
Between Dreams and the Reality: Making of the Administrative Procedure Act in China*

*Xixin Wang***

I. Developments of Administrative Procedures since 1989: A Brief Survey

The past two decades of law reforms since late 1970s have seen remarkable developments with respect to administrative procedural system. The ideas of procedural legality, fairness, legitimacy, and procedural rationality have been greatly improved and come into play in China's administrative process. In the meanwhile, however, the process of the administrative procedural reforms has also revealed a series of problems and challenges ahead. For instance, there exist crying problems in terms of procedural openness, systematization, institutionalization, and procedural reasonableness, to name just a few. The law reformers come to recognize that the

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** Professor of Law, Peking University Law School.

making of a unified Administrative Procedure Act, which is now under the way, is of critical importance to the ideas of “administration in accordance with law” and rule of law. Yet it is in no sense an easy job. In fact, the making of APA in China, deemed as an opportunity for “*reinventing government*”, requires subtle integration of ideas and realities and of fundamental principles and practices of the administrative process.

In this regard, it is helpful to begin with a brief survey of developments of administrative procedures, in terms of both ideas and realities, for a better understanding of the context in which the making of administrative procedure act is under its way.

1. Procedural Legality: Legislative Requirement and Its Practice

It is widely believed, in today’s China, that procedural legality is one of the fundamental elements of the Rule of Law. Reforms in contexts of civil, criminal, and administrative procedures have reflected the practical attentions given to legal procedures. The Administrative Litigation Law as adopted by the National People’s Congress in April 1989, which for the first time raised the issue of procedural legality to regulate exercise of administrative power by providing that courts may repeal an administrative action that “violates statutory procedures”. “Procedural rule of law” has since then become an aspect of the practice of the “administrative rule of law”. In the legal reforms of promoting the modernization of the legal system of China, as many believe, the Administrative Litigation Law has been a milestone, for its contribution to the establishment of the system of judicial review over administrative actions. However, there still exist good reasons for us to believe, from the perspective of institutionalization of administrative procedures, that the Administrative Litigation Law has also made another important achievement by highlighting the significance of legal procedures for curbing abuse of administrative power and safeguarding individual rights, as is mentioned here. This law provides for the first time that the court “may repeal through judgment” a specific administrative action that “violates statutory procedures”;¹⁾ therefore, the legal requirement of

1) The Administrative Litigation Law of the People’s Republic of China (hereafter “the Administrative Litigation Law”), Article 54.

procedural legality in the process of exercising administrative power has been established in the form of legislation for the first time.²⁾

However, while the requirement of procedural legality in administrative process by the Administrative Litigation Law should be deemed as a gigantic progress for China's construction of the rule of administrative law and the modernization of China's legal system, the practice of procedural legality may be a different story. It can be observed from the current administrative law system that two facts with respect to administrative procedures may practically hamper the functioning of principle of procedural legality.

Firstly, the requirement as articulated by the Administrative Litigation Law is limited to the context of "statutory procedures" only. In other words, courts can repeal administrative actions, when, and only when, they believe that agency violates "statutory procedures". If there were no such "statutory procedures" governing agency actions, it would be very difficult for courts to apply the principle of procedural legality to review agency action. Unfortunately, the reality is that there exist wide varieties of administrative actions that are not governed by "statutory procedures."

Secondly, in the practice of administration, the legal effect of the principles, such as procedural justice and reasonableness, have largely failed to be practically acknowledged and judicially enforceable, and the principle of the rule of procedural law could hardly serve directly as the "statutory procedures" for governing the exercise of administrative power. Therefore, when there is no clear provision in laws and regulations concerning legal procedures for administrative actions, there shall be no "playground" for the principle of procedural legality as established by the ALL. To put it more simply, the ALL, by requiring procedural legality, has left a huge task of developing legalized procedures governing agency actions.

As for us, a review of the requirement of procedural legality as described above has also pointed out a direction for administrative procedural reform in this country. With regard to administrative procedures, to take the requirement of procedural legality more seriously, we believe huge efforts must be made primarily in the

2) Of course, before the enactment of ALL, there were some sorts of "policy requirements" of procedures and procedural legality, but such requirements were largely in the bureaucratic system, referring to internal administrative procedures. Procedures governing agency actions affecting individuals were very vague and subject to administrative discretion.

following two aspects: First, fair and rational procedural rules must be made through legislation to govern any and all administrative actions that may affect rights and interests of private parties or public interest in administrative process, and such legislation should be available at a practically earliest possible time. Secondly, in the practice of administration and judicial review, legal effect must be attached to fundamental procedural principles that aim to guarantee procedural fairness, rationality, and reasonableness, because there exist huge discretion in agency's procedural activities. In order to curb abuse of discretion, and to ensure procedural fairness and reasonableness, those basic principles of administrative procedure highlighting fundamental values such as impartiality, fairness, consistency, credibility, and reasonableness must be declared and, more importantly, to be judicially enforceable through judicial review.³⁾ In other words, the basic principles of due administrative procedures shall have the same legal effect as statutory procedural rules. In this regard, the making of an Administrative Procedure Act is to govern exercise of administrative powers by providing both governing procedural rules and guiding procedural principles as well.

