of methods aimed at controlling its officials, but methods utilising courts and laws did not feature prominently. The new government abolished all the existing Nationalist government laws, including the 1932 Administrative Litigation Law. In its place, the Common Programme of 1949 gave PRC citizens the

1 This law, together with the Organic Law of Administrative Courts, was promulgated by the Nationalist government. The laws established an administrative court to hear cases brought by legal entities against a government administrative organ. Very few cases were heard under these laws. See Fang Xin 行政诉讼指南  (A Guide to Administrative Litigation) (Beijing: The People's Press, 1990), p.10.
constitutional right to lodge a complaint with the state's supervisory or judicial organs. The 1954 state Constitution modified this right slightly by allowing citizens to lodge either a written or oral complaint with any state organ, and also to claim compensation where personnel of a state organ encroached upon the rights of citizens. Very little material exists that demonstrates this right to appeal was exercised by individuals.

In substantive laws, there was also quite a mixed record. The state was willing to provide judicial redress for plaintiffs who disagreed with a decision of a people's government in relation to land reform, but not for disagreements over the public security organs' public order management powers. The only option here was to petition for the process of what is now known as administrative review, which allowed for a higher level of the public security organ to reconsider the decision. Jerome Cohen reports a public order management case where this occurred, attesting to the implementation of the departmental review process, but I have been unable to find any record of cases of any type that were challenged by citizens in court. The PRC author of a book on the ALL admits that even though the laws were in place in the 1950s, routine operation of the system was never established. Western-based scholars concur by describing these laws

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as "political-philosophical declarations (rather) than legally binding norms".\(^8\) This deficiency draws our attention to an important consideration for the study of contemporary administrative law: that is, are the newly promulgated laws mainly political-philosophical declarations, or do they have much more practical effect for plaintiffs than did provisions during the early years of the People's Republic?

The lack of a judicial review option in the early years of the PRC is not, however, an indicator of the Chinese authorities' lack of commitment to providing avenues of redress against illegal or unfair administrative decisions. The most effective way for an individual to gain redress at that time was to use the letters/visits system, which requires individuals to lodge a written or oral complaint directly with the offending administrative organ. This mechanism still operates in the PRC, so we will discuss it in detail below.

Other methods included establishing behaviour-control institutions and conducting political campaigns. At least three institutions – the Ministry of State Control (\textit{Guojia kongzhi bu}), the Ministry of Supervision (\textit{Jiancha bu}), and the Central Discipline Inspection Commission (\textit{Zhonggong jilu jiancha weiyuanhui}) (CDIC) – were established in the early 1950s to combat a range of bureaucratic problems in state and Party organs: incompetence, economic waste, corruption, violations of discipline, and criminal offences.\(^9\) These bodies usually responded to complaints that were forwarded by other bureaucratic organs, although occasionally a letter of individual complaint found its way to the Ministry of Supervision. Yet this body, like the others, was often powerless to act on problems it discovered. Both ministries were abolished in 1959 and the CDIC in 1968.


The Ministry of Supervision and the Central Discipline Inspection Commission have been re-established in the reform era with clarified roles for each.\textsuperscript{10}

Political campaigns were also conducted.\textsuperscript{11} In 1951 the Three Antis (三反) campaign was implemented against corruption, waste and bureaucratism. The Five Antis (五反) campaign was aimed more at particular problems associated with the bourgeoisie, such as bribery, tax evasion, fraud, theft of government property and economic secrets.

It is generally accepted that these early attempts to establish accountability over administrative behaviour had limited success.\textsuperscript{12} It is important to consider the reasons for this, as we cannot discount the possibility that the failure was due to factors other than defective institutions. Part of the way that the new administrative law system operates is by giving more autonomy to the courts, but if the real problem lies with political deficiencies, then individual plaintiffs may have very little success in appealing to a court under the new administrative law system.

Lawrence Sullivan explains some of the organisational and functional deficiencies that fed the early failure of the Party's discipline control mechanisms. He claims the lack of an administrative structure below the provincial level made the inspection mechanisms subordinate to party committees,\textsuperscript{13} and that this made it extremely difficult for control organs to discipline Party members at the local level.

This problem re-emerges in the implementation of the new administrative law system and is often explained ultimately as a financial imperative: party committees control the funds

\textsuperscript{10} See Yasheng Huang, "Administrative Monitoring in China", \textit{The China Quarterly}, 143, 1995, pp.828-843. The Ministry of Supervision is a government body concerned with administrative officials (both Party and non-Party members) who work in state institutions. The CDIC is a Party body concerned with Party members working in Party organisations.


\textsuperscript{12} \textit{Ibid}, Chapter Five; Lawrence Sullivan, "The Role of the Control Organs", pp.597-617.

\textsuperscript{13} Lawrence Sullivan, "The Role of the Control Organs", p.601.
of local courts; therefore they control the courts' decisions. But this is too simplistic an explanation and does not sufficiently account for the influential role of political culture in a state. Australian courts are similarly funded by the governments of the states in which they are located, but this has not led to the application of political power to judicial decision-making in Australia on a scale comparable to that which plagues the PRC. Individual plaintiffs who use the new administrative law system in the PRC still face this administrative and political interference. This will be examined more closely in Chapters Six and Seven.

Sullivan cites the complex process required for an individual to bring a complaint as another reason for the early failure of control mechanisms. No less than 27 steps were apparently necessary for a citizen to bring a complaint against an important person. In comparison, the new administrative law system is simple to use, although it can be very slow, so complexity is unlikely to be a barrier to contemporary use of the administrative law system. In fact, the new system was consciously designed to be simple yet effective, which may indicate a genuine intention on the part of the regime to offer citizens a real means of obtaining redress for administrative abuses.

The reform era

In the reform era, politics has moved from centre stage, and the pressure to modernise has brought changes to almost every sector of PRC life, including the business of government. The state's commitment to law as a means of regulating society and providing justice has strengthened, as has the position of the individual in relation to the state. There is now more variety permitted in terms of dress, occupation, pastimes, consumption habits, political thought, and, significantly for this dissertation, avenues through which individuals can modify state actions.

16 The start of the reform era is generally referenced to the Third Plenum of the 11th Party Central Committee in December 1978.
The new administrative law system began with the promulgation of the Administrative Litigation Law of the PRC in 1989. We will look closely at the drafting process for that law below, as it demonstrates the progression of thought in PRC legal circles associated with the concept of 'people sue officials'. But first we will briefly cover the early reform period to see what exactly individuals could do to defend their rights against state encroachment, as this will demonstrate some of the imperatives for the new administrative law system.

The development of administrative law during the 1980s has been described by Professor Jiang Ming'an of Beijing University Law Department as occurring in four stages: the theoretical preparation; judicial experimentation; administrative litigation law research and drafting; and formal drafting and implementation of the administrative litigation law. I will use Jiang's stages with wider references where necessary.

First stage - theoretical preparation
The first stage began in 1978 with the reform era and lasted until about 1982. The most significant shift was that courts were able to hear administrative cases in practice, rather than just having the legal authority to do so but not acting upon that. Existing laws such as the Land Reform Law had, at least on paper, provided for judicial redress against administrative action, and new laws such as the People's Congress Electoral Law of 1979 also provided similar redress. The approach was to make provision in individual laws rather than a blanket legal provision. At the same time, a great deal of research into foreign administrative law systems was undertaken.

Second stage - judicial experimentation
The second stage began with the promulgation in 1982 of the Civil Procedure Law (for trial implementation)

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17 For a full description of the four stages see Jiang Ming'an, 行政诉讼法学 (Jurisprudence of Administrative Litigation) (Beijing: Beijing University Press, 1993), pp.31-37.
This law provided generally for administrative cases to be heard in the courts where specific regulations allowed, and this occurred in the following sectors: (1) food hygiene, (2) land administration, (3) forest management, (4) administration of industry and commerce, (5) some aspects of administrative decisions relating to patents, (6) some aspects of administrative decisions relating to taxation, (7) health management and (8) the marine environment.

Over 130 such individual regulations authorised courts to hear administrative cases before the Administrative Litigation Law was passed in 1989. As a guide to the implementation of these provisions, courts accepted over 21,000 administrative cases between 1983 and 1988 that were heard according to the Civil Procedure law. But the infrastructure lagged behind the legal provisions and most administrative cases were heard in the economic division of the courts. This limited the type of cases which could be effectively handled to economic administration cases.

That the Administrative Litigation Law had its origins in the Civil Procedure Law is significant for understanding its functions in the current system of justice. Many disputes in the areas referred to above can be handled as civil disputes if the administrative organ wishes to do so. If, on the other hand, the organ issues an administrative decision about the dispute, then the case becomes administrative in nature. There is some evidence to suggest that administrative organs in the PRC habitually channel such disputes into civil

20 Jiang Ming'an, 行政诉讼法学 (Jurisprudence of Administrative Litigation) (Beijing: Beijing University Press, 1993), p.34.
22 Ibid, p.93.
mediation or litigation, thereby avoiding legal responsibility for their administrative decisions. This will be further discussed below.

The limitations posed by hearing administrative cases in the economic divisions of courts became even more apparent with the promulgation of the 1986 Public Order Management Regulations (治安管理条例), which replaced the 1957 regulations. The regulations allowed for public order administrative decisions to be appealed in court if no satisfaction was obtained from administrative review within the public security organ. Such cases could clearly not be heard in the economic division of the courts. Many cases of citizens challenging public security organ decisions began to be heard in courts, causing overloading of the system, and the subsequent establishment of an administrative division in the courts to hear administrative cases, most of which were public order cases. This led to the third stage in the development of the new administrative law system. The new Public Order Management Regulations have also been influential in determining the role and character of the administrative law system in general, as the two types of organs which have their decisions challenged most often under the ALL are the public security organs and the land management organs.

**Third stage - administrative litigation law research and drafting**

Suggestions for an Administrative Litigation Law were made as early as 1986, but concerns were expressed over private law versus public law issues. Mediation, for example, which dominates as a dispute resolution procedure in private law, was said to be unsuitable for administrative cases because of the unequal power relationships between citizens and administrative organs. Another pressing concern which arose in the wake of the promulgation of the 1986 Public Order Management Regulations was whether to

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establish a separate administrative court after the style of the French system, or to continue with the administrative divisions in the ordinary courts.  

In October 1986 the initial drafting stage was established by a special research group of legal scholars set up under the Legislative Affairs Commission of the NPC Standing Committee. This group composed an initial draft of the ALL based on the experiences and concerns outlined above, after consultation with government organs and courts. The draft was ready for a more public discussion in August 1988.

**Fourth stage - formal drafting and implementation**

The fourth and final stage, from August 1988 to 1990, was characterised by a high level of consultation in law-making. The responsibility for drafting the ALL lay with a special group of the NPC's Legislative Affairs Commission, which set about incorporating as many views as possible.

The group organised a four-day forum in Beijing in August 1988 to discuss the preliminary draft. The forum was attended by delegates from the courts, procuracy, relevant departments of the State Council, democratic parties and mass organisations. Delegates argued and consulted about issues such as the scope of cases the courts should accept, the use of administrative rules as a basis for court judgements, whether administrative review should be included in the scope of the administrative litigation law, and how much power to give the courts to overrule administrative decisions.

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27 *China Legal News*, 8 October 1986, p.3; *Jurisprudence*, 12, pp.9-10, 27.
31 These issues are explained in Chapter Three. They had been widely discussed and commented upon even before the forum, which was part of the process of determining the contents of the new law. See, for example, Jiang Ming'an and Liu Fengming, *行政诉讼法立法的若干问题研究* (Certain Questions for Research on the
The changing political environment appeared to be engendering a process of consultation in other policy-making arenas at the time too, as noted by Kenneth Lieberthal, Michel Oksenberg, and David Lampton. Murray Scot Tanner has observed that China's law-drafting system has generally become more consultative, but notes that the consultation does not include citizens. A similar "bureaucracy dominated" imperative has been noted by Pitman Potter, who maintains that in drafting the ALL there was tension right from the start between the legal reform constituency and bureaucratic interests.

The debate continued at the NPC Standing Committee's fourth session in October 1988, where it was decided to publish the draft in order to "facilitate the discussion of important issues by the people of the country". The draft was duly published in the People's Daily in November 1988 with the aim of soliciting opinions from anyone who cared to contribute, a move that has been described by one scholar as "an extraordinary step in China's law drafting practice". Debate was especially encouraged among provincial governments, ministries, commissions and other government agencies.


36 People's Daily, 4 December 1988, p.4.

37 People's Daily, 10 November 1988, p.4.


In December 1988 the Legislative Affairs Commission of the NPC sponsored a symposium in Beijing that was attended by local congress delegates and administrative officials, as well as delegates from the courts and general legal circles.\textsuperscript{40} Wang Hanbin, director of the Legislative Affairs Commission at the time, reported that the Commission had received over 100 letters from workers, farmers, administrative officials, justice officials, university professors and students in regard to the draft ALL.\textsuperscript{41} By the time the draft was ready for submission to the NPC the following April, the Commission had received over 300 opinions from individual citizens since its publication in November 1988.\textsuperscript{42}

The accuracy of Potter's assessment, flagged above, is partly demonstrated by comments publicised by the Chinese media just prior to the promulgation of the ALL in April 1989. Deputies to the NPC at the time were reported to have variously described the draft ALL as "significant for democracy", "not worth that much", or likely to be a "disaster for the government".\textsuperscript{43} The public security system in particular, signalled its likely reluctance to cooperate when a reporter from its newspaper pointed to financial and manpower shortages as barriers to effective implementation of the ALL in the public security system.\textsuperscript{44}

The drafting process was thorough and consultative, although we do not have any information available to indicate whether the views of private citizens were actually incorporated into the final version of the ALL. However, in the light of the unusual step to publish a draft and solicit public opinions prior to forming the law, it must be acknowledged that even if the legal reform constituency \textit{was} motivated by a desire to strengthen its position rather than to protect the rights of citizens, as Potter maintains, this does not detract from the fact that ordinary people were advised, consulted, and included in the drafting process.

\textsuperscript{40} FBIS - China Daily Report, 15 December 1988, p.4.
\textsuperscript{41} \textit{Ibid.}
\textsuperscript{42} FBIS - China Daily Report, 28 March 1989, pp.7-8.
\textsuperscript{44} FBIS - China Daily Report, 30 March 1989, pp.15-16.
The passage of the ALL was long in the making. China has never had a strong foundation of rights-based law, and the new ALL, on the surface, appeared to offer some progress towards this. The question remains as to what degree this version of the ALL represents a more genuine intention by the regime to protect citizens' rights than any earlier administrative litigation legislation in China. Any system of redress against illegal or unfair administrative decisions must be viewed within the context of other existing options. Mention has been made of the letters/visits system, and other forms of redress such as petitions and so on. It is worth looking at these in some detail because all these avenues continue to exist alongside the ALL. If a citizen of contemporary China has an administrative dispute what are the options that can be pursued for redress?

Other options

Administrative review

The provisions of the administrative review system are examined in detail in Chapter Three and the implementation of the system is examined in Chapter Four, so we will confine this discussion to the distinctive role that administrative review can play in contrast to administrative litigation and the letters/visits system. Administrative review provides for internal review of an administrative decision at a higher level within an administrative organ.\(^\text{45}\) This avenue of redress has been available throughout the life of the People's Republic, but has only been formalised in the wake of the ALL's promulgation.\(^\text{46}\) It provides for review of any specific administrative act that a person believes has infringed on his or her lawful rights.

Edward Epstein describes the Administrative Review Regulations as "a conservative reaction, typically restoring to administrative authorities the power they feared was lost to

\[^{45}\text{Generally on administrative review see Fang Xin (ed.), 行政复议指南 (A Guide to Administrative Review) (Beijing: The Legal Press, 1991).}\]

\[^{46}\text{The Administrative Review Regulations were promulgated on 24 December 1990 and were modified on 9 October 1994.}\]
the courts” in the Administrative Litigation Law. Epstein rightly claims the locus of power remains within the bureaucracy involved. However, this overstates the role of administrative review in China’s system of law and government. Rather than provide effective control over bureaucratic behaviour, the regulations on administrative review were promulgated in the wake of the ALL to bring greater regularity to administrative review and to provide continuity of procedure between administrative review and administrative litigation.

Each administrative organ is required to have dedicated review organs and personnel to handle this work, but in effect few do. Most of the applications for review are simply handled by a higher level in the organ. It is most frequently a written procedure, but it does allow for evidence to be sought and a hearing to occur. In some matters, administrative review is required by law as a first step prior to administrative litigation. This seems to be required of high-volume cases such as public order and land management disputes in order to reduce the number of cases that proceed to litigation. The fact that most administrative review decisions can subsequently be taken forward to administrative litigation is, for some scholars, an indicator of the justice of the system.

This system allows a plaintiff to bring the complaint directly to the organ concerned, which promotes swifter resolution, instead of having to rely on the ombudsman-type route of the letters/visits office.

There are, however, several recurrent problems with the administrative review system in the PRC that diminish its ability to be an effective avenue of redress. The system is generally not trusted by the populace. The review organ is regarded as being part of the

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48 See the discussion on the scope of regulation (of the ALL) in Jiang Ming’an and Liu Fengming (Certain Questions for Research on Administrative Litigation Legislation) from 法律学习与研究 (Legal Studies and Research), 1988, 3, pp.16-19 in Reprints from the Press - Law, 1989, 1, pp.122-123.
49 Interview with an official from the State Council’s Office of Legislative Affairs, Beijing, 1998.
50 Lin Feng, Administrative Law - Procedures and remedies in China (Hong Kong: Sweet & Maxwell, 1996), pp.92-93.
51 The reasons given here are taken from my fieldwork interviews with legal scholars, judges, and so on.
same system that made the offending decision in the first place, and therefore is not seen as independent. The regulations that require administrative review as a first step are thus obeyed perfunctorily by plaintiffs as a necessary stage on the road to administrative litigation, which is regarded as providing slightly more justice.

A second problem is that in a vast number of cases, administrative organs simply refuse to accept cases for review, thereby preventing complaints from proceeding any further along that track. In such cases the courts may accept cases without the required administrative review having been carried out. This problem is compounded by the lack of provisions in the ARR to penalise organs that are at fault on this point. The Legislative Affairs Office of the State Council anticipates that this problem will be remedied by the new Administrative Review Law (ARL) which compels organs to accept all applications unless there is a valid reason not to, and allows for the applicant to bypass the reviewing organ and apply to the next higher level of the organ if necessary.52 Whilst the new ARL contains these provisions (see Chapter Three) and stipulates penalties for organs and officials who fail to comply, it remains to be seen whether this law will be sufficiently enforced to remedy the problem.

Furthermore, despite provisions in the new Administrative Review Law to penalise those responsible in an administrative organ if the organ does not accept a case for review,53 the impact is softened by the law’s provision that legal affairs offices may only suggest (建议) to an administrative organ that non-acceptance of a case be penalised.54 Final authority over penalisation still remains within the administrative organ at a higher level than the review organ, and the weakness of external legal authority is exacerbated. If these new provisions have any positive effect in achieving a higher rate of acceptance of

52 Interview with an official from the State Council’s Office of Legislative Affairs, Beijing, 1998. See Administrative Review Law, Article 20 in the Legal Daily (internet version), 30 April 1999, p.3.
53 Administrative Review Law, Articles 34-38.
54 Ibid, Article 38.
cases by review organs, they are likely to simply result in a higher rate of automatic confirmation of the administrative decision.\textsuperscript{55}

Automatic confirmation of administrative decisions by review organs is the biggest problem in administrative review, and there are several reasons for this: \textsuperscript{56} (a) officials generally protect other officials in their section of the PRC administrative bureaucracy; (b) review organs do not want to create trouble for lower-level organs on whose cooperation they rely in their regular working relationships; (c) the review organ does not want to be the defendant in any administrative litigation that may result from the review decision.\textsuperscript{57} These problems suggest that direct complaints to the offending administrative organ are not an effective means of obtaining redress, and that a third party is necessary to play an intervening role. The letters/visits system provides for such a third party, but does it offer a more effective means of redress than administrative review?

\textit{The letters/visits system}

The system that allows for government organs to receive letters of complaint and visits (信访) from individuals originated in the early years of the People's Republic\textsuperscript{58} and continues to the present. The system has a history of dealing not just with complaints about specific administrative decisions, but also with complaints of corruption and bribery among cadres, and broader social problems such as famine and unemployment. During the early years of the People's Republic a significant proportion of problems brought to the letters/visits office were passed to a local mediation committee for handling because they concerned marriage problems, family financial disputes and

\textsuperscript{55} Interview with a teacher of administrative law from the Wuhan Institute of Politics and Law, Beijing, 1998.

\textsuperscript{56} These reasons were repeated, either together or individually, by nearly all interviewees that I approached about this matter.

\textsuperscript{57} The ALL states that where a decision has been reviewed and confirmed, the organ responsible for the original decision becomes the defendant. Where the decision is overturned by the review organ, the review organ becomes the defendant (ALL, Article 25). Thus there are legislative factors that work against administrative review being an effective avenue of redress.

property issues. In the initial post-Mao era, 80% of cases related to requests from individuals seeking redress after the Cultural Revolution. During the reform period complaints have more often been about quality standards in state owned enterprises, reflecting the new priorities of economic development.

The letters/visits system is broad in scope and can accept any problem at all, and this is a major advantage compared to administrative review. It is not limited to concrete administrative acts, nor is it limited to the decisions of administrative organs. It also sets much looser time limits within which a complaint must be lodged, so in some ways it is more flexible than administrative review. Some scholars regard the letters/visits system as being superseded by administrative review, but in view of its broader role and greater degree of flexibility this does not seem to be so. Plaintiffs at the letters/visits office are first encouraged to seek administrative review if time limits allow, but this is only possible if the dispute involves a specific administrative decision. In the current context, writing a letter of complaint is often a course of action taken if an application for administrative review or litigation is unsuccessful, but it is important to note here the barrier to effective complaint that illiteracy may pose. Those who are unable to write their claims may ask someone to write on their behalf, or more realistically, are limited to the option of visiting a government office to lodge their complaint orally. These special offices are established in all government organs, but for those in the countryside this may mean a considerable journey to a large town.

59 Diao Jiecheng (A Brief History of the People's Letters/Visits), (Beijing: Beijing Economic Institute Press, 1996), p.89 reports that from January to April 1956, 304 cases were passed from a county letters/visits office to a township mediation committee, constituting 76% of cases received by the county office during that period.


62 These time limits are a relatively recent addition to the letters/visits system. See Regulations on Letters and Visits (Regulations on Letters and Visits) 28 October 1995, Diao Jiecheng (A Brief History of the People's Letters/Visits), (Beijing: Beijing Economic Institute Press, 1996), pp.403-409.


64 Lin Feng also maintains the two systems are supplementary: Lin Feng, Administrative Law - Procedures and Remedies in China, The China Law Series (Hong Kong: Sweet and Maxwell, 1996), p.92.
A number of different types of complaint can be made at a letters/visits office. An appeal (申诉 shensu) is initiated when a citizen files a complaint to a relevant organ or a judicial organ claiming that his or her lawful rights have been violated or encroached upon, and demands that there be rectification. The most important complaints relate to administrative decisions that are alleged to be unlawful (不合法) or unreasonable (不合理). Illegal decisions exceed the limits of an organ's statutory authority, whereas unreasonable decisions relate to the fairness of the administrative decision. Unreasonable decisions are sometimes presented in administrative case records as improper (不当) decisions. The appeal involves identifying the responsible official and reviewing the legality of the original decision, and may be associated with appeal for administrative review or litigation.

If a citizen wishes to charge, accuse, or complain (控告 konggao), he or she goes to the relevant organ or judicial organ and reports an action that is either illegal or involves a neglect of administrative duty. This type of petition differs from shensu in that it does not necessarily involve a demand that an administrative decision be remedied, but is more often a general complaint about administrative behaviour.

A more dramatic type of complaint about official behaviour is the denunciation to authorities (检举 jianju) of actions that are either illegal or involve a neglect of duty. The jianju differs from konggao in that the konggao may include appeals against personal injustice to the plaintiff, whereas a jianju petition does not. It differs from a shensu in that shensu petitions always relate to the person making the complaint whereas a jianju denunciation relates to a third party.

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65 ARR, Article 21.
67 There are several types of shensu: (1) shensu against the judiciary; (2) shensu against an administrative agency; (3) shensu against the Party; (4) shensu against an electorate. See Margaret Woo, "Adjudication Supervision and Judicial Independence in the P.R.C.", American Journal of Comparative Law, 39, 1991, p.104.
Written or verbal petitions about any kind of administrative offence or questionable behaviour can also be submitted to any level of the People's Congress or to a People's Political Consultative Conference at county level or above. The congress or conference is then supposed to pass the problem to the relevant organ for rectification. Mostly these petitions are written to the authorities at the congress, but sometimes the petitioner will stand at the door of the meeting and shout out the complaint to draw attention to his or her plight.

There are several recurring patterns in the system of written complaints, that probably also applies to visit-based protests. Political movements affect the amount of, and content of, the letters that are written. John Burns notes that at the start of a political campaign in the pre-reform period there was an increase in the number of complaint letters that was directly attributable to the campaign. Similar patterns can be noted for the reform period, as letters of complaint and visits tend to be made by individuals or groups that are affected by new policies.

The main advantage of the letters/visits system is that it provides for a third party to intervene in a dispute, but this is undermined by the system's lack of legal authority to directly remedy a problem. The letters/visits organs can only pass the complaint back to the organ where the problem originates, a course of action that often results in retribution being taken against the plaintiff, or on to a higher authority. In either case, redress for the plaintiff is not likely because there is no procedure in place that requires any of the parties to actually carry out a process of considering the complaint. In many cases, the letters and

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69 Shouting and physically intruding on the congress' proceedings is reputedly not common, but it does happen. Interview with a lecturer from the Department of Law, Beijing University, Beijing, 1998.

70 See John P. Burns, Political Participation in Rural China (Berkeley: University of California Press, 1988), Chapter 7.

records of complaint are simply filed and forgotten. All of the interviewees for this study regard the letters/visits system as a mechanism that belongs to the Mao era, and even though it still operates it is not held in high esteem. It is seen as lacking the legal teeth that is provided by the ALL, which clearly sets out the procedures to be followed when an application is received. It must be noted, however, that the ARR also sets out a required procedure for handling complaints, but this does not strengthen the departmental review system. Nor does the new Administrative Review Law add much on this score, as the supervision of administrative power remains predominantly within the domain of administrative organs.

The media

There are at least two ways in which the Chinese media serves as an avenue for redress of administrative grievances. Complainants may contact a media outlet which may then print or broadcast the complaint, or journalists may initiate their own investigations in response to outside pressures. Writing letters of complaint to newspapers and other media outlets is a practice that began in the 1950s, continued throughout the Mao era, and is still popular. Like the letters/visits system, the subject matter of letters is broad, ranging from maladministration to general grievances such as retrenchment. One of the advantages of complaining to the media rather than through the administrative system is that complainants hope to obtain rectification without the retribution that is common in the letters/visits system.

When journalists in China initiate their own investigations about an administrative or other abuse, it is done either as a response to a letter of complaint from an individual, or because of factional political interests, in which case the impetus comes from a higher level in the administrative hierarchy. For example, the Lawyers News (中国律师报) is under pressure from several sources: its readers who are mostly

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lawyers, citizens who read the newspaper and want help with a problem, and from other media colleagues.\textsuperscript{74} When an administrative or other abuse is "exposed", this means it is made public in the press. Such exposures may be isolated cases, or may coincide with political campaigns initiated from the higher levels of the bureaucracy.\textsuperscript{75}

Many of the problems for an individual complainant are similar to those encountered in the operation of the letters/visits system and administrative review: investigations are obstructed by the office or official about whom the complaint had been made; higher level authorities often prevent the matter from being exposed in the newspaper; and usually there is little action taken to rectify the problem even if the matter is publicised.\textsuperscript{76} Further to these problems, letters tend to reflect government policy of the time. If there is an anti-corruption campaign in progress, for example, letters tend to be about corruption among officials. The media has a considerable advantage in that it can play the role of the third party in an unobtrusive way, as it can pass on information about administrative abuses without publicising it, but its lack of legal authority to act on complaints limits its effectiveness.

Television, radio and film also play a similarly important role in the grievance redress system. "Focus" was first broadcast on CCCTV in 1994 and was designed to play a supervisory role by focusing on problems that occur during the implementation of major reform policies. The program has boldly exposed incidents of corruption among government officials, and abuses in the sensitive area of the grain distribution system. It aims to go beyond reporting to resolving the problem, thereby promoting implementation of government policy.\textsuperscript{77} "News in Length and Breadth", broadcast by the Central People's

\textsuperscript{74} Interview with a reporter from the \textit{China Lawyers News}, Beijing, 1998.
\textsuperscript{75} See T. Wing Lo, \textit{Corruption and Politics in Hong Kong and China} (Buckingham: Open University Press, 1993), Chapter Three, for an account of anti-corruption campaigns in the late 1980s in China and how well known figures were censured by public vilification in the press as part of factional political struggles. Also see Andrew Nathan, \textit{Chinese Democracy} (New York: Knopf, 1985), pp.156-187 for an account of the diverse ways in which the Chinese media can serve as an avenue of redress.
Broadcasting Station, fills a similar role, as does the Zhang Yimou film “Qiuju Goes to Court”, which recounts the story of a village woman who files a suit against the village head who injured her husband. The woman does not seek punishment for the village head, but is happy just for an apology, an outcome that dilutes the responsibility of the state to ensure its officials behave justly.

As with print, these media are driven by the government’s agenda: they expose problems the government wants resolved, and resolves them in a manner sanctioned by the government. Some court cases are now televised in China in an attempt to persuade the public that there is open government, but these are usually commercial in nature, such as a copyright case, and probably serve the government’s wider international political agenda of persuading the United States of its firm commitment to crack down on copyright fraud.

**Big character posters**

The right to use these posters is currently banned in the PRC, but what can be learned from the occasions on which they were used? Big character posters (大字报) have a long history in the PRC dating from at least the 1940s and continuing throughout the reform era. The right to use big character posters as a form of political expression and complaint was, for a time, included in the PRC Constitution, but was subsequently removed. The content of these posters has ranged from major political-legal issues through to more mundane complaints about individual officials or problems, including administrative grievances.

Big character posters have been most effective, historically, in two types of situations: elite-level factional political struggles, and as a means of expressing important political ideas, although the two are not necessarily unrelated. Posters were particularly used

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78 *Beijing Review*, 2-8 November 1992, pp.32-34.
during the Cultural Revolution, for example, to further the aims of factional political struggles.\footnote{John P. Burns, \textit{Political Participation in Rural China} (Berkeley: University of California Press, 1988), Chapter 7; Hua Sheng, "Big Character Posters in China: A Historical Survey", \textit{Journal of Chinese Law}, 2, 4, 1990", pp.239-243.} In the post-Cultural Revolution climate, on the other hand, big character posters such as were used in the Li Yizhe debates were critical of the regime and demanded a return to socialist democracy and legality,\footnote{For translations of some of the documents used in these debates and an edited introduction to them see: Anita Chan, Stanley Rosen, and Jonathan Unger (eds.), \textit{On Socialist Democracy and the Chinese Legal System - The Li Yizhe Debates} (Armonk: M.E. Sharpe, 1985).} while the Democracy Wall Movement of the late 1970s demanded democracy and other political reforms. But interspersed with the high-profile demands for democracy during this latter movement were more ordinary demands for redress of specific grievances as part of the post-Cultural Revolution reappraisals.\footnote{Hua Sheng, "Big Character Posters in China: A Historical Survey", \textit{Journal of Chinese Law}, 2, 4, 1990", p.245; John P. Burns, \textit{Political Participation in Rural China} (Berkeley: University of California Press, 1988), pp.150-151.} As a means of gaining redress for more mundane problems, big character posters were ineffective because they were swamped in significance by posters such as Wei Jingsheng's "The Fifth Modernization."

\textit{Mediation}

There are several types of mediation in the PRC\footnote{Courts may conduct mediation prior to formally adjudicating a civil dispute; arbitration organs may conduct mediation as a preliminary step prior to formal arbitration; and people's mediation committees handle ordinary civil disputes such as divorce: see Albert Chen, \textit{An Introduction to the Legal System of the People's Republic of China} (Singapore: Butterworths Asia, 1992), pp.171-175.} but only one type, so-called people's mediation, is an alternative option to administrative litigation.\footnote{For two comprehensive studies of people's mediation see Donald Clarke, "Dispute Resolution in China", \textit{Journal of Chinese Law}, 5, 1991, pp.245-96; Stanley Lubman, "Mao and Mediation: Politics and Dispute Resolution in Communist China", in Ralph Folsom and John Minan (eds.), \textit{Law in the People's Republic of China} (Dordrecht; Boston: Martinus Nijhoff and Kluwer, 1989), pp.89-113.} Mediation is long-established institution in the PRC, and there is some evidence to suggest that significant numbers of disputes that are administrative in nature are channelled into mediation as civil disputes. This allows the administrative organ several advantages over the protesting individual: the organ, which often provides the mediation service, can exercise its power over an individual and coerce the individual to accept its view; the organ can save face; and the organ can avoid being called to account legally for its actions.
People's mediation committees were originally set up in 1954 to handle ordinary civil disputes, minor criminal cases and to educate people about state law. They operate under the jurisdiction of local governments. The minor criminal disputes referred to included those administered by the public security organs in accordance with the 1957 Public Order Management Regulations, that is, disputes that would now be classified as administrative in nature. However, the mediation regulations were upgraded in 1989 and the category of "minor criminal cases" was removed from the scope of mediation. But Donald Clarke maintains that such cases continue to be subject to mediation. If true, this may mean that there are many more complaints made against public security organs' decisions than official statistics show.

Some disputes may be either administrative or civil in substance, depending on how far the parties involved want to take the matter, and how the administrative organ responds. Public order offences, for example, may be handled informally by the public security organs, by giving a verbal warning or by sending the disputing parties to mediation. Or a more formal method would require the organ to impose an administrative penalty. Public security organs should only recommend mediation to the parties in civil disputes, as mediation is voluntary. Only if an administrative punishment is imposed, does the dispute become formally administrative in nature and therefore able to be challenged under the new administrative law system. There does not seem to be sufficient information to determine the degree to which public security organs may channel disputes.

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87 Ibid, p.279.
administrative disputes into the civil dispute resolution system, but we do have evidence for land disputes.

Land management disputes that go to mediation are so prolific because the Land Management Law of the PRC gives priority to mediation and encourages the parties to reach a mutually agreeable solution. If a joint decision cannot be reached then the dispute should be handed to the local government at county level or above for resolution. It is at this point that the dispute may be handled either as civil or administrative. If the government handles the dispute as civil in nature, then any subsequent litigation is also civil. If, on the other hand, the government imposes an administrative penalty on one of the parties, then the dispute may become administrative in nature and any subsequent litigation may involve the government organ as defendant. Thus, the government has a vested interest in directing disputes of this nature to the mediation committees.

Knowledge of this is important when making an assessment of the extent of administrative disputes between citizens and the state. Published figures show that in 1996 the courts across China settled nearly 14,000 land management administrative litigation disputes. At the same time, the mediation committees that handled housing and other land matters handled nearly 600,000 cases. In short, many housing and land disputes are channelled by the government into administrative mediation rather than administrative review and litigation.

**Administrative litigation as an option**

For a complainant to choose administrative litigation as the preferred avenue for dispute resolution means that he or she is interested in gaining redress by getting the offending administrative decision overturned and possibly by also obtaining compensation. A

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plaintiff is best situated to use this option if the administrative decision in question is not technical or commercial in nature; for these types of disputes, administrative arbitration is most appropriate. The structure of the PRC administrative dispute-resolution system gives professional administrative bodies primary jurisdiction (and sometimes sole jurisdiction) over areas that are regarded as commercial or technical in nature. Administrative litigation plays a more general role in ensuring the legality of any particular administrative decision.

There are two types of disputes that dominate the administrative litigation system: land management disputes and disputes involving the public security organs. Lack of professional knowledge on the part of the courts tends to hamper judicial handling of land disputes. Land management organs would prefer that the courts not have the authority to review the facts of a land case but only the authority to review the application of law, arguing a need for professional knowledge in the resolution of such administrative disputes. The implication of such an argument is that to allow the courts to review all and any administrative actions may not necessarily result in greater justice for the plaintiffs.

Courts are professionally better suited to handling administrative litigation suits against public security organs because the courts and public security organs are within the same administrative system. Problematically, though, this closeness also undercuts the courts’ authority. Regardless of the shortcomings, courts overturn approximately the same proportion of public security decisions as land management decisions when national figures are used as the measure, suggesting that professional knowledge by the courts is not a key determinant of the outcome of administrative litigation. Chapter Seven will observe important local distinctions in judicial activity which shed further light on the

94 Interview with the director of the Department of Policies, Law and Supervision in the State Land Administration of the PRC, Beijing, 1998.
relationships between the courts' level of professional knowledge, administrative justice, and the outcome of administrative litigation.

In this chapter we have examined the historical evolution of the new system and canvassed a range of dispute resolution methods, identifying their shortcomings. In a significant shift from the provisions of the early years of the People's Republic, it is clear that the regime intends the new system to curb illegal or unfair administrative actions. There has also been a growing realisation that the power of administrative organs in contrast to that of individual citizens has been a stumbling block for justice and that the new system must be designed to overcome this imbalance. It has been designed, though, in the midst of bureaucratic turf battles rather than with a strong individual-rights-based framework.

Other options for redress, such as the letters/visits system and approaching the media, face the problem that the role of a third party in the resolution of administrative disputes must be underpinned with legal authority to redress the problem. Moreover, all other options are clearly subject to coercion by the political environment which undercuts the provision of a regularised redress system. A key factor we are looking for in examining the new system is whether it too is subject to political manipulation.

The new system of administrative law is better than the previous systems. In the context of other options it is also the best way, apart from informal means such as using one's personal relationships, to get a specific administrative decision changed because it is specifically designed to do so. Theoretically, anyone can use it, at any time over any specific decision. To be sure, the required procedure is not always carried out and organs often simply refuse to accept an application for administrative review. Courts, too, cannot be relied upon to accept all of the cases that they should. The initial point of filing an application for administrative litigation in the court will be shown to be the most important phase for the plaintiff. If the court accepts the case for review, there is
approximately a 40% chance that the administrative decision will be either overturned or revised by the administrative organ to the advantage of the plaintiff. However, it is extremely difficult to get one's case as far as being accepted by a court. The policy background of the new system, together with an examination of the legislation’s provisions, will enable a fuller understanding of what individuals face when they approach the state through this system.

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CHAPTER THREE

THEORY, POLICY AND LEGISLATION

The pre-existing political-legal-cultural milieu, together with the provisions of the new administrative law system, significantly affects a citizen’s chance of success when he or she uses the system to gain redress from an illegal or unfair specific administrative decision. We will deal here with the following factors that impinge upon this milieu: the concept of administrative law in the PRC, including the so-called balance theory; the reasons for developing the new system; and the provisions of the Administrative Litigation Law, the Administrative Review Regulations, the Administrative Review Law, and the State Compensation Law. In examining the provisions and ideas that informed the final versions of these pieces of legislation, I shall weave in alternative positions that were considered but not included in the law, in order to demonstrate possible sources of resistance to the system’s implementation. I shall also draw out the ways in which the provisions benefit either the state or the plaintiff, the implication of which is that the state may have designed an unjust law.

The concept of administrative law

In the PRC, administrative law has a broad conceptual framework, including both the function and structure of government authorities, with the ALL fulfilling a remedial function. Administrative law also determines the organisation of administrative organs, including their specific tasks, scope of authority and working procedures; the personnel of administrative organs, including their tasks, qualifications and supervision; the drafting and promulgation of administrative laws, regulations and rules; the legislation for administrative penalties; the process and structure of administrative supervision; and the scope and procedures for legislation regarding administrative litigation. Administrative law is said to coordinate (协调) management between state administrative organs and

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other state organs, social groups, and so on. Another term used to describe the role of administrative law is to adjust, regulate or revise (调整). (This term is used by Professor Jiang Ming'an, Head of the Administrative and Constitutional Law Centre in the Department of Law at Beijing University).

This broad conceptual framework has given rise to conflict over precisely what the aims and structure of the Administrative Litigation Law should be. On the one hand, some PRC legal scholars conceptualise administrative law as a set of procedures to ensure that administrative organs are able to efficiently carry out their duties. To this end, administrative law should primarily focus on the structure of government by defining the tasks, scope of authority, and working procedures of administrative organs. On the other hand, some other PRC legal scholars conceptualise administrative law primarily as a means to protect individual rights and control state power. To this end, administrative law should focus on defining the scope and procedures for legislation regarding administrative litigation. The provisions of the ALL reflect these different influences. We will examine them here to aid our understanding of the ALL's provisions. The "balance theory" has been coined as a theoretical construct to represent these different views, and no doubt also as an attempt at inclusiveness.

The 'Balance Theory'

Chinese legal scholars have constructed their own paradigm of administrative law: the “balance theory” (平衡理论 pingheng lilun). The balance theory of contemporary Chinese administrative law is not to be confused with the theory of the three-way separation of powers that underpins the structure of many Western states by maintaining a separation of legislative, executive, and judicial powers (三权分立 san quan fenli). The theoretical structure of the institutions of political power in China considers

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legislative and administrative power as unitary (*yixing heyi*). The implications of this theoretical structure for an administrative law system are significant: administration must be based on law, but administrative and legislative power are unitary, thus there is no apparent control over administrative power. How then, is the judiciary supposed to supervise the administration, especially when it is part of the bureaucracy? This issue was at the heart of the heated debates that occurred during the preparatory phase of the ALL.

The balance theory proposes a balance of power between the state and the citizen. The theory is at least partly the result of the bargaining and negotiating that took place when the provisions of the ALL were being determined, although its features were recognised prior to this. The theory was first expounded publicly in 1993 by Luo Haocai.

According to Luo, the extremes of the balance theory are management theory (*guanli lun*) and control of power theory (*kong quan lun*). Management theory stresses the instrumental role of administrative law as a tool of state management. Historically, administrative law in the PRC is said to be based on "management theory" (*guanli lun*). As such, administrative law was visible predominantly in the promulgation of administrative rules that determined the organisation, structure, and functions of various state organs. This theory stresses the use of law as a tool of administrative regulation. The duties and powers of the administrative

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6 Luo Haocai et al, "The Theoretical Basis of Contemporary Administrative Law" in 中国法学 (Chinese Jurisprudence), 1, 1993, pp.52-59 in Reprints from the Press - Law, 4, 1993, pp.72-79. In 1998 Luo Haocai was a vice president of the Supreme People's Court of the PRC and a teacher of graduate law students at Beijing University. A collection of essays about the balance theory, from both positive and negative viewpoints, can be found in "The Balance Theory".
organ are of primary importance, together with ensuring that administrative organs have the necessary power to enforce their decisions. Rule by man rather than rule by law predominates, and the right to remedies is limited to petitioning.\textsuperscript{10} The overall aim of the system is administrative efficiency, rather than justice. Disputes are settled by a common hierarchical superior within the administrative system. This approach was borrowed from the Soviet Union and influenced administrative law in China until the 1970s, although some scholars see its influence lasting until the Thirteenth Party Congress in 1987.\textsuperscript{11} It maintains that laws governing the tasks and organisation of administrative organs are more important than judicial review. Thus it was clearly useful for regulating the planned economy and maintaining collectivism.

Modern administrative law in capitalist countries, according to Luo, is based on "control of power" theory (\textit{kong quan lun}). The control of power theory places most emphasis on the role of law as a protector of individual rights from state encroachment. This theory stresses the rights of the individual, and the supervision of administrative behaviour. According to the theory, the legal system should function as a restraint on government behaviour, culminating in the right to seek judicial review of administrative action. This theory is the outgrowth of natural law theory, liberalism, and the economic theories of Adam Smith. In making this assessment, Luo has drawn on the writings of well known Western legal scholars, among them W.H.R. Wade, K.C. Davis, Carol Harlow and Richard Rawlings.

The balance theory, as explained by Luo, combines aspects of both management theory and control of power theory. It posits that administrative law should seek both to regulate and supervise administrative behaviour. Both protection of individual rights and ensuring that administration is carried out according to law are important. The balance theory

\textsuperscript{10} Chapter Two examines the historical development of the PRC’s administrative law system and shows that early forms of judicial remedies against illegal or unfair administrative action existed, but they remained theoretical. The most effective practical remedy was, as Luo states, to petition the relevant administrative organ.

allows for the existence of many different remedies for redress of administrative grievances apart from judicial review, such as administrative review, the letters/visits system, and so on. The balance theory also aims to allow for citizen participation (through administrative litigation appeals) while not undermining administrative efficiency.

Thus, in terms of theoretical underpinnings, Chinese legal scholars are proposing a middle ground between pure socialist "pro-management" theories of administrative law and what they see as Western "pro-individual" theories. It must be stressed here that this is merely a "theory" and appears to be designed more to justify the compromises necessary to get the ALL in its current form passed in the National People's Congress, than as a basis for practice.

The balance theory has its critics, of course. Most of such criticism is directed towards the fact that this theory is not universally applicable to law in general. Some PRC legal practitioners discard it outright as having no practical use in daily problem solving. Nevertheless, they acknowledge that administrative law in the PRC currently is more a matter of management law than of control of power law (guanli fa versus kong quan fa). In fact, there is a tacit understanding among administrative law scholars that the balance theory is weighted towards management principles. One scholar I interviewed had this to say about it:

The balance theory is good for China and its social conditions. The population is large and their educational level is low. Therefore, if we give people more power this will cause problems. Most people in China will break the laws rather than obey them, so we must give most power to the administrative organs to manage the social situation....China is not like Western countries...This theory suits China's practical situation.13

This hard line view can be contrasted with the view of another scholar who was adamant about the role administrative law should play:

I do not have any comment on the balance theory. I think it should be control

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13 Interview with a teacher of administrative law at the Wuhan Southern Central University of Politics and Law and PhD candidate in administrative law at Beijing University Beijing, 1998.
theory. The government has so much power; we must control it, not balance it!  

In summary, China’s administrative law system is related to, but not coterminous with, administrative management. The balance theory is meant to consider the competing interests of administrative organs and citizens. It is a theoretical expression of the pressures at work in a society undergoing broadly-based reforms. Throughout the life of the People’s Republic, administrative law has largely been management law: that is, it has been used as a tool of management. For example, the promulgation in 1957 of the Public Order Management Regulations allowed public security organs to detain offenders for minor offences without recourse to any judicial procedure. This regulation was purely a tool for the management of society; it authorised administrative organs to manage social order in a particular way. It was not until these regulations were replaced by the 1986 Public Order Management Regulations that the rights of the offenders were incorporated into the process of managing public order, thus enabling individual recipients of these administrative penalties to challenge such decisions in court. The new administrative law system is theoretically designed to combine the old role of regulation with the new one of control of power.