2. Wakening up of the consciousness of procedural reasonableness

In the early stage of China's administrative procedure reforms, although the legal system has failed to show concerns for the idea of procedural reasonableness, it should not be taken for granted that awareness of general public and law reformers on procedural reasonableness have been remaining in silence. As a matter of procedural practice, the consciousness of procedural reasonableness in the process of administration has been awakened and constantly increased. The Regulation on Administrative Reconsideration as promulgated by the State Council in 1990 and amended in 1994, and thereafter the Administrative Reconsideration Law, enacted in 1999 by the Standing Committee of China's National People's Congress, may be regarded as further efforts made for awakening China's dormant consciousness of procedural reasonableness and for institutionalization of mechanisms to attain reasonableness. As we have pointed out, although the Administrative Litigation Law

3) For a detailed discussion of the basic principles and requirements of due administrative process, see Wang Xixin, *The Basic Requirements of Procedural Fairness Explained*, 3 ADMINISTRATIVE LAW REVIEW (2000); Wang Xixin, *Due Process and 'Minimum Impartiality'*, 2 LAW REVIEW (2002).

has provided for the scope and principles as well as an institutional framework for the courts to conduct judicial review over administrative acts, this law also embodies a conspicuous defect — according to this law, it is the general principle that the courts can only review the lawfulness of concrete administrative acts. In other words, to a large degree, the court is not empowered to do anything to review the reasonableness of challenged administrative actions. By comparison, the Regulation on Administrative Reconsideration and the Administrative Reconsideration Law enacted thereafter have empowered the administrative reconsideration organs to review both the lawfulness and reasonableness of a concrete administrative acts.⁴⁾

Logically speaking, the reasonableness of concrete administrative acts includes both substantive reasonableness and procedural reasonableness. The reconsideration organs may annul any administrative decision if they believe that it has contravened the requirement of procedural reasonableness. As the key issue of procedural reasonableness is, in its essence, procedural fairness, the Administrative Reconsideration Regulation's concern for the issue of procedural reasonableness implies that procedural fairness has caught attention of the law reformers and the general public as a basic requirement for administrative decision-making. We have great reason to believe that, with the wakening up of public consciousness of procedural fairness, procedural reasonableness will become a focus in the context of administrative procedure reforms.

3. Efforts for Institutionalization of Procedural Fairness

In pace with the wakening of the consciousness of procedural fairness reflected in laws and regulations, institutionalized efforts have been made in administrative procedure reforms to attain procedural fairness. As viewed from the process of administrative decision-making, the basic elements of administrative due process, such as the neutrality of the administrative decision maker, the participation of the affected party, procedural openness, and rationality of decision-making, and so forth, have transformed from concepts of procedural fairness into procedural rules and workable mechanisms to regulate administrative decision-making process. All these may be regarded as institutionalized efforts to attain procedural fairness in the

4) The Regulation on Administrative Regulation, Article 5.

process administrative decision-making.

For example, the Law of the People's Republic of China on Assembly, Procession and Demonstration as adopted by the Standing Committee of the National People's Congress in 1989 provides that, for an application for assembly, procession or demonstration, the public security organ shall inform the citizens concerned, at least two days before the date as applied for, of its final decision of approval or disapproval. If the public security organ fails to make a decision within the legally prescribed time limit, it shall be deemed that the application has been approved.⁵⁾ From the perspective of procedural impartiality, the aforementioned provision has begun to treat seriously some of the basic elements of procedural fairness, say, explaining the reason for the decision, informing the affected party, and providing the legal remedies for the adversely affected parties, among other things.

As for the institutionalized efforts to guarantee procedural fairness, the Law of the People's Republic of China on Administrative Punishment (hereafter the "Administrative Punishment Law") as promulgated in 1995 is a remarkable starting point in this regard. As we can observe and analyze from procedural requirements concerning imposing administrative penalties by agency, this law has made giant steps for the institutionalization and realization of procedural fairness in the following major aspects:

A. Ensuring the neutrality of the decision maker

The Administrative Punishment Law has for the first time clearly showed its concern to the neutrality of the decision makers in the process of making administrative punishment decisions. According to this law, if the affected party believes that an administrative decision maker has an interest, bias, or prejudice in the administrative punishment decision, he or she is entitled to apply for the withdrawal of that decision maker. A prejudice may be that the maker of administrative punishment decision has a direct interest in the case in question or that the maker has personal relations with the party concerned in the case in question. In the hearing procedure for administrative punishment, the affected party may also

5) The Law of the People's Republic of China on Assembly, Procession, and Demonstration, Article 9.

apply for the withdrawal of the presiding hearing officer whom is believed to be biased, interested or prejudiced.⁶⁾ On the other hand, this law has also tried to prevent and eliminate the preference of the administrative decision maker by separation of functions. For example, this law provides that, in the process of imposing administrative punishment, the officer taking charge of the investigation may not participate in the making of final administrative punishment decision.⁷⁾

B. Introducing formal hearing procedures into administrative decision-making

The Administrative Punishment Law has, for the first time, introduced formal hearing as a procedural requirement into administrative decision-making process in the form of legislation. This is, undoubtedly, remarkable progress forward in realizing procedural fairness in the process of making administrative decisions. The establishment of the hearing system makes it possible for the realization of an important procedural right of affected parties, namely, the right to be heard. For administrative organs, when imposing administrative penalty upon individuals, such administrative punishment as revoking a license or imposing a considerably large amount of fine, the affected party shall be entitled to apply for a formal hearing.⁸⁾ According to this law, in the process of hearing, the private party concerned is entitled to obtain relevant information about the hearing activities within a reasonable period of time, to retain professional legal assistance, to defend herself, to demand the holding of the hearing to be made public, and so forth. The introduction of formal hearing system and the procedural rules aiming at ensuring procedural fairness of the hearing process have provided an institutionalized channel to realize procedural legality and fairness in administrative decision-making process.

C. Separation of functions

Though the Administrative Punishment Law fails to clearly articulate separation of functions as a general principle for decision-making in the context of imposing

6) The Law on Administrative Punishment, Article 42 (4).

7) The Law on Administrative Punishment, Article 38, Article 42 (4).

8) The Law on Administrative Punishment, Article 37.

administrative penalty, it has nonetheless embodied the spirit of separation of the functions of investigation, decision-making, and enforcement in the process.⁹⁾ To put it simply, separation of functions is reflected in two aspects. Firstly, according to this law, the officer taking charge of the investigations may not participate in the making of punishment decisions. The essence of this provision is to separate the function of investigation or the function of prosecution from that of making decision, the purpose of which is to prevent the decision maker from being prejudiced that otherwise might occur as result of mixture of functions. Secondly, this law has separated the function of imposing administrative fine from the function of collecting that fine. From the theory of procedures, the former is an “internal separation of functions”, while the latter is an “external separation of functions”. Whatever the form, the purpose of separating the functions is to ensure procedural impartiality. If, under any procedure, the function of investigation and that of decision-making is integrated and vested in the same body, the decision maker would be the “judge of his own case”. If, in the process of making administrative punishment decisions, the person who makes the decision of fine is able to collect the money, it may imply or indicate a fact that the decision maker has a “direct interest” in the final decision that he makes.

D. Reason-giving and pre-notice

These two procedural requirements are not only the requirements of administrative transparency, but also the requirements of administrative rationality. The Administrative Punishment Law provides that before a final decision-making, agency must notice facts, charges, reasons and legal bases for its proposed final decision to the affected party, and inform that affected party of her right to defend for herself, and that when final decision is made, it again must be noticed to the affected party with clearly stated reasons and legal bases. Such procedural requirements are believed to be critical to curb arbitrary use of agency power and to safeguard individual rights, and to facilitate consequent judicial review if the affected party is not satisfied with the final decision.

9) For a discussion of the legislative spirit of the Law on Administrative Punishment, see Wang Xixin, *On the Legislative Spirit of the Law on Administrative Punishment*, 6 STUDIES IN LAW AND BUSINESS (1996).

Further, the Administrative Licensing Law, as enacted by the NPC in 2003, has reaffirming the basic principles of procedural openness, fairness, impartiality, and reasonableness in contexts of establishing and deciding on administrative licenses. It has also developed mechanisms of procedures to institutionalize such principles. What is more, the Licensing Law introduced formal hearing procedure and other forms of public participation into policy-making process. For instance, when agency intends to create a licensing regime, the Law requires that some “appropriate sorts forms for soliciting public opinion” must be taken, including formal hearing and some sorts of public notice and comments procedures. In this regard, it is believed that the implementation of the Administrative Licensing Law may contribute to improvements of administrative procedures, in terms of both procedural ideas and practice.

4. The rise of public participation: procedural reforms of the administrative regulatory process and the rule making process

Spurred by the procedural reform in the area of administrative decision-making process, the procedural reform in the administrative regulatory process and the rule-making process of China has also been carried out and some achievements have been scored. Being different from administrative decision-making, the administrative power as exercised in administrative regulatory process may produce an impact on the rights and interests of the general public rather than on particular parties. The typical administrative regulatory acts include the price fixing as dominated by the government in some regulatory contexts, the setting of industrial standards, city planning, management of public facilities, and so forth. The administrative regulatory process is closely connected with the rule-making process, yet there exist some procedural differences between the two processes. The rule making process is, in practice, a process of making administrative regulation and rules, as well as formulating and issuing of administrative normative documents that also bear practical legal effect. There are different procedures governing administrative regulatory policy-making and rulemaking, but generally speaking, rulemaking is required to follow more complicated procedures, while procedures for policy-making are relatively flexible. In both processes, the recent five years have seen the rise of idea and practice of public participation; consequently, it should be no surprise to find that public participation has been increasingly a keyword in the procedural

reforms. Since the time when the price hearing system was introduced by the Price Law, the means for participation by the general public in the administrative regulatory process has developed from the various forms of hearings into diversified means for public participation. In the process of rule making, the concept of legislative hearing and encouragement of various forms of public participation are provided by the Law on Legislation, and further required by two State Council regulations concerning Procedure of Making Administrative Regulations and Procedure for Making of Administrative Rules, which have introduced legislative hearings into a wider scope of practice, particularly in the practices of rulemaking by local governments. What's more, a procedural practice similar to notice-comments has also been introduced into the process of rule making by both central and local governments in recent years. The practice of public participation in administrative regulatory process and rule making process, while has shown an exciting new trend of procedural development in terms of rationality and democracy, has also revealed practical problems that are crying for solutions.