**General aims and policies behind the new system**

In Chapter One we touched upon the reasons behind the development of the new administrative law system: the demands for economic development, legal reform, administrative reform and internationalisation. Although these factors are acknowledged Chinese legal scholars to be part of the impetus, they are not considered to be equally important drivers.

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14 Interview with a teacher of administrative law at the China University of Politics and Law, Beijing, 1998.
15 See also Wei Zong and A Jiang, "Important Theories for Administrative Litigation Legislation" in 《中国法学》 (Chinese Jurisprudence) 6, 1988, pp.11-20 in Reprints from the Press - Law, 2, 1989, pp.99-108.
Economics, political pressures and a general re-assessment of the theoretical foundations of the state have all contributed to the development of administrative litigation. Economic reforms have produced a new type of administered state that gives more responsibility, and therefore more power, to enterprises and other constituent parts of the state apparatus to manage their own affairs. Direct interference from the government has been reduced in return for increased efficiency and higher output.

The mode of government has also changed from the autocracy that underpinned the centrally planned economy, to a more rule-based system that attempts to give more institutionalised protection to the rights of enterprises to manage their own affairs. If efficiency and initiative are to be encouraged, then state encroachment in the affairs of business must be controlled. Administrative litigation is seen as a method that supports greater institutionalisation of dispute resolution.

But by far the most significant impetus for change came from a desire to establish the concept of “people sue officials” as a significant element underpinning the structure of the state. The reformed and modernised PRC wishes to clearly establish the notion that state-citizen relationships are now equal in legal status to citizen-citizen relationships.

The official essay chosen to accompany the announcement of the promulgation of the ALL in the People’s Daily is titled "An Important Step in the Establishment of  

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18 On the relationship between political system reform and administrative law generally, see Zhang Shang, “Administrative Law and Reform of the Political System” in 中国法制报 (China Legal System News), 15 August 1986, p.3.
Democratic Politics" (民主政治建设的一个重要步骤). This is a small piece by the paper's commentator, printed next to the text of the ALL, which highlights the general aims and intentions of the new law. This essay draws universal links between democracy (which is undefined) and rule of law, and the establishment of an administrative litigation system. According to the commentator, one of the features to be expected of a country that is improving its level of democracy and rule of law is an administrative litigation law. In China's case, it is claimed, the ALL is an important expression of socialist rule of law and socialist democratic government:

这是我国社会主义法制建设的一件大事，
也是我国社会主义民主政治建设的一个重要步骤
(This is an important event in the establishment of China's socialist legal system, and is also an important step in the establishment of China's socialist democratic politics.)

一个国家是否建立行政诉讼制度，
是衡量这个国家民主和法治发展水平的一个重要标志
(Whether or not a country establishes an administrative litigation system is an important indicator that measures that country's standard of development in democracy and rule of law.)

The article points out that previously people had to appeal to higher authorities to get a problem solved, which often left many problems without legal resolution. Now, it is pointed out, the ALL will make it possible to: protect the lawful rights of citizens and organisations; safeguard and supervise administrative organs as they carry out their functions according to law; and advance honesty and clean government.

A key indicator of the authorities' understanding of who will benefit most by the new administrative law system is also given, as the essay makes several references to the

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ordinary or common people (老百姓).

现在，行政诉讼法颁布了，老百姓可以告《官》，
法院审理行政案件的程序更加完善

(Now that the Administrative Litigation Law has been issued,
ordinary people can sue the officialdom, and the procedure for courts
to hear administrative cases has become more perfect.)

This notion raises two contending ideas: first, universality of access to justice, as
demonstrated by the inclusion of ordinary people in the group who will benefit; and
second and more indicative of the intent behind the law, the idea that although the
theoretical underpinnings of the new administrative law system advocate universal
access, the law might have been designed to fill a gap in the range of China’s dispute
resolution systems and more easily enable the least powerful members of society to obtain
redress. This idea will be explored further in Chapters Six and Seven.

Provisions of the Administrative Litigation Law

The stated aim of the ALL is both to protect the lawful interests of citizens and legal
persons, and to safeguard the exercise of administrative power by administrative organs.²¹
This aim is a compromise between powerful bureaucratic interests which do not want
their administrative power circumscribed and more liberal-minded legal thinkers who
wish to favour the rights of plaintiffs. During the drafting phase of the ALL there was a
contentious debate about the aims of the ALL. Jiang Ming’an and Liu Fengming describe
the two contending views thus:

One aims to raise administrative efficiency by emphasising the implementation and management
functions of the administrative organs; the second aims to protect the lawful rights of citizens by
controlling violations of functions and abuses of power by administrative organs.²²

Jiang and Liu explain that the fundamental aim of the legislation affects its provisions.
Generally, legal scholars were in favour of framing the ALL entirely with the rights of
plaintiffs in mind.²³ Zhang Shuyi, a legal scholar, expressed disappointment that some

²¹ ALL, Article 1.
²² Jiang Ming’an and Liu Fengming, “Certain Questions for Research on the Establishment of
Administrative Litigation Law Legislation” in 法律学习与研究 (Legal Studies and Research),
interests involved in the drafting process gave primary consideration to the rights of the administrative organs.\textsuperscript{24} Zhang maintained that administrative organs had all the power they needed and that the point of an administrative litigation law is not to give further power to the government, but to protect citizens from encroachment by state power. Nevertheless, the views of legal scholars were tempered by the interests of administrative organs, and the provisions of the ALL reflect this compromise.

\textit{Specific Provisions}

\textit{1. The scope and mechanism of regulation}

The drafting stages of the ALL engendered lengthy discussions about a cluster of issues concerning the scope of the law and the mechanisms that should be established to implement it. Chief among them was the question of whether to establish a special administrative court in the European style, and if so whether to locate it within the administrative bureaucracy or the court system. The advantage of this type of mechanism for the PRC was perceived to be that such courts would have the authority to handle even high-level administrative organs and officials as defendants,\textsuperscript{25} thereby making provision for maximum accountability of administrative power. This structure was not adopted, however, supposedly because to establish a separate administrative court would overstretch the PRC's judicial personnel and resources. The fact that administrative divisions had already been established in the ordinary courts to hear public order management disputes was also a determining factor.\textsuperscript{26}

The second matter concerning scope and mechanisms of the ALL that occupied the drafting committee was whether to appoint specialist administrative judges to provide administrative adjudication in the style of the US system. Advocates of this structure pointed out that it can provide a degree of specialist knowledge in the resolution of

administrative disputes, which furthers efficiency and fair handling of disputes.\textsuperscript{27} Most judges, it was argued, do not possess specialist knowledge of administrative decision-making areas and would thus be unable to deliver fair judgement in dispute resolution.\textsuperscript{28} But rather than employ this mechanism, which would provide a comprehensive procedure for the control of administrative power, the drafters of the ALL chose to limit the scope of cases that could be heard under the ALL to specific administrative acts that are not elsewhere limited by law to adjudication by administrative organs.\textsuperscript{29} Thus, drafters retreated again from drafting a law which would provide maximum accountability of administrative power, and chose instead to limit the scope of the ALL so as not to intrude on administrative power that is authorised in other legislation. Administrative acts that are excluded from the scope of the ALL, such as some aspects of trademark and patent disputes, will be discussed below.

The third important issue that the drafting committee had to clarify regarding the scope of the ALL was the relationship between administrative review and administrative litigation. The discussions on this topic revealed administrative resistance to any form of oversight by a third party.\textsuperscript{30} The third party may be a court, or a non-judicial body that was not a party to the dispute, such as an upper level of the administrative organ. In this view, 诉讼 (action at law, lawsuit, litigation, proceedings) need not necessarily be conducted by an ordinary court, but could be carried out by a special administrative court, or administrative adjudication. This proposal was dismissed, however, on the grounds that

\textsuperscript{27} Jiang Ming'an, 行政诉讼法学 (Jurisprudence of Administrative Litigation) (Beijing: Beijing University Press, 1993), p.40.


\textsuperscript{29} ALL, Article 12, Clause 4.

many of the groups who were consulted during the drafting of the ALL did not support
the concept of litigation proceedings being conducted outside the ordinary courts. The
view prevailed that if the PRC was establishing an administrative litigation law, then such
a law must be limited to litigation in the courts. Administrative review, as a distinct
procedure for administrative organs to conduct, was subsequently authorised in the
Administrative Review Regulations, the provisions of which will be discussed in a later
section.

The Administrative Litigation Law regulates the procedures for hearing administrative
disputes in administrative divisions of the ordinary courts. Defining the limits of the
ALL's regulatory power was a highly significant issue that sought to further determine the
nature of state power in its administrative and judicial forms. If the broad view had been
adopted and the ALL's jurisdiction included the procedures for administrative review,
then its structure would be closer to a general administrative procedure law that regulates
all administrative conduct. In deciding that the ALL should only regulate the procedures
for administrative litigation in the courts and that administrative cases would be heard in
administrative divisions of the ordinary courts by ordinary judges, the drafting committee
curtailed the ALL's authority to control administrative organs and their operating
procedures.

2. The scope of cases to be heard in court

The scope of cases that should be subject to the ALL was a much debated issue during the
drafting stage of the law. One option, favoured by rights-conscious legal scholars in the
PRC, was the outline method: the courts are given general rules by which to decide
whether a case should be heard. The disadvantage of this method was thought to be that it

31 Promulgated 9 November 1990: People's Daily, 28 December 1990, p.3. The regulations were modified
32 ALL, Articles 1, 2, 3.
33 Hu Jianmiao, "A Summary of Opinions on Administrative Litigation Legislation" in Guangming Daily,
21 July 1987, p.3 in Reprints from the Press – Law, 1987, 8, p.90; Wei Ajiang, "An Important Discussion
of Administrative Litigation Legislation" in 中國法學 (Chinese Jurisprudence), 6, 1988, pp.11-20 in
reprints from the Press – Law, 2, 1989, pp.99-108; Jiang Ming'an,
would result in a flood of administrative suits in the courts which the system would not be able to handle. An alternative was to specify the types of cases that courts could handle. There were also combinations of these two methods: to determine a general scope and specify a few exclusions; to determine a specific scope and specify a few general exclusions, and so on. The ALL in its promulgated form sets a general range of cases which can be heard and specifies several types of cases that cannot.  

Courts may hear administrative disputes that arise from specific administrative acts such as the imposition of a period of personal detention, imposition of a fine, cancellation of a business permit, an order to cease production, failure to issue a licence or permit where the applicant believes he or she is otherwise entitled to it, and failure by an administrative organ to protect personal or property rights or to allocate a legitimate pension.  

Exclusions are set out: administrative acts involving national defence or foreign relations; administrative laws, regulations, and rules (although some rules may now be challenged under the new Administrative Review Law, but this does not give the courts any jurisdiction over them); administrative decisions of organs that relate to rewards, appointments, dismissals, or punishments of administrative personnel within an organ (some of these too, may now be challenged under the Administrative Review Law); and specific administrative acts which are determined by law as being the responsibility of administrative organs.  

Some exclusions deal with issues that arise regularly throughout life, while others deal with issues that people would face only rarely.  

o Acts involving national defence or foreign affairs, for example, will not be regular issues of contention between administrative organs and citizens. The avenue for redress on these matters is the National People's Congress (NPC), an organ whose administrative
power does not come within the scope of administrative litigation. There is, however, a couple of ways in which this exclusion may affect an individual or business plaintiff. If a young man is drafted into the army, for example, even though this relates to national defence, such decisions are appealable under the ALL. On the other hand, if a factory that produces munitions is subjected to an administrative order concerning how much and what type of munitions it may produce, even though this may interfere with managerial decision-making and thus be appealable, the directive is not appealable under the ALL.

- Administrative laws and regulations may not be challenged. The best course of redress on these matters is a People's Congress at the appropriate level. This exclusion partly reflects the civil law tradition on which the PRC legal system is based, giving primary importance to the legislature rather than the judiciary in determining the validity of statutes. But it also reflects reluctance on the part of the state to accommodate too many civil rights challenges. The Administrative Review Law, that has now replaced the Administrative Review Regulations, permits applicants to challenge rules of the State Council or a people's government, but not laws or regulations.

- Decisions of administrative organs relating to rewards, punishments, dismissals, and appointments of their staff may not be challenged. Complaints about these matters must be taken to the next higher level in the administrative organ, or to the Procuracy, or to the personnel organs. This is another exclusion reflecting a civil law tradition, but it also indicates an unwillingness on the part of the bureaucracy to have an untrained judiciary interfere in its affairs. As one interviewee replied when questioned about this matter: "This is a matter of division of power and labour. These internal matters are not the business of the courts". Administrative sanctions imposed by administrative organs on their own personnel can now be challenged under the Administrative Review Law, but this merely reinforces arrangements that were already in place; it does not give the courts additional jurisdiction over the affairs of administrative organs.

- Decisions for which administrative organs have the right to make the final adjudication. This category typically involves decisions relating to commercial or technical matters. Such issues were excluded from the range of cases applicable to the

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37 Interview with a lecturer in law at Beijing University, Beijing, 1998.
ALL because it was considered that PRC judges do not have the required professional expertise to handle them. Economic contracts, patents, trademarks, and auditing are just a few such areas.

This exclusion, like the others, signals important limits to the role for administrative litigation. It is meant to provide resolution of administrative disputes that are non-technical, general in nature, or fall within the area of the courts' specialisation, that is, criminal or minor criminal (administrative) offences.

Technical or commercial disputes are usually resolved by administrative arbitration. Specialist arbitration bodies have been established to handle these disputes, covering such areas as economic contracts, labour, real estate, product quality, and technology contracts. The decisions of administrative arbitration committees have legal effect, and if the parties do not register disagreement with the arbitration decision within a set time period, then the decision must be implemented. If one party does not implement it, the other can apply to the court to have the decision enforced. Registering disagreement with the arbitration decision is done by either of the parties taking the case to court in a civil suit. Administrative arbitration decisions are thus exempt from administrative litigation.

Administrative arbitration is regarded as similar to the administrative adjudication systems of the US and UK that give specialist arbitration commissions the first and primary right to resolve a dispute. A major difference to Western bodies is that the PRC arbitration organs are attached to administrative organs, whereas the foreign counterparts are established by law as legal entities in their own right. Economic contract arbitration committees, for example, are under the jurisdiction of the industry and commerce organs.

38 Interview with a lecturer at the China University of Politics and Law, Beijing, 1998.
The complexity of administrative arbitration in the PRC is further compounded by the existence of such committees as those for review and examination of trademarks and patents, which also operate under the jurisdiction of the industry and commerce organs. Both these types of bodies carry out the dual functions of administrative adjudication and administrative supervision. If, for example, a party makes an application to have a trademark registered and the application is rejected, appeal can be made to a trademark review and examination committee. This committee has the authority to make final decisions on requests for such reviews because the issue is considered to be a specialised province of the industry and commerce organs. It likewise may make final decisions if a trademark is registered but then opposed by a third party, or if a trademark is cancelled. If, on the other hand, one party's exclusive use of a trademark has been infringed, and the industry and commerce organ imposes a fine or other administrative penalty on the offender, any dissatisfied party may request that a higher level of the industry and commerce organ review the decision and subsequently may initiate administrative litigation in court.

Administrative adjudication committees can co-opt suitably skilled and knowledgeable people from the ranks of lawyers, other professions or specialist areas, and relevant state offices. Thus they have the capacity to provide specialist expertise for resolving disputes. In the PRC, administrative arbitration and administrative adjudication are seen as important players in the range of administrative dispute resolution mechanisms. They

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44 Trademark Law Implementing Rules (Revised), Article 35.
45 Trademark Law Implementing Rules (Revised), Articles 42, 43, and 44.
are intended to provide professional knowledge, thereby increasing efficient handling of disputes.

Mention should be made here of other concrete administrative acts which cannot be handled under the ALL. Communist Party administrative decisions cannot be handled under this system,47 nor can the administrative decisions of any social organisations, or the administrative decisions of many other state organisations such as banks. For example, in 1998 the People’s Bank of China decided to close down the Guangdong International Trust and Investment Corp (GITIC), a decision which was closely followed by a court decision freezing the bank accounts and assets of the organisation.48 This decision is beyond the scope of administrative review or litigation in the PRC. By contrast, if an industry and commerce organ made a similar decision in relation to an enterprise, the decision would be subject to administrative review and litigation.

3. The importance to the state of administrative litigation
The ALL stipulates that in an administrative litigation case the court must use the collegiate system,49 which means that at least three judges must hear the case. This number is contrasted with civil litigation cases which may be heard by only one judge. This requirement demonstrates the sensitive nature of administrative litigation cases for the state, and a concern that the correct decision be reached.

4. Joint Litigation
The ALL makes provision for cases which may have more than one party wishing to complain about the specific administrative act. These cases are joint actions (gongtong susong).50 They differ from class action suits in Western countries in that joint action suits in the PRC must involve plaintiffs who are directly affected by the administrative

49 ALL, Article 6.
50 ALL, Article 26.
behaviour in question; abstract involvement is not sufficient grounds for making a case. The ALL also provides for third parties to be part of a suit where they have an interest in the case, but their interest may not be that of the plaintiff.\(^{51}\) This situation usually arises when there are two parties to a dispute, such as a public order dispute, and the public security organ imposes a penalty on one of the parties. The other party may disagree with the administrative penalty on the grounds that it is too lenient and thus may wish to challenge the decision as part of the suit when the recipient of the penalty challenges it on the grounds that it is too harsh.

5. The courts establish a case

When a plaintiff files an application for litigation there are set procedures the court must undertake to establish whether the case is one that it can hear. The criteria set out in the ALL which the court must examine are general in nature: the applicant must be a citizen, legal person or other organisation which considers that a specific administrative act has infringed his or her lawful interests; there must be a clearly identifiable respondent; there must be a specific claim and facts upon which the application is based; and the case must fall within the scope of cases a court may hear, and within the specific jurisdiction of the court to which application has been made.\(^{52}\) The court is merely meant to establish at this point that all the elements are in place for a legal administrative litigation suit to be heard. The court must then accept or reject the case within seven days.\(^{53}\) The implication is that courts should accept all cases which satisfy the requirements, but in fact there is no obligation for them to do so.\(^{54}\) Authoritative Chinese sources on administrative litigation appear to be silent on this point, which is not necessarily an indication of collusion between the state and legal scholars. Chapters Six and Seven of this dissertation demonstrate that courts do not accept all the cases they should, and that this is acknowledged as a shortcoming of the system, rather than as a loophole.

\(^{51}\) ALL, Article 27.
\(^{52}\) ALL, Article 41.
\(^{53}\) ALL, Article 42.
\(^{54}\) "Editor's Notes", *China Law and Practice*, 3, 5, 1989, p.56.
6. Suspension of the administrative act during trial

If a person files for administrative litigation in protest against an administrative penalty, the penalty is not suspended during the course of the trial. This provision also applies in administrative review. This means that a plaintiff will often have endured the penalty to its completion before the administrative review or litigation is complete. This rule may be voided in the following circumstances: if the defendant considers that the administrative penalty should be postponed; if the plaintiff applies for a suspension and the court agrees on the grounds that irreparable harm would otherwise be caused to the plaintiff, and public interest would not be harmed; or if a law or regulation allows for it. The Public Order Management Regulations 1986, for example, provide for bail to be paid in order to have the penalty suspended while the review or litigation is in process. This provision is more repressive than that in the original 1957 Public Order Management Regulations which allowed for a personal penalty to be postponed during the appeal period if the offender had a fixed local address. Where the offender had no fixed address he or she was obliged to find a guarantor, or to pay bail before the penalty would be postponed. The most recent provision might reflect the reform-era problem caused by China’s itinerant floating population.

This provision in the ALL blatantly ignores the plaintiff’s circumstances. The state’s position is that once an administrative decision has been issued it has legal effect and therefore the state has the right to implement and enforce it. Even if the action is illegal or unsuitable, the parties must implement it. The state maintains that if the administrative action were to be suspended during the time of appeal, this would adversely impinge upon the safety and order of the rest of society. An example used to illustrate this point is

55 ALL, Article 44.
56 ARR, Article 39.
57 ALL, Article 44.
the supervision of food product standards by the health management organs: if a producer of below-standard food products is permitted to continue the business while an appeal is in progress, the health and safety of consumers may be seriously affected.

The state does admit that under some circumstances this provision may harm a plaintiff’s lawful rights. To deal with these situations the state has provided for compensation to cover losses incurred as a result of what is subsequently shown to be an illegal or unsuitable administrative decision. In some circumstances the system for compensation works effectively and in others it does not. For example, if a business had to suspend operations for a week as a result of an administrative decision that was subsequently shown to be illegal, then the business operator can request compensation for the direct economic losses incurred during that week of non-production, such as for staff salaries. If, however, an unemployed citizen is given a seven-day administrative detention for a public order violation, and the decision is subsequently shown to be illegal, then only an apology will be issued from the public security organ because there has been no direct economic loss. The State Compensation Law does not generally provide monetary compensation for indirect losses such as psychological trauma, but only for direct losses such as damaged clothing, hospital bills and so on.61 If the detainee had been beaten by the police while in custody and had to go to hospital to get attended to, then he or she could claim compensation for the medical fees and to replace any damaged clothing. But the plaintiff cannot claim compensation for the indirect losses incurred as a result of having been illegally detained.

7. Withdrawal of a case
A plaintiff may apply to withdraw an administrative litigation case during the course of the trial but the court must approve such a withdrawal. There are a number of factors that contribute to a plaintiff wishing to withdraw a case, which will be dealt with in detail in

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Chapter Seven. The important point to note here is that the defending organ has the right to alter the administrative decision during the course of the trial and that such alterations may contribute to a plaintiff wishing to withdraw the suit.62

8. Enforcement of a court judgement
When a court makes a ruling in an administrative litigation case, the ruling has legal effect and it must be carried out. If a plaintiff refuses to carry out the ruling, the administrative organ can ask the court to enforce it. If a defending organ refuses to carry out a court ruling such as refunding a fine or paying damages, then the court has the authority to order a bank transfer of money from the account of the administrative organ. It also may fine the organ or make a judicial recommendation (司法建议 sifa jianyi) to the next highest level of the administrative organ, suggesting the higher level take action to ensure the ruling is carried out. In extreme circumstances, criminal liability may be considered.63 The courts generally have more power to enforce their decisions over individuals than over powerful administrative organs.

9. Compensation
If a citizen suffers tangible losses as a result of a specific administrative decision then a claim can be made for monetary compensation. The administrative organ must first deal with the claim, and if no satisfaction is obtained then the plaintiff may take the case to court. Significantly for the outcomes, mediation is a lawful means of handling compensation claims. This becomes important when a case involves both a request to cancel an administrative decision and a claim for compensation.64 The compensation claims are paid out of public money, but the official responsible for the damages may be asked to pay some or all of the cost out of his/her private finances if it is shown that the damages were caused intentionally or by gross negligence.65

62 ALL, Article 51.
63 ALL, Article 65.
64 This relationship will be examined in detail in Chapter Five.
65 ALL, Articles 67, 68 and 69.
10. **Foreigners and administrative litigation**

Foreigners in China who wish to conduct administrative litigation may do so according to the ALL with all the same conditions as citizens, providing the foreigner’s country extends similar rights to PRC citizens. The only legal hurdle for foreigners is that if they wish to conduct their case through a lawyer, then the lawyer must be from one of the lawyers’ associations of the PRC. 66

11. **The responsibility to provide evidence**

The legal situation in administrative litigation is that the plaintiff (原告人 yuan gao ren) accuses the administrative organ of an illegal act. The organ is then the defendant (被告人 beigao ren), and must provide evidence to prove the legality of the decision. The plaintiff does not have to prove that the administrative organ made an illegal decision; the organ must provide its reasons and evidence to show that its decision was legal. 67 The only condition under which this may vary is if the plaintiff thinks the defending organ has used evidence which further harms the rights of the plaintiff, leading the plaintiff to claim further compensation. In such circumstances the plaintiff must provide the evidence.

This provision assigns more rights to the plaintiff than to the defending organ, so in this particular circumstance the ALL is more conscious of individual rights than of the prerogatives of the state. This affects the choice of redress sought by plaintiffs, as one interviewee pointed out: if faced with the choice of suing an administrative organ in an administrative suit or suing a fellow citizen in a civil suit, as often arises in land disputes and environment protection disputes, the best course is to choose the administrative suit because the plaintiff has more rights. 68 In a civil suit, the parties have equal rights.

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66 ALL, Articles 70-73.
67 ALL, Article 32.
68 Interview with a teacher of administrative law at the Wuhan Southern Central University of Politics and Law and graduate law student in the Department of Law, Beijing University, Beijing, 1998.
It is argued by PRC legal scholars, in support of this provision, that since it is the defendant's behaviour that is under scrutiny then the defendant should be obliged to provide the evidence. In addition to this, it was recognised that in most administrative cases the defendant has the evidence in hand and the plaintiff will have no legal claim to the necessary documents.\(^6^9\) Courts have the power to request documents from administrative organs in the course of litigation, but as will be shown in Chapters Six and Seven, administrative organs often refuse to cooperate.

The alternative to this provision, considered during the drafting of the ALL, was to assign the responsibility for evidence on a civil law basis, which would have assigned to both parties equal responsibility for the provision of evidence.\(^7^0\) This view was based on the concept that the aim of administrative litigation is to resolve administrative disputes and in such disputes both parties have a position to advocate, and thus both parties should provide evidence. The overriding of this view in the ALL indicates a degree of recognition by the drafting committee of the power imbalance between administrative organs and citizens, and recognition that this must be addressed in determining responsibility for provision of evidence.

12. Basis for court judgements

One of the most contentious issues debated during the drafting of the ALL was the legal basis upon which court decisions should be made.\(^7^1\) Should courts only be permitted to use laws and regulations (法律法规 \textit{falılı fagui}) as the basis for their rulings in administrative litigation cases, or should they also be permitted to use administrative rules (规章 \textit{guizhang}), which are often confusing, unclear, or contradictory? The

\(^6^9\) Jiang Ming'an, 行政诉讼法学 (Jurisprudence of Administrative Litigation) (Beijing: Beijing University Press, 1993), p.45.
\(^7^0\) Jiang Ming'an, 行政诉讼法学 (Jurisprudence of Administrative Litigation) (Beijing: Beijing University Press, 1993), p.45.
promulgated version of the ALL states that courts must refer to laws, regulations, decisions, orders, and administrative rules when making a judgement.\(^{72}\)

Not surprisingly, administrative officials and legal scholars tended to support the use of *guizhang* as a legal basis,\(^{73}\) whereas judges pointed out that *guizhang* are not laws (*falu*) but rather are abstract administrative behaviour.\(^{74}\) Judges also maintained that the aim of administrative litigation is for courts to supervise administrative behaviour and determine the legality of concrete administrative acts. If this decision-making were to be done on the basis of *guizhang* which are determined by an administrative organ, then there would be no legally effective supervision.

13. Judicial review

The ALL is not the sort of all-embracing judicial review law found in many Western countries which empowers the courts to review any administrative act, including legislation. The ALL of the PRC empowers the courts to determine the legality of a specific administrative act only against given criteria.\(^{75}\)

In contrast to the concept of judicial review being an integral part of the three-way separation of powers that is common in Western countries, the widely supported view of judicial review in the PRC is that it helps determine the division of labour among a state’s administrative organs, with the aim of accountability.\(^{76}\) This concept leaves administrative litigation to provide a legal review of concrete administrative behaviour, thus realizing judicial supervision and regulation of administration.\(^{77}\)

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\(^{72}\) ALL, Article 53.


\(^{74}\) Jiang Ming’an, 行政诉讼法学 (Jurisprudence of Administrative Litigation) (Beijing: Beijing University Press, 1993), p.43.

\(^{75}\) ALL, Article 5.

\(^{76}\) Jiang Ming’an, 行政诉讼法学 (Jurisprudence of Administrative Litigation) (Beijing: Beijing University Press, 1993), p.44.

\(^{77}\) See also: Yang Haikun, "Reflections on Establishing the Administrative Litigation System" in *Jurisprudence*, 8, 1987, pp.5-8, 4, in Reprints from the Press – Law, 9, 1987, pp.108-112;
14. How the court may adjudicate

When a court hears an administrative litigation case it is authorised to determine the legality of the administrative decision but not the fairness of it. The fairness or suitability of an administrative decision is considered to be the province of administrative organs and only they have the authority to review a decision on those grounds. Thus, the ARR, the provisions of which are discussed below, authorises administrative review organs to overturn a lower-level decision if it is found to be unsuitable, but courts may not. Courts may, however, consider the fairness of an administrative decision if the decision is extremely unfair (so unfair as to be illegal), but in normal circumstances it is limited to examining the legality of an act. The determinants of legality are: evidence, facts, laws and regulations, statutory procedures, excess of authority and abuse of power.78

If the evidence is conclusive and the correct laws and regulations have been used then the administrative act should be upheld. Where any of the determinants of legality are insufficient the court may overturn all or part of the administrative decision and may order the administrative organ to make a new decision.79 The organ may not make a new decision that is the same as, or very similar to, the one which the court overturned if the same facts are used as the basis.80

15. Administrative review as a prerequisite

The ALL permits the courts to accept any case where the plaintiff is unhappy with a specific administrative decision except for the four categories of exclusions examined above.81 Administrative review is not a prerequisite for administrative litigation as a general principle, but it is specifically required in some cases. Public order disputes

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78 ALL, Article 54, Clause 2.
79 ALL, Article 54, Clauses 1, 2.
80 ALL, Article 55.
81 ALL, Article 12.
involving the public security organs, for example, must first go through administrative review.\footnote{Public Order Management Regulations 1986, Article 39 in 中华人民共和国法律全书 (Compendium of Laws of the People’s Republic of China) (Changchun: Jilin People’s Press, 1989).}

The arguments put forward in support of administrative review as a prerequisite maintain that administrative review can promote promptness and accuracy in dispute handling because upper levels of administrative organs can provide specialist knowledge about their field. Furthermore, it is claimed that administrative review provides an opportunity for upper level administrative organs to supervise the lower levels, and facilitate the early correction of mistakes. There was also the recognition that administrative review as a prerequisite is common in foreign countries as part of judicial review. \footnote{Jiang Ming’an, 行政诉讼法学 (Jurisprudence of Administrative Litigation) (Beijing: Beijing University Press, 1993), pp.44-45; Zhang Shuyi, “Reexamination of Several Controversial Issues in the Draft Administrative Litigation Law” in 法学 (Jurisprudence), 3, 1989, p.8.} More practical considerations, however, include the aim of using administrative review as a sifting process to reduce the large number of cases being litigated. \footnote{Interview with a teacher of administrative law at the China University of Politics and Law, Beijing, 1998.}

There are other administrative disputes for which laws and regulations determine the path allowed for plaintiffs. For example, disputes involving auditing cannot go to court but may only be handled through administrative review.\footnote{Dong Jianguo, 行政复议手册 (A Handbook on Administrative Review) (Beijing: China Legal System Press, 1991), p.2.} Rather than list all the types of cases that cannot be accepted by the courts, the ALL was framed for more general provisions.

Still other disputes allow the plaintiff to choose whether to apply for administrative review first or to go direct to administrative litigation. The disadvantage to the plaintiffs of first choosing administrative review is that upper-level administrative organs usually protect their lower levels by automatically confirming the lower level’s administrative decision. If, however, the organ provides genuine and fair review, then the plaintiff
obtains quick, cheap, and hassle-free redress, as administrative review is largely a written procedure and does not require the applicant to attend a hearing.

16. The power of the courts to amend administrative decisions

The issue of judicial authority to alter an administrative decision was, together with the legal basis for court judgements in administrative litigation, a highly contentious issue because it is at the heart of the relationship between judicial and administrative power.\(^{86}\) The ALL provides that courts have the authority to order that an administrative decision be altered if it is clearly unfair.\(^{87}\) But this power does not mean that the court directly issues the new decision. The court has the power to cancel either part or the whole of the decision and order the administrative organ to issue a new decision.\(^{88}\) For disputes about the fairness of an administrative punishment, the courts have no power to order alteration of the decision.

The arguments for assigning to courts the power to alter an administrative decision were vigorously opposed by administrative organs on the grounds that judicial power should not usurp administrative power.\(^{89}\) The organs claimed exclusive knowledge about administrative decision-making and therefore exclusive rights to decide when, and under what conditions, an administrative decision should be altered. The courts, in response, generally supported the provision and pointed out that judicial power to alter an administrative decision can provide better protection for the lawful rights of plaintiffs. In

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\(^{87}\) ALL, Article 54, Clause 4.


support of this argument, the courts claimed that although administrative organs do have the experience required to make administrative decisions, some personnel within the organs do not have sufficient experience to do this. In such cases the courts are not always able to overturn the administrative decision outright, and even when they do so the administrative organ does not always cooperate. Thus the real issue is under what conditions the courts can provide adequate protection for plaintiffs' lawful rights. Some administrative decisions also rest on a fine line between legality and illegality: an administrative decision may still be within the scope of the law but clearly unfair, and if the courts cannot change it then the ALL's aim of rights protection is not fulfilled.

The promulgated version of the ALL provides that courts may cancel an administrative decision in whole or in part if it is found to be illegal or clearly unfair, but the bureaucratic resistance to this power is considerable. This adversely affects the implementation of the administrative law system, as will be shown in subsequent chapters.

17. Mediation
The ALL prohibits the use of mediation as a tool to settle administrative disputes, but provides for its use during proceedings for damages. The first administrative litigation cases heard during the reform era were handled under the Trial Civil Litigation Law which permits, even encourages, the use of mediation in dispute resolution. This background inevitably raised concerns during the drafting stage of the ALL as to whether mediation should be permitted in administrative litigation. As the status of the parties in administrative litigation is unequal, it was realised that mediation is inappropriate.

90 ALL, Article 50.
91 ALL, Article 67.
92 See Chapter Two.
Further to this, the court’s role in administrative litigation is to establish the legality of the administrative decision in question, and legality is not a matter than can be mediated. 94

Those in favour of using mediation to settle administrative litigation cases tended to regard the courts as a general dispute resolution body that should aim to negotiate a lasting agreement between the parties. 95 Further to this, it was thought that mediation would provide an opportunity to sort out any misunderstandings that may have contributed to the dispute, and this would enable the courts to publicise the state’s policies.

18. Qualifications to be a plaintiff
Qualifications to be a plaintiff in an administrative litigation suit are limited to citizens, legal persons and other organisations whose lawful rights have been infringed by a specific administrative act. 96 There were questions raised during the drafting stage about whether organisations such as the Trade Union, the Women’s Federation and the Individual Labourer’s Association should be permitted to be plaintiffs in an administrative litigation suit. 97 The decisions of such bodies are not challengeable under the ALL, but it was debated as to whether they should be permitted to challenge specific administrative decisions of bureaucratic organs. The main question was whether the rights of these bodies could be harmed by specific administrative behaviour. 98 It was decided that there was no real connection between specific administrative behaviour and the activities of

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96 ALL, Article 2.
these bodies, and thus there was no need to include them as possible plaintiffs. But this
decision masks concern that such organisations might be used as proxy plaintiffs by
individuals who were afraid to sue an administrative organ themselves, thereby gaining
a powerful organisation as an ally against an administrative organ of the state.

Provisions of the Administrative Review Regulations
This section refers primarily to the Administrative Review Regulations (ARR) because
the Administrative Review Law (ARL) was not promulgated until April 1999, by which
time the dissertation was in the writing-up phase. The primary thrust of the ARR have not
been overtaken by the ARL, thus it is still useful for the reader to be aware of their
provisions. Where the provisions of the ARL differ from those of the ARR in ways that
may affect the implementation of the administrative law system, such provisions will be
discussed below.

Aims of the regulations
The formalization and codification of the procedures for administrative review in the
form of the Administrative Review Regulations\textsuperscript{100} (行政复议条例 ) marked a
significant step forward in the structuring of accountability systems that operate within
each administrative xitong. Administrative review existed in form and reality in the PRC
as early as 1950, but the procedures were not codified and therefore not transparent. A
significant advantage of the ARR for applicants is that they now know the criteria and the
processes used by administrative organs when conducting administrative review. This
strengthens the position of the applicant in relation to the administrative organ compared
to the situation before the ARR, when applicants for administrative review knew they had
the general right to ask for review but had no idea of whether the administrative organ
was conducting the process fairly.

\textsuperscript{99} Jiang Ming'an and Liu Fengming, "Several Questions for Research on Administrative Litigation" in
\textit{Legal Studies and Research}, 3, 1988, pp.16-19, in Reprints from the Press
\textsuperscript{100} These regulations were promulgated on 9 November 1990 (\textit{People's Daily}, 28 December 1990, p.3) and
were amended on 9 October 1994 (\textit{People's Daily}, 16 October 1994, p.5).
In most cases administrative review provides for vertically organized reconsideration of a specific administrative decision. This means that the review organ most often will be a higher level organ within the administrative xitong that made the disputed administrative decision, though in some cases the review organ will be at the same hierarchical level as the unit which made the disputed decision.

In general terms the review organ is charged with reconsidering the decision’s legality and suitability, although the suitability provision may only be used to overturn a decision that is extremely unsuitable. The issue of administrative discretion as to whether the applicant merited, for example, seven days detention or three days detention is not provided for in the ARR. This is disappointing because a significant advantage of organizing a review at a higher level in the same system is that the higher-level organ can step into the shoes of the original decision-maker and make an assessment as to the suitability or merit of the decision that is informed by knowledge of how the system operates. Theoretically, if the lower-level organ was disbanded or otherwise could not make its administrative decisions, the work could be transferred to the upper level. This should mean that providing a review of the decision’s merit should be easy and quick for the upper level. Its omission from the scope of provisions limits the power of administrative review to provide redress on matters of general, rather than specific, legality. Excluding administrative discretion from the scope of the regulations is the type of provision that would be more suitable for a system of redress where the reviewing authority was external to the original administrative organ which made the disputed decision, such as a court.

The ARR were adopted in the wake of the Administrative Litigation Law. Once it was determined that the ALL would be limited to determining the court procedure for handling administrative disputes, it was realized that this left the procedures of administrative organs for handling administrative appeals unregulated except for the

\[^{101}\text{ARR, Article 7.}\]
traditional system of letters/visits. The ARR set out the procedures that administrative organs must follow when a plaintiff applies for review of an administrative decision. The form, structure, and provisions of the regulations are designed to provide continuity between administrative review and administrative litigation.

The purpose of the regulations is to safeguard and supervise administrative organs as they perform their powers of office, prevent and rectify illegal or unsuitable specific administrative acts, and protect the lawful rights and interests of citizens, legal persons and other organisations.

There was considerable debate during the preparation phase of these regulations as to precisely what the purpose of administrative review should be. By far the most common view was that administrative review is a dispute resolution system alongside administrative arbitration, administrative adjudication and administrative mediation. Despite this framework of dispute resolution, which strongly informed the regulations, legal drafters made it clear that administrative review organs should not be like administrative arbitration organs, which are under the jurisdiction of administrative organs and yet operate independently. Nor should they be like the administrative courts or the administrative tribunals of foreign countries. A widely held view was that administrative review should be firmly designed as a supervisory mechanism, together

102 See Chapter Two.
104 ARR, Article 1.
107 Su Jian, "Timely Formulation and Promulgation of the 'Administrative Review Regulations' " in 法学 (Jurisprudence) 8, 1990, pp.19-22; Yang Haikun, "Establishing a Cohesive Administrative
with a strong perception that it should strengthen the core work of administrative litigation by acting as a filter to reduce the numbers of cases that are filed for litigation.\textsuperscript{108}

The first significant difference to the ALL to be noted is that administrative review organs are authorised to rectify not just illegal administrative behaviour, but also unsuitable administrative behaviour, which may lie within the bounds of the relevant laws but is grossly out of proportion to the offence committed. Determining the suitability of a specific administrative act is regarded firmly as the responsibility of the relevant administrative organ and administrative review organs, thus any tendency by the court to stray into this area is heavily criticised.

Plaintiffs are the same as for administrative litigation: citizens, legal persons and other organisations may appeal a specific administrative act.\textsuperscript{109} Close relatives of citizens who would be qualified to appeal may also do so if the citizen is dead, as may the citizen’s legal representative.\textsuperscript{110} This provision reflects the principle that administrative review is not just about dispute resolution but is also about administrative supervision and justice, which may require that administrative behaviour be rectified or compensated for, even after the death of a person. There was a strong push to have social organisations also included as plaintiffs,\textsuperscript{111} but as for the ALL, this was not carried through. Plaintiffs were limited to those with a direct complaint or their legal representatives.


\textsuperscript{109} ARR, Article 2.

\textsuperscript{110} ARR, Article 26.

As in administrative litigation, mediation is prohibited, and this provision was widely supported. But the ARL does not appear to specifically preclude or permit mediation. Also as in administrative litigation, laws, regulations, rules, decisions, and orders all have authority as a legal basis for administrative review.

The administrative acts which may be appealed include: an administrative penalty such as a fine, personal detention penalty, cancellation of a permit or licence, order to suspend production or business operations, or confiscation of property; seizure of property; infringement upon managerial decision-making autonomy; refusal to grant a licence or failure to respond to an application for a licence for which the applicant believes he/she is qualified; refusal or failure of an administrative organ to respond to an application for the carrying out of statutory duty to protect one's personal or property rights; failure of an organ to pay pensions for the disabled or deceased; requests to perform unlawful acts; and infringement of personal or property rights.

This is a standard list of concrete administrative behaviours covering both positive acts and acts of omission. The list of acts which are excluded from appeal is similar to the list in the ALL but it has been modified to account for an unexpectedly large number of appeals in some sectors. The original list of exclusions covered:
- administrative regulations/decisions/orders;
- decisions on awards, penalties, appointments or dismissal of personnel in administrative organs;
- decisions relating to conciliation or mediation or other handling of civil disputes;
- and acts of state such as national defence and foreign affairs.

112 ARR, Article 8.
114 ARR, Articles 41-43.
115 ARR, Article 9.
In the 1994 amendments to the regulations, the work of administrative organs in handling civil disputes remained excluded from administrative review, because the work is not regarded as administrative in nature, but certain categories of civil disputes are no longer excluded. The current list of exclusions is:

- administrative regulations/decisions/orders/rules;
- decisions on awards, penalties, appointments or dismissal of personnel in administrative organs;
- decisions relating to conciliation or mediation or other handling of civil disputes, except disputes concerning ownership or use rights of land, minerals, forests and other natural resources;
- acts relating to national defence or foreign affairs.\(^{117}\)

That is to say, handling of civil disputes relating to ownership or use rights of land, mineral resources, forests and so on, can now be appealed against in administrative review. This revision was made supposedly because land disputes were overloading the courts, and it was thought an administrative review option might sift some of these out. For the same reason, public order disputes are required first to go through an administrative review before going to the court for litigation.\(^{118}\) However, this reasoning may have been spuriously made by the organs concerned to bolster their control over the reviews relating to their work, and keep such cases out of the courts.

The ARL does not contain such a list of exclusions. The new law permits some administrative rules and some internal punishments imposed on administrative personnel to be challenged. And it directs potential challengers of civil disputes to apply for arbitration or to file a suit at a court. It makes no mention of acts of national defence or foreign affairs, but as these decisions were excluded already, the ARL has not revoked any rights.

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118 Interview with a lecturer at the China University of Politics and Law, Beijing, 1998.
The institution of administrative review is meant to take precedence over the letters/visits system for complaints about specific administrative decisions. The ARR stipulates that where a complaint is made to a letters/visits office that is within the time frame allowed for administrative review, then the letters/visits office must advise the plaintiff to apply for administrative review at the relevant office.\textsuperscript{119} This stipulation leads to the interpretation that the letters/visits office is being downgraded as a dispute resolution function in favour of more "legal" methods, and is now a final backstop if a citizen wants to complain about an administrative behaviour some time after the event. The letters/visits office is still used, however, to gather complaints of a more general nature against the administration.

The rules on jurisdiction to accept an application for administrative review were amended to account for the various sources of authority that impinge upon administrative organs, particularly at the local level. Administrative organs in the PRC are subject to both vertical and horizontal lines of control, except at the local level where administrative tasks are performed jointly by the local government. The problem arises in administrative review as to whether an administrative decision carried out by a local government should be reviewed by the next higher level of government or by the next higher level of the administrative organ which has the relevant specialised knowledge.\textsuperscript{120} The original regulations were framed to give jurisdiction for a review predominantly to the next higher level of the relevant administrative organ for disputes that arise from decisions of a local government.\textsuperscript{121}

The amended regulations were designed to account for both sets of circumstances by naming the responsible review organs as the people's government at the same level as the organ which made the offending administrative decision, or the administrative organ at

\textsuperscript{119} ARR, Article 21.
the next higher level. Some PRC legal scholars interpret this as meaning that the applicant may choose the organ from which he/she is likely to obtain the fairest review. However, normally jurisdiction belongs to the next higher level administrative organ, and only in exceptional circumstances does it belong to the people’s government at the same level. Review organs should establish a dedicated review office if the workload demands it or appoint specific personnel to handle review applications.

Applications for administrative review are made in writing and are normally handled by the reviewing body on paper. There is provision for a hearing to occur if necessary, although the ARR does not define the circumstances. The ARL permits an applicant to lodge an oral application, which requires the administrative review organ to record the relevant details on the spot. An application for review is supposed to be accepted within ten days if the following conditions are met: the applicant believes the administrative act has infringed his/her lawful rights and interests; there is a specific defendant; there are facts as the basis for the request; and the administrative act falls within the jurisdiction of the organ to which application for review has been made. If the organ cannot accept the application it must advise the applicant and provide reasons for the rejection. If some required details are missing from the application then the organ may return it to the applicant for further attention.

The new ARL shortens the time frame allowable for review organs to accept a case from ten days to five days, which appears to be an attempt to improve administrative efficiency and accountability. However, this will probably have minimal impact on the justice of the administrative review process, as will be shown below and in Chapter Four.