II. Major Problems of the Administrative Procedure System: A Summary

While it is acknowledged that, since the reform and opening up policies were carried out and with the efforts of the construction of democracy and rule of law, the administrative procedure system has witnessed much progress, examination from a macroscopic point of view on the legal procedure construction nonetheless indicates the reality that procedural system is yet far from being able to satisfy the demand of the principle "administration according to law and building the rule of law state", as adopted by the Constitutional amendment in 1999. Therefore, a summary of those procedural problems may be helpful for the ongoing administrative procedural reform. To be specific, major problems plaguing the administrative process may include:

1. The existing administrative procedural rules are sporadic and lack necessary cohesion and uniformity which have resulted in conflicts among the principles or rules within the procedural system;
2. The process of making some important administrative decisions still lack

statutory provisions of legal procedure, and in the exercise of administrative power too much discretion is left to agency, therefore, it is hard to ensure the fairness of procedure;

3. Procedural rights are not taken seriously by administrative agency, or even courts. In administrative process, agency may give its major attention to substantive matters, such as facts and criteria, but very little attention to respecting individual procedural rights; so is the court in judicial review over agency actions. In addition, procedural mechanisms safeguarding procedural rights are not well developed, leaving those rights largely unrealistic.
4. As compared to the enhancement of the consciousness of the “procedural legality” in the legislation and practice, the value and significance of “procedural reasonableness” has not received enough attention, resulting in arbitrary and capricious use of administrative powers;
5. There are serious conflicts among existing procedural rules, which demonstrates that such procedural rules have been arbitrarily designed and therefore lack minimum consistency;
6. Some of the basic procedural principles containing crucial values of procedural fairness have not been recognized by legislations and their legal effect usually denied by agency and the court;
7. There are no clearly defined and specific conditions for the use of summary procedures, which has left too large rooms for arbitrary exercise of administrative power in procedural operations;
8. The participation of the general public in the administrative regulatory process and rule making process is not sufficiently ensured by law in terms of scope and degree, and the institutionalization of public participation remains to be improved, and the constitutive elements for effective participation (e.g., information disclosure, organization of interest groups, etc.) remain poorly defined;
9. The liabilities for the agency violation of statutory procedures or infringing upon individual’s procedural rights are not defined clearly, and some violations of administrative procedures by agency still remain unaccountable at all;
10. The administrative organs and officials are not equipped with a good sense of procedural legality and reasonableness, instead, the instrumentalism has

been for a long time a dominant ideology with respect to legal procedures;
11. Consciousness of citizens, legal persons and other organizations concerning procedural rights has been remaining very weak.

As summarized above, the problems faced by the procedural reform may fall into two categories. The first category is problems resulting from subjective factors. Subjectively speaking, the Chinese traditional legal culture has for a long time shown misunderstanding, bias and even indifference to values and functions of legal procedure. For example, agency officials believe that legal procedures are only a means for managing the society and controlling people, and can only govern the “governed” rather than to “govern the governor”, otherwise legal procedures may “bind up agency’s own hands and feet”. They believe that procedures are merely means for attaining administrative ends; therefore, if procedure cannot serve particular administrative ends, they may go beyond the procedures.¹⁰⁾ Similarly, the fact that the social members have a faint consciousness of significance of legal procedures, values of procedural rights and procedural fairness is also a problem of procedural ideology. The second category is resulted from objective factors. The objective factors mainly include technical factors, such as empirical research and procedural designing, particularly the insufficient knowledge and mastery of the structure of legal procedures, the conditions for procedural reasonableness and procedural fairness, and the institutional arrangements for attaining due process. All such factors may lead to the corresponding problems in procedural arrangements. Accordingly, we strongly recommend that reform of administrative procedures must also be tackled from the aforementioned aspects.

10) Objectively speaking, all legal procedures serve certain “purposes”. In this sense, the “instrumentalist view of procedure” is not unacceptable, and in fact, in any legal system, legal procedures possess certain instrumentalist functions to a certain degree. But if this is why we believe that legal procedures can only serve substantive results, and when the procedures cannot serve the results and they are not to be observed, then it is not “instrumentalism of procedures”, but “nihilism of procedures”.

III. Theoretical Research as a Preparation for Making of Administrative Procedures Act: A Review

Chinese scholars have begun to pay remarkable attention to the study of administrative procedures and the practical problems relating to them since early 1990s, resulting in great scholarship on administrative procedures and theoretical proposals of reforming the administrative procedural system. Such theoretical studies are undoubtedly of pivotal guiding significance to the making of Administrative Procedures Act that has been initiated in late 1990s.

To sum up, theoretical studies that have been done are basically focused on the following areas. First, emphasizing of importance and values of administrative procedures and conceptual enlightenment. Studies with regard to this aspect involve the basics of legal culture regarding administrative procedures, the significance of administrative procedures in the rule of law context, concepts of the rule of procedural law and the meanings thereof, procedural fairness and the interpretation of due process, procedural rights, and relations between procedural law and substantive law. Such studies done by the Chinese legal community on the above important theoretical issues may lay a conceptual foundation for the making of Administrative Procedure Act.

Secondly, research on the basic principles and rules regarding administrative procedures. Such studies concern with basic principles and rules for setting the framework of the Chinese APA, including debate over fundamental goals or values of administrative procedural legislation, particularly the potential intension between procedural fairness and procedural efficiency.

Thirdly, comparative studies of administrative procedures. The theoretical study done by the administrative law community on the administrative procedure legislation has highlighted a global vision; they have made an all-round investigation and study of administrative procedure legislations and practices of major western countries. The Administrative Legislative Research Group, a group responsible for drafting the Chinese APA under the sponsorship of China's NPC Standing Committee, has organized many seminars and conference on comparative studies of administrative procedures, plus study tours to many countries, including the United States, the UK, Germany, France, Spain, Japan, and South Korea. Through

comparative studies, the Chinese administrative law community has not only translated legislative documents of administrative procedure law in major countries, but also studied experiences or lessons from practices of administrative procedure abroad. Such comparative studies have provided necessary reference for China's legislation on administrative procedures.

Finally, studies on format and legislative techniques for the making of APA. Apart from the general theoretical and comparative studies, Chinese administrative law scholars have also conducted some research works directly relating to the making of APA itself. Such studies focused on the formats of the APA, the framework and the structure of the Law, techniques of coordinating uniformity and specialty of administrative procedures. Some scholars have even completed "Model Drafts" of the Administrative Procedure Act.

IV. Empirical Research for the Making of Administrative Procedure Act

It is unimaginable to reform the administrative procedure system and to make a law governing administrative procedures without full understanding of the real situation of administrative procedures. It is widely agreed that empirical studies of administrative procedure is critical to the making of the Chinese APA.¹¹⁾ However, such studies have not been given sufficient attention until now. When the Chinese Administrative Legislation Research Group started its drafting work on the

11) In the history of legislation on administrative procedures in other countries, the relevant positivist research has formed a basis of legislation. To take the making of the United States' Federal Administrative Procedure Act as an example. In the process of enacting this law, the American Bar Association ("ABA") organized long-term positivist study, and the relevant authorities also conducted large-scale positivist studies. In 1939, President Roosevelt established an Attorney General's Committee on Administrative Procedure consisting of outstanding scholars, private lawyers, and judges, aiming at conducting an extensive investigation and study on the status quo of administrative procedures. During the subsequent two years, a positivist study was conducted on the administrative procedures of 27 federal government departments by various ways, including interviewing administrative officials, lawyers, the general public, attending the meetings of administrative organs, consulting relevant archival files, etc., and formed a 474-page-long report in 1941. This report was believed to be "a landmark in the administrative law of the United States", which has formed an important basis for the making of the Administrative Procedure Act. See: 1941 Final Report of Attorney General's Committee on Administrative Procedure.

Administrative Procedure Act in late 1990s, it was fully aware of the significance of systematic empirical studies on situations of administrative procedures. At the “Sino-US International Conference on Administrative Procedure Law” held in Dalian, northeastern city of Liaoning Province in July 2000, the Group proposed that, during the stage of preparing for the drafting of the Administrative Procedure Law, it would be necessary to make a systematic investigation and study on China’s status quo of the rules on administrative procedures so as to enable the draft law to respond exactly to practical problems existing in the area of administrative procedures. This proposal met with the support of the attendees coming from both China and the United States. The objectives of the empirical study are to conduct investigations and studies on the major administrative procedures of the Central Government and those of the selected local governments from the beginning of 2001 to the end of 2002, and to submit a general report and corresponding legislative suggestions to the legislature for reference of legislation.¹²⁾

Between September 2001 and May 2002, the Group started its investigation of the major administrative procedures of the organs of the Central Government. The main purpose is to make an observation and understanding of the status quo of the administrative procedures in China in an effort to offer an outline of the operation of administrative procedures. Therefore, the purpose of this investigation was not to offer an all-round “knowledge” about the relevant procedural operations. The purpose was to attract the examination and concern of the reformers and the objects of reform, and to call on the legislators to carefully observe and construe the local context of administrative procedures legislation. From the investigations we have identified some key issues to which the coming administrative procedure reforms must respond.

12) The task force “Positivist Study on Chinese Administrative Procedures” was chaired by Professor Ying Songnian with the National Institute of Administration and Dr. Wang Xixin, Associate Professor with Peking University Law School. Over a dozen postgraduates and doctoral postgraduates of Peking University Law School participated in the practical investigation work. For the time being, we have finished the investigation of the administrative procedure rules and practice of some of organs of the Central Government and local governments, and are now in the final stage of writing the investigation report. The Legislative Affairs Committee of the National People’s Congress has provided tremendous support to this study, and the Asia Foundation has also provided funds to the said study.

1. The necessity for uniform legislation on administrative procedures

Is it necessary to make a uniform law so far as the present situation is concerned? From the data that we have acquired from the investigation in the organs of the Central Government, we believe that the following three aspects may be helpful to our deliberation over this issue. Firstly, at the present time, the ministries and commissions of the Central Government are not short of regulatory provisions regarding administrative procedures; on the contrary, the provisions on administrative procedures are large in amount and plenty in variety and the procedural operations are diversified. The problem is that many of the procedural provisions are overlapping in content; they “check” or even conflict with each other. For example, in the area of foreign trade regulation, the existing administrative procedures include at least the procedures for management of quotas, procedures for management of import and export licenses, antidumping procedures, countervailing procedures, and so on. Let’s take the antidumping and countervailing procedures as an example. The procedure for accepting cases alone concerns the MOFTEC(now the Ministry of Commerce), the State Economic and Trade Commission, the General Administration of Customs, the Tariff Policy Commission of the State Council, and all these government organs have their own procedural provisions. Their different provisions have displayed a procedural network with “mutual check” and conflicts, which has affected the efficiency of administration and the reasonability of control.

Secondly, the procedural rules of different departments mostly concern very specific matters, and with the progress of situation, corresponding rules will show much variance. The procedural rules lack governing principles and necessary concerns for continuity and consistency of administrative activities.¹³⁾

Thirdly, the procedural rules of the departments concerned are not dovetailed well and concerted with each other, and application of procedures by different departments is characterized by inconsistency and arbitrariness.

Undoubtedly, all these existing problems indicate practical necessity of making a uniform law on administrative procedures; however, it is no easy task. If uniform legislation is necessary, then how shall we deal with the relationship between

13) See *Investigation Report* (Concerning the organs of the Central Government, quoted from the materials obtained from the 2002 annual conference of China Administrative Law Society).

uniform legislation on administrative procedures and the procedural particularities in different administrative areas? How should this relationship be positioned? How can it be concerted through the uniform procedural legislation?