121 ARR 1990, Article 11.
122 ARR, Articles 11, 12, 13.
125 ARR, Article 23.
126 ARR, Articles 32 and 37.
127 ARR, Article 31.
As for administrative litigation, one of the significant features of administrative review is the requirement that the specific administrative act not be suspended during the period in which a plaintiff conducts application for review.129 This stipulation can, however, be waived if any of the following conditions occur: the defending organ believes its administrative action should be suspended; the reviewing organ believes the action should be suspended; the plaintiff asks the defending organ to suspend the action and the organ has good grounds for agreeing to the request; and laws or regulations stipulate that the action must be suspended.130

This particular article in the ARR favours the duties of administrative organs as they manage state affairs. The right of a plaintiff for relief from what he or she believes is an unjust behaviour takes second priority. Just as for administrative litigation, this provision may or may not cause injustice to the applicant, depending on the situation. For example, if a business permit or licence is cancelled for a week or so and the cancellation is subsequently shown to be unlawful, then the plaintiff can apply for monetary compensation to cover salaries and other expenses that had to be paid even while production had ceased. Loss of intangibles, however, such as profits, good will, and business reputation, are not covered. More will be said about this in Chapter Five which examines the operation of administrative compensation.

This provision causes injustice, however, when a citizen is detained under public order management regulations. Under these regulations an application for administrative review of the detention decision must be made within five days, and then the review must be completed within another five days.131 By the time the review is complete the plaintiff has

128 ARR, Article 34.
129 This feature was not discussed during the preparation phase at all, indicating that the only issues that were publicly discussed were those that both curtail the power of administrative organs and about which there was disagreement.
130 ARR, Article 39.
often been detained for up to ten days, and as the maximum period for detention under the public order management regulations is 15 days, the review is often carried out after the period of detention is complete or is close to completion. Thus the review has no substantive effect on the plaintiff's situation.

The ARR provides considerable flexibility for both parties during the period of review. Either party may choose to change their course of action: the plaintiff may decide to withdraw the case, or the defending organ may decide to alter or retract its administrative decision.\(^ {132}\) But once a plaintiff withdraws an application for review, he/she cannot make application again based on the same facts.

The criteria upon which the review organ makes its decision about the administrative act are basically the same as those used by the courts: the facts, the application of law, the legal limit of authority, correctness of statutory procedures, and the suitability of the decision in view of the offence committed\(^ {133}\) (this last criterion being unique to the authority of the review organ). Another aspect that is unique to the administrative review role is the authority to examine the procedures used to make the administrative decision and decide whether any inadequacies exist in the procedure. If there are, then the review organ has the authority to order the protecting organ to make rectification. This provision may appear to be straightforward, but it will be shown in Chapter Four that the way this clause is interpreted leads to a bias in its implementation.

The written record of the review organ's decision is an important step in the system. The record should contain relevant personal details about the applicant, the defendant, the request and all associated details, the review organ's decision, and significantly, a notice advising the applicant of the time limit within which he/she must make application to the court for administrative litigation.\(^ {134}\) This last step is a crucial part of advising plaintiffs of their rights. The general guide is that plaintiffs must make application to the courts

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\(^{132}\) ARR, Article 40.

\(^{133}\) ARR, Article 42.

\(^{134}\) ARR, Article 45.
within 15 days of receiving the written notice of the review organ unless other time limits are stipulated in laws relating to the particular case. It is worth noting at this point too, that if a review organ confirms a lower level decision and the plaintiff takes the case to court, then the original organ is the defending organ in court. If the review organ overturns a lower level decision then the review organ becomes the defending organ. This procedure is stated in the Administrative Litigation Law\textsuperscript{135} but not the Administrative Review Regulations. It is worth noting at this point because any possible responsibility for litigation affects the implementation of the ARR.

Unlike the Administrative Litigation Law, these regulations do not specify which party has the responsibility for provision of proof. The applicant is merely obliged to state clearly the request and the reasons for which he/she is applying for review,\textsuperscript{136} and the reasons must have a basis in fact.\textsuperscript{137} Pitman Potter interprets this lack of provision as an attempt "to impose on the applicant at least a burden of persuasion if not proof."\textsuperscript{138} Potter further claims that the provision of vertical jurisdiction for administrative review where upper levels of an administrative organ provide the review, also reinforces the presumption of correctness by failing to provide for an independent review.\textsuperscript{139}

But these arguments do not take sufficient account of the broad range of aspects which a review organ is required to investigate. The organ must consider whether the facts are clear; whether the application of laws, regulations, and so on is correct; whether the procedures used to make the administrative decision were adequate; whether the legal limits of authority have been exceeded, or abuse of power is evident;\textsuperscript{140} and whether the administrative decision is clearly inappropriate.\textsuperscript{141} These criteria are not all able to be established by an applicant. An applicant would be unlikely to know, for example,

\textsuperscript{135} ALL, Article 25.
\textsuperscript{136} ARR, Article 33.
\textsuperscript{137} ARR, Article 31, Clause 3.
\textsuperscript{140} The meanings of "excess of power", "abuse of power", and so on will be explained fully in Chapter Six.
whether the correct laws and regulations were used as a basis for the decision. Although it is true, as Potter claims, that the applicant must provide a factual basis for the claim for relief, there are other factors which contribute to the review organ's decision. The review regulations are designed to provide oversight and supervision as well as administrative dispute resolution.

Potter's second claim as to the purpose of vertical jurisdiction overlooks the reason that the review system was designed that way. As discussed above in the section on jurisdiction, upper levels of administrative organs are perceived as being able to provide the relevant specialised knowledge for a fair review decision. As one of the main purposes of review is to ascertain the appropriateness of the decision, it seems appropriate that review be carried out within the administrative xitong in which the offending decision originated. This provision certainly fails to provide an independent review organ, as Potter argues, but this is not sufficient grounds to presume that the review framework thereby requires more of the applicant than it does of the reviewing organ. On the contrary, given that the locus of administrative knowledge in China resides within administrative systems, if an organisationally independent organ were to review an application for administrative review, the applicant would likely need to provide even more solid grounds for appeal, or else the review organ's authority would be limited to confirming that the decision had been made according to the correct procedure. This would leave the appropriateness of an administrative decision as unappealable.

One area in which the ARL improves notably on the ARR is that of stipulating procedures for applicants who find that a review organ refuses to accept a valid application. The applicant may then appeal to a higher level of the organ concerned, or file a suit at a court. The law also stipulates penalties for administrative organs that do not accept a valid case for review. These include demerits, administrative sanctions, demotion or dismissal. The effect of these stipulations will not be known until case

141 ARR, Article 42.
material begins to emerge in several years time, but the low standard of administrative accountability in the PRC does not raise high hopes.

Provisions of the State Compensation Law

The State Compensation Law of the People's Republic of China (SCL) (中华人民共和国国家赔偿法) was promulgated by the Standing Committee of the NPC on 12 May 1994. The law provides for both administrative and criminal compensation where state organisations cause harm to individuals and legal persons in the course of their work. One of the key issues discussed during the preparation phase of this law was the difference between civil and administrative compensation, and the related aspect of whether the administrative official or the administrative organ itself should be made responsible. A key feature of the promulgated version is that compensation is linked to acts committed by administrative officials during the course of performing their duties, not to administrative officials as individuals when not performing administrative duties. But in order to encourage lawful behaviour by administrative officials, the organ responsible for paying the compensation is authorised to demand part or all of the compensation payment from the offending official. Further to this, the organ also has the authority to impose a disciplinary punishment on the official concerned.

There are two broad categories in which administrative compensation is considered payable: first, infringements of personal rights such as the illegal detention of citizens or the deprivation of personal liberty, physical injury or death through assault, physical injury or death through the use of illegal weapons or police gear, and second,

145 SCL, Article 5, Clause 1.
146 SCL, Article 14.
147 SCL, Article 3.
infringements of property rights such as the illegal imposition of fines or revocation of business licences, illegal confiscation of property, collection of illegal property charges, and other property damage that occurs through an illegal act.\textsuperscript{148}

A compensation claim must first be taken to the administrative organ that would be responsible for paying the claimed damages. The new ARL stipulates that applicants for administrative review may request compensation at the same time as making the application for review, but this clause merely codifies a pre-existing practice, as will be shown in Chapter Five. If no satisfaction is obtained then the plaintiff may file a suit with the court. The SCL draws a connection between an illegal administrative decision and possible claims for compensation by suggesting plaintiffs file the compensation claim when they file for administrative review or litigation.\textsuperscript{149} This connection becomes significant in the implementation of the administrative law system and will be examined in Chapter Five.

An important aspect of the SCL that affects claimants is the method used for calculating the amount of compensation. If a claim relates to losses incurred while personal freedom was violated then the amount payable is calculated on the basis of the average state worker's wage for the previous year,\textsuperscript{150} which means that the level of compensation is very low. Other direct losses such as medical expenses are also payable.

Indirect losses such as compensation for the psychological stress of being illegally detained are not allowable claims. Where property claims are concerned, direct losses incurred when a business licence is wrongfully cancelled, such as staff salaries and equipment maintenance fees, may be compensated but indirect losses such as lost profits due to wrongful business closure cannot be compensated.\textsuperscript{151} As noted above in the discussion on the Administrative Litigation law, it is permissible to use mediation to

\textsuperscript{148} SCL, Article 4.
\textsuperscript{149} SCL, Article 9.
\textsuperscript{150} SCL, Article 26.
\textsuperscript{151} Interview with an official from the State Council's Office of Legislative Affairs, Beijing, 1998.
settle the amount of an administrative compensation claim. This is based on the idea that a person may waive his/her rights to compensation.

**Conclusion**

In assessing the provisions of the new administrative law system in the PRC, I have attempted to emphasise the diverse angles of approach by those who implement the system, as this has a significant effect on the success of an individual case. The issues examined in this chapter have partly informed us about how the administrative law system is perceived in the PRC. An important point is that administrative litigation is meant to provide redress for a limited range of grievances, and that the PRC’s administrative law system as a whole provides a number of mechanisms which a plaintiff may use to gain redress. This concept of “one option among many” must inform our assessment of the system. When a citizen has an administrative grievance and contemplates using the new system of administrative law to obtain redress, he or she faces a system that is designed mostly to bolster the authority of the state, but fails to provide the necessary corollary, which is an adequate control on state power. When the new system was in the planning stages, there was clearly hope in some quarters that it would provide an avenue of direct, legal redress for citizens and engender a stronger culture of accountability in administrative organs. The state’s organs have yielded power to a very small extent, though, and the provisions of the legislation tend to favour their pre-eminent position.
CHAPTER FOUR
ADMINISTRATIVE REVIEW

This chapter examines the procedure undertaken by applicants who wish to obtain reconsideration of a specific administrative decision, and the outcome of the process. In Chapter Two we examined some of the problems of the administrative review system as compared to other avenues of redress, and in Chapter Three we examined the provisions of the Administrative Review Regulations and the Administrative Review Law. In this chapter we will focus on how the system is implemented.

The first part of the chapter is structured around the particular forms used by the PRC bureaucracy in the process of imposing an administrative penalty, and those used in an administrative review of such penalties. The forms provided in the body of the text are translations of model forms taken from two sources, with copies of the originals provided in the Appendix. This material is based on a period covered by the provisions of the Administrative Review Regulations, and it is not known whether the promulgation of the new Administrative Review Law has resulted in the use of new forms. Given the slow pace at which administrative organs adopt the implications of legislative changes, this is unlikely for at least several years. Even when new forms that reflect the Administrative Review Law begin to be used, the provisions of the law, where they differ from those of the regulations, will probably have minimal impact on the operation of the administrative review system.

Returning to the issues raised in Chapter One, the questions that the reader is asked to bear in mind at this point include: is the implementation of the administrative review system a ritualised form of political behaviour on the part of the state or the applicant, and

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1 Records of administrative review cases may be found in various sources, including a book heavily used in this chapter: Li Peizhuan (ed.), 行政复议概览 1991-1992 (A General View of Administrative Review, 1991-1992) (Beijing: China Legal System Press, 1993). See also collections of administrative cases such as: Lin Zhun (ed.), 行政案例选编 (A Volume of Selected Administrative Cases) (Beijing: Legal Press, 1997).
if so what interests does it serve; is it a process that citizens undertake entirely using their own resources, leading to further atomisation of society, or are there resources available to assist an applicant; is the process of administrative review entirely institutionalised or do personal factors impinge on the outcome; if specific administrative disputes are not handled via administrative review, what happens to them and what does this reveal about the administrative review system; is administrative review used as an instrument by the state to further protect the state's power; what concepts are associated with administrative review in terms of the rule of law discourse; and, do individuals use the system to define or defend their rights, and under what conditions?

The administrative penalty decision - process and forms

The authority for administrative organs to impose an administrative penalty is contained in the Administrative Penalty Law (Xingzheng Chufa Fa) of 1996. The law sets out the types of penalties that may be imposed (warnings, fines, confiscation of property, administrative custody, and so on) and the principles that apply (legality, openness, fairness, and so on). It stipulates that if recipients disagree with the penalty they have the right to apply for administrative review or litigation. The law also states that administrative penalties cannot be given in the place of criminal punishment. The importance of this aspect of the law will become apparent in the discussions in Chapter Seven, which contains material that suggests that public security organs, especially during times of heightened anti-crime campaigns, have a tendency to blur the distinction between criminal and administrative offences.

The law stipulates that written administrative penalty decisions shall be prepared with relevant details (see Form A below) and notification of the applicant's right to review and/or litigation. Receipts for confiscated property must be issued or the party has the right to refuse the penalty and report the case. This right is probably not well-known and the implications of it will be discussed in Chapter Six under the rubric "Administrative Organs".
With regard to collection of fines, this law deals for the first time with the problem of public security organs retaining monies for their own use rather than handing them over to the treasury. It is now stipulated that the organ which imposes a fine must not be same organ which collects the money, that receipts must be issued for fine money collected, and that offending officials may be subject to disciplinary sanctions or criminal liability.

The process of administrative review begins after an administrative penalty has been imposed on a citizen, legal person, or other organisation, but there are several administrative procedures associated with imposing a penalty which impinge upon the recipient’s ability to apply for administrative review.

The intention behind the concept of the administrative penalty, in contrast to criminal punishment, is to simplify as much as possible – without losing fairness – the procedures for imposing a penalty. It does not require a fully detailed record of the conditions surrounding the events that gave rise to the penalty, nor does it require a lengthy delay between the event and the imposition of the penalty. It should be quick, simple, and easy, with the whole process of establishing a case and imposing a penalty taking no more than 1-2 hours. Even though speed and simplicity are stressed, offenders are to be questioned and complaints and protests heard on the spot. But it is not necessary to give the offender an administrative penalty decision form (行政处罚决定书 xingzheng chufa jueding shu) with the penalty, a step that is often omitted when an oral penalty is given.

Administrative penalties take one of two forms: oral penalties, which may include warnings, orders to cease the offending activity, or small on-the-spot fines; and written penalties, which are given according to specific legislation. Extremely minor penalties may be given orally, and most properly should include an administrative penalty decision

2 "Penalty" has been used as the translation for the term "chufa", rather than "punishment", so as to maintain a clear separation from criminal punishments.
form, but may not. Written penalties must include, by definition, a form recording all of the details.\(^3\)

As is common to administrations around the world, the form on which administrative details are recorded is often regarded as a mere tool for the procedure and not as integral to the fairness of the decision-making. In the PRC, this has led to very lax standards being applied to the administrative penalty decision form which has adversely affected the fairness of administrative review. There is a general, standard form which may be used for any administrative penalty imposed by any organ, but individual organs may also issue their own forms for particular penalties that are regularly imposed.

The standard administrative penalty decision form (see Form A below)\(^4\) contains three parts: the heading, which has the name of the organ imposing the penalty, the sequential number of the penalty, and details about the recipient of the penalty (name, gender, age, ethnicity, place of origin, occupation, work unit, address); the main body of the form, which contains the details of the offence, the legislation offended against, and what the penalty consists of; and a final part of the form which contains advice on how long the recipient has to appeal for review or to the courts if he or she is unhappy with the decision, the seal of the organ, and the day, month, and year that the penalty was imposed.

The general time limit that applies to administrative review is 15 days from receipt of the penalty notice,\(^5\) but this may vary if other legislation so stipulates. Public order management decisions, for example, stipulate a five-day limit within which applicants may apply for administrative review.\(^6\) The standard form contains a blank

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\(^4\) The forms referred to in this chapter are taken from: Dong Jianguo (ed.), 行政复议手册 (A Handbook on Administrative Review) (Beijing: China Legal Press, 1991) with the exception of Forms C and P. These forms are taken from: Jiang Bo and Zhan Zhongle (eds.), 公安行政法 (Public Security Administrative Law) (Beijing: China Personnel Press, 1994), pp.389, 403. Chinese language versions of the forms are in Appendix A.

\(^5\) ARR, Article 29.

FORM A: Administrative penalty decision

Administrative Penalty Decision

Administrative penalty (_______) no.___________

Person penalised: Name_________________________ Gender________ Age________
Ethnicity____________ Place of origin______________ Occupation____________
Work unit____________ Address____________________

Facts of the violation________________________________________

The above facts are offences against___________________________

Based on______________________________________________ is given the following administrative penalties:

1. ____________________________________________________;
2. ____________________________________________________;
3. ____________________________________________________;

If a party concerned does not accept this administrative penalty decision he or she may apply to a higher-level organ for review within ___________ days of receiving this notice, or may apply directly to the people's court for administrative litigation. If the time limit for review and litigation have expired and the penalty has not been fulfilled an application will be made to the people's court to enforce the penalty.

__________________________ work unit (official seal)

_______year _______month _______day
space for the number of days within which the recipient may apply for administrative review or to the courts, which must be filled in by the organ imposing the penalty. The combined imperatives of speed and lack of attention to detail often mean that such details are omitted, which severely impinges upon the rights of the recipient.

Even the title of a standard form may vary, and it is the responsibility of the organ to ensure that the title is clear and linked to the function of administrative penalties. For example, the form may also be called simply a penalty decision form (处罚决定书 *chufa jueding shu*), or an administrative penalty notice (行政处罚通知书 *xingzheng chufa tongzhi shu*).

The forms that individual organs may issue pertain to a specific administrative penalty. For example, the public security organs may issue a public order management penalty decision notice (治安管理处罚决定通知书 *zhian guanli chufa jueding tongzhi shu*), and the land management organs may issue a land management administrative penalty notice form (土地管理行政处罚通知书 *tudi guanli xingzheng chufa tongzhi shu*). The forms that pertain to a specific administrative penalty may vary in design and content to the standard form and characteristically come preprinted with as much detail as possible, including the time limits allowed for review or appeals to the court. The public security organs in particular have an enormous variety of forms due to their diverse responsibilities. The form used by traffic police (Form B below) is succinct, and usually would come preprinted for each public security bureau and city. The official is required to fill in the particular details of the offender and the penalty, but as can be seen from this form, any details as to the cause of, and conditions surrounding, the accident are omitted from the record. This particular form is viewed by some legal practitioners in the PRC as particularly problematic from the point of view of providing adequate rights protection for recipients of such penalties. But attempts to

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7 More will be said about such omissions below.
8 Interview with a member of the Chinese Academy of Social Sciences Law Institute, Beijing 1998.
change or improve the layout of the form are usually resisted by the public security organs on the grounds that the matter is an internal one for the organs (内部 neibu).

FORM B: Public order management penalty notice

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Public Order Management Penalty Decision Notice

Administrative penalty (90) no.79

Public order management offender Qiu___________, male, aged 48, Han ethnicity, of ______Province, ______County, _______Township, _______Village, caused an accident because he violated the traffic rules. He is hereby given 8 days of administrative detention and a fine of 150 yuan according to Article 27 the People's Republic of China Public Order Management Penalty Regulations.

If he does not accept this decision he may appeal to ______City Public Security Bureau within 5 days.

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The Administrative Review Regulations, by excluding abstract administrative acts from its scope, are powerless to combat the administrative power that pre-determines the framework in which an administrative penalty will be imposed. In the case of the traffic accident form, the administrative record begins from the point of presumption of fault, not from the point of the conditions that gave rise to the accident. This makes administrative review, which may occur several days after the event, of questionable value as great reliance would have to be placed upon the memory of either the official or the offender as to what actually occurred. These problems associated with use of the
correct forms are compounded by the fact that the correct forms are not necessarily used, especially in rural areas. Where incorrect forms are used, recipients of penalties are seldom confident or courageous enough to ask that the correct form be used so their rights can be better protected.\(^9\)

An advantage of preprinted forms, however, is that the official is usually not required to fill in the number of days within which application for administrative review must be made.\(^10\) There are different opinions as to the consequences if officials do sidestep the law by not filling in the number of days allowable for review applications. A researcher at the Supreme People’s Court said that such circumstances would definitely impinge upon the applicant’s lawful rights and the review organ or the court should cancel the decision.\(^11\) Alternatively, a judge of 10 years experience in the administrative division of the Supreme People’s Court said that such circumstances, if the case made it beyond administrative review to administrative litigation, may be cause for a judicial recommendation to be made. The concept of the judicial recommendation will be dealt with more fully in Chapter Seven, but here it is helpful to note that it is a procedure employed by the court to handle irregularities in administrative conduct that are not deemed serious enough to warrant the court overturning the administrative decision. The court, if discovering such a problem in the course of handling a case, would write a recommendation to the administrative organ detailing the problem and suggesting a course of action to improve the decision-making process. It is a weak procedure predominantly because there is no legal requirement for the administrative organ to act on the judicial recommendation; it is simply a recommendation, not a legal directive.

Another example of a public security bureau administrative penalty form is given at Form C below. This form is described as a decision or finding (裁定书 caijue shu) because this is the term used in the Public Order Management Regulations 1986, Article 39, as

\(^9\) Interview with a member of the Chinese Academy of Social Sciences Law Institute, Beijing 1998.
\(^10\) Interview with two judges of the administrative division of the Supreme People’s Court of the PRC, Beijing, 1998.
\(^11\) Interview with a court official, Beijing, 1998.
being the process by which the regulations are applied. Recipients of such penalties (caijue shu) are permitted to appeal (申诉) to an upper level in the public

**FORM C: Public order management penalty decision**

<table>
<thead>
<tr>
<th>City Public Security Bureau</th>
<th>District</th>
<th>Station</th>
</tr>
</thead>
</table>

**Public Order Management Penalty Decision**

No._______

19____year ____month ____day

Because public order management offender____________________ gender ______ age_____.

did ________________________________ ________________________________

it has been decided to give the penalty of____________________on the basis of

Article __________ of the People's Republic of China Public Order Management Penalty Regulations.

If the offender does not accept this decision he or she may appeal within five days.

____________________ office director

security organ and if no satisfaction is obtained there, they may file a litigation suit in court. This form also comes preprinted with the number of days allowable for review and allows about as much space for detail as the traffic accident form.

As in many bureaucracies, when the correct form is not available, a substitute is used and modified where necessary by the official. This is one of the points at which administrative officials do not pay sufficient attention to detail. If, for example, a preprinted public order management penalty form is not available, then the official would use the standard form but would be required to fill in the five-day period allowable for administrative review applications. Such details were characteristically omitted,

**FORM D: Review application form**
Review Application Form

Applicant (who received the penalty): name__________________________,
gender____________________, age_____________________ , ethnicity____________________,
place of origin____________________, occupation____________________,
address___________________________.

Defendant: name___________________________.
Legal representative's name______________________, address___________________________.

Because the applicant does not accept the defendant's decision of ______ year ______ month ______ day
to apply the administrative penalty of ____________________________, he or she
herewith applies for review.

Applicant's requests:
______________________________________________________________________

Facts and grounds (for the demands):
______________________________________________________________________
______________________________________________________________________
______________________________________________________________________

To:________________________________________ (administrative organ receiving the review application)

applicant__________________________ (signature or seal)

______ year ______ month ______ day

Attachments: 1. _____ duplicate copy(ies)
2. _____ copies of relevant materials

FORM E: Review application form
Review Application Form

Applicant (who received the penalty): Zhai___________, male, aged 50, Han ethnicity, individual worker or trader, resident of ___________County, ___________Township __________Town, place of origin ___________Province, ___________County.

Because the applicant does not accept the Refusal to Pay Tax Administrative Penalty Decision (90) no. 13 of ___________County ___________Township Tax Office he hereby applies for review.

Applicant’s demands: that the Refusal to Pay Tax Administrative Penalty Decision (90) no.13 be cancelled and the fine of 370 yuan be refunded.

Facts and grounds (for the demands):
In 1986 I began an individually operated clothing business, the scope of which covered general merchandise and clothing. The local tax office collected taxes in fixed amounts at fixed intervals. On 24 January 1989, Chen ___________, an official from the tax office in charge of this, and I, had an argument when he or she came to collect my taxes. Chen ripped up two articles of clothing from my shop, imposed a penalty of 370 yuan for refusing to pay tax, and reduced the selling price on 100 items of clothing from my stock. The penalty was not imposed through proper procedures. I did not refuse to pay tax, Chen’s decision to penalise me was mistaken, and the procedures he used were illegal.

I hereby apply for review.

To:
____________________County Tax Office

Applicant: Zhai___________

_________year, _______month, _______day

Attachments: 1 duplicate copy of this application
3 copies of relevant materials
especially in the early years of administrative review. The Administrative Review Regulations are phrased such that the time limits commence from the time when the recipient of the penalty becomes aware of the right to apply for administrative review.\(^\text{12}\) Thus, if the time limits are omitted from the penalty decision form and the recipient subsequently becomes aware of his or her right to apply for administrative review, then the time limit commences from that day. The provision is fair, but it is questionable as to how a recipient would become aware of his or her rights without being advised of them by the regulating organ (unless he or she was aware of them beforehand, in which case the recipient would have applied for review immediately if that were a viable option).

The next step after becoming aware of one's right to apply for administrative review, and assuming one decides to apply, is to go to the relevant administrative review organ and obtain the review application form (复议申请书 fuyi shenqing shu). Several problems with the jurisdiction of administrative review emerge at this stage of the review process, but these will be dealt with below. For now we will concentrate on the forms and what information is required.

The applicant must put his or her name, gender, date of birth, nationality, occupation, and address on the form (Form D above). The defending organ's details must also be recorded and the details of the case. Interestingly, the review forms are designed such that the applicant must state clearly what his or her demands are. For example, "demand to cancel the particular administrative decision and return the fine money" (Form E above). This suggests either that the applicant must be familiar with the range of demands that can be made, or that help and advice is provided by personnel from the review organ or some other appropriate person. It would be unusual for officials of the organ to assist the applicant because, as will be discussed further below, if the forms are not completed correctly administrative organs may use this as a reason to reject the application, and often do. And the organs certainly do not provide formal legal advice via use of a

\(^{12}\) ARR, Article 29.
lawyer. An applicant may engage his or her own lawyer or other designated representative, but this is not generally known to occur for administrative review. The majority of administrative review cases, especially from the early years of the system's operation, are limited to the applicant and the defendant. Only one case cited in the sources records an applicant for administrative review as having a designated representative: that where a female applicant was represented by her elder brother. This lack of assistance is noticeably different in administrative litigation cases, for which it is much more common to engage another person as one's legal representative. Thus, applicants for administrative review are most likely to get help from their work unit or a personal acquaintance. This places the applicant in a weaker position than the defending organ.

After an applicant has filed the review application form with the relevant organ he or she waits for notification or communication from the review organ. If the application form is incomplete the organ may send it back and allow extra time for it to be completed properly. If the application appears correct the review organ begins its bureaucratic paperwork trail by formally accepting the case. This process is recorded on the form for investigation and approval to accept a case (立案审批表 li'an shenpi biao) - Forms F and G below.

This is a very significant phase for the applicant as it is at this point in the administrative review process that he or she has the least amount of influence over the case. It is common for review organs not to accept all the applications for administrative review that they should at this phase.

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13 Interview with an academic from the China University of Politics and Law, Beijing, 1998.
14 See sources in Note 3 above.
16 More will be said about this in Chapter Six.
17 The proportion of cases rejected at this stage will be discussed in detail in the final section of this chapter.
**FORM F: Investigation and approval to accept a case**

<table>
<thead>
<tr>
<th>Investigation and Approval to Accept a Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grounds for the case</td>
</tr>
<tr>
<td>Person or unit applying for review</td>
</tr>
<tr>
<td>Defending work unit</td>
</tr>
<tr>
<td>Date of receipt of application year month day</td>
</tr>
<tr>
<td>Requests for establishing a review case</td>
</tr>
<tr>
<td>Recommendation about accepting the case Whether or not there are grounds to accept a case:</td>
</tr>
<tr>
<td>Investigator: Clerk:</td>
</tr>
<tr>
<td>Ratifier: year month day</td>
</tr>
</tbody>
</table>
FORM G: Investigation and approval to accept a case

Investigation and Approval to Accept a Case

<table>
<thead>
<tr>
<th>Grounds for the case</th>
<th>Does not accept ______ Tax Office's decision to impose a 1300 yuan fine for refusal to pay tax.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Person or unit applying for review</td>
<td>Zhang _______</td>
</tr>
<tr>
<td>Defending work unit</td>
<td>_______ County _______ Township Tax Office</td>
</tr>
<tr>
<td>Date of receipt of application</td>
<td>1990 _______ month _______ day</td>
</tr>
<tr>
<td>Requests for establishing a review case</td>
<td>_______ County _______ Township Tax Office forcibly reduced the selling price on 100 items of clothing from my stock and imposed a fine of 1300 yuan. I think the Tax Office has encroached upon my lawful rights. I hereby apply for review.</td>
</tr>
<tr>
<td>Recommendation about accepting the case</td>
<td>It is in accordance with review application regulations; it is not a repeat application; it has not been filed at the people's court for litigation; the written application is in accordance with statutory demands; and the date of application is within the statutory time limit. Acceptance of the case is granted.</td>
</tr>
<tr>
<td>Investigator:</td>
<td>Yao ___________ Clerk: Sun ___________</td>
</tr>
<tr>
<td>Ratifier:</td>
<td>Liu ___________ _______ year _______ month _______ day</td>
</tr>
</tbody>
</table>

The criteria for formally accepting an administrative review case are not explicit in the Administrative Review Regulations. Article 34, Clause 1, states that if the review application complies with the stipulations in these regulations then the case should be accepted. It can be seen from Form G that in practice this means examining several aspects to ensure that the legal requirements for establishing this particular administrative review case at this particular time are in place. These are: that this is the first and only
time this case has been brought to administrative review; that the case has not been taken to court as an administrative litigation case; that the application has specific statutory demands; and that the application has been made within the set time limits. These criteria are similar to those set out in the Administrative Litigation Law for the courts to examine when accepting an appeal for administrative litigation and can best be understood as a preliminary check to see if all the constituent parts of a legal administrative review case are present. These criteria are spread throughout the Administrative Review Regulations but not all are points that are drawn to the attention of a recipient of an administrative penalty. Only the time limit for review applications is communicated formally to the applicant (see Form A above), so the applicant is disadvantaged by the fact that the application is subjected to criteria that he or she was unaware of.

If the review organ accepts the case it then forwards a notice to the applicant advising this (复议案件受理通知书 fuyi anjian shouli tongzhi shu - Form H below). Significantly for the applicant's rights, there is no provision in this communication advising the applicant that, according to law, the review organ must complete its handling of the case within two months of receiving the application. Significant numbers of review applications are not responded to within the designated time period and in such cases the applicant may then file a litigation suit in court or ask the court to enforce handling of the review application. But it is unlikely the applicant would know that the review organ must respond within two months unless he or she was familiar with the regulations. Two months is a considerable period for an applicant to wait for the outcome of an application, so speed in responding to complaints is clearly not a priority of the PRC administration. At this point the administrative review system fails to protect the rights of individuals and legal persons by allowing administrative organs too much time and requiring too little accountability.

FORM H: Notice of acceptance of review case

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18 ALL, Article 41.
19 ARR, Article 46.
Notice of Acceptance of Review Case

Review acceptance ( ) no.______

_________________________: (Applicant's name)

Concerning________________________________________ application for review, this
____________________ (review organ) has received and investigated the application. In accordance with
Article 31 of the Administrative Review Regulations the application is accepted.

You are hereby notified.

____________________(review organ)

______year _______month _______day

At the same time as the applicant receives the notice of acceptance, the review organ
initiates the process of gathering the necessary information. A notice by the same name is
forwarded to the defending organ setting out the basic details of the case and containing
several requests: the defending organ is asked to check the duplicate review application
that has been enclosed, forward to the review organ materials and evidence relating to the
case, and provide a defence of the disputed administrative decision (Forms I and K
below). If appropriate, the review organ also arranges for third parties who are affected by
the case to participate in the review by checking the enclosed review application,
providing a response to it, filling in the forms that authorises their legal representative to
represent them during the case, and forwarding all evidence and relevant materials to the
review organ (Form J below). When the review organ communicates with other organs
and work units on such matters, the communication includes a 10-day time limit by which
the matters should be dealt with. This indicates an attempt to keep the handling of the
case flowing along reasonably quickly, so it sits in contrast to the two month period
allowed for review.

FORM I: Notice of acceptance of review case

Notice of Acceptance of Review Case

Review acceptance ( ) no.

_____________________________________(defending organ)

_____________________________________(applicant's name) does not accept your __________________(name of defending
organ) Administrative Penalty Decision (____) no.____ of ______year ______month ______day
and has applied to this organ for review. This organ __________________(name of review organ) has
accepted the case. Please check the duplicate review application forwarded to your organ ____________
(name of organ), and within 10 days of receipt of it forward to this organ __________________ (name of
review organ) relevant materials and evidence relating to the administrative penalty decision, and also
provide a reply to the accusation.

You are hereby notified.

_____________________________________(review organ)

__________year _______month _______day

Attachments: . one duplicate copy of the review application
FORM J: Notice of acceptance of review case

<table>
<thead>
<tr>
<th>Notice of Acceptance of Review Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Review acceptance ( ) no.___________</td>
</tr>
<tr>
<td>__________________________________</td>
</tr>
</tbody>
</table>

This review organ has received an application for review of a case concerning __________________. We have accepted the application and think that the case may concern the interests of your work unit, and as such you are hereby notified to participate in the review. Please check the duplicate review application forwarded to you, provide a timely reply, fill in the statutory representative’s testimonial, and forward these documents together with relevant evidence and materials to this organ by ______ year ______ month ______ day.

__________________________ (review organ)

______ year ______ month ______ day
FORM K: Notice of acceptance of review case

Notice of Acceptance of Review Case

Review acceptance ( ) no.

County Industry and Commerce Bureau:

Wang ______ does not accept your organ’s Administrative Penalty Decision 1990 ______ month ______ day, and has applied to this organ for review. Please check the duplicate review application forwarded to you, and within 10 days of receipt of it forward to this organ relevant materials and evidence, including a reply to the accusation.

You are hereby notified.

District Industry and Commerce Bureau

year _______month ______ day

Attachments: one duplicate copy of the review application

If the review organ refuses to accept the case it forwards a form indicating it has disallowed review (不予受理复议裁决书 buyu shouli fuyi caijue shu - Forms L and M below). Such a form contains a space for reasons for the refusal and advises the applicant of his or her right to file an administrative litigation suit in court within 15 days of receipt of the notice. These two features demonstrate an intention to protect the rights of applicants from bureaucratic abuse, but the contents of Form M reveal some ways in which this phase of the administrative review process can be twisted to the state’s advantage. The example given at Form M is addressed to Li but the disputed administrative decision appears to have been directed at Zhao. There are at least two explanations for this form. First and least likely, Li is a friend or family member of
FORM L: Ruling on disallowing review

Ruling on Disallowing Review

Review disallowance ( ) no. __________
________________________: (applicant's name)

Concerning ___________________________ review application, this organ ___________________________
has received the application. After investigation, ___________________________
_______________________________

On the basis of Article 34 of the Administrative Review Regulations, the application has not been accepted.
If you do not accept this decision, you may apply to the people's court for administrative litigation within 15
days of receipt of this notice.

______________________________ (review organ)

_______ year _______ month _______ day

Zhao's and is trying to use the administrative review system to protest against an
administrative penalty that may affect Li either financially or in some other personal way,
as would personal detention of a spouse, for example. Such an application is beyond the
scope of the ARR because Li would not have been the recipient of a specific
administrative penalty nor would he or she have been directly involved in the case that
gave rise to the specific administrative penalty. The explanation given for refusing to
accept the case does not state that the case is beyond the scope of administrative review,
so this explanation is not very likely.
FORM M: Ruling on disallowing review

Ruling on Disallowing Review

Li ____________:

Concerning your non-acceptance of an administrative penalty fine imposed by ____________City Public Security Bureau’s ____________Station, this organ has received your application for review of the penalty. After investigation it has been established that ____________Station’s Public Order Management Penalty Decision (90), no. 78 applies to Zhao ________________, and as such the specific administrative act does not encroach upon your lawful rights. On the basis of Article 34 of the Administrative Review Regulations, your review application is disallowed. If you do not accept this ruling, you may apply to the local people’s court for administrative litigation within 15 days of receipt of this notice.

___________City Public Security Bureau

_______year _______month _______day

The second and more likely explanation is that Li and Zhao were involved in a fight which resulted in Zhao receiving a public order management penalty, and possibly Li also. Li may have viewed the penalty imposed on Zhao as minor compared to the wounds he or she suffered and may have requested that the penalty be reviewed and increased. This type of scenario is quite common in public order administrative penalty cases.²⁰ Both cases cited in the sources are public order cases involving a physical dispute between two parties, at least one of whom is penalised, but it is the other party who applies for administrative review on the grounds that the penalty given to the other party is too light. It is legal for either or both parties to apply for administrative review as either the recipient of the disputed administrative penalty, or as a third party to the dispute who

has a direct interest in the case. Such applications have been accepted so it would not be unusual for a review organ to be faced with this type of scenario.

If the background to the example given at Form M is as I have suggested, then the reasons given therein for rejecting Li's application raise some important issues. Li is advised that the public security organ's administrative decision to impose a fine under the Public Order Management Regulations does not encroach upon his or her lawful rights and thus according to the Administrative Review Regulations Article 34, the case is rejected. The review organ's reasons, in this example, are clearly not related to the criteria set out above in Form G, but rather represent a preemptory administrative review decision. The editor and commentator of the book in which these forms are found explains that valid reasons for rejecting a case include the criteria used on Form G above, but may also include a decision that the specific administrative behaviour did not encroach upon the applicant's lawful rights. As the Administrative Review Regulations clearly state that citizens and legal persons may apply for review where they believe their lawful rights and interests have been infringed, this appears to be faulty advice on the part of the book's editor.

A possible explanation, however, may be found in the distinction between violations of statutory procedures by the defending organ which infringe on the applicant's lawful rights, and those that do not. If the defending organ has violated a procedure or failed to do something properly, a review organ will not automatically overturn the decision unless it directly infringes an applicant's lawful rights. This is in line with the Chinese legal system's tendency to place a higher value on substantive justice than to value equally both substantive and procedural justice. The case in Form M illustrates that, even if the administrative review went ahead, the review organ would not overturn the administrative decision because the decision and the manner of its making did not encroach upon the

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21 ARR, Articles 26, and 27.
23 ARR, Article 2.
applicant's lawful rights. The decision may have been procedurally incorrect but even if the procedures were rectified the decision would still stand. This is in effect a pre-emptory administrative review decision as it is made according to the Administrative Review Regulations, Article 42, Clause 4, Provision 3.

Due to lack of specific criteria by which review organs are able to accept or refuse to review cases, it is not surprising that criteria which specifically apply to the formal review process creep into the phase of accepting or refusing a case for review. The implication of this is twofold. First, the initial phase of deciding whether to accept or refuse a case for review may turn into a quasi-review. This probably occurs most often when the case is one that is rejected for review and thus the application phases functions as a short-cut and means of avoiding the paperwork and responsibility associated with formal review. Such action substantially affects the rights of the applicant because at this stage no materials or information has been obtained from the defending organ. The decision is being made on the basis of only one side of the case. If a formal review were conducted it may be found that the defending organ was unable to give a credible answer to the accusations made against it, or that as well as incorrect procedures the defending organ employed other unlawful tactics during the course of making the disputed decision.

The second implication is that all cases which are accepted for formal review are cases in which the substantive rights of the applicant may have been infringed, implying that a different outcome may have resulted if the defending organ had performed its tasks lawfully. This is a significant expectation to keep in mind when examining the numbers of cases that go through administrative review and what the outcome is. This will be observed in the final section of this chapter.
FORM N: Administrative review decision

Administrative Review Decision

Review decision ( ) no. ________

Applicant (who originally received the penalty): Name________________________, gender_________, age_______, ethnicity__________, place of origin_______________________________.

occupation___________________, address__________________________________.

Defendant: _____________________, legal representative________________________,

entrusted representative___________________________.

In the light of _____________________________________________________________ a case, the applicant does not accept the defendant's ______________________________ Administrative Penalty Decision ( ) no. ______ and according to law has applied to this organ for review.

Findings of the hearing:____________________________________________________

On the basis of ____________________________________________________________ rules, the following has been decided:

1. ________________________________________________________________;

2. ________________________________________________________________;

3. ________________________________________________________________.

If the applicant does not accept this decision he or she may apply to the local people's court for administrative litigation within ________________ days of receipt of this notice. If a suit is not filed within the specified time period or the review decision is not otherwise implemented, then according to law the review decision will be enforced or application will be made to the people's court to enforce the decision.

______________________ (review organ)

______ year ________ month ________ day
Administrative Review Decision

Review decision (90) no. 31

Applicant: ________________ County Tobacco Co.

Legal Representative: Chen _______________________

Entrusted Representative: Wang _______________________

Defendant: ________________ County Industry and Commerce Bureau

Legal Representative: Luo _______________________

Entrusted Representative: Xu _______________________

The applicant does not accept the defendant's Industry and Commerce Penalty Decision (90) no. 11, and according to law has applied to this organ for review.

Findings of the hearing:

______________ County Tobacco Co., knowing that Liu __________ had not received permission to trade and do business, still sold him cigarettes at the wholesale price and even increased their charge by 20%.

Review organ's opinion:

______________ County Tobacco Co. should have strictly implemented the state Tobacco Sales Regulations, but instead of seeing the advantages in doing the right thing, the company engaged in illegal management, not only by providing Liu with a source of goods and thereby obtaining illegal income of 376,070,000 yuan, but also by assisting Liu to go elsewhere to resell cigarettes at a profit and on many such occasions personnel from the company provided Liu's group with an escort.

On the basis of the regulations the following has been decided:

To uphold ________________ Industry and Commerce Bureau's Administrative Penalty Decision (90) no. 11. If the applicant does not accept this review organ's decision he or she may apply to the people's court for administrative litigation within 15 days of receipt of this notice. If a suit is not filed within the specified time limit or the review decision is not otherwise implemented, then according to law the review decision will be enforced or application will be made to the people's court to enforce the decision.

______________ City Industry and Commerce Bureau

______ year ______ month ______ day
FORM P: Decision on a public order management penalty appeal

<table>
<thead>
<tr>
<th>Public Security Bureau</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decision on a Public Order Management Penalty Appeal</td>
</tr>
<tr>
<td>No. ________________</td>
</tr>
<tr>
<td>19____ year _______month _______day</td>
</tr>
</tbody>
</table>

Because public order management offender ____________________________, gender ____________, age ________, did ___________________________, the ____________________________ Station (or County Public Security Bureau), imposed ____________________________ Public Order Management Penalty on the basis of Article _________ of The People's Republic of China Public Order Management Penalty Regulations. The offender does not accept the ruling and hereby appeals. The review decision is ____________________________.

If the offender does not accept this review decision he or she may file a suit at the people's court within 5 days of receipt of this notice.

(Bureau Director) ____________________________

This decision is announced on 19_____ year _______month _______day at _______o'clock.

Once a case has been accepted and formally reviewed, the review organ issues an administrative review decision form (行政复议决定书 xingzheng fuyi jueding shu) or, in the case of the public security organs, a decision on a public order management penalty appeal (治安管理处罚申诉裁决书 zhian guanli chufa shensu caijue shu) - Forms N, O and P.

This is the most important document of the process as it contains the review organ's decision as to whether the demands of the application will be met. It contains room for all
the necessary details but notably not the applicant’s side of the story nor the defending organ’s reply to the accusations. The applicant’s demands are recorded but the circumstances which gave rise to the demands, such as are recorded on the review application form (see Forms D and E above) are omitted. Whatever reply to the accusations that was forwarded to the review organ as a result of the requests made on Forms I and K above is also omitted. This means that the defending organ has been made aware of the applicant’s grievances (because the review organ forwards a copy of the review application to the defending organ) but the applicant is not informed of the defendant’s reply to these accusations, except in the guise of the "review organ's opinion" — Form O — and therefore has minimal information by which to assess the review organ's decision. The review organ's responsibility to establish the facts of the case is clearly reflected in the review decision form. The focus of this form is on the findings of the review organ's investigations, which are recorded together with the review organ's decision(s). But the main problem is that the review is presented as a fait accompli. On Form O there is no record of the evidence used to confirm the applicant's offence, no hint as to the reasoning process used to arrive at the review decision and no justification of the decision to uphold the penalty. The review is supposed to check the administrative penalty decision, but here it is used as an opportunity to further lecture the applicant. In the case of the public security organs' public order management penalty appeal decision forms, the results are very tersely presented. The form contains no evidence that the review organ made any attempt to obtain any information about the case or to establish any facts. This does not mean that the review organ did not do such things, just that there is no record of it on the appeal decision notice. Clearly the public security organs have a minimalist approach to administrative review and do not see the need to explain their actions or reasons to those affected by them.

However, on both the standard form and the public security form there is provision for the applicant to be made aware of his or her right to subsequently file an administrative litigation suit in court within the specified time limit.
It can be seen from comparing Forms O and P above that considerable variation exists between the public security organs administrative review decisions' and those made by other review organs. Despite the problems of the standard administrative review decision form, it provides a better framework for responding to grievances than does the public security organ form. There is a push from some legal affairs offices within the PRC government structure to better standardise and regularise the administrative review decision form. A significant suggestion from the Shanghai City Government Legal Affairs Office is to only use a form titled 'review decision form' (fuyi jueding shu) at this final stage. Forms with a variety of titles have been used and even though the proponents of this view recognise that the core function of administrative review was carried out in all cases, they advocate that a standard form be used by all PRC administrative xitong. This suggestion is not just about the title at the top of the form, but more importantly is about the layout and contents of the forms, because as we have shown above, such matters significantly affect the rights of the applicant. One of the outstanding features of the new administrative law system, comprising administrative review, administrative litigation, and administrative liability, is that the standards set therein apply to all administrative organs when they make specific administrative decisions. If some organs, like the public security organs, are less bound than others to provide a decent standard of administrative redress, then not only does the ARR fail to protect the rights of all individuals equally, but there is no common, all encompassing standard of administrative review in the PRC; there is a variable standard according to which xitong the applicant is dealing with. It is this problem to which the Shanghai City Government Legal Affairs Office is proposing a solution. If a common, standard administrative review form was used, this would go some way towards lessening the distinctive hierarchy of the xitong structure and would help raise the concept of a professional administrative service characterised by norms of administration.