2. Feasibility of uniform legislation on administrative procedures

Is it feasible to make a uniform law on administrative procedures? So far as the present situation is concerned, we believe that it is feasible to make a uniform law on administrative procedures. Firstly, after more than a decade of building the administrative rule of law, the consciousness of “procedural lawfulness” of public power and the exercise of such power is growing,¹⁴⁾ which has provided a “manpower” basis for the carryout of lawfulness in procedural operations because the legislative feasibility does not only include the feasibility of making laws but also the feasibility of implementing the laws. Secondly, we have accumulated rather rich experiences during the past years in the relevant legislation on administrative procedures and law enforcement thereof, and some major administrative departments have begun to make a lot of attempts in regularizing their procedures. For example, the customs and the foreign trade departments have made some future-oriented legislative efforts to reform their procedures in accordance with requirements of WTO. Thirdly, some important administrative procedural systems have been established and have produced good results, e.g., the procedures for hearing and the procedures for information disclosure in the antidumping investigations, etc. The establishment and application of such procedural systems has formed the basis and offered important practical experiences for the uniform legislation on administrative procedures.

3. The format of the uniform legislation on administrative procedures.

What format should be employed for the legislation on administrative procedures? Should it be a uniform and detailed code or a legislation of general provisions? With regard to this question a lot of discussions have taken place.¹⁵⁾ From

14) This is an initial impression that we get in the investigations and interviews.

15) For representative discussions, see Ying Songnian, *Law on Administrative Acts*, PEOPLE'S PRESS (1993);

the practical situation, the format of legislation on administrative procedures should be able to meet the need of the procedural operations. On the one hand, we should be aware that different administrative departments have their substantive and procedural particularities in the administrative regulatory process, therefore a uniformed and detailed procedural code might result in “cutting the feet to suit the shoes” or “attending to one thing but losing sight of another”. On the other hand, though different administrative processes are somewhat different in procedural operations, they are in essence exercise of government power, and such exercise of power should satisfy some common and general procedural requirements, e.g., transparency, consistency, procedural efficiency, and fairness, etc. If these general principles and values are not provided for in the procedural legislation, the legislation itself would be meaningless. Taking these two aspects into consideration, we believe that, in terms of the legislative format, we may adopt the format of “a law on general principles and mechanisms of procedure”, namely, the legislative structure may adopt a model of “principles guided general provisions and special provisions”. The principles shall apply to all the administrative processes, and the general provisions shall apply to all circumstances for which there are no special provisions of law, while the special provisions shall apply to the special administrative processes only. The legislation should be a combination of principles and general provisions and the concretization of particular administrative processes.

4. Institutional innovation of the legislation on administrative procedures

From the present situation of administrative procedures, the Administrative Procedure Act should pay much attention to the following institutional arrangements: Firstly, provisions about the general principles of administrative procedures. For the time being, the diversity of the practice of administrative procedures has reflected the various procedural requirements, but it also has revealed the disarray of administrative procedures. An important objective of legislation on administrative procedures should be offering a basic “model procedure” so as to ensure that the diversified administrative procedures are operated under the guidance of the basic procedural principles, and to promote uniformity with necessary diversity. The

Jiang Ming'an, *How Should China Select Its Legislative Mode on Administrative Procedures?*, 6 CHINA LEGAL SCIENCE (1995).

objective of general procedures is also to provide, by setting models, standards for judging the reasonableness of the non-statutory procedures or discretionary procedures and to work out a basic procedural framework for the special procedures of different departments.¹⁶⁾ Secondly, the hearing procedures need to be further improved and rationalized. At the present time, the provisions regarding the hearing procedures in administrative processes are diversified in kind but lack basic consistency.¹⁷⁾ To this end, the Administrative Procedure Law should include general provisions for the “minimum requirement” for the hearing procedures — the opportunity to be heard. In the meanwhile, the requirements for the hearing procedures under different circumstances should be provided for in other separate laws. By doing so, the principle and flexibility can be balanced. Thirdly, it should articulate the principle of disclosure of government information. Though it is believed that openness and participation are the basic procedural requirements in administrative processes, due to the “concealing” of information by the government, the general public is largely restrained in their participation in administrative activities. Fourthly, the legal liabilities for agency’s violation of procedures should be clarified and made practically accountable. In the relevant legislations on administrative procedures today, the crying problem is that the provisions regarding legal liabilities of the illegal procedural activities of administrative agencies are too vague, and there may even be no corresponding provisions at all. This situation has resulted in the rampancy of various illegal activities in administrative procedural operations, or even procedural nihilism.

V. The Basic Framework and Suggestions for China’s Legislation on Administrative Procedures

With the tremendous support of the Legislative Affairs Working Commission of the National People’s Congress, the Chinese Administrative Legislation Research

16) The Framework of the Administrative Procedure Law, which has been finished so far, has included good provisions in this aspect, which can basically satisfy the aforesaid requirements.

17) According to the statistics done by the authors, there are at least several dozens of hearing procedures. There is sharp difference between the different procedures as well as the provisions of the different regions and different departments.