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Other recommendations by the Shanghai City Government Legal Affairs Office include paying more attention to recording the required details on the review decision form such as relevant dates, the applicant's name and address, and the specific demands made by the applicant. This latter recommendation reveals that applicants have largely been left to their own devices when filling in the application form. As they do not have knowledge of the Administrative Review Regulations, they have been unable to present their demands in the required legal language, thereby giving the organ grounds to refuse the application.  

Two of the biggest concerns with the review decision forms are the lack of detail they contain about the case, and the reasoning behind the review decision. These problems are both illustrated by the traffic accident form (Form B) referred to above. The review decision form is a legal document, and as such, proponents of the push for standardisation claim that it can be classified as legal only if it contains full and complete explanations and information.

Even though lack of detail and information raises concerns, perhaps most worrying overall is that many administrative organs do not appear to have even a basic grasp of the legal administration principles involved in administrative review. On the administrative review decision form (Form N) where applicants are advised of the time limits within which they must apply for administrative litigation, if this part is filled in at all, it is often perfunctorily completed with the general 15 day27 time limit stipulated in the Administrative Review Regulations. But in many cases the substantive law used as the basis for the administrative penalty decision stipulates otherwise. For example, a tax office advised an applicant that there were 15 days within which to file a suit at court,

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26 Interview with an official from the State Council's Office of Legislative Affair, Beijing, 1998. The weak position of the applicant during administrative litigation is similar. This will be dealt with in Chapter Seven where I discuss an administrative litigation trial I attended.

27 ARR, Article 36.
whereas the relevant tax law used to impose the penalty allows 30 days. This reveals a worrying lack of familiarity by administrative organs with even the basic contents of the laws they use in their daily work. Or, even more problematical, an administrative culture that places a low value on the procedural legalities of administration, or one in which officials knowingly disregard legal requirements.

The report from the Shanghai City Government Legal Affairs Office does not concern itself at all with the substance of any of the administrative decisions that gave rise to the review applications whose problems are discussed. Either the substance of such decisions is presumed to be lawful or it is just not relevant to this particular report. Either way, the literature is silent on this aspect. What is significant for us is that the discourse surrounding the administrative review system, and the report cited is one element of it, links the issues of standardisation and regularisation of bureaucratic procedures with administrative review.

Important and unimportant procedures and facts

When a review organ receives an application for review it does so in a pre-existing cultural, political and legal milieu. Chinese law has traditionally placed a great deal more emphasis on getting the right result for a legal case rather than following proper procedures while obtaining the result. This causes particular problems for administrative review applicants because a dearth of adequate procedures at the time of the imposition of the administrative penalty can make it even harder to obtain a just decision in administrative review. The example of the traffic violation penalty referred to above demonstrates this point for us. Due to a lack of other records, the review organ can only presume that the public security official made the correct interpretation of the events and the correct decision at the time when the penalty was imposed. As discussed in

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Chapter One, one of the characteristics of the reform era in the PRC is the trend towards legalising and codifying rights, powers and duties. The expression of this trend in the bureaucracy has resulted in the promulgation of numerous laws and regulations together with attempts to engender the concept of lawful administration in the bureaucracy. Not only are there more laws to follow now, but there is the expectation that such laws will be followed. This expectation now extends to the government's own machinery as well as to citizens and other legal persons. But in the new system of administrative law, comprising administrative review, administrative litigation and administrative compensation, the laws and regulations are interpreted by both bureaucratic organs and the courts in the light of pre-existing attitudes towards justice. This is not surprising, of course, but it serves as a caution against unjustifiable optimism about the new system.

In contemporary Chinese administrative law there is an open expectation that all administrative organs will follow all statutory procedures when carrying out their tasks. The highest standard is set publicly and organs are continually encouraged to strive for the highest standards. But alongside this ideal is the recognition that conditions vary a great deal across the PRC and that not all organs achieve this goal. To cater for this expected shortfall, the Administrative Review Regulations are interpreted in a way that allows the review organs to be flexible about procedures and facts.

A specific administrative decision in the PRC is measured by five main criteria:

- Are the important facts clear?
- Were the correct laws, regulations, decisions and orders used as the basis for the decision?
- Was there any violation of statutory procedures that affected the applicant's lawful rights?
- Were the legal limits of the organ's authority exceeded or abused?
- And, is the decision suitable in general terms?
Two terms used in these criteria signal the flexibility that review organs are able to employ: "important facts" and "statutory procedures that affect the applicant's lawful rights". A review organ is not obliged to cancel an administrative decision just because the defending organ did not follow all the proper procedures. The organ is encouraged to consider the extent to which the relevant procedures assisted or hindered the making of the specific administrative decision. This is guided by whether the facts of the case are clear, the application of law is correct and whether the procedures employed followed basic lawful demands (which are not spelled out in the ARR).

There is open admission that administrative organs routinely fail to fulfil the following duties: to fill in the forms properly; to clearly notify the parties of their rights; and to record the date on the written review decision form. Any of these omissions may contribute to an applicant's rights being adversely affected, particularly if the party is not advised of their rights to review and litigation. But generally such omissions will not result in the review organ overturning the decision. The review organ may note the irregularities and recommend to the defending organ that it improve its procedures, but if the outcome for the applicant would have been the same in any case then the decision would stand.

The facts of a case are understood in a similarly flexible light. The ARR only permits confusion about "important facts" to be the basis for overturning an administrative decision. Unimportant facts are not considered sufficient grounds. Important facts are described as those which relate to the situation or the evidence used as the basis for the administrative decision. For example, if a person illegally manufactures flick knives (弹簧刀 tanhuang dao) and the public security organ imposes an administrative

32 Interview with an official from the State Council's Office of Legislative Affairs, Beijing, 1998.
33 ARR, Article 42, Clause 4, Provision 1.
penalty of 13 days detention, the organ only needs to produce as evidence the tools used to produce the knives. Unimportant facts in this case would constitute the types of materials used in the manufacture of the knives and how many knives were produced. The public security organ does not need to know such facts in order for its administrative penalty decision to be suitable and lawful.34

"Correct application of law" refers to the use of one particular law when another should have been used, or the use of laws that no longer have effect, or the use of laws that have not yet gone into effect. This provision in the ARR points again to the main function of the regulations being to improve and regularise bureaucratic decision-making rather than to protect individual rights. In some cases the applicant will be affected adversely by the wrong application of law, but in many cases the penalty would still stand on the basis of another law. Incorrect application of law is always grounds on which to accept a case for administrative review but in practice is not sufficient grounds to overturn the decision. An administrative decision that had been made on the basis of a wrong application of law would merely be changed by the review organ to be made on the basis of the correct law, resulting in a substantively similar outcome for the applicant. This demonstrates that the main purpose of including this criterion in the ARR is to improve the standardization and regularisation of bureaucratic decision-making.

The understandings attached to "excess of power" and "abuse of power" will be explained fully in Chapter Six in the context of administrative litigation because they are most applicable to that process. Here it will suffice to say that "excess of power" is associated with administrative actions that are performed outside the legal limits of the law. In English the concept is usually described as *ultra vires*, beyond power. "Abuse of power" is associated most specifically with an abuse of *discretionary* power, and in the context of the new administrative law system usually refers to a complaint that an administrative organ imposed one penalty when the recipient thinks another would have been more suitable. For example, a person may receive a 7-day personal detention from a public

security organ for a public order offence, but may prefer a 200 yuan fine as it would enable him or her to continue to work and earn money.

The suitability of an administrative decision is measured in a negative way. That is, only if a decision is clearly unsuitable and out of proportion to the offence committed is a review organ required to overturn or change it.

**Costs**

Unlike in administrative litigation, there is no direct charge made to the applicant for the service of an administrative review,\(^35\) and this is now stipulated in the Administrative Review Law (Article 39), so a direct cost is not a barrier to using the service. There are, however, geographical barriers, which particularly in rural areas adversely affect an applicant's rights.

Jurisdiction over administrative reviews of cases that arise from basic level (county) government decisions may be reviewed by either the government at the same level or by the relevant department at the next higher level. If an applicant wishes to go to the next higher level to seek review this usually involves long distance travel to the next largest town where the department is located, which requires considerable time and expense. Sometimes laws allow for this by specifically granting extra time for appeals to be made in mountainous districts or where communications are poor, such as in the Public Order Management Regulations of 1957 (Article 18, Clause 6). These regulations only allowed 48 hours (normally) within which an appeal was to be lodged against the penalty decision, with the time limit extended (but for an unspecified time) for cases in remote areas. Such allowances have been removed from the 1986 Public Order Management Regulations, which simply state the five-day time limit for appeals to be lodged.\(^36\) Thus, the time allowed for appeal has been lengthened in return for the applicant taking more responsibility for registering the appeal on time.

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\(^36\) Article 39.
A questionnaire survey conducted in Harbin City among 1000 people sought to find out how jurisdictional issues affected administrative review, in terms of time and resources. People were asked whether they would prefer to apply for administrative review to the city government, to the district or county government, to an office subordinate to the city, or to an office subordinate to the province. Respondents indicated they would prefer to apply to the city, district or county government (75.7%), followed by the subordinate office (17.5%), and the least popular option was the office subordinate to the province (4%). The results were interpreted by those who conducted the questionnaire to suggest that people prefer to apply for administrative review on familiar territory and that distance or unfamiliar surroundings were significant barriers to applying for a review. Similar problems with vertically organised jurisdiction have been observed in Beijing and surrounding districts.

The cost to administrative organs of providing the administrative review service is considerably greater than the costs facing applicants. There are at least two issues involved. First, each organ was required to establish an administrative review office or to appoint a number of staff to the task. Most organs have established administrative review sections in their legal affairs offices. By way of a general guide, in 1991 the Beijing City government appointed four people to its administrative review section, the Jiangsu provincial government appointed five people to its section, and the Anhui provincial government appointed three people. Taking Beijing alone, as administrative organs across the entire city (not just the Beijing City government) received only 314 applications for administrative review in 1991 (see Table 1 below) and the majority of these would have been cases in functional organs like the public security bureaus, the four

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people in the Beijing City government's administrative review section were unlikely to have been overworked by administrative review applications. The staff may not be exclusively engaged in administrative review work, of course, but it appears that at least three people are required to staff an administrative review section. This may be partly explained by the personnel designations on the forms used to register acceptance of a case for administrative review (Forms F and G above). In forms F and G at least three people are involved in handling the acceptance of a case: the investigator (审查人), who is probably responsible for collecting all the relevant information and making a recommendation; the clerk (承办人) who probably hands out the forms to applicants; and the ratifier (审批人) who approves the recommendation.

The second cost-related issue for administrative organs is that due to the varying nature of administrative work, some organs incur greater costs per review case than others. The environmental protection organs, for example, may be required to run tests on pollution levels to defend an administrative penalty that a lower-level organ has imposed. 40

Who you are determines how much and what kind of redress the system can offer. Among the areas in which problems arise in the implementation of the administrative review system are those which overlap with other forms of discipline or other patterns of decision making. Communist Party discipline, for example, which is conducted by the Party's discipline inspection commissions, is designed to deal with the ethics and conduct of Party members working in Party organisations. The Ministry of Supervision and the Ministry of Personnel, on the other hand, deal with the conduct of administrative personnel in state organs. There are also some institutions that remain subject to more personalised and traditional patterns of decision making, such as the defence forces, which remain excluded from the scope of administrative review. 41 For all the individuals and organisations associated with these institutions, the new administrative review system cannot offer any form of redress. This means that there is no common form of

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40 Interview with the Director of the Policy and Regulation Department of China's National Environment Protection Agency, Beijing, 1998.
administrative redress available and that different segments of the population are subject to different sets of rules and standards.

Let us take administrative personnel in state organs as an example. Decisions relating to their awards, penalties, appointments and dismissals are excluded from the scope of administrative review.\textsuperscript{42} (Readers should note that this material, and the example used below to illustrate the point, is only relevant to the period up to the promulgation of the Administrative Review Law, which permits applicants to request redress on these matters. But as such an applicant would be requesting their own organ to review the penalty, the new law probably still does not provide an adequately impartial review system). In the case of administrative personnel, problems arise due to the distinction made in the PRC bureaucracy between internal and external administrative power, a distinction that does not exist in many Western countries.

Internal (内部 neibu) tasks relate to the manner and means by which the organ organises and manages its workload, tasks, and personnel. External (外部 waibu) tasks relate to the actual function of the organ in regulating society: for example, in supervising the market place, controlling public order, or managing health problems. External tasks typically bring the organ into direct contact with the public.

If an administrative official violates the code of conduct for officials in his or her organ, there are several means available to the organ to discipline the official. Minor mistakes will often incur no more than criticism and education, a (Maoist) form of control which involves the supervisor giving the official "a talking to". One notch up from this is the allocation of work demerit points, then possible demotion, then dismissal. All of these actions are called administrative disciplinary sanctions (行政处分 xingzheng chufen), and they are classified as internal acts of the organ. As such they are beyond the

\textsuperscript{41} ARR, Article 10, Clause D.  
\textsuperscript{42} ARR, Article 10.
scope of administrative review. For redress on these issues one must appeal to either the Supervision organ or the Personnel organ.

The administrative penalties that may be imposed on the general population for violations of administrative laws or regulations are called administrative penalties (行政处分 xingzheng chufu). These penalties are classified as external acts of the organ and fall within the scope of administrative review.

The problem for establishing a common system of redress is that the same behaviour receives different responses according to the offender's occupation. To illustrate this I have chosen a case from Anhui Province. 43

The case records that a certain Zhang, a worker in a basic-level collective, gave birth to two children, in 1975 and 1977 respectively. Then in 1989 a third child was born. Some time after this, in October 1991, the county government imposed an administrative disciplinary sanction (chufen) by dismissing her, and an administrative penalty (chufa) of 1000 yuan fine for violating the planned childbirth regulations. Zhang refused to accept these decisions and went to the district administrative office to apply for administrative review, requesting that the review organ cancel the county government's decisions.

There was disagreement about two matters of this case. First, which organ had jurisdiction to conduct an administrative review? The options were: the planned birth committee of the county administrative office; a body entrusted with power by the provincial government, such as the district or county government; or the provincial government itself. The end result was that the district government handled the review.

The second problem was whether the case came within the scope of review. Here again the situation was not clear. According to the Administrative Review Regulations,

dismissals of administrative personnel do not fall within the scope of reviewable cases. The alternative view posed was that Ms Zhang was not, strictly speaking, a state administrative official but rather was a worker at a basic-level collective. As such she was not on the official list of state employees. The review organ decided that the dismissal part of the penalty did not come within the scope of administrative review because Zhang was an administrative official, but she could apply for review of the 1000 yuan fine. Zhang indicated that the main issue she had complaint with was the disciplinary dismissal sanction and that she did not intend to apply for review over the fine.

The commentary accompanying this case record and the two issues raised above are concerned predominantly with organisational matters of the state. The jurisdictional problem is discussed by the commentators in terms of which organ, according to hierarchy and responsibility, had the authority to review this case. The PRC's local people's congress and local people's government organisation laws are quoted as references in support of the commentator's (and the case managers') reasoning. Discussions about whether the case falls within the scope of administrative review also revolve around organisational concepts such as the distinction between internal and external administrative power.

We do not know if any personal reasons prompted the dismissal and fine imposed on Zhang, and nowhere in the case record or the commentary is the suitability of the penalty discussed. But we do know how the case was used publicly, and that was to make at least two points: that administrative review cannot be used for these types of cases; and that the reason for this is the way that state power is organised. Administrative review is organised to ensure that state power currently vested in various organs and governments is not lessened by the right that citizens now have to apply for administrative review. Administrative review can only be effective for sections of the population that do not come under any other form of authority. The implication of this for society is that it further divides the population into groups that have a chance of effectively using the legal system to obtain redress and those who do not. This lessens any possible progress for the
‘rule of law’ discourse (which argues that the government is just another party to a dispute and will be treated the same as a citizen). At the same time it indicates that the discourse of "administration according to law" is concerned primarily with following rules and less so with protecting the rights of citizens and other legal persons. In terms of the balance theory discussed in Chapter Three, this demonstrates a management imperative rather than a control of power imperative.

Other organisational problems relating to jurisdiction arise out of the common problem of local protectionism. As alluded to in Chapter One, courts are funded by the government at the same level, which often leads to overt political manipulation of judicial decisions. In administrative litigation it is very common for an appeal to be denied at a local court only to be granted at the next higher-level city court. This pattern has been interpreted as an effect of protectionism by local courts on behalf of local government organs. In administrative review the applicant may choose to apply for review at either the local level, in which case the review organ is the government at the same level as the organ which made the offending decision, or at the next higher level functional organ. If the applicant goes for horizontal jurisdiction he or she runs the risk of being adversely affected by local protectionism. This consideration is probably usually overridden, however, by the barrier imposed by travel to the city organ.

Up to this point in this chapter we have examined in detail how the administrative review system works. A study of the forms used in the process reveals that the applicant for administrative review is at a considerable disadvantage vis-a-vis the administrative organ, not only because of the initial difference in power between the two parties, but particularly because administrative organs take unfair advantage of their position in offering poor administrative standards, a disinclination to assist applicants, and a perverse tendency to further penalise applicants by refusing to accept incorrectly framed applications for review. Added to this is the pre-existing legal framework that allows administrative organs to choose which facts and which procedures are relevant to a case,

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44 Interviewees unreservedly supported this interpretation, especially as it applies in rural areas.
and which are not, thereby further limiting the ability of applicants to defend their rights
to lawful administration. But it is the organisation of power and authority in the PRC that
is probably the most powerful way in which the state circumscribes the power of
administrative review. Administrative review may only be considered as an option for
redress if no other state institution has authority in that area. The only way in which the
state appears to be generous and considerate of applicants is by not directly charging a fee
for the service, but this benefit is dissipated by the problems of distance and the low
likelihood of success. What is the result of all this on applicants? How many applications
are made and what is the outcome of them? Is it worth the hassle?

**How many cases are there?**
In contrast to the systematically published figures for administrative litigation cases, the
figures for administrative review are much less systematically collated. We can only
speculate as to the reasons for this, and piece together a picture from the patchy sources
that are available.

The officials from administrative organs whom I interviewed, in reply to questions about
how many applications for administrative review their organ receives each year, said that
they did not know or did not collect such figures. The Director of the Policy and
Regulation Department in the National Environment Protection Agency, for example,
said that his organ collates the number of administrative penalties imposed on individuals
and enterprises but these figures are not published. He then added that his organ does not
collect the figures about other issues, such as how many applications are made for
review. 

I subsequently interviewed the director of the General Office in the Office of Legislative
Affairs of the State Council. The director stressed that the statistics on administrative
review that his office has are patchy and unreliable, but he did admit that there are about

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46 More will be said about this in Chapter Seven.
47 Interview, Beijing, 1998.
30,000 applications for administrative review each year lodged with all organs across all of the PRC. In about 60% of the cases, the original administrative decisions are confirmed by the reviewing organ, and applicants then take their cases to court in about 30% to 40% of such cases.48

The number of applications for administrative review in 1991 made to 17 of China's provinces and province-equivalents can be obtained by adding the number of cases represented in Table 1 below. A figure of approximately 25,000 cases per year is obtained by this method. Although this table only accounts for 56.6% of China's provinces and province-equivalents, it covers about 70% of the population.49 If we increase the figure of 25,034 by a third to account for the other 30% of the population, we obtain an approximate number of review applications for the whole country in 1991 of 33,000, which is close to the director's estimate of 30,000.

Unfortunately I have only been able to obtain consistent figures for 1991 and 1992, with patchy figures for some organs and provinces available for later years. So we cannot obtain a thorough picture of the trends in administrative review applications.

Table 1: Numbers of applications for administrative review received in 17 provinces and province-equivalents of the P.R.C. in 1991

<table>
<thead>
<tr>
<th>Province or equivalent</th>
<th>Number of applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beijing</td>
<td>314</td>
</tr>
<tr>
<td>Shanghai</td>
<td>1142</td>
</tr>
<tr>
<td>Sichuan</td>
<td>*5000</td>
</tr>
<tr>
<td>Ningxia</td>
<td>*200</td>
</tr>
<tr>
<td>Shaanxi</td>
<td>*700</td>
</tr>
<tr>
<td>Hubei</td>
<td>1637</td>
</tr>
</tbody>
</table>

48 Interview, Beijing, 1998.
Hunan        2163
Jiangxi      947
Guangxi      1333
Guangdong    1498
Henan        *2000
Tianjin      *500
Shandong     *1000
Jiangsu      *1000
Anhui        *2000
Zhejiang     *3000
Fujian       *600
Total        25,034

Source: Li Peizhuan (ed.), 行政复议概览 1991-1992 (A General View of Administrative Review, 1991-1992) (Beijing: China Legal System Press, 1993), Section 1, pp.3-100. Li's figures are sourced from reports by the various city and provincial governments legal affairs' offices or administrative review offices. An average of 95% of applications for administrative review are handled to completion by the process. The remaining cases are either transferred to another organ or are cases that failed to be established as proper administrative review cases.

*Figure is approximate and is obtained by apportioning an appropriate number of cases from the number of applications reported for a longer period. For example, the only figures available for Sichuan Province report that from when administrative review formally commenced at the start of 1991 until September 1992 the province received 9392 applications for review. Thus, if cases were received at a constant rate, and other figures indicate this is the case, then approximately 5,000 were received in 1991.

The public security organs, which have the largest number of complaints made against them, are reported to have accepted 22,513 applications for administrative review in 1991 and 27,196 applications in 1992. 50 In 1991 tax organs received 1,400, and commodity price organs received approximately 500. In short, the evidence is that the public security organs receive the lion's share of complaints.

The variation among types of organs is due to several factors: public order management disputes constitute the bulk of public security organs’ cases, and the right to appeal such cases (established by the new regulations in 1986) precipitated the establishment of dedicated administrative divisions in the courts, a development which was widely publicised.\(^{51}\) With the passage of the Administrative Review Regulations in 1991, all public order management penalty cases had to go through administrative review first before going to court. This contributed to the high number of public-security review applications. It should also be noted that land management disputes at this stage were not able to be handled under administrative review, but after the 1994 amendments to the ARR such disputes began to come before administrative organs and may have contributed to an increase in the number of overall review applications after that time. More will be said about this below.

The geographical variations are startling. To demonstrate several points here I have chosen to compare three jurisdictions: Beijing, Shanghai, and Sichuan. The choice of jurisdictions and the comparisons made should not be taken as methodologically problem-proof, but rather should be taken as an attempt to illuminate some of the issues, such as wealth and political-legal environment, that may affect the number and outcome of administrative review applications. I have chosen two wealthy areas with similar population levels (Beijing and Shanghai) and one poor area (Sichuan).

Table 2: Frequency of administrative review cases compared to population in 17 of China’s provinces and province-equivalents in 1991

<table>
<thead>
<tr>
<th>Province or equivalent</th>
<th>No. of people per case</th>
<th>Wealth rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shanghai</td>
<td>11,734</td>
<td>1</td>
</tr>
<tr>
<td>Zhejiang</td>
<td>14,006</td>
<td>6</td>
</tr>
<tr>
<td>Tianjin</td>
<td>18,180</td>
<td>3</td>
</tr>
<tr>
<td>Sichuan</td>
<td>21,794</td>
<td>26</td>
</tr>
<tr>
<td>Ningxia</td>
<td>24,000</td>
<td>20</td>
</tr>
<tr>
<td>Hunan</td>
<td>28,705</td>
<td>21</td>
</tr>
<tr>
<td>Anhui</td>
<td>28,805</td>
<td>28</td>
</tr>
<tr>
<td>Guangxi</td>
<td>32,438</td>
<td>29</td>
</tr>
<tr>
<td>Hubei</td>
<td>33,671</td>
<td>14</td>
</tr>
<tr>
<td>Beijing</td>
<td>34,841</td>
<td>2</td>
</tr>
<tr>
<td>Jiangxi</td>
<td>40,813</td>
<td>23</td>
</tr>
<tr>
<td>Guangdong</td>
<td>42,984</td>
<td>5</td>
</tr>
<tr>
<td>Henan</td>
<td>43,815</td>
<td>27</td>
</tr>
<tr>
<td>Shaanxi</td>
<td>48,083</td>
<td>22</td>
</tr>
<tr>
<td>Fujian</td>
<td>51,317</td>
<td>11</td>
</tr>
<tr>
<td>Jiangsu</td>
<td>68,440</td>
<td>7</td>
</tr>
<tr>
<td>Shangdong</td>
<td>85,700</td>
<td>10</td>
</tr>
</tbody>
</table>


Beijing and Shanghai are the wealthiest province-level areas in the PRC (Table 2). In 1991 Shanghai ranked first out of 30 provinces with an income level of 5,423 yuan per capita. Beijing ranked second with a level of 3,925 yuan per head of population. Sichuan ranked 26th with a per capita income of 980 yuan. In 1991, Shanghai also had the highest rate of administrative review applications (Table 2) at the rate of one case per 11,734 people. Beijing, with a similar income level, had one administrative review case per 34,841 people, constituting about a third the rate of Shanghai. Sichuan’s rate, with a significantly lower per capita income than either Shanghai or Beijing, was one case for every 21,794 people, making it about half way between the rates of Shanghai and Beijing. Clearly the people of Shanghai were more active in using the administrative review system to defend their rights than the people of Beijing in 1991, but there is no clear indication that this is because of the wealth factor.

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Table 3: Number and rate of applications for administrative review in three of China's province-equivalents in 1992.

<table>
<thead>
<tr>
<th>City or province</th>
<th>Number of applications</th>
<th>No. of people per case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shanghai</td>
<td>912</td>
<td>14,748</td>
</tr>
<tr>
<td>Sichuan</td>
<td>4392</td>
<td>25,041</td>
</tr>
<tr>
<td>Beijing</td>
<td>310</td>
<td>35,548</td>
</tr>
</tbody>
</table>


The figures available for 1992 demonstrate a similar pattern (Table 3). Although the number of applications for administrative review in Beijing fell by only 1% to 310 cases, in Shanghai the number of applications fell 20% to 912 cases. Even so, the people of Shanghai were still nearly three times more likely to use the legal system to defend their rights than the people of Beijing. It must be said, though, that even though there are stark variations, the figures overall are extremely low compared to the scale of administrative activity undertaken by the Chinese state.

The literature tends to portray the low number of review applications as a problem rather than as a positive indicator. If the standard of administrative decision-making had improved significantly, administrative review applications would not only decline, but so would administrative litigation appeals. As the latter has not occurred (see Chapter Seven), we can safely assume there are still significant levels of dissatisfaction with administrative decisions.

Further support for this interpretation is provided by evidence from questionnaires conducted by administrative review system personnel in the PRC. In a report on the administrative review situation in Liaoning, a questionnaire survey was conducted in an

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unnamed city involving 582 people. They were asked about their encounters with administrative organs in that city and whether or not they were happy with an organ's handling of their case, regardless of whether this resulted in an administrative penalty being imposed or not. The answers revealed that 134 people (23%) were happy with how their cases had been handled, while 448 people (77%) were not. The administrators of the questionnaire state that the figure of 77% who were unhappy with the handling of their case did not translate into numbers of applications for administrative review and that this significantly affected the ability of the administrative review system to play a positive part in redressing administrative grievances.

It is commonly said about administrative litigation in the PRC that there is a link between wealth and the likelihood of a person using the new administrative law system to defend his or her rights. The characteristics of the relationship are described, in a saying, as a bean pod: bulging in the middle and tapering at the ends. The ends of the pod, where the smallest number of cases occur, are said to be the very poor areas of the PRC where people fear to take action against the government more than elsewhere, and the very rich areas where money can buy a desired outcome outside the legal system.

The figures quoted here demonstrate this bean pod saying to be false for administrative review in 1991 and 1992. Beijing and Shanghai are the two wealthiest province-equivalents in the PRC in terms of per capita income, yet the rate at which their citizens used the administrative review system to defend their rights varied enormously. The case of Sichuan Province further demonstrates the lack of clear links between wealth and the likelihood of a person using the formal legal system to gain redress for administrative grievances.

54 See for example, "From the point of view of the implementation of the review system, the most important problem currently is the low number of review cases, even to the point where the number is declining" in Jiang Ming'an (ed.), "Investigative Report", 1998, p.258.
56 Interview with a judge of 10 years experience in the administrative division of the Supreme People's Court, Beijing, 1998.
Geographical variations may be explained, however, by a combination of wealth and the political-legal environment. This suggestion is built upon an explanation put forward to explain the regional variation observed in administrative litigation appeals. The argument is that administrative organs in province-equivalents which have a high rate of administrative review applications are fairer in their handling of the applications, which thus contributes to even more applications.

Table 4: Numbers of administrative review cases which may have been decided favourably for applicants in three province-equivalents of the P.R.C. in 1991

*Overturned cases: decided favourably for the applicant.
*Changed cases: the review organ changed the administrative decision, usually in favour of the applicant.
*Withdrawn cases: the applicant decides to withdraw the case during the course of review, either because he or she can see the case will not succeed, or because he or she has obtained some concession from the review organ during the review.
*Rejected cases: the review organ refused to accept the case for review.

NB. Confirmed cases, which are not represented here, are cases in which the review organ decides in favour of the defending organ.

<table>
<thead>
<tr>
<th>City or province</th>
<th>No. and percentage of administrative decisions overturned or changed (A)</th>
<th>No. and percentage of administrative cases withdrawn or rejected (B)</th>
<th>A + B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beijing</td>
<td>112 (35.6%)</td>
<td>72 (22.9%)</td>
<td>58.5%</td>
</tr>
<tr>
<td>Shanghai</td>
<td>364 (32.5%)</td>
<td>184 (16.11%)</td>
<td>48.6%</td>
</tr>
<tr>
<td>Sichuan</td>
<td>1955 (39.1%)</td>
<td>760 (15.2%)</td>
<td>54.3%</td>
</tr>
</tbody>
</table>


As it is not known conclusively why applicants withdraw a case from the administrative review process, it is worth separating this figure from the number of cases which it is known are decided favourably for the applicant. In the case of administrative litigation cases, there are at least two explanations given to explain why applicants withdraw a case.

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57 This idea is taken from Minxin Pei, "Citizens v. Mandarins", 1997, pp.238-239, who suggests that regional variation in the number and handling of administrative litigation cases may be accounted for by differing degrees of judicial fairness across regions.
from the litigation process. The explanation by some PRC scholars is that plaintiffs for administrative litigation realise during the course of proceedings that they will not win and as they fear to antagonise a powerful administrative organ they withdraw their suits without achieving a favourable ruling. A foreign-based scholar disputes this reasoning and claims that in 38%-45% of withdrawn litigation cases, the plaintiffs withdraw the case after the defending organ rectifies the administrative decision. 

In the case of administrative review, we do not have sufficient data to determine why a portion of cases are prematurely withdrawn, but depending on whether we include withdrawn and rejected cases among the favourable rulings or not significantly affects our analysis. If these cases are omitted from the analysis, then we can see from Table 4 that a citizen is slightly more likely to get a favourable administrative review decision

Table 5: Results of administrative review cases across the P.R.C in 1991.

*Confirmed cases are decided in favour of defending organs.
A: cases that were either overturned or changed by the review organ, usually in the applicant's favour.
B: cases that were either withdrawn by the applicant or rejected by the review organ.

<table>
<thead>
<tr>
<th>City or province</th>
<th>Confirmed</th>
<th>Overturned(A)</th>
<th>With.(B)</th>
<th>A + B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beijing</td>
<td>111 (35.3%)</td>
<td>112 (35.6%)</td>
<td>72 (22.9%)</td>
<td>58.5%</td>
</tr>
<tr>
<td>Shanghai</td>
<td>470 (41.1%)</td>
<td>364 (32.5%)</td>
<td>184 (16.1%)</td>
<td>48.6%</td>
</tr>
<tr>
<td>Hubei</td>
<td>- (50.3%)</td>
<td>- (31.8%)</td>
<td>- (15.5%)</td>
<td>47.3%</td>
</tr>
<tr>
<td>Hunan</td>
<td>-</td>
<td>593 (27.4%)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Guangdong</td>
<td>885 (59%)</td>
<td>494 (33%)</td>
<td>55 (3.7%)</td>
<td>36.7%</td>
</tr>
<tr>
<td>Henan</td>
<td>1019 (50.9%)</td>
<td>711 (35.5%)</td>
<td>233 (11.6%)</td>
<td>47.1%</td>
</tr>
<tr>
<td>Shandong</td>
<td>403 (40.3%)</td>
<td>315 (31.5%)</td>
<td>200 (20%)</td>
<td>51.5%</td>
</tr>
<tr>
<td>Jiangsu</td>
<td>492 (49.2%)</td>
<td>226 (22.6%)</td>
<td>208 (20.8%)</td>
<td>43.4%</td>
</tr>
<tr>
<td>Anhui</td>
<td>909 (45.45%)</td>
<td>647 (32.3%)</td>
<td>157 (7.9%)</td>
<td>40.2%</td>
</tr>
<tr>
<td>Zhejiang</td>
<td>1654 (55.1%)</td>
<td>774 (25.8%)</td>
<td>280 (9.33%)</td>
<td>35.1%</td>
</tr>
<tr>
<td>Fujian</td>
<td>290 (48.3%)</td>
<td>190 (31.6%)</td>
<td>64 (10.6%)</td>
<td>44.2%</td>
</tr>
<tr>
<td>Sichuan</td>
<td>2250 (45%)</td>
<td>1955 (39.1%)</td>
<td>760 (15.2%)</td>
<td>54.3%</td>
</tr>
<tr>
<td>Ningxia</td>
<td>60 (30%)</td>
<td>112 (56%)</td>
<td>22 (11%)</td>
<td>67%</td>
</tr>
<tr>
<td>Shaanxi</td>
<td>400 (57.1%)</td>
<td>204 (29%)</td>
<td>84 (12%)</td>
<td>41%</td>
</tr>
</tbody>
</table>


58 For both views see Minxin Pei, "Citizens v. Mandarins," 1997, p.843.
from an administrative organ in Sichuan as opposed to Beijing or Shanghai. Indeed, just working on cases that are definitely known to have been decided favourably for applicants, Sichuan has a higher rate of favourable administrative review decisions than every province or city except Ningxia (Column A, Table 5).

If, however, withdrawn cases are included in the analysis, then applicants in Beijing are more likely to get a favourable response from an administrative organ as opposed to applicants in Shanghai or Sichuan. Even compared to listed provinces and province-equivalents (Table 5), Beijing has the highest rate of administrative review responses favourable to applicants when withdrawn cases are included, again with the exception of Ningxia. But should withdrawn and rejected cases be included in the rulings favourable to applicants?

If, in fact, applicants in Beijing were more likely in 1991 to get a favourable ruling on an administrative review case then we would expect the number of applications for administrative review to increase in subsequent years. In fact, the number decreased marginally (Tables 1 and 3). When data from 1991-1996 are taken as a whole the rate of favourable rulings declined even further: of 1512 cases that were handled to completion under administrative review in Beijing during this period, 1038 (68.7%) were confirmed in the defending organ's favour by the review organ and 448 (29.6%) were overturned or changed in favour of applicants. This latter figure is significantly lower than the 35.6% recorded for Beijing in 1991 (Table 4).

Another factor supporting the argument that withdrawn cases should not be included with those overturned or changed in favour of the applicant is the relationship between administrative review figures and administrative litigation figures. The trend throughout the 1990s in Beijing was that as the number of administrative review applications declined, there was a corresponding increase in the number of administrative litigation figures.

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appeals. This suggests that potential applicants quickly became aware of the difficulty in obtaining a favourable ruling from an administrative organ in Beijing and so switched their tactics to filing a suit in court in the hope of gaining a better outcome. This connection between the handling of administrative review cases and the subsequent effect on administrative litigation figures has also been reported from other regions of the PRC.

On a related matter, the letters/visits system has also been affected by administrative review. In the first six months of 1991, for example, the letters/visits offices in public security organs across all of the PRC received 20,749 cases, representing a 17% decrease from the same period in 1990. This reduction could be interpreted as an indicator of better administration in the public security organs, but in light of the discussion above such an interpretation cannot stand. It is most likely that the reduced number of cases is partly the result of alternative avenues of redress becoming available.

A report which discusses figures from the whole country states that for the initial two years of administrative review (1991 and 1992), 25% of reviewed cases were subsequently filed as suits in court. Administrative litigation was increasingly regarded as able to deliver justice far better than administrative review, and thus the number of applicants who decided to try their luck with the courts after obtaining no redress from the administrative organ increased.

Administrative litigation figures available for the rest of the country support the significance of the relationship between review and litigation. Pei Minxin has shown that in 1994 the people of Sichuan were the least likely to use administrative litigation as a means of redress: in 1994 Sichuan courts received 6% of the country’s administrative litigation appeals while having 9.3% of the population. The people of Henan and Hunan, on the other hand, were most likely to use administrative litigation as a means of redress. Henan courts received nearly 15% of China’s administrative litigation appeals while the province contained about 7.5% of the population. Similarly, Hunan courts received nearly 14% of administrative litigation appeals with 5.3% of the population. Pei uses these and other figures to argue that the courts in Henan and Hunan are more likely than elsewhere in the PRC to give a favourable ruling to a plaintiff, suggesting a higher degree of judicial fairness than the national average. This view is also expounded by the head of Law Department of the PRC’s National School of Administration.

The evidence from the analysis of administrative review applications presented above suggests that the number and outcome of administrative litigation appeals is also related to the outcome of administrative review applications. The people of Sichuan were slightly more likely to obtain a favourable ruling from administrative review and thus would have been less likely to then make an administrative litigation appeal in court. The people of Henan had about the same rate of success in administrative reviews as the people of Beijing (Table 5) and yet a disproportionately higher number of them subsequently made administrative litigation appeals. Of those litigation appeals, Pei Minxin claims that plaintiffs in Henan had a two-to-one advantage over the government when the outcome of the litigation is examined. These plaintiffs did not enjoy such advantages during administrative reviews in Henan, suggesting that the administrative organs in Henan were more likely to alter an administrative decision in the face of litigation than were administrative organs in Beijing. These results tell us something of the varying degree to which administrative organs in different regions of the PRC are likely to alter an

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65 Interview, Beijing, 1998.
administrative decision during litigation, as well as something of the regional variation in
the strength of the courts.

The rate of administrative review applications is extremely low
Despite any observations that can be made about the distribution and handling of
administrative review applications, there is an extremely low rate of applications
compared to the scale of administrative activity of government organs in the PRC. In
1995, by way of example, all functional organs of the Beijing City government handled
10.5 million violations of administrative behaviour and consequently imposed nearly 8.3
million administrative penalties, a staggering rate of one penalty per 1.5 people! 66 But
only 209 applications for administrative review were made, 67 representing an appeal rate
of .0025%.

Similar conditions are reported from Xinjiang's capital, Urumqi. In 1996 the Urumqi re-
education-through-labour committee (劳动教养 laodong jiaoyang) imposed
1601 re-education through labour penalties, but received only 35 applications for
administrative review, a rate of 2.19%. The Urumqi detention and investigation
committee (收容审查 shourong shencha) imposed 1275 administrative penalties
and received only 40 applications for administrative review, a rate of 3.1%. The city's
labour bureau imposed 708 labour supervision penalties and received only one
application for administrative review. 68

There are both positive and negative reasons put forward to explain the very low rate of
administrative review applications compared to administrative penalties imposed. 69 The
positive reasons are: first, administrative organs act more within the law now than they
used to, and the professional conduct of cadres has improved such that people have no

67 Ibid.
68 Ibid, p.280.
69 Ibid. Also see: Report from Liaoning Province, “Some Thoughts on the Administrative Review System”
real cause to complain; and second, administrative organs have strengthened and improved their procedures for authorising enforcement of an administrative decision which has resulted in a reduced rate of applications for administrative review of enforcement decisions.

The negative reasons are: first, many administrative organs regard administrative review work as troublesome and do not accept all of the cases they should; second, a review organ's decision on cases is often driven by criteria that are irrelevant or harmful to the applicant's rights, especially the economic situation of the organ; third, citizens are often afraid to accuse an administrative organ; and fourth, administrative review generally provides a claimant with less than it costs in time, energy and resources, especially in rural areas. 70

Table 6: Numbers of administrative review and administrative litigation cases filed in Beijing, 1991-1996

<table>
<thead>
<tr>
<th>Year</th>
<th>Administrative review applications</th>
<th>Administrative litigation appeals</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>314</td>
<td>142</td>
</tr>
<tr>
<td>1992</td>
<td>308</td>
<td>231</td>
</tr>
<tr>
<td>1993</td>
<td>254</td>
<td>243</td>
</tr>
<tr>
<td>1994</td>
<td>219</td>
<td>290</td>
</tr>
<tr>
<td>1995</td>
<td>209</td>
<td>283</td>
</tr>
<tr>
<td>1996</td>
<td>246</td>
<td>430</td>
</tr>
</tbody>
</table>


Another factor which it is claimed contributed to the low level of review applications in the early years of administrative review, and one which no longer applies, was the exclusion of land management disputes from the scope of administrative review. 71 When the Administrative Review Regulations were promulgated in 1991, land management disputes that had been adjudicated as civil disputes by administrative organs were

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70 See the discussion above about "costs".

excluded from the scope of administrative review. This was because these cases were deemed to be civil in nature and the administrative organ was merely providing the adjudicatory service. In as much as administrative review deals with administrative disputes which involve a citizen and an administrative organ as opposing parties, these civil case decisions were unsuitable for administrative review. This provision was modified in 1994 to allow adjudicatory rulings by administrative organs on land management disputes to be appealed against in administrative review. The courts were being swamped with land management administrative litigation appeals and it was thought that this may dissipate some of the pressure. Shortly after this change in regulations the number of administrative review applications began to increase (Table 6 above), and land management disputes are now the second most frequently disputed category of administrative decisions in both administrative review and administrative litigation. The relatively low numbers of administrative review applications in the early years may have been partly caused by this. It is doubtful, though, whether even allowing land disputes to be reviewed right from the start would have given a significantly different picture. The trend during the 1990s was for review applications to decline, regardless of changes to the categories of disputes which could be taken to review. This decline was turned around in Beijing in 1996 (Table 6 above) but not so as to give the view that there was suddenly a significant proportion of review applications compared to the scale of administrative decision-making.

In this chapter we have followed the process by which a Chinese today goes about making an application for administrative review, and the outcome of such applications. The state's superior position at the outset is further strengthened by the way applications are handled and regulations are interpreted. Who the applicant is and how much knowledge he or she has of both the Administrative Review Regulations and the legal system are significant factors affecting the outcome of the application. The administrative review system is organised in a way that should provide professional checking and supervision of administrative decisions. This is achieved partly in procedural matters, but
very little attempt is made in regard to the substantive justice of the decision. Even on the issue of proper procedure, much of this is more attuned to the review organ's relationships with other organs rather than with the applicant.

The result is that there is a slim chance of success for the applicant of administrative review, and this is reflected in the very low numbers of applications. Overall, administrative review has been a failure as an attempt to protect the rights of citizens and other legal persons from state encroachment. The impetus of the system is towards bureaucratic reform and improved regularity of administration, but even in these aspects the results are disappointing. In terms of the balance theory expounded in Chapter Three, the theoretical discourse of the administrative review system is oriented more towards management rather than controlling administrative power, but there has been very little impact in practice.

The situation for the applicant is not entirely dismal, though. The applicant's position in relation to the government has strengthened compared to the period before the Administrative Review Regulations were passed. He or she now knows that a review must be conducted according to a standard legal procedure and that it must examine set criteria. This reduces the chances of personal interference in the review procedure.

What the administrative review process does not provide, because it is mostly conducted on paper, is a hearing involving all of the parties to a dispute. The applicant has no opportunity, other than on the application form, to influence the outcome of the review. Because the review is conducted entirely within the administrative xitong and the applicant has only formal written access to this system, the chances of being able to negotiate a mutually acceptable solution are diminished. The administrative review process is based on the premise that negotiation with the individual applicant is not necessary. We will now turn to the phase beyond administrative review, and examine the procedure undertaken by an applicant after he or she receives a notice advising that the administrative decision has been confirmed by the review organ in favour of the
defending organ. What options are open within the bounds of the administrative law system? Are these options the only or most effective ones?
CHAPTER FIVE

PRE-TRIAL NEGOTIATION AND COMPENSATION

The interstitial period between administrative review and administrative litigation may at first appear to be a yawning chasm of filling in yet more forms and more waiting, but a closer look reveals that it is potentially a significant phase for the plaintiff. This is partly an unintended consequence of the new administrative law system, and partly a result of the pre-existing political-legal culture. Applicants for administrative review and plaintiffs in administrative litigation have different amounts of power at different stages in pursuit of redress for a complaint, so we need to examine not just the formal systems and their operation, but also the informal, in-between stages.

When a person is dissatisfied with an administrative decision, he or she has several options: apply for administrative review if laws permit; or, choose to apply for review or litigation as he or she sees fit, or a variation is to apply for litigation after an unsatisfactory review; or, apply directly for litigation if laws permit. The time period between review and litigation, or prior to a litigation case being formally accepted by a court, is not a legally defined phase, but the discussion below will show that it can be a crucial time for the applicant, especially if a claim for compensation is made at the same time as application for administrative litigation. The material in this chapter focuses on the issues surrounding compensation that are associated with the interstitial or early litigation phases. The discussion below will show that when demands for compensation and litigation are linked the two processes tend to be melded into one.

Applicants for administrative review may also request compensation at the same time as applying for administrative review, and indeed, any compensation claims must first be taken to the relevant administrative organ and only if the applicant is unhappy with the outcome may he or she then file the case at court.¹ I have no information available as to

¹ ALL, Article 67.
characteristics associated with such a course of action. But as the rate of administrative review applications is extremely low, and the rate of reversal of decisions is also low, it seems probable that administrative organs rarely pay compensation at that stage. It is more likely that an applicant who deems mistreatment serious enough for compensation to be demanded would also file an application for litigation, thus linking the two processes.

Philip Huang has explored the theme of informal phases in legal process as it applies to civil justice in the Qing Dynasty, and claims that a Qing lawsuit had three stages. The first stage began when a complaint was filed and extended until the magistrate made an initial response. The second stage was the interstitial phase before the formal court session which was often characterised by interaction and mediation between the court and the litigants. The third stage was the formal court hearing. Huang concludes that there were features of the interstitial phase that contributed to abuse of formal law, but that it was advantageous to plaintiffs by equally considering both peacemaking and law.²

It should be noted that Huang's study is of civil suits, which are fundamentally different in nature from administrative suits. Negotiation and mediation between two civil litigants may be appropriate, but if this approach is extended to disputes between citizens and the government, the citizen is often disadvantaged because of the superior power of the government. It is for this reason that mediation is prohibited as a method of dispute resolution for administrative disputes.³ But as is often the case in China, practice varies from policy so we cannot ignore the possibility that the interstitial phase plays a significant part in understanding the whole.