Group (the Group) started to work on the framework of the Administrative Procedure Act at the beginning of 2001. At the beginning of 2002, the Group produced the Framework of the Administrative Procedure Act (initial draft). After the Framework was completed, the Legislative Affairs Working Commission of the National People's Congress held a symposium in Beijing and Tianjin in April and June 2002, respectively, to discuss and solicit advice for revising and supplementing the initial draft. On the basis of this and after making study visits to other countries, the Group absorbed the advices from all sides and completed the expert initial draft of the Administrative Procedure Act, which has been discussed, and advice for it solicited as many as 15 times so far. In December 2004, the Draft Administrative Procedure Act was submitted to the Legal Affairs Working Commission of NPC for intensive review and discussion.

1. Basic features of the content of the Draft Administrative Procedure Act

1) Apart from general provisions that may applicable to all administrative actions, for instance, procedural principles and hearing procedures and general provisions of procedures, the Draft also provides for the specific procedures for particular administrative acts, such as decision-making, rulemaking, and administrative planning, and government contract, thus featuring a combination of generality and particularities.

The Administrative Procedure Act is expected to be a general law on the procedures for administrative acts, but it is not a simplistic enumeration of the various administrative procedures. Rather, provisions regarding the common procedural rules for the various administrative acts show that there exists a relationship of overlapping between procedural rules and administrative acts: a procedural rule may be applied to more than one administrative act, and an administrative act needs the application of more than one procedural rule. If the chapters of the Administrative Procedure Law are arranged in such a structure as they are arranged according to specific categories of administrative acts, the result would be that procedural rules must be provided in great detail for each administrative act, and the Administrative Procedure Law so arranged would be a "compilation" of procedural laws for various types of administrative acts and would be verbose, lengthy and overlapping in content, and would not be able to form an organic system. Therefore, some countries, such as the United States, have followed

the format of providing for the common procedural rules for the various administrative acts in making their administrative procedure laws.

The Draft of the Administrative Procedure Act has to large extent taken the practice and legislative model of German administrative procedure law as a reference. It provides general provisions for procedures of making administrative decisions, and procedures for particular types of administrative acts. After careful deliberation, the particular types of administrative acts as provided in the final Draft include administrative rulemaking, decision-making, administrative programs and planning, government contract, and administrative guidance. Considerations on selection of these particular types of administrative actions relate to the fact that previous to the making of Administrative Procedure Act, there are already the Administrative Punishment Law (1995), the Administrative Licensing Law (2003), and the Administrative Compulsory Enforcement Law (expected to come very soon), all of which lay down specific procedures governing corresponding administrative actions and measures; therefore, general guiding provisions on procedures for those specific administrative actions would be enough, leaving detailed and specific procedure provisions to those separate laws. On the contrary, there exist no separate laws providing even guiding principles and general provisions of procedures for administrative actions and measures such as making of administrative normative documents, administrative planning, government contract, and administrative guidance. Meanwhile, procedural problems with these types of administrative actions are among the most serious ones that need to be dealt with in practice.

2) Apart from procedural provisions, the Draft also includes provisions on substantive matters, thus featuring the combination of procedural and substantive provisions.

The reasons for this arrangement are that there lack unambiguous legal provisions regarding such important issues as the basic principles, the validity, and the legal effect of administrative acts; there also lack necessary arrangements for principles guiding allocation and exercising of administrative powers within the administrative system; and still, there lack clear and accountable legal liabilities for violations of administrative procedures. With those facts, it would be hard to imagine the practical effect of legal procedures if there are not such substantive provisions concerning the above-mentioned key issues in administrative process.

3) Apart from external administrative procedures, the Draft also provides for internal administrative procedures, thus featuring the combination of internal and external procedures.

From the administrative law perspective, administrative procedures mainly refer to external administrative procedures governing agency actions that may directly affect private parties concerned. However, although agency internal administrative action may not directly affect rights or interests of parties concerned, it may nonetheless influence rights or interests of private parties in terms of procedural fairness and efficiency. Given the fact that in China today there exist huge amount of chaotic and bureaucratic agency internal procedures that usually impose great impacts on private parties in particular administrative context, including, but not limited to conflict of administrative jurisdiction between administrative organs (positives and negative conflicts), and assistance among administrative organs, we perceive a compelling demand for regulating agency internal procedures through the Administrative Procedure Act.

4) The Draft concentrates on laying down prior procedures for administrative actions, but leave posterior procedures such as administrative appeal and judicial review procedures for regulation by other laws.

It might be surprising to some US legal scholars that the Draft says nothing about judicial review relating administrative procedures. Yet the fact is that the already existing laws, including the Administrative Reconsideration Law (1999), the Administrative Litigation Law (1989) and the State Compensation Law (1994) have already provided for procedures for administrative appeal, judicial review, and state compensation. There is the call for integration of all these laws into a unified administrative procedure code in the future, but at present stage, the Draft of Administrative Procedure Act remains to be a law concerning procedures of exercise of administrative power within administrative process.

2. Main Contents and Structure of the Framework of the Administrative Procedure Law

From the above description about the Draft, we could see that the draft of the Administrative Procedure Act has a large volume of contents; therefore the lawmaking in this case requires huge legislative techniques in terms of arranging the

contents scientifically, reasonably and logically. With reference to the experience of other country, we have proposed that the contents of the Law be arranged in the following way:

- 1) General provisions precede special provisions. Chapter I of the Draft law lay down the general provisions and Chapter II provides for principles governing organization of administrative organs and relations among them; Chapter III contains general provisions for procedures of administrative decision-making. Chapters IV through VIII are provisions for specific types of administrative actions, including administrative rulemaking and making of normative documents, administrative planning, government contract, and administrative guidance.
- 2) Procedural provisions precede substantive provisions. As for the arrangement of the general provisions, we believe that the administrative acts by which the subjects exercising administrative power makes decisions through certain procedural operations, so the initial draft should take administrative power as the axis, and arrange the relevant contents according to the sequential order of “administrative bodies → procedures governing operation of administrative power → legal effect and consequence of administrative actions”. That is to say, the Draft first lays down basic principles for structure of administrative organs and relations thereof, and then provides for procedures for different administrative actions, and then clarifies conditions for validity and legal effect of administrative actions.
- 3) Some of the provisions regarding internal administrative procedures are provided in Section 1, Chapter II: “Administrative Organs”.