The interstitial phase is significant predominantly if a claim for compensation is involved, because the Administrative Litigation Law allows the use of mediation to settle compensation claims. Where mediation is used (legally) to agree upon compensation it

³ ALL, Article 50.
tends to be extended (illegally) to settle related claims for reversal of a specific administrative decision. The mediatory process may occur at any time during administrative review, or prior to, or during, administrative litigation.

The authorised use of mediation to settle compensation claims is the weakest point of the administrative compensation system because it places applicants in a vulnerable position in relation to the state. Mediation is not permissible in administrative review or administrative litigation because the issues are understood as being questions of right or wrong: that is, “did this administrative organ act lawfully when it made this particular administrative decision?” Permission to mediate in relation to any damages stemming from a specific administrative decision undermines the administrative review or litigation process. The reasons given by scholars in China as to why mediation is permitted in compensation claims do not engender confidence. Some see the system as based on a principle that separates the exercise of administrative power from state responsibility to pay for the consequences of an unlawful exercise of that power:

Mediation is permitted in administrative compensation litigation because the essence of administrative compensation litigation is to resolve the question of administrative compensation; it is not related to the exercise of administrative power.4

And further:

Administrative compensation litigation is not a question of the lawfulness of the specific administrative act, but stems from the question of whether the lawful rights of the parties were harmed and whether the administrative organ should assume responsibility for damages.5

To claim that administrative compensation is not related to the exercise of administrative power is a weak attempt to excuse the state for not designing an administrative law system that financially supports the declared aim of lawful administration. Linking compensation to the question of harm caused to the applicant rather than the legality of the administrative act weakens the responsibility of administrative organs to carry out their duties lawfully, regardless of the consequences. This may raise questions as to the

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intentions of the new administrative law system. Without legislative and financial support to deliberately compensate victims of maladministration, the process of administrative review and litigation may be hollow.

This chapter will continue the storyline of what it is like for a plaintiff during this period. What events are supposed to happen? What events may, in fact, happen? How does this affect the plaintiff? What are the relative positions of power of both the state and the plaintiff? What factors impinge upon this power? And whose interests are served?

**What should happen?**

When a plaintiff wishes both to complain about a specific administrative penalty decision and to claim compensation, what is the administrative organ and the court supposed to do?

Early in the life of the Administrative Litigation Law, administrative compensation claims were often handled (incorrectly) as civil suits by the court. The situation was often complicated by the fact that certain types of administrative litigation suits tended to engender civil compensation suits. Public order and environmental disputes, for example, often involve at least three parties: the administrative organ, the plaintiff who is penalised, and one or more third parties who have been adversely affected by the plaintiff's behaviour. The administrative organ, as part of its administrative penalty, may order the offender to pay compensation to another party who was harmed as a result of the offender's actions. If the offender wishes to complain about this decision, the case should most properly be handled as a civil suit. Or the third party(ies) themselves may wish to lodge a compensation suit against the person who was penalised, for example, as a result of behaviour that polluted the environment and that subsequently affected the

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third party(ies)' ability to do business. This latter situation also involves a civil dispute that should be handled differently to an administrative dispute, but often they were lumped together.

Where a plaintiff requests compensation from an administrative organ for damages caused by the administrative decision, this is the proper context for an administrative compensation suit. The correct handling of such disputes when the plaintiff wishes to pursue both cases in court is to establish two administrative suits. There are at least three scenarios that may lead to this. The first occurs when investigation of the legality of a specific administrative decision directly relates to the compensation claim, causing the plaintiff to request that the court both overturn a specific administrative decision and award compensation. The second scenario occurs when an administrative organ, on its own volition, cancels its specific administrative decision but no recompense is offered to the plaintiff. The plaintiff may have requested compensation from the administrative organ, which was refused, so he or she requests the court to award compensation. The third scenario occurs when the plaintiff actually receives a penalty for the action that had caused harm to a third party. This may arise, for example, if a public order management offender is given an administrative penalty for beating up a third party, and the third party challenges the penalty on the grounds that it is too lenient. The third party then brings an administrative compensation suit. This latter scenario is similar to the first scenario outlined above in that the court should, at the time of considering the legality of the specific administrative act, also consider the question of compensation.

The practicalities of handling two suits which have the same plaintiffs and defendants almost inevitably means that there is a tendency to consider all of the issues associated with the cases together, and indeed some Chinese legal scholars raise this as a sensible

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But it is made clear that the primary factor to consider is the legality of the specific administrative decision, and from this should flow any compensation award. What is the likely sequence of events if a plaintiff files both an administrative litigation appeal and an administrative compensation claim as a joint suit? If a diversion away from proper procedures occurs, at what point does this occur, and what are the consequences? Which party initiates the diversion and exactly how does it happen? A specific administrative compensation case will help clarify a possible sequence of events.

How mediation in the interstitial phase works

The location of the events in this case will be familiar to any reader who has stayed at the Beijing University campus. We do not know if this is a genuine case record, and it is possible the events may have been re-written to demonstrate the state's fair handling of the matter. The importance of the record, however, is that it shows how mediatory activity undertaken during the pre-trial phase may, in some cases, significantly alter the outcome for the plaintiff.

The case records that a certain Yan Zhengxue, originally from Jiaojiang City in Zhejiang Province, deputy chairman of a fine arts cooperative and a representative in the Jiaoyang City congress, at 10 o'clock in the evening on 2 July 1993 was travelling on the 332 bus via the southern and western walls of the Beijing University campus as it travelled towards the Summer Palace. Yan was not paying enough attention to his upcoming stop, and consequently found the bus doors had already closed before he got himself organised to get off. He then started demanding loudly that the doors be opened so he could get off. An altercation with the ticket seller ensued which resulted in the ticket seller's kit being strewn across the floor and she herself being thrown to the floor of the bus.

Upon the bus' arrival at the Summer Palace, the ticket seller went to report the case, whereupon two police from the Donggongmen Station boarded the bus, handcuffed Yan

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9 Ibid.
10 Haidian District Court (eds), 审判案例选析 (Analysis of Selected Trial Cases) (Beijing: China University of Politics and Law, 1997), pp.323-328.
and forced him to go with them to the police station. At the police station the two police officials beat him up using their hands, feet and truncheons. After about 40 minutes, Yan admitted that he had a bad attitude and that he had not behaved himself after boarding the bus. At this admission, the public security officials did not impose a formal administrative penalty on Yan, but conducted mediation to settle the complaint. They allowed Yan to pay 25 yuan in compensation to the ticket seller and he was allowed to leave at 1.00am.

Yan went to hospital to get patched up. He subsequently filed an administrative compensation claim at the court on 12 July demanding compensation for his medical expenses, loss of income, and psychological stress, claiming a total of 46,956 yuan. After the court received Yan's appeal application, but before it had formally accepted the case, the political commissar and deputy head of Party affairs for the Haidian District Public Security Bureau contacted Yan and offered an apology and 2,000 yuan compensation. Yan refused and insisted on going forward with the suit. During the suit Yan reiterated his claim for 46,956 yuan, being 30,000 yuan for psychological stress, 6,300 yuan for loss of working time, 5,656 yuan for property losses, and 5,000 yuan for continuing medical expenses. He also demanded an apology. On 4 March 1994 the Haidian District Procuratorate began a public prosecution suit against the public security official who was most responsible for the beating Yan received. As a result of this suit, the official was given a criminal sentence of one year's detention and Yan was awarded 8,000 yuan compensation, which he accepted. Subsequently, however, Yan was sent off to Heilongjiang Province on a re-education through labour punishment for the administrative offence he had committed.

**What is the significance of this process?**

There are several significant points to observe in this case: the intermediate position created by the compensation claim, the timing of the mediatory offer, and the Party's role in initiating the mediation and compensation. In this case record, a mediatory offer of compensation was made prior to the court's acceptance of the case for consideration. Is
this the proper sequence of events, or should the court first accept the case and then permit mediation to begin? None of the three laws that regulate the new administrative law system — The Administrative Litigation Law, The State Compensation Law or the Administrative Review Regulations — state that mediation for compensation claims can be conducted prior to the formal acceptance of a case, and yet both the explanatory literature¹¹ and interviewees¹² claim that this is quite legal. Mediation for compensation claims can be conducted before a case is accepted, at the time when it is accepted, or during the actual hearing.

There are several implications of mediating a compensation claim prior to a formal court hearing. First, as in the example above, the amount of compensation offered is likely to be lower than what would otherwise be obtained from a court ruling, and this functions as a form of "silence money" on the understanding that the plaintiff would then withdraw the suit.

Second, officials who should be held accountable for illegal acts may go unpunished or lightly punished. In the case discussed above, the public security organ claimed it had offered 2,000 yuan compensation to Yan, suspended one police official from duties, and had imposed an administrative disciplinary sanction on the other. All these responses are considerably lighter than those imposed after the public prosecution suit. If a plaintiff is interested in securing the accountability of public officials as well as monetary compensation, then he or she must use the formal legal system to pursue the case as far as possible. The downside of this is that in cases like Yan's, the plaintiff may end up with an administrative penalty that he or she did not previously face.

Third, if Yan had initially been given an administrative penalty and wished to appeal against it, this is likely to be dealt with at the same time as an intermediary offer for compensation. Legally, the courts should establish two separate cases, one to deal with

¹² Interviews with judges and senior officials of the Supreme People's Court of the PRC, Beijing, 1998.
the administrative penalty appeal, for which mediation is prohibited, and one to deal with the compensation claim, for which mediation is permitted. But because both cases would have the same plaintiff and defendant they are commonly handled as one case, and mediation is used to settle both matters. This considerably reduces the chances of the plaintiff receiving a fair response because the administrative organ, by far the more powerful of the two parties, is in a position to pressure and cajole the plaintiff.

Fourth, intervention by the Party or some other institution (such as an administrative organ) is more likely during the intermediate phase. In the case above, it is highly likely that the Party was involved with the public security organ in determining the initial (lighter) punishment to be imposed on the police officials. This demonstrates the continued protection of state officials from the full legal consequences of their actions, a disappointing observation when examining official accountability.

The nature of specific, official accountability is dealt with in the Administrative Litigation Law, which makes it clear that where a compensation claim is awarded, the administrative organ must first pay the claim. After this, the organ should (应 当) order the offending official to pay a part, or all, of the claim to the organ, but there is no imperative that it do so. Whether or this occurs depends on two main factors: intentions and significant mistakes. If the official clearly knew that the decision would encroach upon a person's lawful rights then he or she should be asked to pay some of the compensation claim. If, on the other hand, the action was a "significant mistake", more flexibility is permitted as to whether the official should make a personal financial contribution to the claim. "Significant mistakes" are indicated when there are laws that the official should have paid attention to, had the ability to do so, but did not, thereby causing harm to a citizen.13

Administrative organs may make their own rules in the handling of such matters. The State Administration for Industry and Commerce, for example, has issued implementing measures that cover the handling of administrative compensation claims in its organs. On the subject of officials being requested to pay part or all of a compensation claim, the measures state that such decisions lie with the director of the organ concerned. They also state that if an official is requested to contribute to the compensation claim, then not more than 10% of the official’s salary may be deducted each month, depending on the responsibility involved.\[^{14}\] If a director does take a decision to pursue the official for a contribution, the matter is then passed to the supervision department of the offending official’s work unit, or to the judicial organs if it constitutes a crime.

None of my interviewees had ever heard of any administrative organ ordering an employee to pay up for a compensation claim, indicating that this is not carried out in practice, or is certainly not routine. Some said that it is more likely that the organ would give a warning or an administrative disciplinary sanction (*chufen*) to the official, given that official salaries are low and there is concern for the official’s welfare.\[^{15}\] This concurs with the case above, where the public security organ initially imposed internal disciplinary sanctions on the officials.

The courts have no formal legal control over the way an offending official is dealt with, as this is strictly an internal (*neibu*) matter of the administrative organ. However, once a decision is taken to publicly prosecute the official, as above, the courts might play a role in securing a more appropriate punishment. The effect of this type of system is that administrative organs may find themselves litigated against because of unlawful behaviour and there may, if all goes well for the plaintiff, be some redress for the *effects* of that unlawful decision, but the unlawful behaviour itself is beyond the reach of the


\[^{15}\] Interview with a member of the Chinese Academy of Social Sciences Law Institute, Beijing, 1998.
legal system unless the organ decides to hand the case to the procuracy. Unlawful administrative behaviour most often remains subject only to internal departmental handling by supervision departments.

What is the effect of this type of internal handling on the numbers and patterns of administrative compensation claims? There is very little information available about administrative compensation in comparison to administrative review and administrative litigation. This is partly because the State Compensation Law, which regulates administrative compensation, was only passed in 1994, so the effects of it have not yet been systematically studied. There is, however, some information available about how administrative compensation has worked in certain areas of China, and this will be relied upon heavily in the next section. The reader should be cautioned against assuming that the characteristics of administrative compensation claims presented below for Tianjin, Hebei, and Hubei are indicative of what occurs across China generally. The features vary a great deal even within the three areas studied below, and it will become clear why generalities cannot be presumed.

**Administrative compensation**

The number of claims for administrative compensation in China has varied according to the law that regulated such claims. During the early 1980s, the State Constitution and the Law of Civil Procedure permitted administrative compensation claims. Doubtless the relative newness of the idea that the state should bear responsibility for its actions, combined with regulation by laws which did not specifically cater for administrative cases, contributed to the very low number of administrative claims. In Tianjin, for example, only four applications for administrative compensation were made to courts at all levels during the 1980s. Similarly in Hebei Province, there were only six applications for administrative compensation made to four middle-level courts in the province. After the passage of the Administrative Litigation Law (1989) and the State Compensation Law (1994), however, the same courts in Tianjin received 61 applications for administrative
compensation and those in Hebei Province received 93.\textsuperscript{16} In Hubei Province, among administrative litigation cases that were handled to completion in 1996, 529 cases related to administrative compensation.\textsuperscript{17}

The effects of the passage of the State Compensation Law in comparison to the Administrative Litigation Law have not been as dramatic. That is, the passage of the Administrative Litigation Law in 1989 had a greater effect in increasing the number of administrative compensation claims than did the subsequent passage of the State Compensation Law. In Tianjin, up until 1997 the courts received 29 applications for administrative compensation under the Administrative Litigation Law (a dramatic increase from four cases during the 1980s), while 32 were received under the State Compensation Law. If the SCL had not been introduced, the 32 cases would most likely have been appealed under the ALL. Furthermore, the number of compensation cases appealed under the ALL probably declined after the passage of the SCL (the breakdown of available figures does not allow precise analysis) as applicants began to use the new law, but there was not as dramatic a shift to the SCL as there was to the ALL in the early 1990s. Similar proportions applied to Hebei, with 42 applications and then 51 applications.\textsuperscript{18}

\textsuperscript{16} Gao Ruomin and Lu Jianguo (Tianjin City High Court judge and Hebei Province High Court judge), "Where there is power there should be redress - Where government organs encroach upon people's rights they should also assume responsibility" (an investigative report into the factual situation of the administrative compensation system in Tianjin and Hebei) in Jiang Ming'an (ed), "Investigative Report", 1998, p.286.

\textsuperscript{17} Jiang Ming'an (ed.), "Investigative Report", 1998, p.308.

The situation in Tianjin and Hebei

Are claims independent or part of a litigation appeal?

Are administrative compensation claims related predominantly to an administrative litigation appeal against a specific administrative organ, or do they arise as independent disputes? There is some evidence to suggest that the majority of administrative compensation claims relate to specific administrative decisions, and that there is a correlation between the high number of administrative review and administrative litigation appeals made against public security organs and the pattern of compensation claims.

Table 7: Numbers of administrative compensation claims made against organs in Tianjin and Hebei from 1989 to 1997

<table>
<thead>
<tr>
<th>Administrative organ</th>
<th>Tianjin - 3 levels of courts</th>
<th>Hebei - 4 middle level courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Industry &amp; Commerce</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Tax</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Public Security</td>
<td>24</td>
<td>24</td>
</tr>
<tr>
<td>Planned Childbirth</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Land Management</td>
<td>7</td>
<td>5</td>
</tr>
<tr>
<td>Government</td>
<td>7</td>
<td>48</td>
</tr>
<tr>
<td>Culture</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Public Management</td>
<td>2</td>
<td>-</td>
</tr>
<tr>
<td>Health</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>Other</td>
<td>14</td>
<td>8</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>61</strong></td>
<td><strong>93</strong></td>
</tr>
</tbody>
</table>


Table 7 demonstrates clearly that in Tianjin the public security organs, as well as attracting the lion’s share of administrative review and litigation complaints, also attract the largest number of compensation claims. A similarly large portion applies to Hebei but was eclipsed there by claims made against local governments. This has significant repercussions for the argument presented in this chapter about the interstitial phase of this system of redress. If most compensation claims are related to an administrative litigation
appeal against a specific administrative decision then this heightens the probability of mediation being applied to both claims, which adversely affects the plaintiff's rights.

The other interesting observation to be noted from Table 7 is a stark difference between urban and rural areas when it comes to requesting administrative compensation from the local government itself. Three levels of courts in Tianjin received only seven claims compared to 48 among four rural-based courts in Hebei Province, but we do not have sufficient information about the populations covered by the courts to make any firm interpretations from this data.

Table 8 below provides further evidence for the argument that compensation claims are, by and large, related to an appeal against a specific administrative decision.

Table 8: Administrative compensation claims and administrative litigation appeals in Tianjin and Hebei from 1989 to 1997

<table>
<thead>
<tr>
<th></th>
<th>No. of cases received as part of a joint suit.</th>
<th>No. of cases received as independent claims.</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tianjin</td>
<td>54 (88.5%)</td>
<td>7 (11.4%)</td>
<td>61</td>
</tr>
<tr>
<td>Hebei</td>
<td>70 (75%)</td>
<td>23 (24.7%)</td>
<td>93</td>
</tr>
</tbody>
</table>


The great majority of compensation claims relate to a specific administrative decision that the plaintiff also wishes to appeal against. The reasons for this are threefold. First, administrative organs refuse to recognise and take responsibility for their own unlawful behaviour. Second, in the few cases where administrative organs admit they have performed an unlawful act and cancel the decision, they often give compensation to the victim and thus the victim usually does not then file a suit at court. The implication of this is that all cases which are filed as joint suits (both as a litigation appeal and compensation claim) had been previously rejected by the administrative review organ for both the specific administrative decision appeal and the compensation claim. Third, compensation claims must first be taken to the administrative organ, and the organs hope
in vain that even though they disallow the compensation claim, the applicant will not take the suit to court.\(^{19}\)

**What proportion of applications for compensation does the court accept?**

Table 9 below indicates a varied pattern of acceptance, with courts in Hebei more likely to accept applications than courts in Tianjin, but overall the plaintiff's chances of getting a court to examine a case is about 50%.

**Table 9: Numbers and percentage of administrative compensation claims accepted and rejected by courts in Tianjin and Hebei from 1989 to 1997**

<table>
<thead>
<tr>
<th></th>
<th>Cases accepted</th>
<th>Cases rejected</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Tianjin</strong></td>
<td>25 (41%)</td>
<td>34 (55.7%)</td>
<td>61*</td>
</tr>
<tr>
<td><strong>Hebei</strong></td>
<td>52 (55.9%)</td>
<td>41 (44%)</td>
<td>93</td>
</tr>
</tbody>
</table>

*Two applications were not completed.


**What sort of compensation demands are made?**

In line with what we already know about administrative compensation, we can expect that most claims will be related to violations of law by public security organs and will therefore involve claims for personal and property damages. But the evidence available suggests even more than this.

**Table 10: The nature of compensation demands in Tianjin and Hebei from 1989 to 1997**

<table>
<thead>
<tr>
<th></th>
<th>Return of property</th>
<th>Property damage</th>
<th>Personal harm</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Tianjin</strong></td>
<td>13</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td><strong>Hebei</strong></td>
<td>26</td>
<td>3</td>
<td>23</td>
</tr>
</tbody>
</table>


The pattern of specific demands for compensation relates, as expected, to personal harm and property damage caused by organs such as the public security, and industry and commerce bureaus. The claims for return of property relate to public security organs’ decisions to confiscate property as part of an investigation into an offence, such as the example used in Chapter Four of the offender who manufactured flick knives. Plaintiffs are not only complaining against the specific administrative decision which imposed a penalty, but also are claiming their property back. There are also a significant proportion of claims against personal harm, further evidence that abuses of power are common in Chinese public security organs.

Table 11: Results of compensation claims made to courts in Tianjin and Hebei

"yes": compensation claim was deemed payable by either the court or the defending organ.  
"no": compensation claim deemed disallowed by the court and possibly the defending organ.

<table>
<thead>
<tr>
<th>Court decision</th>
<th>Plaintiff cancels suit</th>
<th>Unable to be completed</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;yes&quot;</td>
<td>&quot;no&quot;</td>
<td>&quot;yes&quot;</td>
</tr>
<tr>
<td>Tianjin</td>
<td>7</td>
<td>30</td>
</tr>
<tr>
<td>Hebei</td>
<td>51</td>
<td>23</td>
</tr>
</tbody>
</table>


The results in Table 11 can be discussed in three groups: cases where the plaintiff and the defending organ came to a mutual agreement before the formal court hearing took place; cases where this was attempted but failed; and cases where either the plaintiff or the defending organ did not appear at all interested in negotiating an agreement, thereby necessitating a formal court hearing.

In Tianjin, there appears to be a positive correlation between a pre-court negotiated agreement and the likelihood of plaintiffs subsequently withdrawing a suit. In 18 cases plaintiffs withdrew their suits after compensation was deemed payable, and in 4 cases plaintiffs withdrew their suits without receiving any compensation. But there is also clearly another group of cases for which negotiation may have been tried and failed, or where either or both parties were unwilling to even try to negotiate a pre-court settlement.
In a majority of these cases (30) the court disallowed the compensation claim. The implications of this are twofold. First, in Tianjin most cases were withdrawn from the process by applicants presumably because they had already achieved a satisfactory outcome. Second, where defending organs refuse to make an offer of compensation in the pre-court stage, most plaintiffs will still take their case to court but the court will disallow the claim, thereby supporting the government’s position.

In Hebei, however, the situation is different. In only one case did a plaintiff withdraw a suit after receiving compensation. Most suits withdrawn by the plaintiff were done so even though he or she had failed to obtain compensation. But if plaintiffs persisted in taking their cases to court they had a much better chance of achieving their claims than did plaintiffs in Tianjin.

The implications of this finding are twofold. First, it is not clear-cut that plaintiffs withdraw their suits from the process only because they have achieved a favourable concession from the defending organ. The situation varies from place to place, and without full statistical data it is difficult to make a conclusive assessment. Second, administrative organs in Hebei Province are more likely to change a previously unfavourable administrative review or compensation claim decision in the face of an administrative litigation case in court. This tells us both that the courts in Hebei are more confident in facing administrative organs than those in Tianjin, and that administrative organs see themselves as slightly more subject to the law there than in Tianjin.

Do administrative organs pay up?
The execution of court judgements in China has been plagued by several factors: the low position of the courts, the superior power of administrative organs compared to judicial organs, and the structure of the government that links courts to their local governments,

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20 This counters the assertion of some Chinese legal scholars that administrative suits that are withdrawn during the process indicate the failure of the ALL to provide legal redress. It also counters Minxin Pei’s assertion that plaintiffs withdraw suits on the basis of rational reasoning and not fear or distrust. See Minxin Pei, “Citizens v. Mandarins”, 1997, pp.843-844 for both views.
thereby creating local strongholds. In the past it was extremely difficult to get a court ruling from one district executed against an administrative organ from another district. The new system of administrative law has also foundered on these structural problems and has failed to deliver due compensation payments by organs outside the ruling court's area. But again, the patterns are different for each area.

Table 12: The execution of administrative compensation rulings in Tianjin and Hebei

<table>
<thead>
<tr>
<th></th>
<th>No. of cases where court ruled compensation is payable</th>
<th>Executed</th>
<th>Not Executed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tianjin</td>
<td>7</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>Hebei</td>
<td>52</td>
<td>37</td>
<td>15</td>
</tr>
</tbody>
</table>


It can be seen from Table 12 that 14% of court rulings in Tianjin were unable to be executed compared to nearly 30% in Hebei. In cases where execution was not achieved it is claimed that the reason is local protectionism. Although the variation between the two cities is considerable, it is clear that the judicial system does reliably deliver due compensation. If the compensation ruling involves return of property or a small amount of money then the chances of execution are very good. Conversely, if the amount of compensation involved is large, or the ruling requires a considerable amount of money to be returned, it is often the case that the defending organ has diverted the money for another use. In such circumstances the likelihood of the plaintiff being awarded what is due is very small. This demonstrates that the new administrative law system has not been able to overcome some significant operating problems in the Chinese bureaucracy.

Some Chinese scholars claim that even though there are problems in the administrative compensation system, it still does protect the rights of some people from state

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encroachment. But for this to be possible the plaintiff must be prepared to take the case to court (after first going through the required procedures within the administrative organ). Within administrative organs there is very little appearance of self-regulation and effective supervision.

Furthermore, merely protecting the rights of a few people from state encroachment, while important to the individuals involved, is the lowest possible standard to be expected of a system which claims to protect the rights of citizens from powerful state maladministration. These few successes should be the bare minimum standard by which the success of the system is measured. The fact that so few successful compensation claims are made demonstrates that the system has failed to deliver an effective avenue of redress against state encroachment.

**The situation in Hubei**

It is worth noting that the majority of the published information about the new administrative law system has been collected by judicial officials and not administrative officials, especially information about administrative compensation. An investigation about administrative compensation in Hubei Province, conducted by judicial officials, reputedly failed to obtain much information from administrative organs as to the numbers and characteristics of administrative compensation claims made to them. This may reveal anything from complete lack of interest on the part of administrative organs in systematically monitoring statistics related to lawful administration, to a reluctance to reveal statistics that may paint an unflattering picture of administrative organs. Whatever the reasons, information is patchy.\(^{23}\)

In 1996, Hubei courts at all levels received 6,657 administrative litigation appeals. Of these, 529 had a related administrative compensation claim. The great majority of these administrative compensation claims (408) were filed at the same time as an administrative litigation appeal against a specific administrative decision, while only 121

compensation claims were filed as independent suits. This echoes the situation in Tianjin and Hebei. Claims against encroachment on personal rights numbered 314, and claims against encroachment on property rights came to 215. In a little over half of the cases, (297 cases, or 56%) courts decided that compensation was payable, and in most cases where compensation was deemed payable mediation was used to agree on the amount (232 cases, or 78%).

As in Tianjin and Hebei, the majority of administrative compensation claims are associated with an administrative litigation appeal, and most of these are resolved by mediation. And like Tianjin but unlike Hebei, plaintiffs are likely to withdraw a suit during the procedure if the defending organ initiates an offer to pay compensation. The overall picture is not greatly dissimilar from that in Tianjin or Hebei. There are some successes, but then we should expect this.

**What conditions constitute harm?**

The State Compensation Law lacks any details as to the conditions under which administrative compensation is payable. There are general guidelines provided, such as if citizens are illegally detained or torture is used, but just how these violations are measured is left undefined. Compensation is only payable if an administrative organ encroached upon the rights of a person so as to constitute harm to them or to their property. But why is it that the majority of compensation claims are filed as joint suits with an administrative litigation appeal? Is it the administrative decision itself which is in question, or is it the way in which the decision was made, or is it illegal behaviour by the organ, carried out while the person was dealing with the organ? In the case of Mr Yan and the bus, it was illegal behaviour by the organ’s officials that occurred while the plaintiff was dealing with the organ that was in question. Most claims relate to a specific administrative decision and involve personal harm or property damage, so how do these types of violations relate to specific administrative decisions?

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When an administrative detention penalty is imposed, there are four types of circumstances which commonly give rise to personal harm or damage to property. First, the organ enforcing the detention penalty does not have legal authority to do so. Only public security organs at county level or above have authority to enforce administrative detention, so where a lower level organ does so it is in violation of the law. Second, where a person is detained in absence of any facts or evidence of wrongdoing. Third, where detention is imposed on the wrong party. Fourth, where the legal time period for the detention has been exceeded. From this list it is clear that for compensation to be payable there does not necessarily have to have been physical harm caused to the person. If a person is detained mistakenly or because of poor procedural protection, but no physical harm has been caused while in custody, then compensation should be payable. A similar reasoning applies to property violations: if a person’s property has been mistakenly or carelessly confiscated, but is subsequently returned unharmed, then compensation should still be payable.

In the cases discussed above from Tianjin, Hebei and Hubei, it is clear that the compensation claims relate to incidents of physical harm caused to a person, or property damage caused by failure of the organ to return property and make restoration. These compensation claims did not arise out of circumstances of mistaken or poorly implemented detention that, when discovered, were immediately put right. A plaintiff would be unlikely to go to the trouble of filing a compensation claim in such circumstances. Chapter Four showed how difficult it is for an applicant of administrative review to get an application as far as being considered by the review organ, and this chapter discussed the similarly poor response by administrative organs to compensation claims. Plaintiffs will most likely only file a compensation claim if the circumstances are extreme, as in the case of Mr Yan and the bus.

The claims filed in Tianjin, Hebei and Hubei involve incidents where the plaintiff was physically harmed or property was confiscated and not returned. There is no lawful reason

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why a person should be physically harmed as a result of the imposition of an administrative penalty, so in all such compensation claims we can assume the person has been harmed as a result of unlawful behaviour carried out during the handling of the dispute. In short, for these cases, it is not the administrative decision itself which is primarily in question, nor the decision-making process, but rather the illegal behaviour of the administrative officials handling the dispute. Claims relating to return of property are more complicated in that property may, in some circumstances, be lawfully confiscated as a result of a specific administrative decision, and we have no way of determining which of the claims above involve lawful, specific administrative decisions and which do not.

The implications of this are problematic for the new system of administrative law. The Administrative Litigation Law clearly links administrative compensation to the carrying out of specific administrative decisions by organs or their personnel. But if a significant proportion of compensation claims arise not because of a specific administrative decision but because of unlawful behaviour by administrative officials during the handling of a case, then the law’s intentions are undermined. The permitted use of mediation to settle compensation claims only exacerbates this situation because a plaintiff is placed in the position of having to mediate over return of property that is rightfully the plaintiff’s, or worse still, mediate over personal injury caused by administrative officials. If the administrative decision was unlawful then there should be no question of the plaintiff getting his or her property back, and no question of the state not paying relevant medical expenses and so on. In short, in some case the compensation system works to further opportunities for the state to steal from and injure citizens.

The compensation application form

The details required on the compensation application form (赔偿申请书 peichang shenqing shu) are very similar to those required on the administrative review application and Facts of State Compensation Law) (Beijing: Beijing University Press, 1998), p.104.

25 ALL, Article 67.
form and associated forms. The applicant is asked to provide his or her name, gender, year of birth, work unit, occupation, and address. This is followed by a section soliciting information on how much money and/or whether return of property is requested. Several requests can be dealt with on the one form. The next section covers the facts and the grounds for the compensation application. This must include when and where the events took place that gave rise to the application, and the outcome of the events. Evidence and materials should be included, especially records from hospitals or doctors that refer to the applicant's injuries, or repair bills if damaged property is involved. The final section of the form contains space for the applicant to record the organ to which the compensation application is directed, and the date of the application. The applicant is also asked to provide duplicates of important documents such as the administrative review organ's decision to cancel an administrative decision, or a court's ruling on an administrative litigation application.

Similar to administrative review applications, if the application form is deficient in some way the compensating organ is supposed to advise the applicant that extra information is required. It is not permitted to use these deficiencies as an excuse to refuse acceptance of the claim.

The applicant needs to be familiar with this type of document and the provisions of the law in order to state his or her case clearly. Since lawyers are not generally known to be involved at this stage, the applicant is left very much to his or her own devices and knowledge. Further to this, since the compensation claim is to be dealt with by the compensating organ only after an administrative review or litigation decision has been made, a duplicate copy of the relevant decision gets attached to the compensation application. This means that the compensation claims are viewed as connected to, and perhaps pre-determined by, any administrative review or litigation decisions. This places compensation claims as secondary in importance to review or litigation decisions.

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All applications should be accepted for consideration if the format is correct, if the applicant meets the legal conditions, if the demands are within the scope of the law, and if the application has been made within the allowed time period. A decision on whether compensation will be deemed payable should be made within two months of the compensation organ receiving the application.\(^{27}\)

**Exclusions from the scope of administrative compensation**

The State Compensation Law does not state any specific exclusions for the scope of administrative compensation that are similar to those in the Administrative Litigation Law and the Administrative Review Regulations. The State Compensation Law only specifically excludes the payment of administrative compensation in the following circumstances:

- where personnel of administrative organs commit individual acts that have no relationship to their exercise of powers and functions;
- where citizens, legal persons, and other organisations cause harm through their own acts; and
- other circumstances prescribed by law.\(^{28}\)

However, explanatory literature on this matter reveals that there are, in fact, exclusions and mitigating circumstances for which the state disclaims compensation responsibility, some of which are similar to those in the ALL and ARR. The law itself is not the sole source of authority in practice.\(^{29}\) This has commonly been the case in PRC law, but it is disappointing to discover continuance of this practice in matters that particularly pertain to rule of law, as does administrative law. The problem posed by diverse sources of authority in this matter is that the diversity may be unending and opaque unless it is clearly stated, which in this case it is not. Such a system might work adequately if users of the system are aware of all the factors. Where they are not, they are subject to

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\(^{27}\) Ibid, p.163.

\(^{28}\) State Compensation Law, Article 5.

\(^{29}\) On this concept generally see: Perry Keller “Sources of Order in Chinese Law” in American Journal of Comparative Law, 42, 1994, pp.711-759.
manipulation by administrative organs and elite or professional services, such as those provided by lawyers. For a system that is supposed to protect the rights of citizens and be easy and simple to use, forcing applicants for administrative review, compensation, or litigation to require the services of a legal professional is at best an unintended consequence, and at worst a deliberate strategy to dissuade applicants.

There are three categories of circumstances for which the state will not assume responsibility for administrative compensation, or will assume only partial responsibility. The first category consists of circumstances which are fully excluded from the scope of administrative compensation.

- Administrative legislation, as this is considered to be abstract administrative behaviour and as such does not directly harm individuals.
- State action involving national defence, foreign affairs, the enforcement of martial law, national planning, and safety, including acts which are closely related to the public interest.
- Internal acts, which cover all the internal workings of administrative organs, although in some limited situations a person is permitted to apply for compensation for property damage caused as a result of an internal departmental administrative sanction that was found to be unlawful.
- Discretionary behaviour of administrative organs such as their choice between imposing one administrative penalty or another when both are within the scope of the law. Discretionary behaviour can only be unsuitable; it cannot be unlawful.

The second category consists of circumstances which would considerably hamper the state in its duties if it had to assume responsibility for administrative compensation.

- Military affairs, because military action is not administrative action. For compensation for military action one must apply to the military’s internal mechanisms.
- The management and installation of publicly owned utilities such as the railway, postal service and other public enterprises. If harm is caused by such utilities it is
dealt with under the civil law or a special law because the management of such utilities is not carried out by the state but by the relevant public enterprise.

The third category consists of circumstances in which the state claims mitigated responsibility.

- The urgent need to prevent danger;
- Unexpected events or accidents;
- Acts of God, or force majeure;
- Harm caused by a third party as a result of a state act, that is, when the state penalises A and it has adverse affects on B. 30

Some of these situations, such as pieces of legislation, national defence, and internal acts of organs are also excluded from the scope of the Administrative Litigation Law and the Administrative Review Regulations. The additional exclusions and mitigating circumstances for compensation applications are quite revealing. As shown above, administrative compensation is linked to harm caused to the applicant. It is not based on the principle of legality of the related administrative act. It is therefore surprising to find discretionary acts of organs excluded on the grounds that such acts can only ever be unsuitable rather than unlawful. An "unsuitable" discretionary act to impose an administrative penalty of closure of business may cause more harm to the business than imposition of a fine. This clause suggests that the state may be trying to dodge any possible situation of compensation, rather than being prepared to fairly compensate victims of maladministration.

The exclusion of any military action, including the enforcement of martial law, very clearly excludes the possibility of a repeat of the June 1989 circumstances from being subject to any compensation claims. These provisions may well benefit citizens in a time

30 These categories are taken from Hu Chonghan and Zhou Xiongwen (eds), 《中国国家赔偿法学》 (Jurisprudence of Chinese State Compensation) (Wuhan: Central Southern University of Technology Press, 1997), pp.58-61.
of war or attack from outside the country, but they can also be used against citizens to shield the state from the consequences of violence against its own citizens.

The third category of ill-defined circumstances could include a wide variety of events that the state may find beneficial to itself to exclude. Acts of God, such as floods, would be beyond the scope of compensation claims, according to this category. If the state, by its mismanagement, ignorance, or constant refusal to deal with corruption that diverts funds from infrastructure projects that may assist in flood control, is thereby responsible for a bigger disaster than would otherwise have occurred, then it is excused from financial responsibility.

**An overall assessment of the pre-trial phase**

One of the central questions to look at in the pre-trial phase is how the use of mediation to determine compensation affects the process of justice in protecting plaintiffs from state maladministration. To return to Philip Huang’s research on civil law during the Qing, to what extent does mediation overlap with formal justice? Does the use of mediation necessarily mean the plaintiff is worse off than without its use?

There is clearly a dynamic relationship between formal and informal justice when it comes to administrative compensation claims. Greater use of one affects the other. But on the whole, mediated justice tends to dilute the full effects of legal responsibility. Where a claim is large and significant, the plaintiff is better situated if he or she uses the formal legal system. Indeed, plaintiffs are only likely to use the system in these circumstances. In similar situations, the Party/state prefers to use informal, mediated justice.

What happens when the two types of justice intersect? This varies from place to place in the PRC, but the significant variables are:

- the power of the defending administrative organ;
- the power of the local courts;
- the persistence of the plaintiff; and
the nature of the compensation claim: that is, whether it is a monetary or property restoration claim.

If the claim is large it tends to be mediated through the Party and involves the courts as well as the plaintiff. Such mediation is initiated by the Party/state, not the plaintiff, and this has several implications for the position of the plaintiff. First, the state has a good chance of achieving a cheaper compensation agreement at the expense of the plaintiff. Second, the state has a greater capacity to shield its officials from the full legal consequences of unlawful administration. Third, being in a negotiating position, especially as the instigator, gives the Party/state the upper hand, and the role of the Party as the interstitial negotiator therefore may be a source of abuse. If the case is formally accepted by the court, the court may then conduct its own mediation to settle compensation claims, but it does not appear to have the authority to do this in the interstitial phase. This ground belongs to the Party.

Sources of abuse in this system also relate to legislative deficiencies. The operating environment in which administrative organs exist allows them to spend or divert funds obtained from fines before any dispute resolution is completed. This could easily be overcome by legislation placing a stop on the use of such funds until the time period allowed for dispute resolution is passed.

The limiting of official accountability to the internal authority of administrative organs, and the ability of the administrative law system to deal only with the effects of unlawful administration, undermine the credibility and authority of the system.

The State Compensation Law lacks criteria by which administrative compensation claims should be assessed, and the criteria which do exist in non-legal sources leave a lot of room for the state to avoid responsibility. This is especially so for harm caused by institutional deficiencies, such as corruption or poor political decision-making.

31 Interviews, Beijing, 1998.
Mediation is not a suitable method of determining compensation because of the superior position of the state. However, the plaintiff may reject the offer and try for a court-mediated settlement. The outcome of such settlements is not guaranteed to be to the plaintiff's advantage, although it does provide more than one option. Further to this, mediation can only properly be used to determine monetary compensation, not property claims. These latter claims should be linked to the actual damage involved and should not be subject to negotiation.

There is some evidence, however, that administrative organs in the interstitial phase have had to yield some power to the influence of a rising legal culture, the courts, and the Party bureaucracy. This seems only to occur in extreme cases, though, and in normal circumstances the system often does not work effectively as an avenue of redress. The few successes are important, but they are mere indicators that a system is in place, not that it normally operates satisfactorily or that progress has been made in the rule of law. The state remains all too powerful and the decision-making on matters of redress against state maladministration remains disconcertingly subject to personalised rather than institutionalised systems.
CHAPTER SIX

ADMINISTRATIVE LITIGATION: CONCEPTS, ACTORS AND ATTITUDES

If a plaintiff is not satisfied with the outcome of either an administrative review or an administrative litigation compensation claim, the next step in most cases is to apply to the courts to pursue administrative litigation. As outlined in Chapter Three, some administrative disputes may only be taken as far as administrative review within the organ concerned, while others may be taken directly to the courts for administrative litigation, and in still others the plaintiff may choose whether to first apply for administrative review before administrative litigation. Administrative disputes which arise frequently, such as public order disputes involving the public security organs, are often required to be taken to administrative review first as a step towards reducing the caseload on the courts.

The Administrative Litigation Law (ALL) gives the courts authority to resolve administrative disputes\(^1\). In broad terms, this law gives citizens, enterprises, and other legal entities the right to sue an administrative organ for certain specific administrative decisions that the recipient considers to be unfair or illegal.\(^2\) The ALL took effect in October 1990 as another of the legal reforms that characterised the period of the late 1980s. It has two main aims: first, to protect the legally recognised rights of citizens and other legal entities from state encroachment; and second, to safeguard and supervise administrative organs to ensure they carry out their duties in accordance with the law\(^3\).

This chapter continues the storyline of the plaintiff’s journey from receiving an administrative penalty notice to challenging the decision in court. The discussion covers three broad themes as per the chapter heading. The underlying premise of the discussion is that when application is made for administrative litigation, the legal, political and administrative cultures and practices impinge on the outcome as much as

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1 Prior to promulgation of the ALL, Chinese courts could settle administrative disputes under either the General Principles of Civil Law (民法通则 Minfa tongze) or the relevant substantive law such as the Trademark Law (商标法 Shangbiaofa), but the ALL is regarded as giving the courts wider, more general authority to deal with these disputes.

2 ALL, Articles 2 and 5.
does the validity of the complaint. Chapter Seven explores the actual process of an administrative litigation appeal, but here we explore the surrounding milieu which affects the implementation process.

A key concept for understanding the judicial part of this process is that of “administration according to law.” There are two main dimensions to this concept, both of which affect how courts adjudicate administrative litigation. The first dimension is that of the broad picture in which lawful administration is related to rule of law rather than rule by man, the manner in which administrative organs are organised, and the various responsibilities of different organs. The scope of this dimension includes administrative legislation and the implementation of administrative policies. The second and narrower dimension of this concept relates to the justice of the administrative process, and it is at this point that administrative litigation plays a major role by ensuring that administrative organs carry out the lawfully required procedures when making specific administrative decisions.

This chapter will explore these and other theoretical concepts further before moving into empirical material relating to the different players in administrative litigation and an exploration of their roles. A key issue to be explored here is the extent to which the different actors can influence the outcome of an administrative litigation appeal.

The context of administrative litigation – judicial supervision

Administrative litigation as a system operates within the context of several different structures: it is a system of law alongside criminal and civil law; it is a system of remedy for administrative abuse together with the letters/visits system and the appeals system; and it is also part of the cluster of tasks that come under the rubric of judicial supervision.

Judicial supervision of administrative behaviour has three main tasks. First, to ensure that laws, regulations, rules and so on are correctly implemented. This can range from

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3 ALL, Article 1.
4 See: Dai Changzhao, “How to Implement Legal Administration” in 中国行政管理 (China’s Administrative Management), 9, 1997, pp.19-20; Ying Songnan and Xue Gangling, “Administrative Organisation Law and Administration According to Law” in 行政法学研究 (Administrative
ensuring that administrative penalty forms are completed correctly by the administrative organs to ensuring that the correct law is used as the basis for an administrative decision. Second, to prevent, guard against and overcome bureaucratism and privilege seeking. This can range from handling administrative litigation cases where the plaintiff complains of constant and unnecessary delays and capriciousness on the part of officials, to actual requests for bribes in return for the issue of a business licence. Third, to investigate and affix lawful responsibility for illegal behaviour. This latter task relates to investigating claims by plaintiffs of alleged illegal behaviour on the part of officials and can range from outright illegality such as smuggling, through to diversions from the intentions of laws and regulations, such as would occur in abuse of power situations.⁵

Although courts have the authority to supervise all these areas, not all three areas are considered equally deserving of the strongest judicial response. Trials, investigations, and judicial recommendations are the three main methods used by the courts, and the severity of the problem determines the judicial response. Incorrect completion of administrative penalty forms, for example, will likely only result in a judicial recommendation.⁶ Incorrect application of law, on the other hand, will likely result in the court overturning the administrative decision and ordering a new decision be made.

This distinction between minor procedural deficiencies and what are perceived to be more important illegalities is written into the criteria used by the courts to adjudicate administrative litigation cases. The two most important criteria used by the courts to investigate administrative behaviour are: the application of law, and whether or not the facts of the case were used by the administrative organ in making the
administrative decision. Courts are prohibited from ruling on the rationality or fairness of a specific administrative decision as this is entirely the province of administrative organs, except where the administrative behaviour is completely improper. In such cases the courts may overturn the administrative behaviour. This bias towards "major illegalities" rather than "minor illegalities" reveals both a continuing primary concern with substantive legality, and the limits of judicial supervision over administrative organs. The procedures for correctly completing forms, for example, are regarded largely as internal administrative procedures over which the courts have no authority.

Theoretical concepts
To achieve the aims of protecting individual rights and supervising administrative organs, courts have been given the power to determine the legality of any specific administrative act that falls within the scope of the ALL. To do this the courts use the following criteria: the evidence upon which the administrative decision was made, whether or not the correct laws and regulations were used as authority for the decision, whether statutory procedures were violated or not, whether the act was beyond the authority of the organ, and whether the administrative official abused his or her powers of office.

Abuses of power and exceeding limits of authority
Two of the criteria (acts beyond the authority of the organ and acts which abuse powers of office) cause misunderstanding because the terms used in the ALL are also used, in English translation, to describe administrative behaviour that does not necessarily fall within the scope of the ALL. Acts of corruption, bribery, embezzlement and malfeasance, which are common among administrative officials in the PRC, are often described as acts which overstep the authority of the organ or as acts which abuse the powers of office. These general descriptions of corrupt acts are not what is meant by these terms within the scope of the ALL. For example, some administrative litigation cases may involve an appeal against rejection of an appeal.

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7 These criteria are not the only ones, just the main ones. See the section on "Theoretical Concepts" below for a full list and explanation of the criteria used.
9 ALL, Article 54, Clause 2.
application for a business licence, on the grounds that the administrative official asked for a bribe before issuing the business licence. If such a case is heard by the courts it may result in a decision that the official abused his or her powers of office, but not all cases of bribery occur within the context of administrative relations between citizens or enterprises and the state.

These two criteria, excess of authority (超越职权 chaoyue zhiquan) and abuse of authority (滥用职权 lanyong zhiquan) have similar connotations. Actions that exceed an organ’s "authorised limits" are chaoyue zhiquan de, often translated in English as ultra vires. The authorised limits are either geographical, departmental, or statutory limits to any penalties or fines which may be imposed. This criterion is concerned with whether or not an administrative organ has the authority, according to its place in the structure of the government, to carry out the administrative act in question. It is commonly cited by the courts, together with lack of evidence and incorrect application of law and rules, as grounds for overturning an administrative decision.

The excess of authority (chaoyue zhiquan) clause, as well as being a specific criterion in the ALL, is also used as a concept to express the general intention of the ALL as a whole: that is, administrative organs must act within the law. This conflation of language and ideas exemplifies the concept of administration according to law discussed above.

In administrative practice the excess of authority concept takes one of two forms: unauthorised use of administrative power, or unauthorised use of ordinary power. Unauthorised use of administrative power occurs when a particular law may not have been violated but the decision still encroaches upon someone’s lawful rights. For example, if a violation of the Public Order Management Penalty Regulations involves two or more parties, the public security organ may treat it as a civil case, which

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10 ALL, Article 54, Clause 2, c and d.
12 Minxin Pei, "Citizens v. Mandarins", 1997, p.856, lists 60 out of the sample 219 cases in this category. The three categories of "exceeding legal authority", "lack of evidence" and "incorrect application of law and rules" together account for 148 out of Pei’s sample of 219 cases.
13 Ma Yuan (ed.), 行政诉讼知识文库 , pp.190-193.
permits the organ to make a final ruling (终局裁决 zhongju caijue). When this type of dispute resolution is used it means the PSB has the right to make a final decision about the case and the parties are prevented from taking the case to court for litigation.\textsuperscript{14} Zhongju caijue does not involve the imposition of an administrative penalty. It is, in essence, as if the PSB acts as a mediator and the parties must, by law, accept the PSB's decision as final. If, on the other hand, the public security organ settles the dispute by imposing an administrative penalty on one or more of the parties, then the parties have the right to seek administrative review and litigation. Using zhongju caijue can be used as a means of avoiding legal responsibility for an administrative decision; this is an example of what is meant by unauthorised use of administrative power.

The second type of unauthorised use of power occurs when an organ exceeds the statutory scope of its authority. Unauthorised use of power of this type, as it is understood in administrative litigation in the PRC, can occur in several forms, with the first two being the most common:

1. A lower level agency or a lower-level government carrying out tasks that are supposed to be allocated to an upper level, or vice versa. A common form of this involves a land management agency and a rural township government when a rural resident uses cultivated land to build a house. This should be approved by the government at county level or above, but sometimes a township government improperly approves it.

2. One organ carrying out another's tasks. This problem commonly involves two very powerful organs such as a public security organ and an industry & commerce organ.

3. An administrative organ exceeding the scope of the laws and regulations when imposing an administrative penalty. For example, the Public Order Management Penalty Regulations stipulate that a person can be detained for a maximum of 15 days, so if a public security organ detains a person for 16 days this is defined as overstepping authorised limits.

\textsuperscript{14} For an explanation about the different types of adjudication that administrative organs may implement see Fang Xin (ed.), 行政复议指南 (A Guide to Administrative Review) (Beijing: The Legal Press, 1991), pp.5-6. See also Ma Yuan (ed.), 行政诉讼知识文库, pp.190-193.
In contrast, decisions that abuse power are *lanyong zhiquan de*. These decisions may include a situation where an official requests a bribe. Or, more commonly, the phrase refers to decisions which are technically within an official’s authority in that, for example, an offender against public order may be detained for no more than the statutorily allowable number of days, but the decision may be grossly out of proportion to the offence committed. If it is, then it may be declared to be an abuse of power: that is, an abuse of *discretionary* power. This criterion is concerned with the fairness of an administrative decision. However, very few administrative litigation appeals result in court decisions of this nature.

Abuse of power may also take any of the following forms:
- The motive or intention of the decision-maker was not lawful. The attitude of the official might be frivolous or mean, the official might impose an excessively heavy fine, or the penalty might be severe with intent to punish the plaintiff for making a complaint.
- The decision-maker used irrelevant considerations in making the decision.
- Lack of a common standard in the decision-making patterns, possibly indicated by capricious behaviour on the part of the official or an imperious, domineering attitude.
- Misuse of proper procedures, possibly indicated by an event such as a public security organ using the re-education through labour procedures to deal with a mentally ill person rather than the correct civil procedures.

*Specific and abstract acts*

The ALL only authorises the courts to review certain specific administrative decisions, not abstract decisions. Abstract administrative acts are usually defined as those which determine the scope of the laws and regulations. Courts are not permitted to interfere in lawful conduct of administrative power, or how broadly the scope of administrative

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16 Minxin Pei, "Citizens v. Mandarins", 1997, p.856, lists 16 cases out of the sample 219 in this category; only "failure to perform legal responsibility" and "unjust administrative penalties" rated fewer cases (14 and 9 respectively).
power reaches. Abstract acts are not directed at any particular person or any specific occasion. Abstract acts are those such as rules (规章制度 guizhang), explanations (解释 jieshi), regulations (条例 tiaoli), or sections (款 kuan).

Specific acts, on the other hand, are those that are directed towards a specific individual or group about a specific matter. The Opinion of the Supreme People's Court on Some Issues Relating to the Implementation of the Administrative Litigation Law (for Trial Implementation) defines a specific administrative act as “unilateral acts or conduct, relating to specific matters and the rights and interests of specific citizens, legal persons or other organisations, which are made by the country's administrative organs and their officials, organisations authorised by laws, organisations authorised or entrusted by the administrative organs, and individuals exercising their powers or duties during the performance of their administrative functions.”

Specific acts commonly involve the use of a decision record form (决定书 jueding shu). They represent the application of a law or regulation to a specific individual or group of people. For example, a regulation might stipulate that “all university students must pay parking fees on their campuses”. This is an abstract administrative act because it is a general statement. On the other hand, an administrative decision compelling “all students at Beijing University to pay a 10 yuan parking fee” is a specific administrative act. If the decision is written to a specified person or group the decision is a specific one.

The distinction between abstract and specific administrative acts is a grey area that is open to abuse by officials who seek to distance their decision-making from scrutiny. An interviewee described a case that occurred in Guangzhou in 1997-1998 involving the Guangzhou City Government. The government wanted to demolish a part of the city’s old residential area, requiring the relocation of 500 citizens. The people in question organised a group complaint but had great difficulty finding a court to accept

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the case because judges assessing the case for its bona fide administrative dispute features took the view that the case was abstract rather than specific. Eventually a judge was courageous enough to accept the case, although it is not known on what basis the judge determined that the decision was specific. The argument about the case being specific or abstract was compounded by the fact that the Guangzhou City Government had not written 500 individual administrative decision forms, but rather had put up public notices in the compounds and foyers of the residential buildings. Despite the Supreme People’s Court’s “Opinion”, it is recognised that the determination of a specific administrative act depends a great deal on the judges involved.

Violations of statutory procedures
As with the criteria for administrative review discussed in Chapter Four, the concept of violation of statutory procedures is related to the degree to which such violations affect the plaintiff’s substantive rights. Theoretically, even minor violations affecting a plaintiff’s rights should result in the court overturning the administrative decision, since the ALL stipulates that where statutory procedures have been violated the administrative decision should be overturned. However, in practice this is only seen as necessary when the substantive rights of the person have been harmed. For example, the court may judge that even though the defending administrative organ did not fill out the forms correctly when imposing an administrative penalty, the offender was certainly deserving of the penalty and the decision would not be overturned. Such minor violations are often dealt with through the use of a judicial recommendation to the defending organ, which will be discussed in Chapter Seven.

An important feature of procedural violations is that even if the court overturns the decision, compensation is not always payable. For example, if a public security organ decides to confiscate goods or seal up someone’s property, the organ is legally required to give notice to the property owner to this effect, and also to give a receipt for any goods confiscated. Public security organs often either do not notify the party

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20 Interviews with judicial officials of the Supreme People’s Court, Beijing, 1998.
21 Interviews with lawyers, Beijing, 1998.
22 Interviews with lawyers, Beijing, 1998.
23 Ma Yuan (ed.), 行政诉讼知识文库, p.189.
24 ALL, Article 54, clause c.
at all, or do so after the event, and regularly fail to give receipts for confiscated goods. Under such circumstances, the plaintiff has the right to administrative litigation and the court may indeed overturn the administrative decision resulting in the plaintiff getting the property back, but no compensation is payable.\textsuperscript{25} Such an interpretation undercuts the implementation of the State Compensation Law examined in Chapter Five, which connects compensation to harm caused to the plaintiff. The lack of recompense in such instances indicates that “legal” means “legal in substantive terms”, leaving the plaintiff no financial redress against defective administrative procedures.

\textbf{Application of law}

The application of law refers to which laws, regulations, clauses, and provisions are used as the basis for making an administrative decision. It is a legal requirement that administrative organs notify parties about such matters. In the application of law in administrative cases there are a number of errors that regularly arise under the rubric of “technical mistakes.” These are described as follows:

\begin{itemize}
  \item A particular law or regulation is used, when another should be.
  \item One particular clause is used when another is more appropriate.
  \item An administrative penalty should be imposed on the basis of two or more laws and regulations at the same time, but is imposed only on the basis of one, or an insufficient number of laws.
  \item Where out-dated regulations are used, or those which have had a further explanation issued about them.\textsuperscript{26}
\end{itemize}

At first glance these guidelines appear straightforward and in many instances the courts use the “application of law” criterion in a straightforward manner to simply improve the accuracy of legal administrative decision-making. However, some “technical mistakes” can completely change the nature of an administrative litigation case, to the point where different clauses of the same law can be used to allocate blame to different parties.

\textsuperscript{25} Interviews with judicial officials, Beijing, 1998.
\textsuperscript{26} Zhu Weijiu (ed), 行政行为的司法监督, pp.328, 371.
An example will help explain this very interesting avenue of possible manipulation and alert the reader to the fact that good legal advice may play a significant role in determining the outcome of a case before the courts.

The case has its origins in 1984 and occurred in an unnamed city. The plaintiff is a mechanical engineering contracting company and the defending administrative organ is the district government's water conservation office.

In 1984 the contracting company and the district government made an agreement that the contractor would demolish an old part of the city's residential area and construct new living quarters. It was the responsibility of the district housing office to relocate the residents. In February 1987 the contractor met with the housing office to ensure the procedures for the departure of residents were in hand. In 1989 demolition proceeded apace and only 2 compounds remained. One of the households moved out and its compound was demolished, leaving only a wall which it had in common with the neighbouring compound. In February 1990 the remaining household refused to move out because they did not like the alternative accommodation they had been offered. The contractor, in demolishing the second-last compound, left a tap in place because the residents were still there. The tap water spilled onto the street, eventually made a watery mess, and became a hazard for which no one was taking responsibility. Eventually the neighbourhood residents' committee contacted the emergency repairs office and the contractor. It was determined that the contractor would repair the tap.

Concurrent with these events, the water conservation office's water metre readings recorded a huge increase in water consumption by this tap in February, March and April of 1990. On 21 April the office imposed an administrative penalty fine of 1382 yuan on the contracting company for not maintaining and repairing the tap and thereby wasting water. The company was charged according to the "Township and Village Water Wastage Penalty Rules", Clause 3, Section 1, Number 6. The contractor disagreed with the decision on the grounds that the company was not the

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body responsible for the tap. The contractor applied to the district court to pursue administrative litigation.

The court took the view that laying responsibility with the company was not unsuitable; however, the rules regarding the use of neighbourhood water taps should also be considered as part of this case. The court held that the same piece of legislation was applicable, but that the penalty should have been imposed according to Clause 4, Section 1, Number 6, under which the residents could be held liable. Thus it determined that the application of law was unsuitable. The decision was overturned and the water conservation office was ordered to impose a new decision.

The water conservation office disagreed with the court’s ruling and appealed to the city intermediate court to overturn the first court’s decision and to uphold the administrative organ’s correct and lawful behaviour.

The second court took the following view:
1. responsibility for the wasted water lay with the company;
2. the company should assume responsibility for the repairs of the taps;
3. the amount of the fine was correct, and
4. saving water is very important and the city water conservation office should support administrative organs which are involved in controlling water wastage.

In this case, the alternative to laying responsibility with the company would have been to blame the residents under Clause 4. The significant point to note is that different legal clauses can be used according to where it is perceived that responsibility lies.

The editors’ commentary which follows the record of this case refers to a State Council circular about water equipment. The circular states that the maintenance of such equipment is the responsibility of the water conservation organ, the housing and property organ, and all work units who use it, leaving this case unclear as to who should pay for the wasted water. The second court decided the contractor should bear responsibility in this case, thereby supporting an important state policy over and above the close relationship between the contractor and district government, a relationship which may well have driven the first court (at the same level as the district government) to arrive at its decision.
Evidence

Evidence relating to administrative litigation cases, like that relating to administrative review cases, can be broadly classified as either important or unimportant evidence. Also parallel to administrative review, only important evidence is regarded as affecting the facts of the case and therefore open to scrutiny by the courts.\(^{28}\)

In common law countries such as Australia, courts have the power to review the evidence relating to a judicial review case because evidence in such systems is treated as a legal issue and thus reviewable by the courts. In China, evidence is treated as part of the facts of an administrative litigation case rather than as a legal issue. At present, Chinese courts have the authority to establish the facts of an administrative litigation case, and therefore review the evidence, but there is dissent among high-level administrative and judicial figures as to the appropriateness of this. The director of the Department of Policies, Laws and Supervision of the State Land Administration of the PRC holds the view that Chinese courts should not have the authority to review the facts of land dispute cases because the low level of professionalism among Chinese judges makes it difficult for them to fully understand the facts of such cases. The director would, thus, prefer that the courts be limited to reviewing the application of law.\(^{29}\) Of course, the director may be influenced by a desire to retain power to review the facts of a case and preclude another organ from exercising this power.

Support for this view is also to be found among some judicial officials of the Supreme People’s Court, who regard the authority of the courts to review evidence as a stop-gap measure until the level of professionalism in administrative decision-making rises sufficiently to preclude the need for judicial review.\(^{30}\) This institutionalised favouritism for further strengthening the power of administrative organs at the expense of the courts reveals a continued distrust of external controls on administrative power.

\(^{28}\) Ge Hengmei (ed), 土地管理中的行政诉讼 \((Administrative Litigation in Land Management)\) (Beijing: Legal System Press, 1993), p.125. See also Chapter Four for details on important and unimportant facts in administrative review.

\(^{29}\) Interview, Beijing, 1998.

\(^{30}\) Interviews with officials from the Supreme People’s Court of the PRC, Beijing, 1998.
The players in the system and their relative positions of power

Courts and judges

Courts and judges in China, as is well known, are considered an integral part of the state bureaucracy. In this section I will not refer to the position of courts and judges in this broad sense, as such matters have been adequately covered by other writers. I will concentrate here on the specific characteristics of courts and judges in administrative litigation trials. There are well known problems with courts and judicial personnel that affect many trials, such as the lack of judicial independence and the low level of legal education of trial judges, and more will be said about this below. The most distinguishing feature of administrative trials, however, is the phase of court acceptance of the case. At this point, prior to any formal investigation or hearing, the courts and their personnel already begin to have a major influence on the outcome of the litigation appeal.

Each court is organised into divisions such as economic, civil, criminal and administrative, which hear cases in those areas. Other organisational features cut across these divisions and supplement them, such as the judicial committee (审判委员会 shenpan weiyuanhui), the professional division (业务庭 yewu ting), the judicial bench division (合议庭 heyi ting), and the sole judge division (独任庭 duren ting).

The role of the judicial committee has been explored elsewhere and can be summarised as involving three main tasks: to coordinate and regularise judicial work, to discuss difficult or important cases, and to discuss issues relating to other judicial work such as the development of the legal system and determining the professional qualifications of judges.

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The professional division is the body responsible for accepting, distributing and assigning cases as they come into the court. The way this is done varies from court to court. This appears to be quite acceptable in the Chinese writings on the court system, although the varied methods of handling cases at this point must have a significant impact on whether or not a case is accepted by a court for hearing. There are four main variants:

- Some courts distribute cases to the judges in the order in which they are received without taking account of whether the case is major, minor, difficult or otherwise.
- Some courts allow ordinary cases to be chosen freely by the judges available but determine the method of handling difficult or complicated cases, such as authorising a judge to act on his or her own or stipulating that a judicial bench consisting of at least one senior judge handle the case.
- Some courts divide the judges into groups and call for each group to handle particular cases.
- Some courts distinguish the cases by their type, such as real estate, divorce, economic contracts, public order disputes, and so on. There are perceived to be benefits in having groups of judges who specialise in certain types of cases.34

There are still other methods employed. Some areas have a special division which checks over the superficial aspects of an administrative litigation appeal, such as whether there is a clear defendant and a clear plaintiff and whether the facts and evidence appear to be in order. Yet another system exists where the chief justice, or head of the administrative division, or several judges from the administrative division will decide whether to accept a case.35 There is an implied expectation though, that the judicial bench plays a major role in accepting cases, rather than just an individual.36

The judicial bench or collegiate bench division organises which judges will sit on which cases. It is stipulated in the ALL that administrative litigation cases must be heard by a collegiate bench37 and collegiate benches consist of three or more judges.

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34 Ibid, p.118.
37 ALL, Article 6.
This is an indication of the higher degree of sensitivity attached to administrative cases compared to civil cases, which may be heard by only one judge.

The “sole judge” division is the organisational mechanism which appoints individual judges to hear cases on their own. This is authorised for civil cases and minor criminal cases at a court of first hearing. Second hearings must be heard by a collegiate bench. As many administrative litigation cases are public order disputes that, if more serious, would be minor criminal offences and thus able to be heard by an individual judge, it is anomalous that such cases are currently excluded from the range which an individual judge may hear. The explanation may possibly lie in the different power relationships that exist in criminal and administrative cases.

Judges are susceptible to being pressured by administrative organs when handling administrative litigation cases. Several factors feed into this. First is the quality of judges in terms of their education and legal qualifications. The PRC Law on Judges was passed in 1995 in an attempt to clarify the expectations of, and improve the standard of, judges. The then Supreme People’s Court President, Ren Jianxin, made a significant, open admission that in the four decades since the founding of the People’s Republic judges have been managed as administrative personnel rather than judicial personnel and that this has been inadequate. The PRC Law on Judges states that judges must strictly enforce the law, and Ren was acknowledging that judges had difficulty doing this when they were treated as administrative officials rather than as a distinct profession in their own right. The new law sets standards for professional qualifications and personal ethics but does not go as far as changing the system that maintains state control over the courts.

Despite adopting new laws, though, the Chinese state has not left behind its old forms of behaviour modification. The model hero, “Judge Tan Yan”, appeared on the propaganda stage shortly after the new Law on Judges was passed. Tan Yan is a young judge from Ji’an City in Jilin Province who has been noted for his outstanding

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39 FBIS-CHI-95-054 “Ren Jianxin Discusses Law on Judges.”
impartiality, civilized manner, honesty and efficiency. Despite the low standard of personnel and professional ethics among judges, they more commonly conduct themselves illegally when handling economic or criminal cases rather than administrative cases, due to the amounts of money involved and the higher stakes. Nevertheless, such occurrences give some indication of the lack of judicial professionalism.

Another major factor that contributes to the weak position of courts and judges in administrative litigation trials is the well-known problem that the funding of courts and their personnel is tied to the local government and Party committee. It is extremely common for an administrative organ’s decision to be upheld in a local county court, and subsequently appealed in the prefectural court, a course of action which results in a higher rate of success for the plaintiff. This problem is often described as one that relates to judicial independence rather than administrative litigation, but there are grounds for the view that administrative litigation trials are more problematic than criminal, civil, or economic trials, giving rise to greater interference from local governments.

An example which aptly illustrates this pattern is recorded as having taken place in early 1991. In Wan’an County, Jiangxi Province, a peasant and some others got into a fight with a teacher. The public security organ imposed an administrative detention penalty of 15 days on the peasant and made him pay compensation, including hospital costs of 760 yuan. The peasant did not agree with the penalty and applied for administrative review. The review organ reaffirmed the 15 day detention penalty but reduced the compensation and hospital costs to 563 yuan. The peasant still did not agree, and on 5 June 1991 he applied to the Wan’an County Court for litigation. This court reaffirmed the public security organ’s decision. The peasant subsequently appealed to the prefectural court in Ji’an, which found that the methods of the first court were unsuitable, the facts were mistaken, unsuitable regulations were used as the basis for the decision, and that the county court judgement should be changed.

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40 FBIS-CHI-96-163 "PRC: Courts Launch Drive on Emulating Judge Tan Yan."
41 FBIS-CHI-1999-0614 "Dalian Court Judges Disciplined for Violating Law."
42 Interviews with judicial personnel, legal academics, legal practitioners, and administrative officials, Beijing, 1998.
second court overturned the decisions of both the public security organ and the first court.

Some scholars in China have suggested that a solution to this problem of localism is to make the first court of appeal the intermediate court rather than the local court, but this is likely to have mixed results. Party secretaries of urban areas have close relationships with the adjoining county Party secretaries, and so can easily influence the intermediate court in favour of the county. In addition, others view the idea of making the intermediate court the first court of appeal as detrimental to the rights of ordinary rural people (laobaixing) who already regard the local state (in the form of approaching the local court to sue a local government department) as a high and distant body. If they had to go all the way (both geographical and psychological) to the intermediate court as a first step they would be much less likely to appeal than now. Thus, these scholars see the solution as lying in the establishment of judicial independence as a working concept.

Further suggestions are to take the funding of judicial personnel out of the hands of the local Party, and to appoint judges from at least the provincial level, if not the centre. These suggestions have merit, but do not adequately account for the fact that judges still have to live and work in the local towns, and this can be a source of direct influence by the local Party Secretary and government.

Still other suggestions include the establishment of a separate administrative court to replace the current administrative divisions in ordinary courts. Research has also taken place on reforming the system by locating prefectural courts in county towns and broadening the geographical area over which they will have jurisdiction.

Changes that have actually been implemented may indicate at least limited support for serious change, as they focus on moving senior judicial personnel around for both

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44 Interviews with legal academics and lawyers, Beijing, 1998.
training and to deepen their experience. Judges at high-level courts, presidents of intermediate-level courts, and judges in charge of various divisions such as civil, economic, criminal, and administrative are now sent for specialised training classes to the Supreme People's Court or to a national law college. County court presidents are regularly transferred or exchanged to different county courts for work, the aim being to lessen the effects of localism.

Table 13: Age and education level of judicial personnel in Hunan, 1997

<table>
<thead>
<tr>
<th>Age or education level</th>
<th>No. of personnel</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>over 40 years of age</td>
<td>124</td>
<td>23.7%</td>
</tr>
<tr>
<td>23 – 40 years of age</td>
<td>400</td>
<td>76.3%</td>
</tr>
<tr>
<td>post-secondary (dazhuan) specialist education or higher</td>
<td>146</td>
<td>36%</td>
</tr>
<tr>
<td>PhD in jurisprudence</td>
<td>3</td>
<td>0.56%</td>
</tr>
<tr>
<td>10 or more years experience in judicial work</td>
<td>346</td>
<td>66%</td>
</tr>
<tr>
<td>5 – 10 years experience in judicial work</td>
<td>104</td>
<td>19.8%</td>
</tr>
<tr>
<td>less than 5 years experience in judicial work</td>
<td>74</td>
<td>4.2%</td>
</tr>
</tbody>
</table>

Source: Deputy Head of the Administrative Division of Hunan Province High-level Court, in Jiang Ming'an (ed.), "Investigative Report", 1998, p.343. Note: dazhuan requires two or three years legal study at an approved college or a similar course through correspondence or self-study; see Lawyers Committee for Human Rights, Lawyers in China, 1998, p.61, Note 218.

Education is often touted as an important means to overcoming the lack of judicial independence. But as will be shown in Chapter Seven this is not borne out in practice, despite improvements in the level of education among judges. The patterns of judicial

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48 Interviews with judicial personnel of the Supreme People's Court, Beijing, 1998.
49 FBIS-CHI-2000-0319 "Supreme People's Court Report to NPC."
education vary greatly across the country. In 1988 in Hunan Province, for example, over 80% of judicial personnel only had secondary level educations (gaozhong), whereas by 1997 that proportion had shrunk to 63% or less (Table 13).

Table 14: Gender, age and education levels of judges in Beijing, 1997

<table>
<thead>
<tr>
<th></th>
<th>Male</th>
<th>Female</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>79</td>
<td></td>
<td></td>
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<tr>
<td>Female</td>
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<td></td>
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<tr>
<td>Total</td>
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<thead>
<tr>
<th>Age Group</th>
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<tbody>
<tr>
<td>23 – 30 years of age</td>
<td>33</td>
<td></td>
<td></td>
</tr>
<tr>
<td>30 – 40 years of age</td>
<td>33</td>
<td></td>
<td></td>
</tr>
<tr>
<td>41 – 50 years of age</td>
<td>54</td>
<td></td>
<td></td>
</tr>
<tr>
<td>50 years or over</td>
<td>6</td>
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<td></td>
</tr>
<tr>
<td>Total</td>
<td>126</td>
<td></td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Education Level</th>
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<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>PhD</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bachelor degree</td>
<td>25</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Post-secondary specialist training (dazhuan)</td>
<td>89</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Secondary-level specialist training (zhongzhuan)</td>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Secondary (gaozhong)</td>
<td>5</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Judge of the Beijing City High-Level Court, Deputy Head of the Administrative Division of Chongwen District Court of Beijing City, and an official from the National Judges Training Institute, in Jiang Ming'an (ed.), "Investigative Report", 1998, pp.403-404. Note: zhongzhuan involves two or three years specialist education for secondary school aged students. It provides a lower level of study than dazhuan which is for students who have graduated successfully from secondary school but failed to get into a bachelor’s degree course.

In Beijing, over 92% of judges had an education level in 1997 of post-secondary specialist training (dazhuan) or above (Table 14). This is quite different to the situation in Hunan Province, where only 37% of judges had this level of education. Also unlike Hunan is the age distribution of Beijing judges. They are generally older, as nearly 48% are over 40 years of age, compared to fewer than 24% in Hunan Province.
There is insufficient data available to determine the effect of changing education patterns on the pattern of administrative litigation appeals in Hunan Province. Some data is available for Beijing and this will be examined in Chapter Seven. As judges in Beijing are markedly better educated than those in Hunan, the patterns described for Beijing in Chapter Seven reveal that even with dramatic improvements in education, judges and courts still act more out of consideration for the state's rights than individual rights.

**Administrative organs**

The power in court of the different administrative agencies varies according to the particular organ and its functional power. Minxin Pei claims that the more powerful government organs such as local governments and public security organs enjoy more favourable treatment from the courts, as measured by the rate of court rulings in their favour. But the figures on which this interpretation is based cannot tell us anything about the quality of the decision-making in the various administrative organs and how this affects the outcome of administrative litigation.

For example, Pei claims that cultural and public hygiene agencies were less likely to have their actions upheld by courts and more likely to have them overturned than were local governments and important departments. This does not mean, conclusively, that the latter agencies are unduly pressuring the courts to decide in their favour. It may also mean that such agencies have made better administrative decisions in the first place than other organs, thus resulting in a higher rate of actions upheld by the court. It may also mean that plaintiffs who have an administrative penalty imposed (in their view, unjustly) by cultural and public hygiene agencies or other less powerful agencies are proportionately more likely to appeal the decision than are plaintiffs who have an administrative penalty imposed by a local government agency, perhaps on the reasoning that there is a higher chance of success. Still another interpretation may be that people who have an administrative penalty imposed on them by the public security organs or other powerful organs have more to lose from the decision than those who have penalties imposed by cultural or public hygiene organs, resulting in a proportionately higher rate of appeal. This rate may not be controlled primarily by the

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perceived illegality of the decision but rather by the desperate circumstances of the plaintiff.\textsuperscript{52} Linked to all these alternative explanations is the influence of the identity and status of the plaintiff on the outcome of the case.

Pei suggests, for example, that private entrepreneurs are disproportionately active litigants against the state, and that individuals of a higher socio-economic status accounted for a smaller percentage of cases. But we do not know how many administrative penalties are imposed on these groups in any given year and thus we cannot make conclusions about their litigious tendencies as groups \textit{per se}. We can only compare their rates of appearance in administrative litigation suits. Without complete statistics about the number of administrative penalties imposed by various organs, on which they are imposed, and the outcomes in administrative litigation trials, no conclusive interpretation can be made. At best, partial statistical patterns can be drawn.

The other factor that is unaccounted for in the statistical study by Pei is that there is no clear pattern in the relationship between the power of an administrative organ and the outcome of administrative litigation against organs. Administrative organs do not appear to the same degree in administrative litigation trials. The taxation organs, for example, although very powerful,\textsuperscript{53} are virtually absent from administrative litigation trial statistics. In Pei’s study of national figures from 1988-1995, tax organs do not appear as a discrete category, nor do environment protection organs, but public health organs do.\textsuperscript{54} In the narrower selection of case studies Pei draws upon for his own study, the supposedly powerful tax organs appear in only 6% of the cases, while the equally powerful public security and land management organs appear in 25% and 21% of the cases. Non-powerful organs such as environment protection agencies appear in only 2% of the cases, a rate comparable to that of the powerful taxation organs.\textsuperscript{55} The power and function of an administrative organ plays a much more

\textsuperscript{52} See \textit{法治的理想与现实} (The Ideal and Reality of the Rule of Law) (Beijing: China University of Politics and Law, 1993), p.264, which recounts the plight of an individual entrepreneur expressing in melodramatic style how extreme an action it is for someone in his position to sue the government.

\textsuperscript{53} In interview, legal scholars listed the most powerful government organs as public security, tax, city planning, and industry & commerce. Environment protection organs were not regarded as very powerful at all.


\textsuperscript{55} \textit{Ibid}, p.849.
important and broader role in administrative litigation than simply affecting the trial outcome. It affects the quality of the decision-making by the organ in the first place, it affects the inclination of plaintiffs to appeal, and it affects the trial outcome. More will be said about these matters in Chapter Seven.

Administrative organs have a distinct advantage over plaintiffs in administrative litigation trials because their personnel have been educated and briefed about the law in general and the ALL in particular. Training for administrative officials falls into a number of categories: training for newly employed personnel about basic work procedures and methods, organisational discipline, and so on; training for specific tasks such as leadership, policy implementation, and maintenance of standards; specialist training for specific professional areas; and training in the use of new knowledge such as the ALL. It is common for administrative officials who are going to handle administrative cases to be sent for specialist training about the aim, purpose, and application of the ALL, not just on a one-off basis but regularly.

In Beijing during May-June 1998, I attended a weekly class on administrative law given by the head of Beijing University’s Administrative Law section. The classes were for Party and government officials from Haidian District who were enrolled in the Beijing University Masters degree in Contemporary Public Management. The course covered the basics of administrative law, such as its history, purpose, key concepts, the content of the ALL and how it should be applied and implemented. Most of the participants in the course were leaders or deputy leaders of local functional administrative offices, with a few others located in Party bodies. All were university graduates. The ones I talked to readily agreed that administrative law was very important to their work, but were less enthusiastic about the ALL. They generally said the administrative disputes in their sections were mostly handled informally between the complainant and the official concerned, resulting in very few applications for administrative review.

56 People are disinclined to appeal against the tax organ, for example, because they have to deal with the tax organ on a regular basis and appeals are perceived as merely resulting in harsher treatment from the organ in subsequent years. Interviews, Beijing, 1998.

Courts and their personnel are ranked lower in the administrative hierarchy than administrative officials in an organ at the same level. This means, for example, that the president of a provincial high court is equivalent in rank to the deputy governor of the province rather than the governor. This leaves the courts with less status and leverage over administrative organs; the opposite is more often the case. Although the bureaucratic levels are close to being on a par, the leaders of administrative organs tend to have a low regard for the courts and their power. Despite ten or more years of implementation of the ALL, little progress appears to have been made in improving the degree to which administrative organs operate in strict accordance with the law.

Administrative organs are a significant source of interference in administrative litigation suits. A survey carried out in China in 1992 that consulted judges, lawyers, administrative officials and applicants for litigation, asked interviewees about the sources of interference in administrative suits. A minuscule 7.5% replied that the Party interferes, followed by 26.3% who rated government organs as a significant source, and a comparable 28.8% who identified outside people as the main source of interference. This is an important finding for our understanding of the Party and government in contemporary China. Although government organs are imbued with Party control, the administrative organs as institutions, with their own bureaucratic aims and agendas, are more active than the Party in administrative litigation suits. This situation has not abated or improved since 1992. A 1998 investigative report from Ningxia identified the relationships between leading judges and administrative organs as a significant source of interference in administrative litigation, and noted that this interference becomes active starting with the acceptance phase of the case. Similarly in Anhui Province in 1997, 72% of judges claim that interference in administrative litigation cases comes from administrative organs.

Of all administrative organs, public security organs are the most lax in their administrative tasks, which combines with a typically non-cooperative attitude after

an administrative litigation suit has been filed. In Guizhou Province, for example, the following problems are common:

- The administrative penalty decision form is not systematically completed by the organs.
- Administrative penalty decisions are not made on the basis of a clear understanding of the facts of the situation.
- Delivery of the penalty forms and general communication with the offender is incomplete and poor.
- Offenders are not informed of their rights when a penalty is imposed.
- If property is confiscated, proper notification and receipts are not given to the person.
- Administrative penalties are often enforced not by the relevant administrative organ, but by another organ such as the procuratorate. 63

Even when an administrative litigation suit is filed at court and the court accepts the case for hearing and sends out the notices to the administrative organ, it is not uncommon for the following “five nots” to occur:

- The administrative organ does not answer or reply to an accusation.
- The organ does not deliver the relevant case materials as requested.
- The organ does not accept a summons to court and simply does not turn up on the day.
- The organ does not accept questions or enquiries about the case.
- The organ does not implement the court judgement. 64

These behaviours have also been observed by lawyers who have dealt with administrative litigation cases. Administrative organs will often not reply to or

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cooperate with large law firms, let alone anyone else. In such situations courts will often proceed with trial by default without the defending organ present, and this can occur in up to 90% of cases in some provinces.

Local governments, too, are a common source of illegal administrative behaviour, particularly in the imposition of illegal fee collection. Such cases often arise as group litigation cases, with a large number of plaintiffs challenging a local government’s fee collection activities. The central government has been legislating furiously during the 1990s to overcome such problems and has announced fresh attempts by the courts to deal more carefully with such cases. Concern about the level of social unrest caused by such cases is quite high and the catchphrase “alleviate the peasants’ burdens” has been coined to describe the state’s response. Officially farmers are encouraged to use the law to protect their rights and interests, but there is open acknowledgment that courts and defending organs collude to dissuade plaintiffs.

When administrative organs do cooperate with the courts in an administrative litigation case it is often done grudgingly because the organs regard the courts as professionally incompetent to handle certain administrative matters. The director of the Department of Policies, Laws and Supervision in the State Land Administration of the PRC claims that courts have very little professional knowledge of land administration, which directly affects the standard of handling land management cases. The director holds the view that courts are specialists in law and the application of law and should not be involved in ascertaining the facts of land cases because they do not have the requisite administrative management knowledge. This view is supported by personnel of the Supreme People’s Court, who expressed the hope that in the future, when administrative decision-making improves sufficiently, courts will

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65 Interviews with lawyers, Beijing, 1998.
67 FBIS-CHI-96-209 “PRC: Law Courts Must Protect Legal Rights of Farmers.”
71 FBIS-CHI-96-209 “PRC: Courts Must Protect Legal Rights of Farmers.”
72 Interview, Beijing, 1998.
be precluded from reviewing the facts of land cases and will only be required to
review the application of law. These views from high-level personnel indicate an
expectation that the power of administrative organs will only strengthen in relation to
that of the courts, rather than weaken, and that the courts are acquiescent regarding
this.

The land administration organs in particular regard the work of the courts in
administrative litigation as a nuisance, because it can adversely affect the ability of
these organs to enforce their administrative decisions. There is a tension between
proper legal process and efficiency that is more apparent in land administration cases
than public order cases. For example, if the land management organ discovers a house
being built without proper administrative permission it may use an administrative
penalty decision to order demolition, but if the demolition order is ignored the organ
must then ask the court to enforce the order by authorising the organ to demolish the
house. The organ does not have the authority to demolish the house on its own
volition. In practice this often means that an illegally-built house is either completed
or close to completion by the time the court authorises demolition, which makes the
demolition more difficult than if construction had just begun. The director of the
Department of Policies, Laws and Supervision in the State Land Administration of the
PRC describes this gap in administrative authority as a hindrance to proper
implementation of land management, thereby revealing a significant tension
between administrative implementation and the rights of citizens and their property to
be protected by the law.

This balance of public and private interests, as well as impacting upon the efficiency
of the administrative process, is also at the heart of the balance theory discussed in
Chapter Three. The superior position of administrative organs at the outset is widely
acknowledged as the driving force behind the “control” part of the balance theory.
Administrative organs are predisposed towards upholding public interests over and
above private interests and this is where the balance theory has failed to adequately
impact upon administrative practice. There are no criteria by which a judge can

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73 Interview with an official from the Supreme People’s Court of the PRC, Beijing, 1998.
74 Interview, Beijing, May 1998.
75 Interviews, Beijing, 1998.
determine the correct balance, and thus the balance of any given administrative litigation case will depend on the judge to a certain extent. By and large public interests prevail, despite a growing appreciation of private interests.\textsuperscript{76} This applies to the level of compensation as much as to administrative decision-making.

The proper process of administrative penalty implementation has varied effects on public and private interests. This depends upon the type of administrative organs involved and their powers of enforcement. Public security organs, for example, have the authority to detain an offender and directly implement an administrative detention penalty, and because the law insists the penalty be implemented even if the recipient thinks it is illegal or unfair and appeals the decision, public security organs are well placed to infringe the private rights of the offender. Land administration organs, on the other hand, also have the authority to implement administrative penalties such as those discussed above relating to illegally constructed houses, but do not have the authority to directly enforce their decisions in the same way that public security organs do. Thus, the private rights of citizens have more sway in the current implementation of land administration than in public security.

\textit{Lawyers}

The use of legal counsels in administrative litigation cases has been explored briefly by Minxin Pei,\textsuperscript{77} but some aspects of the analysis are misleading. Pei’s data show that plaintiffs’ use of lawyers increased sharply in the very early years of administrative litigation and then declined steadily, and by 1995 was back to its 1991 level. The data for defending organs, by contrast, do not show an initial increase in agencies’ use of lawyers, but rather a steady decline over the same period. \textsuperscript{78} Pei explains the pattern for defending organs thus:

\begin{quote}
The most important reason for this general trend is, however, the emergence of out-of-court settlement as the dominant form of resolution, which greatly reduced the need of professional counsel (by administrative agencies).\textsuperscript{79}
\end{quote}

\textsuperscript{76} Interviews, Beijing, 1998.
\textsuperscript{78} Ibid.
\textsuperscript{79} Ibid, p.854.
This explanation could be a little misleading, as Pei does not explain where out-of-court settlements come from. Are these cases that were initially filed as administrative litigation suits and were subsequently resolved by the parties informally, as might occur with cases in the category of “withdrawn suits” (see Chapter Four)? Or are they cases where the plaintiff indicated disagreement with the administrative penalty and a desire to negotiate another resolution, leading to a settlement that was negotiated entirely outside the legal system?

Withdrawn suits cannot be accurately described as “out-of-court settlements”, because their key feature is that judges more often than not are still intimately involved in the process. It is better to call such suits “pre-end-of-trial settlements” and to understand that they occur fully within the control of the court but not within the confines of a trial. It is not uncommon for one or more parties to a case to meet with the judge and/or their lawyers in a social setting in order to influence the judge’s decision. Withdrawn suits cannot be accurately described as “out-of-court settlements”, because their key feature is that judges more often than not are still intimately involved in the process. It is better to call such suits “pre-end-of-trial settlements” and to understand that they occur fully within the control of the court but not within the confines of a trial. It is not uncommon for one or more parties to a case to meet with the judge and/or their lawyers in a social setting in order to influence the judge’s decision.

Often these relationships are not merely expedient for the case at hand but represent more permanent business ventures between courts and administrative organs or courts and lawyers. Such practices have led to promulgation of “Certain Stipulations on Strictly Implementing the Challenge System by the Adjudication Personnel” by the Supreme People’s Court, which states that litigants have the right to ask adjudication personnel to refrain from privately meeting with other parties and their lawyers, and from attending banquets at the expense of other parties to the case.

Furthermore, there is no rational reason why withdrawn cases, or other cases that have not gone to court at all, should need a lower rate of professional counsel than cases which run the full trial process. If a plaintiff has to negotiate with an administrative organ it would seem more crucial than ever to have adequate legal counsel to assist, despite the weak role of lawyers in China. The declining rate of access to legal counsel is more likely to mean that judges and defending organs are engaging in more mediatory tactics, such as those that occur within a social setting, than when the ALL was first implemented.

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81 FBIS-CHI-1999-0323 “Supreme People’s Court Work Report.”
82 FBIS-CHI-2000-0319 “Supreme People’s Court Report to NPC.”
83 See the sections on “Courts and Judges” and “Administrative Organs” above.
It is also difficult for administrative litigation plaintiffs to find lawyers who will agree to represent them. The main reason is that there is relatively little monetary reward for lawyers who handle administrative litigation cases. Most prefer to take on commercial cases, which is a better source of income. Even though the state has less leverage over lawyers than during the 1980s, a necessary move to increase the number and quality of lawyers available to provide legal services, the 1996 Law on Lawyers (Chapter Six) clarifies that they are still required to provide legal aid services.

The success of these measures is limited, though. The PRC Justice Minister had to resort to publicly urging the All-China Lawyers Association to play its proper role of disciplining lawyers who lack a sense of social responsibility as evidenced by requests for exorbitant legal fees and a disregard for the legal rights of the poor. Such attitudes are viewed dimly by the state because they impact negatively on the socially sensitive rural sector, leaving peasants and township enterprises without access to affordable legal aid.

An additional difficulty faced by administrative litigation plaintiffs seeking legal representation is that many law firms will not take on administrative cases because “they are too complicated”, which essentially means that pitting oneself against a government administrative organ is not seen as a desirable course of action.

Lawyers in China today are in a complex position as both independent of, and compliant to, the state. Some lawyers have developed reputations for an interest in administrative litigation cases due to the frequency with which they publish articles about the subject in law magazines and newspapers, and ordinary people have access to such material and rely on it as a means of finding a lawyer who may be sympathetic to their cause. One interviewee who has such a reputation recounted that a group of farmers from just outside Beijing came to see him in 1998 to ask for his help in an administrative litigation case. He listened and then told them that he could

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85 FBIS-CHI-1999-0428 “Minister Urges BAR Association to Defend Rights of Lawyer.”
86 FBIS-CHI-97-175 “China: Lawyers Urged to Serve Agriculture, Rural Affairs.”
not help them because his firm would not permit it. The farmers had tried different
law firms all over the city but had been unsuccessful. Similar responses are to be
heard among some of the academic lawyers at Beijing University, but this does vary
according to the financial position of the plaintiff. Some academic lawyers from
institutions in Beijing were involved in a high-profile administrative litigation case
that was before the Supreme People’s Court in 1998. The case had been appealed
from the Guangdong Provincial court and involved an industry & commerce organ
and a profitable commercial business. The lawyers had been retained by the business.

The problems faced by lawyers in handling administrative litigation cases are
threelfold: undertaking a lawsuit against an administrative organ is difficult because of
the superior power of administrative organs; obtaining evidence is difficult due to the
fact (discussed above) that administrative organs often do not reply to requests for
evidence; and consequently, it is difficult to appear in court well prepared and in a
position to win.

Nevertheless, some lawyers do represent plaintiffs. The national figures used by Pei
perhaps do not do justice to the enormous variations that occur across China. For
example, statistics from Yunnan Province place the rate of legal representation in
administrative litigation cases during 1996 at 55.2% for plaintiffs and 44.8% for
defendants. For the 820 administrative cases heard in Yunnan courts that year,
lawyers assisted plaintiffs in 426 cases and defendants in 336 cases.

When lawyers are involved in administrative cases they fulfil a number of roles, one
of which is as a consultant-coordinator. There are two main times at which this
occurs. The first is before the case is formally established or at the time of filing the
suit. The lawyers will gather the parties together to discuss the case, which may result
in either the administrative organ altering its original mistaken decision, or the

88 Interview with lawyer, Beijing, 1998. See also FBIS-CHI-97-175 “China: Lawyers Urged to Serve
Agriculture, Rural Affairs.”
89 Zhu Weijiu (ed), ~M~~-~-tt~~~m~~T~~M~-~~
(Discussion of the Government Legal Supervision System - The Supervisory System Under the
91 Ibid.
plaintiff realising that the organ’s decision was lawful. This occurred in Yunnan in 1997 in a case involving a rural township government which ordered detention of a person for illegally transporting timber. The parties first went to the lawyers’ office for a consultation about the case which focussed on two particular aspects. The first was legal knowledge about the case, and the lawyers were able to help in that aspect. The second involved an exchange of views between the offender and the government about the government’s work. After this, the government came to see that its decision was in error and agreed to redress the situation. Notwithstanding any bribes which may have passed hands at this point, this kind of coordinating work is regarded as beneficial for the prompt resolution of disputes, keeping losses to a minimum and protecting the rights of all parties. Even if a bribe was the catalyst for resolution in the offender’s favour, it is significant that lawyers are recorded as bringing the parties together. The consultative role of lawyers is regarded as particularly useful during the administrative review phase, as this allows maximum time for consultation and revision of illegal administrative decisions.

The second time at which lawyers play a consultative-coordinating role is after the administrative litigation suit has been formally established. Their role during this phase is still outside the court rather than within it. The ALL prohibits the use of mediation to formally settle administrative litigation disputes in court, but does allow a plaintiff to cancel a suit before a ruling is given, and also allows defendants to alter their decisions and for a plaintiff to respond to this by cancelling the suit. The coordination required for all this is essentially mediatory in nature, so either judges are placed in the awkward position of having to actively and directly facilitate this, or alternatively, lawyers can play this role.