3. Choice of the legislative format for the Draft Administrative Procedure Act

So far as the structure of the aforesaid contents is concerned, there exists the question of how to choose a legislative format in the entire process of making the Administrative Procedure Act. According to the experience of foreign countries, the legislative forms are mainly as follows:

- (1) Highly codified format, as adopted by, for example, Germany and China’s

Taiwan. The feature of this form is that all the contents relating to administrative procedures are incorporated into the administrative procedure code, and the advantage thereof is that the provisions regarding administrative procedures are unified to the largest possible extent.

- (2) The format of separate general provisions. This form can make the separate general provisions and other relevant laws form into an integrated system so as to co-regulate the procedures for administrative activities. This form has been adopted by some countries, including Japan and Italy.
- (3) The format of a separate procedure law with eventual codification, as adopted by, the United States. A feature of this legislative format is that a procedural code of general provisions is formulated first, and then the relevant separate laws are incorporated into the administrative procedure law by means of codification, which may make the administrative procedure law an open-ended legislative process.

The legislative formats as described above have their own advantages and disadvantages. We are holding the view that, to select the legislative format for the Administrative Procedure Act, we should take the following factors into consideration: the costs of legislation, the demands of legislation, the coordination between the administrative procedure act and other already existing separate laws, and practical possibility. Based on these considerations, we have recommended that the Draft Administrative Procedure Act take the format of a separate law of general provisions. That is to say, the Administrative Procedure Act mainly provides for general principles and provisions of procedures governing administrative activities, general procedural rules, and some specific procedural rules. At present stage, it may be unrealistic to make a unified and detailed administrative procedure code. However, we also recommended that along with the administrative procedure reforms, efforts to codifying administrative procedures be made for the concern of attaining uniformity, and consistency of administrative procedure system.

VI. Challenges Ahead: Difficult Issues in the Making of China's Administrative Procedures Act

While it has received great enthusiasm and intellectual support from legal

communities both home and abroad, the ongoing process of making China's APA is still facing great difficulties and challenges ahead. Those difficulties include practical resistance from some government agencies at both central and local level. Since the making of APA intends to regulate administrative process and to control administrative power, it should be no surprise to perceive reluctance or even resistance from the bureaucratic system. In the meanwhile, the process of making APA can also be understood as a process for reallocation of regulatory powers between the central and local governments; therefore, power struggles in the lawmaking process should not surprise either. For the lawmakers, in addition to balance practically involved interests in the lawmaking process, technical and legal issues concerning the law itself also present a huge challenge. With this respect, there still exist a number of key and difficult issues, demanding further comparative and empirical studies and great wisdom for resolutions. Such key issues include at least the following:

First, there comes the question concerning the legal effect of the principles of the administrative procedure law. The basic principles of the administrative procedure law are essentially important in legislation. Should these principles bear direct legal effect and binding force? Can courts apply and enforce legal principles of procedures in judicial review cases? How should we deal with them in legislation? How should we coordinate the relationship between the principles? How should we deal with the relationship between the basic principles and the specific procedural rules?

Secondly, questions concerning the relationship between the general provisions for administrative procedures and the specific procedures for particular administrative acts. Are the general provisions a "benchmark" requirement for administrative procedures? Or shall the special procedural provisions prevail over the general provisions?

Thirdly, questions concerning the relationship between the general administrative procedure act and other relevant laws. Should the relationship be that of one between a new law and old laws, or between a general law and special laws? For example, for administrative licensing and punishment procedures, shall the Administrative Licensing Law and the Law on Administrative Punishment apply, or shall the Administrative Procedure Law apply? Should this relationship be handled and coordinated by the general provisions or by particularized legislations?

Fourthly, questions concerning legal liabilities and means of accountability for violations of administrative procedures. What shall be the legal consequences or

liability for a violation of administrative procedure? What are the means and mechanisms for account agency liabilities for violation of administrative procedures, and what kind of remedies shall be available for individuals to challenge agency's violations of procedural requirements?

Fifthly, questions concerning the choice of legislative format of the APA.

Finally, questions concerning the national uniformity and local diversities of administrative procedures. The Draft APA has paid much attention to attaining procedural uniformity for the administrative system. However, given the fact that local governments may also demand procedural flexibility and diversities in local administration, how to coordinate the uniformity dream and diversified realities? Should local government be given authorities to modify general procedural requirements based upon local and practical realities? If that is case, how to maintain a balance between the uniformity and diversity?

To sum up, the making of administrative procedure Act in China, while widely believed to be a work of great urgency and importance, is also facing considerable difficulties and challenges. Fortunately, there is the increasing consensus among government leaders and the general public on the demanding need for making of the APA. The process of the lawmaking has been ongoing, and steps seem to be accelerating. All these might again give us reasons and sources for a modest optimism toward the future.

KEY WORDS: Procedural Reform, Administrative Procedure, Administrative Fairness