A study conducted in Yunnan Province in 1997 found that lawyers there were playing a significant role in these matters, supposedly based on their considered legal opinion of the case. That is, if they thought the defending organ had acted lawfully they would tell the plaintiff that he or she did not really have a case, and encourage withdrawal of the suit. Alternatively, if the lawyers thought the defending organ had acted unlawfully, they would talk to the organ’s representatives about why the administrative decision was unlawful, and encourage alteration of the decision. There
is no way of determining whether lawyers acted in favour of the state in such situations, but it is significant that they are now becoming involved in this way.

The role of lawyers in administrative litigation is intended to be broader than just representing either the plaintiff or the defendant, and it is in these additional roles that we can clearly see their position as state-approved legal workers. They are supposed to help judges correctly handle all aspects of administrative trials, and judges in Yunnan, at least, welcome their presence in a case as a positive influence. The four main ways in which they do this are: by helping judges run the trial according to the procedures laid down in the ALL, by helping judges discover and clarify the facts of a case, by helping judges correctly apply the law, and by helping judges make just rulings.

**The plaintiff**

Each of the players in an administrative litigation dispute possesses different amounts of power at different stages of the process, and the plaintiff is in his or her strongest position during the lawsuit phase. The courts are at the peak of their influence during the accusation period, that is, deciding whether to accept the case for hearing, and administrative organs have most influence during the enforcement period of the administrative penalty. As will be discussed in Chapter Seven, the plaintiff has a 30% to 40% chance of succeeding with the complaint providing the case makes it past the acceptance phase of the court. If a court accepts a case for hearing, it is like saying: “There is a definite possibility that this administrative action is illegal or unfair.”

Within this relative position of strength, the plaintiff’s position varies according to which administrative organ he or she is dealing with, and the nature of the administrative behaviour that is being challenged. As already seen, plaintiffs seeking to overturn public security organs’ public order administrative penalties, for example, are in a weak position because most often they have served their period of detention before the case makes it to court, whereas plaintiffs against land management organs are better off because the organ cannot enforce its orders without court approval.

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93 Interview with legal academic, Beijing, 1998.
Who is a typical plaintiff? This question has been partly answered by Minxin Pei, who rightly draws our attention to the high proportion of workers, peasants, and private entrepreneurs represented in administrative litigation cases. It should be added, that by far the majority of plaintiffs are male and aged between thirty-five and forty-five. By way of example, of the sixty-two administrative litigation cases recorded in the 中国审判案例要览 1996 (Important Chinese Trial Cases, 1996), only four record a woman as plaintiff. Likewise, the 人民法院案例选 1992-1996 (Selected Cases from the People's Courts 1992-1996) volume of administrative cases records only thirteen females as plaintiffs among fifty-one cases (being twenty-six public security cases, twenty-one industry & commerce cases, and four land management cases). Similar to the volume of trial cases, the selected court cases record average ages of between thirty-five and forty-five years.

This finding is comparable with that of Tianjian Shi, who examined appeal activities in Beijing and discovered that people aged eighteen to twenty-two are least likely to make appeals to government officials, but that the likelihood increases with age and peaks at ages forty-five to fifty-three. It should be borne in mind that Shi is referring to appeals of all types, not just to formal legal system appeals such as administrative litigation. The figures from the two volumes quoted above are for administrative litigation cases taken from all over China, not just Beijing, but the trend of the thirty to fifty years age group being most likely to approach the state to resolve a problem appears to hold for both general appeals and appeals to a court of law.

One area in which the pattern of administrative litigation plaintiffs differs markedly from other complainants to the state regards gender. Shi found that in Beijing, contrary to patterns in most societies, women were more active than men in adversarial activities. In administrative litigation, men are more active, presumably because they are more often subjects of administrative penalties. We do not know,

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95 The selection of cases referred to at this point is made by the courts themselves, and may not be representative of the totality of cases filed at or heard by the courts.
however, the rate of imposition of administrative penalties on men and women, so it is difficult to be conclusive about this.

The judicial environment in which a plaintiff appeals for administrative litigation is weighted against his or her interests. The concept of judicial supervision has a limited role and lacks legal effect; courts may only recommend alternative administrative decision-making on sensitive internal administrative matters. The theoretical concepts underpinning administrative litigation are weighted more to management, and thus the state's interests, than to protection of individual rights. The backlash from administrative organs leaves plaintiffs with little strength during the phase of filing the case at court, despite improvements in the education levels of judges. Furthermore, the nascent role of lawyers is potentially beneficial to plaintiffs, but is undercut by their continued dual role as independent counsels and state-approved legal workers.

Of all the players in administrative litigation, administrative organs have the most influence on the process, although this varies according to the organ. The coercive power of administrative officials means, however, that even the least powerful organs can influence the process of a case more than an independent-minded judge. Having set the actors in their environment, the question now arises as to the precise process of an administrative litigation appeal, and the characteristics of such appeals.
CHAPTER SEVEN

ADMINISTRATIVE LITIGATION: THE PROCESS AND CHARACTERISTICS

The final phase in using the new system of administrative law to address an administrative grievance is to lodge an administrative litigation appeal and attend court for the trial and judgement. The forms used in the process of appeal will be examined, followed by analysis of a court case, and consideration of the role of judicial recommendations. Analysis of the characteristics of appeals in several local areas of China, as compared to the national situation, completes the study of the appeal process. A key question considered here is how the dominant features of the administrative grievance process thus far affect the final outcome.

The process: applying to pursue litigation

I was unable to obtain copies, either published examples or bona fide originals, of the forms used for administrative litigation appeals. The administrative review forms used in Chapter Four were published examples of such forms and, when compared with the type of information found in published administrative review cases, appear to be authentic. The forms used in administrative litigation proved much more difficult to obtain. I was able to view a public security case at a district court in Beijing, an account of which will be given below. While there, I asked for copies of administrative litigation appeal forms and other associated forms. The request was denied without specific grounds, but on the standard vague rider that it would be inconvenient and inappropriate.

Thus the administrative litigation appeal form below has been constructed using two main sources. The first is the background provided by the administrative review forms, as it is reasonable to assume there is a similarity and continuity in the type of information required by the system. The second is published administrative litigation cases. Where the same type of information is recorded in case after case, and it is laid out in the same order each time, it is reasonable to assume that the information was taken from an administrative litigation appeal form. I have used these patterns to work
Administrative Litigation Appeal

Applicant: name__________________________, gender__________________________, age__________________________, ethnicity__________________________, place of origin__________________________, occupation__________________________, address__________________________, legal representative__________________________.

Defendant: name__________________________, Legal representative__________________________.

Plaintiff disagrees with defendant’s decision no.__________________________ of ______ year ______ month ______ day which resulted in ____________________________ administrative penalty and herewith applies for administrative litigation.

Plaintiff’s request__________________________

Facts and grounds for the request__________________________

Received__________________________ (court receiving the appeal)

Plaintiff____________________ (signature or seal)

____year____month____day
backwards to obtain a picture of what the forms probably look like. The purpose of doing this is to see what can be gleaned about the process of administrative litigation.

The information required is fairly standard. It is reasonable to assume that this application would be responded to with a series of forms and processes similar to those used in administrative review (see Chapter Four). The court would need to undertake an initial investigation to determine whether the requisite ingredients exist for administrative litigation, such as a clear plaintiff, a clear defendant, a specific administrative offence, and so on. As discussed in Chapter Five, it is often at this point that the court begins the mediation process by contacting the defending organ and making informal enquiries about the case. The sensitive nature of this phase and the power of courts and judges at this point is indicated by the response of one interviewee, who maintained that the main factor in whether a court accepts a case is the judge who has to decide to accept the case. If the judge is brave enough to take on a particular administrative organ then the case will be accepted, and the main factor here is the experience and qualifications of the individual judge.\footnote{Interviews with lawyers and legal academics, Beijing, 1998.}

One of the most significant problems in administrative litigation appeals is that courts often do not accept all of the cases that they should. There are two main reasons for this: first, judges are under pressure from administrative organs and officials not to accept cases that may result in a ruling unfavourable to administrative organs (see Chapter Six); and second, whether any anti-crime campaigns are running at the time. This second explanatory reason will be examined more fully below in the sections that compare local and national administrative litigation patterns. It is sufficient at this point to note that for any year in which an anti-crime campaign is running, there is likely to be more administrative litigation cases accepted by courts.

If a case is accepted, and if possible mediation and involvement by lawyers at this point does not resolve the case, the formal trial process begins. I was able to view an administrative litigation trial of a re-education-through-labour case. The trial took place at Xuanwu district court at Beijing on Wednesday, 27 May 1998. The trial opened shortly after 9.00am and concluded about 10.20am. Re-education-through-
labour penalties are, strictly speaking, not administrative penalties but enforcement measures. But for all intents and purposes they are administrative penalties because they are imposed by administrative fiat and are appealable under the ALL.²

An account of the trial
There were three judges, all female. One was obviously the head judge and took charge of the case. She managed the proceedings and directed the parties as to what to do and when. A second judge assisted the head judge with the paperwork, followed the proceedings, but did not ask any questions. The third judge appeared quite disinterested in the whole process and on many occasions during the trial was not even following the proceedings.

The courtroom looked like a theatre in that the judicial bench rested on a raised stage which was flanked by several sections of heavy velvet black, brown and red curtains. The bench faced the audience. The PRC court logo was suspended high behind the head judge. The audience’s seating sloped downwards from the rear of the auditorium towards the stage.

The defendant was the Beijing City Re-education Through Labour Committee. Its case was led by a female in her late twenties. She was assisted by another person from the organ, a young male clerical officer. Neither were lawyers and they had no lawyer assisting them.

The plaintiff was a young male in his mid-twenties from Hebei Province. He was clean and neatly dressed in a light blue tracksuit of the type supplied by a detention institution. He was a peasant. He had no legal counsel to assist his case and so spoke on his own behalf.

Apart from myself and three students from Beijing University who accompanied me, there was only one other person in the gallery to view the proceedings. There was also a young male court guard seated behind the plaintiff. He had a set of handcuffs and an

² Although they only became so through the Opinion of the Supreme People’s Court on Some Issues Relating to the Implementation of the Administrative Litigation Law (For Trial Implementation), 29 May 1991.
electric baton attached to his belt. A female clerk recorded the proceedings of the court.

The trial opened with the head judge asking the plaintiff to confirm his name, birth date, ethnicity and place of residence. The defending organ was also asked to confirm its identity and the subject of the trial. Each party had a chance to present its story and respond to the other party's accusations. My overall impression was of a system that patiently listened to the plaintiff's case, and this was about all.

The story was this: the plaintiff had been detained and investigated by public security organs for a variety of minor offences since about 1988. In late 1997 the plaintiff went to a public bath house to have a shower. While there he rented a locker to put his clothes in. During the time that he had this locker, he took the key and duplicated it. (The lock and key were presented as evidence.) Some time later he returned to the locker and used his duplicated key to steal 10 yuan from someone else's belongings. The district public security organ imposed a 15-day administrative detention penalty for this offence. After he had served the 15 days he was not released. The public security organ then overturned the administrative detention penalty (notably, after it had been served!) and arranged for the Re-education Through Labour Committee to impose a compulsory detention penalty on the plaintiff. The plaintiff then appealed to the court on the grounds that this second punishment was illegal. His view was that he had already been penalised for his offence and had served the detention. He also claimed that the re-education through labour penalty was too severe for such a minor offence as stealing 10 yuan. The defendant's view was that the public security penalty had been overturned because the bureau realised it was too light a penalty, and it subsequently imposed the compulsory detention penalty, which was more appropriate.

The trial ended after hearing the two parties' positions. The court judgement was not made public. The court had three months within which to make a decision. At the time of judgement, the court was not to be re-convened but the parties were to be called to an office at the court and advised of the outcome. Meanwhile, the plaintiff was held at a remand centre.
Discussion

It appears that the plaintiff was an itinerant worker as he had no specific business in Beijing when he was detained by a Beijing public security organ. This possibly contributed to the severe penalty of fifteen days’ detention he was initially given. It is not my concern here to comment on the justice of overturning a penalty that had already been served and replacing it with one more severe, but rather to draw attention to the factors at work in administrative litigation trials. Re-education through labour penalties can be imposed in the following circumstances:

- Minor offences of a counter-revolutionary, anti-Party or anti-socialist nature.
- Colluding with murderers and so on, to a minor degree.
- Hooliganism and prostitution.
- Striking people and disturbing the social order.
- Refusing to work at a work unit or otherwise breaking labour discipline.
- Teaching others to violate the law.
- Repeat offences of any of these minor offences.
- The person’s residence is in the countryside but he or she is in the city working without a permit.3

Although the offence was minor, the plaintiff was a repeat offender. As he had no employment to go to the Re-education Through Labour Committee may have considered his situation fell within the bounds of these categories.

Several things must be noted about the trial itself. First, the head judge appeared to have the most influence on the process. This does not mean that she had the most influence on the judgment that was made, as we do not know what pressure the administrative organ was able to exert outside the context of the trial. The judge definitely has the power to assist or hinder the plaintiff’s case, though. The plaintiff in this case was a relatively young man, uneducated and inarticulate. Having to present his own case was clearly more than a little trouble for him. At one stage during the proceedings he was getting tongue-tied and bogged down in what he was saying. He stumbled over his words and eventually stopped speaking in mid-sentence. At this point the head judge intervened and said to him: “Are you trying to say that you think their actions (she indicated towards the defendants across the room) are illegal?” The

plaintiff grinned with relief and responded with an emphatic "yes". This incident demonstrates the ability of the judge to control the direction of a plaintiff's case and we do not know to what outcome.

Second, there is clearly a great deal of work relating to the judgement of the case that happens outside of the trial context. There was no time during the trial proceedings given over to examining the administrative penalty forms for completeness and correctness. As discussed in Chapter Four, administrative organs often do not pay attention to such matters, and this is sufficient grounds for the court to make a judicial recommendation to the administrative organ to improve its performance in these areas. The trial concentrated entirely on ascertaining the facts and going over the evidence of the case. Clearly if there were problems in the area of minor procedural matters, or if the application of law was incorrect, then the court did not consider these matters relevant to the trial part of the appeal. The administrative litigation appeal is perhaps best understood as a process that has several parts to it: the acceptance by the court to hear the case, administrative matters relating to non-substantive justice issues which are ascertained by the court (such as whether the paperwork has been correctly completed), the trial itself wherein the plaintiff has his or her say, and coalescing the information obtained from all these discrete processes which finds its expression in the written court judgment.

Third, the Chinese judicial practice of "first decide, then try" fits the four-part process outlined above. The final part — that of drawing together all the information about the case — may be done by the judicial bench or the judicial committee, and it may occur either before or after the trial. On occasion the trial may well be more of a process of confirming the facts and evidence rather than a process of discovery.

The judicial recommendation 司法建议 (sifa jianyi)

The judicial recommendation is a written method that enables communication between the court and the administrative organ on matters that the court does not have the authority to make rulings upon, but only has authority to make suggestions about. It is a mechanism to provide feedback to administrative organs on their performance.
If the court decides that a judicial recommendation to the defending administrative organ is necessary, this is done at the time of writing up the final judgement. The main problem with the judicial recommendation is that it does not have any legal effect; administrative organs are not required by law to implement any of the suggestions contained therein. The administrative organ either accepts or rejects the recommendation, but even acceptance does not bind the organ to undertake the action.

In the case of a procedural violation which the court considers did not harm the plaintiff’s substantive rights, the court should write a judicial recommendation suggesting that the administrative organ pay more attention in future to the problem in question. If cases continue to come before the courts involving a defending organ that has persistently ignored the judicial recommendations, then the court has the authority to cancel the administrative decision simply on the grounds of minor procedural irregularities. Whether a court would actually do so, however, is open to question.

Judicial recommendations in the context of administrative litigation commonly relate to the laxness of administrative organs when completing the required forms for an administrative penalty to be imposed. This is an acknowledged problem and usually involves omissions of information such as the year, month and day the penalty was imposed, notification to the parties of their right to appeal, and lack of attention to completing procedures in the correct order. The public security organ, a common offender of this latter type of procedural violation, will often confiscate property without issuing the correct notice beforehand. Often the notice is issued concurrently with the property confiscation, or afterwards, or not at all. Situations like this should be overturned by the court but do not allow any compensation to be paid to the plaintiff.

There is some evidence to indicate that judicial recommendations are a very common occurrence. In 1994 courts across China made nearly 40,000 judicial

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4 See Albert Chen, *An Introduction to the Legal System of the People's Republic of China* (Singapore: Butterworths, 1992), p.120.
5 Interviews with judges, Beijing, 1998.
7 Interview with a judge of 10 years experience in the administrative division of the Supreme People's Court of the PRC.
recommendations to various organs on how to strengthen management and perfect systems. As there were 34,567 administrative litigation cases tried by courts across the whole country that year, this is a rate of at least one judicial recommendation per case, which is an astonishingly frequent rate. A similar ratio of almost one judicial recommendation per case is reported for Sichuan Province in 1995, where courts concluded 3,212 administrative litigation cases and made 3,010 judicial suggestions to various organs. Most of these recommendations were to public security organs as they addressed public order issues. However, by 1998 the number of judicial recommendations made by courts across the whole country had dropped to 17,000.

In Guangxi, over the seven years from 1990 to 1996, the courts tried 9,778 administrative litigation cases. Of these, 5,628 cases or 57.6% were disputes related to natural resources. Of these, plaintiffs won 2,294 of the suits or 23.5%. But again the most astonishing feature is the recorded figure of over 1,000 judicial recommendations made during this time to administrative organs about how to improve their management methods or implementation. This works out at 143 recommendations per year or nearly three per week! If there were 1,397 administrative cases per year or about 27 cases per week, then every ninth case was cause for a judicial recommendation. If an average of five cases per day were handled by the courts in this region, then every second day and relentlessly for the entire year, courts wrote a judicial recommendation to an administrative organ. If these figures are accurate they do not present a flattering picture of the administrative organs in Guangxi. We do not know that the rate of writing such recommendations was steady over the seven year period. There may have been a spate in the early years followed by a slowing in the rate. This is what would be expected if administrative organs were taking any notice at all of the recommendations. On the other hand, seven years is a long time to be still writing recommendations about the same sorts of matters. If the education of officials on the subject of the ALL was effective, that combined with the

FORM R: Administrative litigation judicial decision form

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8 FBIS-CHI-95-058 "Further Reportage on Developments During NPC - Ren Jianxin on Court Work."
10 FBIS-CHI-96-095 "PRC: Sichuan People's Higher Court Issues Work Report."
11 FBIS-CHI-1999-0323 "Supreme People's Court Work Report."
Administrative Litigation Judicial Decision

1. Heading
1. Court verdict number

2. Reasons for the appeal

3. Parties to the litigation
Plaintiff: Name, gender, age, ethnic origin, place of origin, residence, occupation
Plaintiff’s representative

Plaintiff: Name, gender, age, ethnic origin, place of origin, residence, occupation
Plaintiff’s representative:

Plaintiff: Name, gender, age, ethnic origin, place of origin, residence, occupation
Legal representative:
Plaintiff’s representative:

Defendant: (Name of organ)
Legal representative:
Defendant’s representative:

4. Trial grade:

5. Trial organ and organisation:
Trial organ:
Members of the collegiate bench:
Trial head: Judge: Judicial representative:

6. Date of trial:

2. Plea positions
1. The specific administrative behaviour of the defending litigant:
2. Statements by the plaintiffs:

3. Statements by the defendant:

3. Facts and evidence

4. Grounds for deciding the case

5. Concluding verdict

1. 

2. 

3. 

Case handling fees: To be paid by: (the defendant or the plaintiff)

6. Comments

fact that word soon gets around in bureaucracies should have had a more positive impact on the standard of administration.
The court judgement

The final step in an administrative litigation trial is the court judgement, which contains the public version of the court’s decision. It may also contain references to any judicial recommendations that were made, but does not contain the text of these. Published judicial decisions on administrative litigation cases have, in recent years, become longer and present more substantial reasoning about the case. But they are also limited, for the most part, to discussing the facts and evidence of the case, although occasionally the application of law will be discussed too. As with the administrative litigation appeal form above, I have constructed the judicial decision form above (Form R) by observing the repeated patterns in published cases and working back to the framework from which published case material has most likely been taken. Many of the sections in the form, such as those for facts and evidence, the grounds for deciding the case, and the comments, are longer than the space I have allowed on the forms, and as each case varies in complexity the forms must be supplemented by information provided on additional paper.

Fees

The verdict section of the form closes with a statement as to who will pay the administrative litigation fees charged by the court because this is based on who wins the case. The loser pays the fees, or if the administrative decision is partially upheld and partially overturned the cost is shared between the plaintiff(s) and the defendant(s).  

There are two categories of fees which parties are subject to when they conduct administrative litigation in Chinese courts. There is a basic filing fee charged by the court and this is a fairly modest amount. It varies according to the type of case. For example, 5-30 yuan may be charged for public order cases, 30-50 yuan for re-education through labour cases, and 30-100 yuan for other categories of cases.  

These fees were set in 1989, and published cases initially recorded fees charged within this range. Throughout the 1990s however, fees have crept upwards and have ranged from 50-300 yuan for all types of cases.

13 Opinions of the Supreme People’s Court on Some Issues Relating to the Implementation of the Administrative Litigation law (For Trial Implementation), 1991, Clause 106.
Remission or reduction of court fees is not included in the legal aid requirements stipulated elsewhere such as in the Law on Lawyers, but the courts claim to have their own scale of fee reduction according to the financial situation of the person filing the case. Published cases though, do not record any such reductions. New regulations were announced in 1998 that require a separation of the two processes of imposition and collection of administrative fees. Sections or units which have authority to impose fees must not also collect the fees. Such fees must now be paid by the party direct to a special bank account from where it will be transferred to the state treasury. Such measures indicate that fee collection by courts has been subject to abuse in the past.

The second category of fees to which parties are subject includes any other costs that are incurred by the court in the process of conducting the litigation. These can include investigation costs, advertisement costs, translation costs, examination and appraisal costs, the costs associated with calling a witness, and any other relevant costs such as accommodation and meals borne by court personnel in the course of the investigation of the case. The highest charge I have come across is a fee of 15,000 yuan and related fees of 20,000 yuan for property evaluation. Another case records fees of 1,438 yuan.

Fees must be paid in advance within a specified time limit or application must be made for a postponement of the payment. If neither occurs, the case is treated as a voluntary withdrawal of the application. And if a suit is withdrawn, the plaintiff is still liable for a fee, which is to be reduced to half what was charged. Likewise if a suit is dismissed, the one who brought the suit must pay the filing fees.

14 People's Courts Fees for Handling Litigation, 29 June 1989, Supreme People's Court, Article 5, Nos. 6 and 7.
15 FBIS-CHI-96-111 "PRC: Legal Aid System Discussed."
16 FBIS-CHI-98-182 "China: PRC Administrative Fee Regulations."
17 These are the fees listed in a case in 中国审判案例要览 1996 (Important Chinese Trial Cases, 1996), economic and administrative cases volume (Beijing: People’s University Press, 1997), p.513.
19 Opinions of the Supreme People’s Court on Some Issues Relating to the Implementation of the Administrative Litigation Law (For Trial Implementation), 1991, Clause 108.
20 People’s Courts Fees for Handling Litigation, 29 June 1989, Supreme People’s Court, Article 23.
Expenses other than those directly related to the administrative litigation, such as the property evaluation fees referred to above, are collected according to actual expenditure.\footnote{Opinions of the Supreme People's Court on Some Issues Relating to the Implementation of the Administrative Litigation Law (For Trial Implementation), 1991, Clause 107.} This means they cannot be collected until after the case is either underway or concluded. It is not clear what happens to a case if a plaintiff or defendant is unable to pay any such fees.

The fee payment system clearly links the process of the case to payment of the fees. We do not know if financial intimidation is directly responsible in any degree for the large proportion of withdrawn cases but it is certainly a possible source of pressure on the plaintiff. Whether the plaintiff withdraws the case on his or her own volition or after the defending organ has altered the decision, he or she is still liable for half the filing fee. Likewise if the case is dismissed or confirmed by the court, the plaintiff must pay the fees. Plaintiffs win in about 40% of cases (Table 17 below, 1997) but are liable for court fees in 78%–85% of cases (Table 15 below, 1997) – that is, all cases except those overturned or changed by the court. Combined with the acknowledged pressure that judges apply on plaintiffs, the system of fees for filing litigation is a weak point in the system.

The patterns of administrative appeals

Minxin Pei draws a picture of the patterns in administrative litigation appeals based on national figures and case studies.\footnote{Minxin Pei, "Citizens v. Mandarins", 1997.} Although a very helpful handle for us to grasp the broad sweep of administrative litigation in China, his study does not have room to tell us about the quality and nuances of administrative appeals. This is partly because in a country the size of China, national figures and trends drawn on the basis of compiled statistics inevitably blur any local patterns and important distinctions.

This final section of the dissertation will attempt to do just that. Published sources that have not been used to date will further our understanding of nationwide patterns in administrative litigation. The evidence may appear patchy to the reader and we should not, of course, take any source as authoritative on its own. The aim is to provide additional building blocks that, when viewed as part of the entire process of making
an administrative appeal, give a picture consistent with previous studies, but more nuanced. Much of the material was gathered by Beijing-based Chinese scholars in a series of investigative studies conducted in various provinces throughout China in 1997. The methodology used involved polling among judges, administrative officials, and on occasion citizens. It is advantageous in that if respondents are honest — and we may as well accept that they are unless we have reliable information to the contrary — it is useful for illuminating local patterns that are subsumed into national figures. A similar methodology was used in a 1992 study.23

One of the interesting features of the information discussed below is that some of it pertains both to wealthy centres of political power such as Beijing and to ethnic minority areas, and can therefore further our understanding of the complex relationship between economic growth, wealth, political environment and tendency to use the legal system.

National patterns and the puzzle of cases withdrawn from the administrative litigation process will be examined first.

Table 15 represents the national pattern of disposition of administrative litigation cases. The initial pattern was that cases were more likely to be confirmed by the courts or withdrawn by the plaintiff, but the latter pattern is a trend towards a higher proportion of cases to be withdrawn by the plaintiff.

The phenomenon of withdrawn cases has caused debate among Chinese and Western scholars as to the reasons behind the withdrawals.24 Chinese scholars consistently refer to withdrawn cases as a negative feature of administrative litigation in China.25 They cite the cause of most withdrawals as the weakness of the courts and their fear to upset administrative organs by making a ruling against them, resulting in plaintiffs losing hope in the courts and withdrawing their case.

23法治的理想与现实 (The Ideal and Reality of the Rule of Law) (Beijing: China University of Politics and Law, 1993).
Table 15: Disposition of tried cases in administrative courts, 1991-1997 (by percentage)

<table>
<thead>
<tr>
<th>Year</th>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
<th>E</th>
<th>F</th>
<th>G</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>32</td>
<td>19</td>
<td>2</td>
<td>37</td>
<td>10</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1992</td>
<td>28</td>
<td>19</td>
<td>2</td>
<td>38</td>
<td>13</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1993</td>
<td>24</td>
<td>20</td>
<td>-</td>
<td>41</td>
<td>15</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1994</td>
<td>21</td>
<td>20</td>
<td>-</td>
<td>44</td>
<td>15</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1995</td>
<td>17</td>
<td>16</td>
<td>-</td>
<td>51</td>
<td>16</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1996</td>
<td>15</td>
<td>15</td>
<td>2</td>
<td>54</td>
<td>-</td>
<td>9</td>
<td>5</td>
</tr>
<tr>
<td>1997</td>
<td>13</td>
<td>14</td>
<td>1</td>
<td>57</td>
<td>-</td>
<td>8</td>
<td>7</td>
</tr>
</tbody>
</table>

A: Administrative actions confirmed by courts.
B: Administrative actions overturned by courts.
C: Administrative actions changed by courts.
D: Suits withdrawn.
E: Other. In 1995 this category consists of dismissed or terminated cases.
F: Dismissed cases.
G: Terminated cases or other cases not otherwise accounted for.


The susceptibility of judges to yield more to the wishes of administrative organs than to the rights of the plaintiffs during a trial is most often demonstrated by their tendency to allow plaintiffs to cancel administrative litigation suits without proper scrutiny and judicial approval. The ALL stipulates that once a suit has been filed and accepted by the court for hearing, it must be tried unless the plaintiff specifically requests the suit be withdrawn. If a plaintiff makes such a request, whether it is because the defending organ has decided to alter its specific administrative decision or for other reasons, the suit may only be withdrawn if the court agrees to it. The intention behind this clause is to further protect plaintiffs from pressure by the defending organs during the conduct of the trial. The court should ensure that the proposed withdrawal has not been requested because the organ has threatened the plaintiff. If the court examines the case that has been proposed for withdrawal and

26 ALL, Article 51.
ascertains that the administrative decision was illegally imposed in the first place, then it should disallow the withdrawal unless the defending organ alters the decision.

Table 16: Withdrawn administrative suits, 1993-1997

<table>
<thead>
<tr>
<th>Year</th>
<th>A</th>
<th>(A*)</th>
<th>(A**)</th>
<th>B</th>
<th>(B*)</th>
<th>(B**)</th>
<th>C</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>6662</td>
<td>(58%)</td>
<td>(24%)</td>
<td>4888</td>
<td>(42%)</td>
<td>(17%)</td>
<td>11,550</td>
</tr>
<tr>
<td>1994</td>
<td>9564</td>
<td>(62%)</td>
<td>(28%)</td>
<td>5753</td>
<td>(38%)</td>
<td>(17%)</td>
<td>15,317</td>
</tr>
<tr>
<td>1995</td>
<td>14,247</td>
<td>(55%)</td>
<td>(28%)</td>
<td>11,743</td>
<td>(45%)</td>
<td>(17%)</td>
<td>25,990</td>
</tr>
<tr>
<td>1996</td>
<td>22,174</td>
<td>(52%)</td>
<td>(28%)</td>
<td>20,741</td>
<td>(48%)</td>
<td>(26%)</td>
<td>42,915</td>
</tr>
<tr>
<td>1997</td>
<td>28,710</td>
<td>(57%)</td>
<td>(32%)</td>
<td>22,025</td>
<td>(43%)</td>
<td>(25%)</td>
<td>50,735</td>
</tr>
</tbody>
</table>

Notes:
A: Suits withdrawn on the initiative of the plaintiff.
B: Suits withdrawn by the plaintiff after the defending organ alters the administrative decision.
C: Total number of administrative suits withdrawn in the year.
(A*) and (B*): Percentage of the total number of administrative suits withdrawn in the year.
(A**) and (B**): Percentage of the total number of administrative suits tried by the courts in the year.


Instead, what often happens is that judges will defer to the defending organ by allowing indiscriminate withdrawal of suits, or by encouraging the plaintiff to withdraw the suit.27 This led to the situation in 1994, for example, where 62% of withdrawn cases were withdrawn without the plaintiff obtaining the desired judicial remedy, and a comparable figure of 57% is recorded for 1997 (column A* in Table 16 above).28

In the face of a negative interpretation of withdrawn cases by Chinese scholars, Minxin Pei uses official Chinese sources on administrative litigation suits, which now clearly separate the numbers of cases which are withdrawn by plaintiffs after

28 法治的理想与现实 (The Ideal and Reality of the Rule of Law) (Beijing: China University of Politics and Law, 1993).
administrative organs have changed their specific administrative decisions from those which are withdrawn under other circumstances,\textsuperscript{29} to make the following assertion:

The decision to withdraw ALCs (administrative litigation cases) seemed to be based on rational reasoning, not merely fear of reprisal or distrust of the legal system. Plaintiffs decided not to pursue their cases against government agencies and officials in the court because of the high odds against winning.\textsuperscript{30}

Pei claims that these odds are about 38\% in the government’s favour compared to 19\% in the plaintiffs’ favour. It is not clear how these figures have been obtained, and because the pattern changed dramatically from year to year it is more helpful to look at specific years.

At this point our interest lies in how often the government wins and how often plaintiffs win, as some guide to the role of judges in the process. To obtain figures for government victories (Table 17), I have combined the figures from Tables 15 and 16 of cases in which it is positively known that the government organ prevailed over the plaintiff. These consist of (from Table 15): A - administrative actions confirmed by the courts, E - other cases, F - dismissed cases, and G - terminated cases; and (from Table 16) A\textsuperscript{**} - suits withdrawn on initiative of the plaintiff.

\textsuperscript{29} See the sections on administrative trials in 中国法律年鉴 1994 (China Law Yearbook), and following years.
Table 17: Rate of government and plaintiff victories in administrative litigation suits, 1993-1997 (by percentage of the total number of cases tried by the court each year)

<table>
<thead>
<tr>
<th>Year</th>
<th>Government wins</th>
<th>Plaintiff wins</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>63%</td>
<td>37%</td>
</tr>
<tr>
<td>1994</td>
<td>64%</td>
<td>37%</td>
</tr>
<tr>
<td>1995</td>
<td>61%</td>
<td>39%</td>
</tr>
<tr>
<td>1996</td>
<td>57%</td>
<td>43%</td>
</tr>
<tr>
<td>1997</td>
<td>60%</td>
<td>40%</td>
</tr>
</tbody>
</table>


To obtain figures for plaintiff victories (Table 17), I have combined figures from Tables 15 and 16 of cases in which it is positively known that the plaintiff's aims prevailed. These consist of (from Table 15): B – administrative actions overturned by the courts, and C – administrative actions changed by the courts; and (from Table 16) B** – suits withdrawn after the defending organ alters the administrative decision. I have included administrative actions changed by the courts in the plaintiff's victories because for the years 1993, 1994 and 1995 court-revised administrative actions are included with the figures for administrative actions overturned by the courts, implying that such actions were changed in favour of the plaintiff. It should be pointed out, though, that it is not conclusive that such actions were changed in either the government's or the plaintiff's favour. Many changes were likely to have been merely due to a change in the law, regulation, clause or provision on which the administrative decision was based, thereby favouring the defending organ rather than the plaintiff. Thus the ratio of government victories may in fact be a few percentage points higher still.

The pattern has remained stable for the years represented in Table 17 despite the significant changes represented in Table 15. In Table 15, the ratio of administrative actions confirmed by the courts fell by almost a half from 24% in 1993 to 13% in 1997. Most of these cases went into the category of withdrawn suits, but it cannot be determined whether most of these suits were withdrawn on the plaintiff's initiative, or after the defending organ had altered its administrative decision. The most reasonable
explanation is an even spread to both sub-categories. In 1993, 58% of withdrawn cases were done on the plaintiff’s initiative, and this changed only marginally to 57% in 1997 (Table 16). Likewise for suits withdrawn after the defending organ had changed its decision: in 1993, 42% of withdrawn cases came after the defending organ had changed its decision, and this increased by only one percent to 43% in 1997 (Table 16).

If we assume that the influx of cases was evenly spread across both categories, then the implications are two-fold. First, the courts have moved away from being predisposed to favour administrative organs by giving an outright confirmation of administrative action, and have moved instead towards mediating between the organ and the plaintiff. The claim that mediation is used with increasing frequency in administrative litigation suits is supported by legal academics in China, who assess the rate of mediation to be about 40%. This estimate would account for the 25% of the cases withdrawn in 1997 after administrative organs changed their decisions (Table 16 above), plus the 15% of case overturned or altered by the courts (Table 15 above).

Second, administrative organs have become more active and influential during the trial phase, either intimidating the plaintiff to withdraw the suit or making a concession to alter the administrative decision. Basically what happens is that the organ persuades the judge and the judge persuades the plaintiff by saying: “If you persist in this case it will do you no good, but if you withdraw the suit I can persuade the organ to alter its decision.” It is acknowledged that it is better for the organs if they alter the decision themselves during the course of the trial rather than to be told to change it by the court.

Alternatively, the influx of cases may not be evenly spread across both sub-categories. Either category A or B (Table 16) may have increased or decreased significantly at the expense of the other, but remained comparable overall. If judges have lost their initial flush of enthusiasm and determination that had been undergirding their rulings

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31 Interviews, Beijing, 1998.
33 Interview with lawyer and legal academic, Beijing, 1998.
in the first few years of administrative litigation (1989-1993), then it is quite possible that administrative organs have grasped this extra space to assert their wishes on the process.

The net effect is that the government is more likely to win than the plaintiff, and judges assist this process. It is true, though, as Pei points out, that judges also play a significant role in mediating between the defending organ and the plaintiff to the advantage sometimes of the plaintiff. But some Chinese legal practitioners assert that despite the positive sounding statistics of plaintiffs prevailing in 30%-40% of cases, this should not be taken as indicative of the success of the ALL in curbing illegal or unfair administrative actions. The counter-claim is that all administrative litigation cases that come before the courts are cases where the administrative organ has acted illegally or unfairly and thus, they should all be overturned by the courts. It is difficult to prove such a claim, but the weight of evidence leans against a positive interpretation of the figures. We know that many people only file an appeal as a final resort; we know that the raw numbers of administrative litigation cases accepted by the courts for trial are increasing each year — being indicative of continuing difficulties in securing legal and fair administrative decision-making, and we know that the problem of judicial independence has not improved significantly in the past few years.

Local and regional variations in administrative litigation

Local variations in the pattern of administrative litigation suits reveal differences in the strength of both courts and administrative organs throughout the country, and even from district to district within a city. Tables 18 and 19, for the most part, indicate comparable rates of withdrawn suits in Beijing and across the country, where it is not

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35 There are reports of plaintiffs winning 70%-90% of their cases against government organs (FBIS-CHI-96-238 “CHINA: Law Protects Farmers’ Interests”) in Jiangsu, Hunan and Sichuan in 1995 but such figures relate to cases which characteristically are group cases and have many parties as plaintiffs about one issue against one defending organ. Thus the high proportion of winning plaintiffs was obtained by including each winning plaintiff individually rather than by simply determining the number of suits in which plaintiffs prevailed over the government.
36 Interviews, Beijing, 1998.
specified whether the plaintiff or the defending organ benefited from the withdrawn suit.

Table 18: Numbers of administrative litigation cases accepted, tried and withdrawn in Beijing City courts, 1991-1996 (withdrawn cases are also represented as a percentage of tried cases)

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases accepted</th>
<th>Cases tried</th>
<th>Cases withdrawn</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>25</td>
<td>24</td>
<td>13 (54%)</td>
</tr>
<tr>
<td>1991</td>
<td>142</td>
<td>115</td>
<td>66 (57%)</td>
</tr>
<tr>
<td>1992</td>
<td>231</td>
<td>212</td>
<td>114 (54%)</td>
</tr>
<tr>
<td>1993</td>
<td>243</td>
<td>259</td>
<td>116 (45%)</td>
</tr>
<tr>
<td>1994</td>
<td>290</td>
<td>270</td>
<td>125 (46%)</td>
</tr>
<tr>
<td>1995</td>
<td>292</td>
<td>279</td>
<td>114 (41%)</td>
</tr>
<tr>
<td>1996</td>
<td>430</td>
<td>421</td>
<td>154 (37%)</td>
</tr>
</tbody>
</table>

Source: Deputy Professor of the National Judges Training Institute, Head of the Administrative Division of Haidian District in Beijing and Head of the Enforcement Division of Xuanwu District Court in Beijing, in Jiang Ming'an (ed.), "Investigative Report", 1998, p.337.

But by also considering the figures from Table 16 above, of the percentage of cases where it is known that the plaintiff benefited from the withdrawn suit, it becomes clear that the marked increase in suits withdrawn to the benefit of the plaintiff between 1995 to 1996 across China is not paralleled in Beijing (Table 19). This may indicate that administrative organs in Beijing are more powerful vis-à-vis the courts than elsewhere in China, or it may indicate the organs are particularly stubborn and inflexible in the face of administrative appeals. More will be said about possible explanations below, together with analysis of Table 20 which provides more detailed information about administrative litigation patterns in Beijing.
Table 19: Percentage of administrative litigation suits withdrawn in Beijing and across China

<table>
<thead>
<tr>
<th>Year</th>
<th>Beijing</th>
<th>National figures (from Table 15)</th>
<th>National figures (from Table 16)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>45%</td>
<td>41%</td>
<td>17%</td>
</tr>
<tr>
<td>1994</td>
<td>46%</td>
<td>44%</td>
<td>17%</td>
</tr>
<tr>
<td>1995</td>
<td>41%</td>
<td>51%</td>
<td>17%</td>
</tr>
<tr>
<td>1996</td>
<td>37%</td>
<td>54%</td>
<td>26%</td>
</tr>
</tbody>
</table>


Table 20 (below) — Beijing: What can we make of these figures and are they consistent with national patterns?

First, the most striking feature is that there is a great variation among the districts over the seven year period represented. Some courts had static rates of acceptance of cases for trial, such as Shijingshan and Mentougou. Others, most notably Dongcheng, Xuanwu and Haidian, were increasingly active in trying administrative litigation cases. All of the courts experienced a raw numerical increase in the number of cases tried except for Miyun.

Second, generally the number of cases tried is comparable to the number of cases accepted by the courts. Sometimes there are more cases tried than accepted, such as at Dongcheng in 1992, Chongwen in 1995, Xuanwu in 1995, Haidian in 1994 and 1995, Miyun in 1993, 1994 and 1995, 1st Intermediate in 1993, 2nd Intermediate in 1996 and the High Court in 1996. This is possibly explained by the extra cases being transfers from another court or district because the case had been filed at the wrong court initially. The exception to this pattern is Miyun court, which appeared to have an initial rush of enthusiasm to accept cases in 1991 when the Administrative Litigation Law was first implemented, but clearly there was interference from some quarter as only eighteen of the twenty-seven cases were tried.
Table 20: Administrative litigation cases received and tried in ten Beijing City courts, 1990-1996 (All the courts are county courts unless otherwise specified.)

The first line of figures for each court is the number of appeals accepted, and the second line is the number of cases actually tried by the court.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Dongcheng</td>
<td>-</td>
<td>3</td>
<td>12</td>
<td>14</td>
<td>16</td>
<td>18</td>
<td>45</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>1</td>
<td>13</td>
<td>14</td>
<td>14</td>
<td>20</td>
<td>44</td>
</tr>
<tr>
<td>Chongwen</td>
<td>1</td>
<td>5</td>
<td>9</td>
<td>14</td>
<td>31</td>
<td>10</td>
<td>18</td>
</tr>
<tr>
<td></td>
<td>1</td>
<td>4</td>
<td>9</td>
<td>13</td>
<td>28</td>
<td>16</td>
<td>18</td>
</tr>
<tr>
<td>Xuanwu</td>
<td>1</td>
<td>3</td>
<td>7</td>
<td>22</td>
<td>20</td>
<td>7</td>
<td>39</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>3</td>
<td>6</td>
<td>22</td>
<td>20</td>
<td>8</td>
<td>35</td>
</tr>
<tr>
<td>Shijingshan</td>
<td>-</td>
<td>-</td>
<td>4</td>
<td>8</td>
<td>8</td>
<td>12</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>-</td>
<td>4</td>
<td>8</td>
<td>8</td>
<td>12</td>
<td>4</td>
</tr>
<tr>
<td>Mentougou</td>
<td>-</td>
<td>2</td>
<td>6</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>2</td>
<td>6</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>Haidian</td>
<td>4</td>
<td>6</td>
<td>24</td>
<td>41</td>
<td>45</td>
<td>53</td>
<td>67</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>5</td>
<td>25</td>
<td>36</td>
<td>46</td>
<td>60</td>
<td>59</td>
</tr>
<tr>
<td>Miyun</td>
<td>4</td>
<td>27</td>
<td>30</td>
<td>15</td>
<td>11</td>
<td>13</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>18</td>
<td>27</td>
<td>17</td>
<td>12</td>
<td>14</td>
<td>12</td>
</tr>
<tr>
<td>1st Intermediate</td>
<td>3</td>
<td>1</td>
<td>11</td>
<td>10</td>
<td>8</td>
<td>10</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>-</td>
<td>7</td>
<td>11</td>
<td>4</td>
<td>8</td>
<td>13</td>
</tr>
<tr>
<td>2nd Intermediate</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>5</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>3</td>
<td>14</td>
</tr>
<tr>
<td>High Court</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>2</td>
<td>4</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>4</td>
<td>2</td>
<td></td>
</tr>
</tbody>
</table>

Source: Deputy Professor of the National Judges Training Institute, Head of the Administrative Division of Haidian District in Beijing and Head of the Enforcement Division of Xuanwu District Court in Beijing, in Jiang Ming'an (ed.), “Investigative Report”, 1998, p.331. Note: The second Intermediate court was only established in 1995.
Third, the Haidian, Dongcheng and Xuanwu courts were the most active in trying administrative litigation cases. There may be several factors feeding into this. First, as was discussed in Chapter Six, cases are only accepted by courts if the judges are confident they can handle the case without getting into too much trouble with the defending administrative organ, so the judges at these courts may well be better educated and have more experience than at other courts. The proximity to some of China's best tertiary institutions and the sharing of knowledge that occurs between such institutions and surrounding administrative organs may also contribute to this. The Haidian court in particular appears to be very organised about its affairs, as it has published, for example, a volume of cases from its records of tried cases. It has also been listed as an exemplary court along with Shanghai's Huangpu District court and Jiangsu's Changshu City, court for demonstrating outstanding levels of judicial justice, honesty, and service.

The second factor that may explain the level of activity in the Haidian, Dongcheng and Xuanwu courts is the correlation between anti-crime campaigns and the implementation of these campaigns by the public security organs in these districts. In 1994 and 1995 national anti-crime measures were strengthened and culminated in the "Strike Hard" campaign of 1996. Concurrent with such campaigns was the decision to strengthen management of the migrant population, which was perceived to be a major factor in public security issues. These campaigns were aimed primarily at criminal activities but there was an inevitable impact on the number of administrative penalties imposed by public security organs. In some districts more administrative penalties would have been imposed together with more criminal punishments, while in other districts the "strike hard" attitude would have meant that minor offences which would normally incur an administrative penalty were treated more severely and incurred a criminal punishment. This reasoning is informed by research carried out on

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40 Beijing City Haidian District People's Court, 审判案例选析 (Analysis of Selected Trial Cases) (Beijing: China University of Politics and Law, 1997).
41 FBIS-CHI-1999-0323 "Supreme People's Court Work Report."
43 FBIS-CHI-96-084 "PRC: Top Procurator Urges Crackdown on Major Crimes."
sets of legal cases that arise from a specific event or product, called a "case congregation", and how such cases are handled over time, or their "careers". For example, the prosecutions and penalties imposed on people after the June 1989 Tiananmen Massacre would form a case congregation. As such, how each case is handled is not just a matter of the legal situation of each case individually, but is also linked to many other factors, not least of which is that there were a lot of people demonstrating against the government in June 1989 but not all can be punished. Those who were punished are likely to have been punished more severely for actions that, had the events not ended in massacre, would not have been viewed so dimly by the state. Marc Galanter concludes thus that:

External events and the litigation system are simultaneously connected and separated by the strategies of the actors. External changes affect the litigation system as they are filtered through the strategic considerations of the parties......so when we see changes in litigation over time, we see reflections of changes in the resources, alternatives, and strategies available to the players.

For example, the number of people detained for criminal and public order offences in 1996 by the Haidian District public security organ was 5,750. This figure represents an 8.2% increase from 1995 and a 45% increase from 1994, and includes both criminal punishments and administrative penalties. Of these people, 60.4% (or 3,478) were itinerant workers from outside the city. Among these itinerants, 53.6% (or 1,863) had administrative detention penalties imposed on them by the public security organ, and this figure represents 62.9% of the total number of administrative detention penalties imposed by the organ in 1996.

That there is a correlation between anti-crime campaigns and the number of arrests and detentions in China is not a new phenomenon. That the pattern is repeated in administrative disputes was confirmed in interviews with Supreme Court personnel.

48 Ibid.
who admitted that China was still a long way from the time when a citizen could apply for administrative review or litigation at any time of the year, in any place, and gain redress without external factors such as campaigns affecting the case.  

These figures from Haidian also demonstrate that some of these detainees are willing to use the legal system to defend their rights, albeit an abysmally small proportion. If 1,863 administrative detention penalties were imposed on itinerant workers by public security organs in Haidian district in 1996, and this represents 62.9% of the total number of penalties imposed that year, then the total number of administrative detention penalties imposed by the organ that year was 2,962. Table 20 records that in 1996 Haidian court tried 59 administrative litigation cases. Even if they were all public security cases, and this is unlikely, this represents an appeal rate of almost 2%, which seems very low. The actual appeal rate would be lower than this after administrative penalties from all administrative organs are included. By way of comparison, in an unspecified district in Anhui Province 2,781 public order administrative penalties were imposed in 1994, resulting in four administrative litigation appeals to the court. This is an appeal rate of 0.14%. Likewise in 1995 in the same district, 2,492 public order penalties were imposed and eight were appealed, representing an appeal rate of 0.32%. The rate for 1996 was similarly almost non-existent at 0.37%: 3,995 penalties and fifteen appeals.

Table 21: Annual changes in administrative litigation appeal rates at three local Beijing courts

<table>
<thead>
<tr>
<th></th>
<th>Haidian</th>
<th>Dongcheng</th>
<th>Xuanwu</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992:</td>
<td>400%</td>
<td>1200%</td>
<td>100%</td>
</tr>
<tr>
<td>1993:</td>
<td>44%</td>
<td>8%</td>
<td>267%</td>
</tr>
<tr>
<td>1994:</td>
<td>28%</td>
<td>0%</td>
<td>-2%</td>
</tr>
<tr>
<td>1995:</td>
<td>30%</td>
<td>43%</td>
<td>-60%</td>
</tr>
<tr>
<td>1996:</td>
<td>-2%</td>
<td>120%</td>
<td>337%</td>
</tr>
</tbody>
</table>

The other interesting feature is that the anti-crime campaigns had varying effects on administrative litigation appeals in Haidian and other district courts in Beijing. The

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50 Interviews, Beijing, April 1998.
annual percentage rates of change in administrative litigation appeals at Haidian, Dongcheng and Xuanwu District courts are shown in Table 21 (based on information in Table 20).

The increase from 1991-1992 is best explained by the initial enthusiasm generated by the implementation of the ALL, but this slowed dramatically in 1993 at Haidian and Dongcheng, while Xuanwu had a slightly different pattern. It can be seen from Tables 21 and 22 that the annual change in appeal rates at Haidian District court from 1993 onwards is higher than the annual change in the rate of public order cases handled across the country. (Although we do not know the rate of penalty impositions after 1993 because such figures began to be omitted from the 中国法律年鉴 (China Law Yearbook, probably because of the large number, it is reasonable to assume that the number of public order penalties kept pace with the number of public order cases handled.) The implication of this is that while anti-crime measures were strengthening nationally and more public order penalties were being imposed, proportionally more appeals were heard in Haidian and Dongcheng courts. This indicates that these courts were more willing to hear cases against government organs than other Beijing City courts.

Table 22: Public order cases investigated and dealt with by public security organs across China, 1990-1997

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of cases</th>
<th>No. of public order penalties imposed</th>
<th>% change in no. of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>1,835,779</td>
<td>3,066,099</td>
<td>---</td>
</tr>
<tr>
<td>1991</td>
<td>2,240,648</td>
<td>3,404,907</td>
<td>22%</td>
</tr>
<tr>
<td>1992</td>
<td>2,529,614</td>
<td>3,860,149</td>
<td>13%</td>
</tr>
<tr>
<td>1993</td>
<td>2,839,124</td>
<td>4,279,039</td>
<td>12%</td>
</tr>
<tr>
<td>1994</td>
<td>2,865,754</td>
<td>----------</td>
<td>1%</td>
</tr>
<tr>
<td>1995</td>
<td>2,968,220</td>
<td>----------</td>
<td>4%</td>
</tr>
<tr>
<td>1996</td>
<td>3,117,623</td>
<td>----------</td>
<td>5%</td>
</tr>
<tr>
<td>1997</td>
<td>3,003,799</td>
<td>----------</td>
<td>-4%</td>
</tr>
</tbody>
</table>

In 1996 there was a noticeable change in the pattern of cases heard at the three courts above which is most reasonably explained by the impact of the "Strike Hard" campaign. Conclusive deductions about the characteristics of administrative litigation appeals cannot therefore be made on the basis of annual national figures, even though there has been, for the most part, an annual increase in the raw numbers of such cases tried by courts in China.\textsuperscript{52} This annual increase may indicate merely that progressively more administrative penalties were being imposed.

The fourth feature to be observed from Table 20 is that these ten Beijing courts do not record a steady annual increase in the raw numbers of administrative litigation cases tried over the seven year period. Most had initial jumps as the ALL was newly implemented but only Haidian came close to a steady annual increase, and this was disrupted in 1995. However, the annual figures for all ten courts combined do demonstrate an annual increase (Table 23).

Table 23: Total number of administrative litigation cases tried in the ten Beijing City courts represented in Table 20, 1990 to 1996

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>4</td>
</tr>
<tr>
<td>1991</td>
<td>33</td>
</tr>
<tr>
<td>1992</td>
<td>97</td>
</tr>
<tr>
<td>1993</td>
<td>123</td>
</tr>
<tr>
<td>1994</td>
<td>134</td>
</tr>
<tr>
<td>1995</td>
<td>146</td>
</tr>
<tr>
<td>1996</td>
<td>208</td>
</tr>
</tbody>
</table>

This draws our attention to the importance of not just raw national statistics but also of local variations and what these reveal about factors affecting the implementation of the ALL.

The fifth feature to be observed from Table 20 is that, taking the years 1994 and 1996 as sample years, seven out of the ten courts recorded an increase in the number of administrative litigation cases tried. Significantly, though, many also had either peaks

\textsuperscript{52} Minxin Pei, "Citizens v. Mandarins", 1997.
or troughs in the intervening year of 1995. This may be explained, again, by the strengthened national anti-crime measures that were implemented from 1994 onwards. As for Haidian, Dongcheng and Xuanwu, if a district's public security organ is quite hard-line then it is likely that more detainees than usual were given criminal punishments during this campaign and also that the organs influenced the courts to accept fewer administrative appeals. If, on the other hand, a district's public security organ is more moderate then this may be reflected in relatively more administrative penalties being imposed and accepted for appeal.

Another explanation offered to explain the increase in the number of appeals made (generally) in 1995 is the passage of the State Compensation Law in 1994.\(^5\) This undoubtedly had some effect but was not the sole factor. The analysis presented in Chapter Five (see the section on "Administrative Compensation") demonstrates that the passage of the Administrative Litigation Law itself had the biggest impact on the number of administrative litigation appeals made. Added to this is the fact that the number of appeals varied from district to district (in both Beijing and across China) and there is no clear pattern indicating that this was due to the passage of the State Compensation Law. A combination of factors is the most reasonable explanation.

The situation in Guangxi

The same investigative study group visited Guangxi in 1997 and found that even in the region's relatively economically developed areas and cities, knowledge of the ALL was not high. A questionnaire was conducted among 50 individual entrepreneurs located in a commercial market in Nanning City, of whom 36 responded. The respondents were asked:

1. Do you understand China's Administrative Litigation Law?

<table>
<thead>
<tr>
<th>Nature of response</th>
<th>Percentage of respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Understand</td>
<td>44.4%</td>
</tr>
<tr>
<td>Have heard of it</td>
<td>13.9%</td>
</tr>
<tr>
<td>Don't know</td>
<td>41.7%</td>
</tr>
</tbody>
</table>
2. If your lawful rights and interests were illegally encroached upon by an administrative organ, would you apply for administrative litigation to a court?

<table>
<thead>
<tr>
<th>Nature of response</th>
<th>Percentage of respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>I would dare to do that</td>
<td>19.4%</td>
</tr>
<tr>
<td>I would not be willing to do that</td>
<td>25%</td>
</tr>
<tr>
<td>I would not dare do that</td>
<td>33.3%</td>
</tr>
<tr>
<td>I would be unlikely to do that</td>
<td>22.2%</td>
</tr>
</tbody>
</table>


From Question 1 it can be seen that among this group of individual entrepreneurs (getihu), knowledge of the ALL stood at only 45% after six years of the law’s implementation. This is quite low among a section of the community who would have to deal with administrative organs — the industry & commerce organs — on a regular basis.

The supervision of this small-business sector by the industry & commerce organs involves a threefold strategy: certificates must be obtained by the individual entrepreneur from the organ to do anything from start up the business, employ more or fewer people, change the nature of the business, move its location, or close the business. Added to this is the dossier (档案 dang’an) system, which is a system of filing not just the relevant certificates of the business, but also other information such as the individual entrepreneur’s personal identification and copies of any violations that have occurred. On top of all this is the general system of supervision by industry & commerce organs, which includes supervising trademarks and advertising, and work practices in the market place such as the use of accurate scales to measure and weigh goods.54

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If individual entrepreneurs violate an administrative law the range of penalties includes warnings, fines, confiscation of illegal income, orders to cease business, and cancellation of the business licence. If an individual entrepreneur is operating his or her business legally then he or she would at least have applied for a business licence and the administrative procedures for this should include making the entrepreneur aware of his or her right to administrative review and litigation. The figures quoted above do not definitely tell us that the industry & commerce organs are not doing this at all, but the figures are low enough to indicate that a very low level of emphasis is placed upon educating individual entrepreneurs about the legal aspects relating to the conduct of their business.

The second question produced a disturbing reply. Only 19.4% of respondents actively saw themselves as ever using the system to challenge an illegal or unfair administrative decision. By far the greatest proportion (80.5%) either would not have dared or even thought about such a course of action. One individual entrepreneur told the investigation team in Nanning that he had been indiscriminately fined by the industry & commerce organs of the city many times. When asked why he did not apply to the court for administrative litigation, he replied: “Who would dare? If you offend an official from the industry & commerce organs how can you continue to do business afterwards?”55 This response is very similar to that obtained from the 1992 polling of individual entrepreneurs, who noted they would bring a suit against an administrative organ if they had nothing else to lose.56 The intervening five year period has done little to overturn this outlook. We do not know, of course, whether the same individual entrepreneurs polled in 1992 would have replied in a similar vein in 1997, and it should be borne in mind that that the results from Question 2 above may be aberrant, but we will hold this in mind as we examine other pieces of evidence.

The low regard that is held by administrative organs for the process of administrative litigation was discussed in Chapter Six. Further confirmation of this was uncovered by the investigation in Nanning, which reports an administrative case in which the

plaintiff had been summoned to court to answer enquiries about the case. The defending organ, a public security organ, sent some of its personnel to the gate of the court to lie in wait for the plaintiff. When he arrived he was arrested by the public security organ, and thereby prevented from further pursuing his case at court. The investigation team reports that this kind of overt retaliation against plaintiffs is as common as the less physical modes of administrative resistance.

One aspect not discussed yet is that of interference by local people's congresses. That this occurs should not be surprising, as the leadership and power structure in China overlaps Party, government and administrative posts. In an unspecified county in Guangxi, the Chair of the People's Congress Standing Committee did not like the fact that the county court had made unfavourable rulings against the county government in administrative litigation cases. The congress subsequently requested that the county court not accept any more administrative litigation cases in which the county government was the defendant. For several years after this the county court obliged the request.

These kinds of events show, first, that outside interference in administrative litigation is often achieved through institutional rather than personal means. The chair of the congress wields a certain amount of power as a result of his personal authority, but the significant factor for state-society relations is that the vehicle through which the interference is effected is not a personal telephone call to the judge handling any particular case, but rather through the abuse of the institution he heads. This is certainly a more effective way to control administrative litigation than to keep tabs on every case that comes before the courts and then pressure the judge as necessary. This power is activated at one of the most significant points in the administrative litigation process for a plaintiff, that is, the phase of court acceptance of the case for trial. As has been said above, if a court accepts an administrative case for hearing this is a tacit admission that the administrative organ very likely committed an illegal act. It is also indicative that other sources of power in the area such as the Party and the congress approve of the case being handled by the court.

Second, these events also show that rule by law may be achieved at one point but at the expense of rule by law at other points. In the case of the congress' interference,
the court may well have handled the administrative litigation cases that it did accept according to the procedures laid down in the ALL. But the fact that a whole batch of cases is simply excluded from this category at the outset (which, granted, is a violation of the ALL, Article 41) through external interference demonstrates that rule by law is being violated elsewhere in the political-legal system.

Official acknowledgment of the importance and, to date, weakness of the phase of court acceptance of cases is demonstrated by official attempts to separate the processes of filing a case from the trial. The Supreme People’s Court Report on work in 1997 states that a new system was tried during that year whereby the office that was responsible for placing a case on file for investigation (and prosecution) was separated from the office that was in charge of the trial. This system was continued throughout 1998 with further refinements being made by separating the trial from the execution of sentences, and the trial from adjudication supervision.

The situation in Hunan
Tables 24 and 25 represent the responses from fifteen work units, such as public security organs, industry & commerce organs, health organs, city construction organs, tax organs, and local governments in Hunan Province given to the investigation team in 1997, about matters related to administrative litigation. Table 24 indicates the respondents estimated that when the ALL was first implemented (early 1990s), administrative trials only had a 35% impact upon strengthening the concept of the legal system, but that this increased to a 75% impact by 1997. Likewise, administrative litigation trials had a 46% impact upon work efficiency in the early 1990s, but that this impact declined to about 5% by 1997.

57 FBIS-CHI-98-084 "China: Supreme People’s Court Work Report."
58 FBIS-CHI-1999-0323 "Supreme People’s Court Work Report." Adjudication supervision is the Chinese judicial process where a procuracy or any citizen (whether or not a party to the case) may request a court to re-open a legally effective judgement. See Margaret Y.K. Woo, “Adjudication Supervision and Judicial Independence in the P.R.C.” in American Journal of Comparative Law, 39, 1991, pp.95-119.
Table 24: Views from 15 work units in Hunan as to the influence of administrative trials on administrative organs

<table>
<thead>
<tr>
<th>Area of influence</th>
<th>Ratio of influence in 1992/93 (%)</th>
<th>Ratio of influence now (%) (1997)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Concept of the legal system</td>
<td>35</td>
<td>75.1</td>
</tr>
<tr>
<td>has to some extent strengthened</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Beneficial in maintaining administrative authoritativeness</td>
<td>6.2</td>
<td>12.4</td>
</tr>
<tr>
<td>Influence on work efficiency</td>
<td>46.4</td>
<td>5.4</td>
</tr>
</tbody>
</table>


Table 25: Views from 15 work units in Hunan as to the rate of implementation of judicial decisions on administrative trials by administrative organs

<table>
<thead>
<tr>
<th>Level of implementation</th>
<th>Ratio in 1992/93 (%)</th>
<th>Ratio now (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Active execution</td>
<td>34.5</td>
<td>79.5</td>
</tr>
<tr>
<td>Non-execution</td>
<td>35.5</td>
<td>12</td>
</tr>
<tr>
<td>Resist execution</td>
<td>14.5</td>
<td>1.1</td>
</tr>
</tbody>
</table>


These two tables together do not present a positive picture of the progressive implementation of the ALL in Hunan Province. Table 24 reveals how the influence of the ALL has progressed from focusing on the minute details of the process of administrative decision-making to greater influence on strengthening the broad concept of administration according to law. This finding concurs with the figures on judicial recommendations referred to above where it was shown that these
recommendations are usually made about minor administrative processes relating to the imposition of administrative penalties, and that administrative organs have not improved their routine handling of these matters, even after seven years of judicial recommendations.

Table 24 also indicates that there was concern in the early years of the implementation of the ALL that the justice process was overly interfering with administrative authority. This concern has not abated either: in Anhui Province in 1997, 51% of the defending organs that responded to a questionnaire replied that administrative organs have a low view of administrative litigation because they are concerned it will interfere with administrative efficiency.\(^59\) The tension between administrative efficiency and administrative justice is common in all bureaucracies, and most Western countries recognise that justice costs a certain amount of time and money.\(^60\)

The outcome after eight years of implementing the ALL and education about it, is that administrative organs still have a suspicious attitude towards the rights of plaintiffs as they are laid out in the ALL. But significantly, this suspicion betrays an awareness of the rights-conscious aspect of the ALL and a clear recognition that citizens' rights come at the expense of administrative authoritativeness.

The responses in Table 25 must be held in abeyance as they claim that nearly 80% of judicial rulings on administrative litigation cases are actively implemented by the organs. A similar ratio is claimed by administrative organs through a questionnaire conducted in Anhui Province in 1997. Responding organs claimed that in 76% of cases they consciously implement the judicial decision about the case.\(^61\) Such claims are contrary to the popular perception that one of the biggest problems in administrative litigation is the poor rate of implementation by administrative organs of judicial rulings.\(^62\) One way in which the figures in Table 25 may be accurate is if

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\(^{59}\) Director of the Research Office in the Hefei City Intermediate Court and Vice President of the Intermediate Court in Chizhou District in Anhui Province, in Jiang Ming'an (ed.), "Investigative Report", 1998, p.424. Note: Chizhou is a Tang Dynasty term for the area now covered by Guichi and Tongling in southern central Anhui Province.

\(^{60}\) See, for example, Margaret Allars, "Managerialism and Administrative Law" in Canberra Bulletin of Public Administration, No.66, October 1991, pp.50-62.


\(^{62}\) This is an openly acknowledged problem. See: FBIS-CHI-1999-0323 “Supreme People’s Court Work Report”; FBIS-CHI-2000-0319 “Supreme People’s Court Report to NPC.”
administrative organs routinely only execute the judicial rulings that are favourable to them. Working from national figures for 1997 (see Tables 15, 16 and 17 above), administrative organs win 60% of the cases so they will definitely implement this portion of judicial rulings. Of the remaining 40% that the plaintiff wins, 25% of these represent cases where the administrative organ has already altered its administrative decision, so the organ will be highly likely to implement this portion of rulings too, bringing the likely level of execution to 85%. Some in this latter group may drop off and the 14% of administrative decisions overturned by the court are possibly un-executed too, thereby accounting for the claimed 20% level of non-execution in Hunan Province.

The situation in Ningxia
Ningxia is one of the smallest and least populated of China’s provinces. We have figures relating to administrative litigation patterns in Ningxia and they evidence that the conduct of anti-crime campaigns influences the pattern of appeals. These figures also enable a comparison of some aspects of the behaviour of administrative organs during administrative litigation trials.

In Table 26 it can be seen that the number of administrative litigation cases accepted by the courts in Ningxia varied considerably from year to year. Initially there was a steady decline in the number but this trend reversed after 1993. The greatest annual change occurred between 1995 and 1996 where the number of accepted cases rose by nearly 63%. The most likely explanation for this pattern is similar to that offered for the patterns in Beijing: the 1996 “Strike Hard” anti-crime campaign that had its origins in strengthened national anti-crime measures in 1994 and 1995 and culminated in the full campaign in 1996.

63 Ningxia is used here as an example because relevant data is available.
Table 26: Number of administrative litigation cases accepted by courts in Ningxia, 1991 – 1996

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of cases accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>111</td>
</tr>
<tr>
<td>1992</td>
<td>105</td>
</tr>
<tr>
<td>1993</td>
<td>93</td>
</tr>
<tr>
<td>1994</td>
<td>106</td>
</tr>
<tr>
<td>1995</td>
<td>116</td>
</tr>
<tr>
<td>1996</td>
<td>189</td>
</tr>
<tr>
<td>Total</td>
<td>720</td>
</tr>
</tbody>
</table>


Table 27 shows the numbers of administrative litigation cases that were withdrawn on the plaintiff’s initiative during the course of a trial, together with cases withdrawn by plaintiffs after the defending organ had altered its administrative decision. These figures may provide some clue as to which organs more frequently alter their decisions during a trial and why.

The first and most obvious feature of these figures is that the courts and plaintiffs did not appear to persuade administrative organs to alter the offending decision during the trials very much at all, especially in the early years of the system’s implementation. This improved a little over the years, presumably as administrative organs became more accustomed to having to consider the legality of their decision-making.

The second most striking feature is that the public security organs in this region did not alter their decisions very often, compared to the land management organs, and this did not change over the six-year period. This indicates the public security organs in this province either make fair and legal decisions most of the time, or take a
Table 27: Administrative litigation cases accepted and withdrawn in Ningxia, 1991 – 1996 (Percentages are of the number of cases accepted in each category that year.)

<table>
<thead>
<tr>
<th>Year</th>
<th>Accepted</th>
<th>Organ</th>
<th>Withdrawn by plaintiff</th>
<th>Withdrawn after decision altered</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>25</td>
<td>PSB</td>
<td>9 (36%)</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>41</td>
<td>Land</td>
<td>10 (24%)</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>I&amp;C</td>
<td>1 (33%)</td>
<td>-</td>
</tr>
<tr>
<td>1992</td>
<td>21</td>
<td>PSB</td>
<td>4 (19%)</td>
<td>1 (5%)</td>
</tr>
<tr>
<td></td>
<td>35</td>
<td>Land</td>
<td>10 (29%)</td>
<td>2 (6%)</td>
</tr>
<tr>
<td></td>
<td>23</td>
<td>Constr.</td>
<td>3 (13%)</td>
<td>-</td>
</tr>
<tr>
<td>1993</td>
<td>28</td>
<td>PSB</td>
<td>5 (18%)</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>31</td>
<td>Land</td>
<td>3 (10%)</td>
<td>4 (13%)</td>
</tr>
<tr>
<td></td>
<td>7</td>
<td>Constr.</td>
<td>3 (43%)</td>
<td>-</td>
</tr>
<tr>
<td>1994</td>
<td>34</td>
<td>PSB</td>
<td>6 (18%)</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>36</td>
<td>Land</td>
<td>7 (19%)</td>
<td>1 (3%)</td>
</tr>
<tr>
<td></td>
<td>5</td>
<td>I&amp;C</td>
<td>2 (40%)</td>
<td>-</td>
</tr>
<tr>
<td>1995</td>
<td>38</td>
<td>PSB</td>
<td>8 (21%)</td>
<td>2 (5%)</td>
</tr>
<tr>
<td></td>
<td>36</td>
<td>Land</td>
<td>6 (17%)</td>
<td>11 (31%)</td>
</tr>
<tr>
<td></td>
<td>5</td>
<td>I&amp;C</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1996</td>
<td>57</td>
<td>PSB</td>
<td>15 (26%)</td>
<td>4 (7%)</td>
</tr>
<tr>
<td></td>
<td>47</td>
<td>Land</td>
<td>1 (2%)</td>
<td>7 (15%)</td>
</tr>
<tr>
<td></td>
<td>7</td>
<td>I&amp;C</td>
<td>1 (14%)</td>
<td>-</td>
</tr>
</tbody>
</table>

Source: Judge of the High-level People’s Court in Ningxia and Head of the Administrative Division of the Intermediate Court in Xining, Qinghai Province, in Jiang Ming’an (ed.), “Investigative Report”, 1998, p.357.

hard-line stance in court. Given what we know from other areas of the country about cases that are withdrawn on the plaintiff’s initiative, that is, that in more than half the cases such withdrawals are made under coercion from courts and administrative organs (see Table 16 above), it is reasonable to assume that the public security organs
in this region are very hard-line and coercive. Likewise, the industry & commerce organs appear to be quite inflexible in the face of administrative trials.

Third, it should be noted that even though public security organs applied pressure in court to get their own way, this does not necessarily mean that they did so in order to avoid altering one of their administrative decisions that should have been altered. It is possible that their decisions were legal but that because plaintiffs have a lot at stake in wanting to avoid administrative detention, they appeal more often.

In contrast to the public security organs, the land management organs in 1995 and 1996 were more inclined to alter their decisions during a trial and this may be related to the nature of the disputes and how they are resolved. The Land Management Law of the PRC stipulates that land disputes are preferably to be resolved through mediation with the parties concerned. It was shown in Chapter Two of this dissertation that many land disputes may be channelled by the local government into the mediation system and do not end up as administrative disputes. The background to such disputes is a predisposition to mediate, not least because many land disputes have a long, complex history and justice cannot simply be determined. It is highly probable that this mediation continues into administrative litigation, even more so than for cases involving other administrative organs, resulting in a higher rate of administrative decisions altered during the trial.

Fourth, the figures in Table 27 indicate that in Ningxia the rate of withdrawal of administrative cases during trial is comparable to the national rate. Table 16 above shows that for the years 1993 – 1997 the percentage of suits withdrawn on the plaintiff’s initiative was respectively 24%, 28%, 28%, 28%, and 32%. The corresponding percentages for Ningxia are 15% (1993), 28% (1994), 24% (1995), and 21% (1996). These percentages are lower than those in Table 27 because not all cases accepted by the courts in Ningxia are represented in Table 27).

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What are the consequences of maladministration for officials?

The consequences of illegal or unfair administrative behaviour is an area that is not invisible in administrative justice materials, but is similar to bribery and corruption. Official acknowledgment of the problem occurs and reports of discipline and punishment are heard, but the problem still remains. An official may have any or several of the following penalties imposed on him or her:

- An administrative sanction imposed by an internal order of his or her organ (行政处分 xingzheng chufen). This may range from a demerit point on the official’s work file through to demotion or dismissal.
- An administrative penalty imposed by his or her organ, such as a fine (行政处罚 xingzheng chufa).
- Civil responsibility where the official is sued by the individual, or
- Criminal responsibility.65

Reports are most common about illegal behaviour among the police, with other administrative officials virtually invisible in public acknowledgment of their maladministration. In 1994 the Supreme People’s Procuratorate investigated and handled 409 cases of extorting confessions by torture, 4441 cases of illegal detention and 1772 cases of illegal search, and 65 cases involving 76 judicial officers who bent the law for personal gain or engaged in extortion or accepted bribes in civil or administrative cases.66 A few years later in 1998, more than 7,000 cases of violations by police personnel were investigated, and an undisclosed number of thousands of personnel were expelled from the public security organs. At the same time police affairs supervision bureaux were established in public security organs, the purpose of which is to conduct close, on-the-spot supervision of police personnel as they go about their duties.67 Such actions indicate the poor impact of laws such as the Administrative Litigation Law on administrative processes. To offset this dismal trend, it must be acknowledged that policing in the PRC is a dangerous business, with on-duty police deaths numbering 442 in 1998, and a further 7735 being wounded.68

66 FBIS-CHI-95-052 “Zhang Siqing on Supervision Over Law Enforcement.”
About 14% of specific administrative decisions are overturned by the courts (Table 15 above) and it is probably only this category of cases for which officials may run the risk of punishment, assuming that there is a high correlation between unlawful behaviour by officials and unlawful administrative decisions. Bearing in mind that this category of judicial rulings may well be ignored by administrative organs, it is not very likely that an administrative official will suffer any significant loss as a result of illegal or unfair administrative behaviour.

The process of administrative litigation is not for the faint-hearted. The plaintiff faces formidable opposition by the defending administrative organ and its influence on the courts. The weakest point in the process is the phase of filing the case at court and waiting for notification of acceptance for trial. If a plaintiff gets his or her case accepted then the chances of achieving a better outcome are about 40%, so the effort is worth it if there is enough at stake. But getting a court to accept a case is the most difficult part. Once in court, the system is weighted against procedural justice and for substantive justice. This is openly acknowledged by the courts, which have recently pledged to change this long-standing practice of “stressing the tangible and neglecting the procedure” by strictly adhering to correct judicial procedure in handling cases. Even if the courts achieve this for their own work it will not necessarily have a positive impact on administrative procedures. Thus far the courts have had minimal impact on improving the procedures that administrative organs use in the course of their duties. Their influence is limited to the broad concept of administration according to law.

What does this mean for the system of administrative law? When the theoretical background, history, development, and institutional context of administrative review, administrative compensation, and administrative litigation are viewed as a discrete system, what is it like for a person who wishes to challenge the system? What does the implementation of this system tell us about state-society relations? Has administrative authority weakened in the face of legal requirements, or is the new system another way the state uses to atomise and stifle complaints? These are some of the questions we will consider in the conclusion.

69 FBIS-CHI-1999-0323 “Supreme People’s Court Work Report.”
CHAPTER EIGHT

CONCLUSION

This dissertation examines the process of administrative review and litigation, from the background, history, development and provisions of the legislation, through to the practical steps involved in appealing for administrative review, compensation and litigation. Important features come to light which have been obscured by the usual academic focus on administrative litigation. The work's underlying principle is that the outcome of administrative litigation appeals is directly related to the outcome of administrative reviews and compensation claims, and that the system is best viewed as a whole.

In Chapter Two it was shown that in legislative terms, the new system of administrative law improves on earlier provisions for redress of administrative grievances. It has the authority to curb unlawful or improper administrative decisions, and unlike the letters/visits system, it determines set procedures which administrative organs and courts must follow when handling cases. It is a process to be used for general administrative grievances, not ones such as trademark disputes which may require specialised knowledge. It is closely associated with public order management disputes, and the bureaucratic connection between the courts and police organs reinforces this association. However, it has been designed amid administrative turf battles and the pre-existing power of administrative organs is apparent in the legislation's provisions.

The discussion of the 'balance theory' in Chapter Three is at the heart of the role of the new administrative law system. Balancing efficient management with control over the power of state organs requires administrative law to both regulate and supervise administrative behaviour. But the scope of the legislative provisions restricts the system's operation to the extent that the supervisory role is the minor one, and thus individual rights are undermined. The operation of the system, examined in Chapters Four through to Seven, demonstrates that an individual plaintiff, even if brave enough to challenge an administrative organ, has considerable disadvantages: administrative organs are known to not accept all the cases for administrative review that they
should, and the initial application phase often functions as a pre-emptive review, thus
diminishing the value of the review; the applicant’s right to administrative litigation
appeal may not be adequately conveyed at the time an administrative penalty is
imposed; and courts in effect may only recommend internal administrative
improvements to an administrative organ and do not have power to enforce them. The
impetus of the system is towards bureaucratic reform and improved regulatory of
administration, but even in these aspects the results are disappointing.

The system is not a wholly ritualised form of political behaviour through which the
state seeks to maintain control over society. It provides redress in about 40% of cases,
but the rate of application, for both review and litigation, is very low. It could be
argued that this pattern merely indicates that a system of redress exists, but not that it
functions effectively. The system provides measurable redress for some plaintiffs,
although these cases are usually selected carefully from the range of appeals and tend
to support the state’s political or economic goals such as curbing excessive police
brutality, managing the productive use of land, or controlling the imposition of illegal
fees. In this sense it is a ‘top-down’ system, and in most cases, claimants can
probably only hope to take advantage of the prevailing political climate.

Lawyers play an increasing role, but not as advocates for the plaintiff. Their role as
coordinators and mediators between the administrative organ and the plaintiff mostly
supports an already powerful administrative organ. This tends to reinforce the
atomisation of claimants and their isolation from wider political discourse, thereby
strengthening the state’s ability to further its own aims at the expense of the citizen’s.

The implementation of the new system of administrative law, like other forms of
redress against the state, is subject to the ebbs and flows of political campaigns – and
the transgressions against legal procedure that campaigns give rise to. There are more
appeals against public security organs’ decisions during the conduct of Strike Hard
anti-crime campaigns than at other times. This can be partly explained by an increase
in the number of administrative penalties imposed on the population during such
campaigns. A full explanation, however, must account for the relationship between
criminal and administrative measures, by acknowledging that the boundaries between
them become blurred at times of heightened anti-criminal activity. The subversion of
individual justice by the state’s political goals is not surprising. But it continues to undercut the state’s claim to rule by way of an impartial body of law.

The courts have an emerging role in the new system of administrative law, but this is not accompanied by a parallel weakening of the state. The state’s intention is to bring a greater degree of regularity to administrative decision-making. In this task, courts have new-found authority over a narrow range of technical legal issues, such as ensuring a decision is made according to the appropriate law. But this type of authority does not allow the courts to approach their cases primarily with the rights of the plaintiff in mind, but rather perpetuates the traditional role of the court as the legal bureaucrat. Courts also have the authority to ensure that administrative organs do not abuse their discretionary power to decide on suitable administrative penalties, and this is an area which, in time, might allow a more rights-based judiciary to emerge. The period covered by this study indicates this role is still in train.

There are two specific ways in which courts operate vis-a-vis the new system of administrative law: they act as gate-keeper and mediator. They must identify the cases which the state is prepared to admit may be worth redressing. They have most influence in overturning clearly illegal decisions, but predominantly they only have the power to recommend that administrative organs improve minor administrative procedures. Courts initially favoured administrative organs in the litigation process, but now they increasingly act as mediators between the plaintiff and defending organ – especially in the key pre-trial phase. Mediated justice has produced some results in the plaintiffs’ favour, but overall it tends to dilute the full impact of legal responsibility and to allow defending organs to avoid calling officials to account.

There is no clear link in China between the level of professional legal education of judges and the justice dispensed; patterns vary from locality to locality and are more dependent upon political factors. Thus, increasing the level of judicial education will not necessarily give plaintiffs a greater chance of achieving justice at the hands of the state. This is borne out by the findings in Chapter Six.

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1 John Burns came to a similar conclusion in a study of pre-reform China: John P. Burns, *Political*
Moreover, there is already a bureaucratic backlash from administrative organs against perceived interference by the courts in efficient administration. The prevailing mood among both administrative organs and courts is that the low level of (non-legal) professional knowledge among judges in China hampers judicial supervision of administrative action. Enhancing the quality of judicial personnel is not seen as the solution, but rather even further limiting their role to reviewing the application of law, which will even further entrench the preeminent position of administrative organs. Further expansion of judicial authority over administrative organs in the near future is unlikely.

Administrative organs retain their superior position, and those with a grievance against them face many disincentives to hold the state accountable. This is partly because the state has a disproportionate interest in the types of grievances handled by the system, such as public security and land management. Land management organs are more likely to negotiate and mediate an agreement than are public security organs, reflecting the history and complexity of land issues. Occasionally, jurisdictional issues between administrative organs are clarified by the courts, but this also reflects a state interest in efficient management.

Administrative organs retain their right to promote efficient administration over and above the rights of individuals who are affected by the administration. The system is a tool of management, albeit an inefficient and periodically malfunctioning tool. There is a pressing need for standardisation of administrative forms to strengthen the concept of a public service in China. The current administrative system works against administrative justice by allowing loopholes to exist in favour of the bureaucracy. As the pre-existing legal milieu also favours administrative organs, defending organs can usually avoid accountability by pleading a lack of resources. The theoretical concepts underpinning the new administrative law system are also weighted in the bureaucracy's favour, as these assume that management is more important than constraining bureaucratic power.

_Participation in Rural China_ (Berkeley: University of California Press, 1988).
The power of an administrative organ is not a major factor that determines the number of administrative appeals made against it. The public security organs and tax organs are similarly powerful, but the latter rarely show up in administrative appeal statistics. The prevalence of public security organs in administrative appeal cases highlights the ongoing problems in China associated with policing and suggests that further codification of the legal system and strengthening of the courts is unlikely to lead to major improvements in this area. The public security organs retain the most authority over their administrative purview. Appealing against a decision made by one of these organs is virtually a waste of time because the penalty will often have been served before the review is complete. Under the rubric of ‘protecting social stability’ the state continues to support the preeminent position of these organs and they have the right to enforce their administrative decisions prior to the judicial supervision phase.

The power of land management organs, on the other hand, is more curtailed. By history and law they are predisposed to negotiate with complainants, and these factors are reflected in the administrative law system that requires them to obtain judicial approval to have one of their administrative decisions enforced.

Neither type of organ, though, is more likely than the other to have their administrative decisions overturned by a court, despite local variations. This suggests that power in China still resides predominantly with administrative organs of any type rather than with courts or individual justice.

Plaintiffs have the least amount of power during the application phase, as it is extremely difficult to get a case accepted for a hearing either by an administrative organ or a court. Indeed, in administrative review, the application phase often becomes a preemptory administrative review in itself. Basic administrative procedures, such as correct completion of forms, are often weak and undermine the justice of the process. At this stage the rubrics of ‘important and unimportant facts’ are often used by the organs to sidestep accountability. If the case is accepted, however, and goes to court, then the applicant has a 40% chance of gaining redress – definitely worth the effort.
Despite this statistic, the concept of 'people sue officials' remains largely instrumentalist rhetoric in China. The pressure to reform, internationalise, modernise, professionalise and regularise led to the emergence of the system. But its untimely arrival in the late 1980s/early 1990s perhaps doomed its impact. Nonetheless, citizens have been granted avenues of appeal against the state, depending on the problem at hand, and this system fills a gap potentially useful to the least influential members of society. But precisely because it is designed to handle grievances that are especially sensitive to the state, this makes the task of a plaintiff doubly difficult.
APPENDIX A

Chinese-language originals of the forms used in imposing administrative penalties and conducting administrative review.
FORM A:

行政处罚决定书

行罚字（ ）第 号

被处罚人：姓名__________，性别_____年，______
民族_________，籍贯________________________，职
业___________________，工作单位__________________。
地址__________________________________________。

违法事实_____________________________________

以上事实已违反_________________________________。

根据______________________________________给予

下列行政处罚：

1. __________________________________________________________________;

2. __________________________________________________________________;

3. __________________________________________________________________。

当事人如果对本行政处罚决定不服，可以在接到处罚决定通知
之日起

天内，向上一级行政机关申请复议，也可以直接向人民法院提起行政
诉讼。期满不申请复议或不提起诉讼又不履行的，将申请人民法院强制执
行。

________________________单位名称（盖章）

年 月 日

Source: Dong Jianguo (ed.), 行政复议手册 (A Handbook on Administrative Review) (Beijing: China
FORM B:

XX市公安局XX区分局

治安管理处罚决定通知书

行罚字(90)第79号

违反治安管理人邱XX，男，48岁，汉族，XX省XX县X X乡XX村农民。因违反交通规则，造成事故，
根据《中华人民共和国治安管理处罚条例》第27条规定，
决定给予行政拘留八天，罚款150元。

如不服本决定，可以在5日内向XX市公安局申诉。

XX市公安局XX区分局(公章)
局长(签章)

年 月 日

FORM C:

XX公安局 分局 派出所
治安管理处罚裁决书

第____________号

19____年____月____日

违反治安管理人_____________男女
____岁，因____________________

____________________________________

根据中华人民共和国治安管理处罚
条例第____条，决定给以____________
处罚。
如不服本裁决，可以在五日内提出申诉。

所长

FORM D:

复议申请书

申请人（原被处罚人）姓名______________________。
性别__________，年龄__________________，民族__________，
籍贯____________________，职业____________________。
住址________________________________________________________________。

被申请人：名称__________________________________。
法定代表人姓名____________________，地址____________________。
申请人因不服被申请人______年______月______日
作出的________________________________行政处罚决定，现申请复议。

申请复议的要求是：__________________________________。

事实与理由：_________________________________________

________________________________________

________________________________________

________________________________________

此致

________________________________________（受理复议申请的行政机关）

申请人：____________________(签名或盖章)

年  月  日

附： 1. 申请书副本  份；
     2. 有关材料  份。

FORM E:

复议申请书

申请人（原被处罚人）：翟XX，男，50岁，汉族，个体工商户，家住XX县XX乡XX集镇，籍贯XX省XX县。

因不服XX县XX乡税务局（90）第13号抗税处罚决定，特申请复议。

复议要求：要求撤销（90）第13号抗税处罚决定之裁决，退还罚款370元。

事实与理由：

本人系一九八六年开业的个体服装商业户。经营范围为百货、服装。税款由当地税务局采用定期定额方法征收。1989年1月24日，税务局管员陈XX在征收我的税款时与我发生争议，撕烂我经营的商品成衣两件，并以抗税为由，罚款370元，低价处理商品衣服100件。以上处罚，均未办理手续。本人并没有抗税，税务局管员陈XX所作的处罚决定是错误的，且有程序上的违法。

特申请复议。

此致

XX县税务局

复议申请人：翟XX

年 月 日

附：申请书副本一份
有关材料三份

FORM F:

立案审批表

案由
复议申请单位（人）
被申请单位
收案时间

复议立案请求

是否立案理由：

审查人：

审批人：

年月日

年月日

FORM G:

立案审批表

案由：不服 XX税务局对有关纳税罚款 1300 元的决定

申请复议单位（人）：张 XX

被申请复议单位：XX县 XX乡税务局

立案时间：一九九0年 X月 X日

复议立案请求：XX县 XX乡税务局对有关纳税罚款 1300 元的决定，本人认为该税务局侵犯了我合法权益，特请求复议。

审批意见：符合申请复议条件，没有重复申请复议，没有向人民法院起诉，复议申请书符合法定要求，并且在法定申请复议期限内提出的复议申请，准予立案。

审查人：姚 XX 承办人：孙 XX

审批人：刘 XX 年 月 日

FORM H:

复议案件受理通知书

复受字（ ）第 号

________________________(复议申请人):

关于__________________________的复议申请书，
本________________(复议机关)已收悉，经审查，符合《行政复议
条例》第三十一条的规定，决定予以受理。
特此通知。

________________________(复议机关)

年 月 日

FORM I:

复议案件受理通知书

复受字(  )第 号

______________________________(被申请人):

________________________(申请人)不服你________________(机关)

________年______月______日_______字( )第 号

处罚决定,已向本________________机关申请复议.本____________

________________(机关)已决定受理.现将复议申请书副本发送你________

________________(机关),请在收到复议申请书副本之日起十日内,向本

________________(机关)提交作出处罚决定的有关材料和证据,并提出

答辩书.

特此通知.

________________(复议机关)

年 月 日

附：复议申请书副本一份.

FORM J:

复议案件受理通知书
复受字( )第 号

我复议机关受理的关于复议一案，经审查认为，本案与你单位有利害关系，特通知你单位参加复议。现将申请书副本发送给你，请及时提出答辩，并填写法定代表人身份证明书，连同有关证据材料于 年 月 日送交我复议机关。

(复议机关)
年 月 日

FORM K:

复议案件受理通知书
复受字(90)第15号

XX县工商局:

王XX不服你局90年X月X日作出的处罚决定, 向本局申请复议. 本局已决定受理. 现将复议申请书副本发送给你局, 请在收到复议申请书副本之日起十日内, 向本局提交作出具体行政行为的有关材料和证据, 并提交答辩书.

特此通知

XX地区工商局

年 月 日

附: 复议申请书副本一份

FORM L:

不予受理复议裁决书

复不字（     ）号

____________________ (申请人):

关于_________________________________的复议申请
书，本____________________ (机关)已经收悉。经审查，__________

____________________ .

根据《行政复议条例》第三十四条的规定，裁决不予受理。如不服本裁决，
可以在收到裁决书之日起十五日内向人民法院起诉。

____________________ (复议机关)

年 月 日

FORM M:

不予受理复议裁决书

李XX:

关于你不服XX市公安局XX派出所的行政罚款决定的复议申请书, 本局已收悉。经审查, XX派出所 (90) 第78号治安管理处罚裁决书所处罚的是赵XX, 其具体行政行为并没有侵犯你的合法权益。根据《行政复议条例》第三十四条的规定, 裁决不予受理。如不服本裁决, 可以在收到裁决书之日起十五日内向当地人民法院起诉。

XX市公安局

年 月 日

行政复议决定书

复决字 ( )第 号

申请复议人 (原被处罚人) 姓名 ____________________, 性别 ________,
年龄 ________, 民族 ________, 籍贯 ________________________, 职
业 ____________________, 住址 ________________________。

被申请人 ________________________, 法定代理
人 ____________________, 委托代理人 ____________________。

复议申请人因 ________________________, 依法向我机关申请复议。

现本案审理查明: ______________________________________

__________________________________________。

根据 ________________________________________ 规定。

决定如下:
1. ___________________________________________;
2. ___________________________________________;
3. ___________________________________________。

复议申请人对本复议决定不服的, 可在收到行政复议决定书之日起
______ 日内向当地人民法院起诉, 逾期不起诉又不履行复议决定的, 将
依法强制执行或申请人民法院强制执行。

__________________________________________ (复议机关)

年 月 日

行政复议决定书
复决字(90)第31号

申请人： XX县烟草公司
法定代表人： 陈XX
委托代理人： 王XX

被申请人： XX县工商行政管理局
法定代表人： 罗XX
委托代理人： 徐XX

上述申请人不服被申请人工商处字(90)第11号行政处罚决定，依法向我机关申请复议。

现本案审理查明：
XX县烟草公司在知道刘某没有领取专卖许可证和营业执照的情况下，仍批卷烟给刘某，且加价20%。

本机关认为：
XX县烟草公司本应严格执行国家《烟草专卖条例》，但却见利忘义，违法经营，不仅给刘某提供了货源，从中获非法所得37607万元，而且在刘某外地倒卖卷烟活动重多次又为其派本公司人员押车护送到外地。

依据规定，决定如下：
维持XX工商行政管理局工商处字(90)第11号行政处罚决定。

复议申请人如对本复议决定不服，可以在收到行政复议决定书之日起十五日内向人民法院起诉，逾期不起诉又不履行复议决定的，将依法强制执行或申请人民法院强制执行。

XX市工商行政管理局

年 月 日

FORM P:

XX公安局
治安管理处罚申诉裁决书

第________号

违反治安管理人______________男(女)
______岁，因______________，由__________分局(或县公安局)根据中华人民共和国治安管理处罚条例第__________条的规定，给予__________处罚。__________不服裁决，提出申诉。经复查决定________________。

如不服裁决，可在接到本裁决书五日内向人民法院提起诉讼。

局长__________________

裁决宣布时间19____年____月____日____时

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