

The Positioning of Pre-litigation Procuratorial Suggestions in China's Administrative Public Interest Litigation

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ABSTRACT

As a separate type of procuratorial suggestion pre-litigation procuratorial suggestions in administrative public interest litigation is a specific way for procuratorial organs to exercise the constitutional right of legal supervision. Prosecutorial Suggestions have the nature of legal supervision. Clarifying the positioning of pre-litigation Procuratorial Suggestions can not only ensure that procuratorial organs exercise legal supervision over administrative organs, but also prevent judicial power from interfering excessively with administrative power. At the same time, the Procuratorial Suggestions is the unity of procedural and substantive. Procedurally speaking, Procuratorial Suggestions are the power of procuratorial organs to initiate administrative relief procedures. Substantially, the contents of procuratorial suggestions are substantive and specific, and administrative organs should perform their duties according to the requirements of procuratorial suggestions. The agency will initiate proceedings on the grounds that the administrative agency does not fulfill the procuratorial suggestions.

Keywords: *administrative public interest litigation, pre-litigation procedure, procuratorial suggestion*

1. INTRODUCTION

Procuratorial Suggestions are an important way for procuratorial organs to perform their legal supervision duties entrusted by the Constitution law. The aim of procuratorial suggestions are maintaining judicial fairness, promoting administration in accordance with the law, preventing and reducing illegal crimes, protecting national interests and social and public interests, safeguarding the legitimate rights and interests of individuals and organizations, and ensuring the uniform and correct implementation of laws. The above-mentioned concept of procuratorial suggestions generally refer to procuratorial suggestions in a general sense, which can supervise administrative organs and judicial organs. As the research focus of this paper, administrative public interest litigation pre-litigation procuratorial suggestion is a separate type of procuratorial suggestions, and it is also a new type of procuratorial suggestion that has been born since the establishment of administrative public interest litigation in China. In the meantime, Procuratorial Suggestions also the Core of Administrative public Interest Litigation Pre-litigation procedures. The procuratorial organs

promote the administrative organs to administer according to the law and strictly enforce the law through administrative public interest litigation, which highlights the basic role of the procuratorial organs in maintaining the unified operation of state power in the process of legal supervision.^[1]

2. ADMINISTRATIVE PUBLIC INTEREST LITIGATION PRE-LITIGATION PROCEDURES

2.1. Pre-litigation and litigation procedures

China's administrative public interest litigation system has achieved plenties of results since the pilot program. The pre-litigation procedure of administrative public interest litigation has played a role in diverting a large number of administrative public interest litigation cases. At least from the perspective of settling the cases the pre-litigation procedure is a more common way of settling the cases than the litigation procedure. However, while the pre-litigation procedure has made great achievements, some scholars have also raised such a

question - is there a possibility that the litigation procedure of the administrative public interest litigation system may be ignored? Some scholars even argue that the pre-litigation procedure is more important than litigation procedure. However, the author believes that the pre-litigation procedure and the litigation procedure are not prioritized in importance, because their purpose ultimately points to the most timely and effective maintenance of the public interest.

What is the relationship between pre-litigation proceedings and litigation proceedings? Academics have different views on this. Some scholars believe that there is a dialectical relationship between the prelitigation procedure and the litigation procedure that is a relationship complementing each other; some scholars support the interdependent and independent relationship between the pre-litigation procedure and the litigation procedure. The pre-litigation procedure and the litigation procedure are two components of the administrative public interest litigation system. The administrative public interest litigation system cannot finally exert its superiority without any procedure. When the case has not yet entered the litigation procedure, the litigation procedure is an important guarantee of the pre-litigation procedure., the litigation procedure is a solid backing for the procuratorial suggestions to be implemented by the administrative organs. In the early stage of the pilot program of administrative public interest litigation, many administrative organs only responded in writing after procuratorial organs put forward procuratorial suggestions, but did not take substantive rectification actions. administrative organs take procuratorial recommendations seriously under the pressure of litigation risks. When the case enters the litigation process, the preliminary work done by the procuratorial organ in the pre-litigation process is the guarantee for the smooth progress of the litigation process. A series of activities carried out by the procuratorial organs, such as investigation, collection of evidence, preservation of evidence, and identification, can not only reduce the burden on the court in the litigation process, but also are sometimes an important prerequisite for the smooth progress of the litigation process.

3. PRE-LITIGATION PROCURATORIAL SUGGESTIONS FOR ADMINISTRATIVE PUBLIC INTEREST LITIGATION

The procuratorial suggestion issued by the people's procuratorate mainly consist of three parts: the first is the procuratorial organ's confirmation of the administrative organ's illegal facts; the second is the procuratorial organ's legal characterization of the administrative organ's illegal act; and the third is the procuratorial organ's rectification suggestion to the administrative organ. in practice, the issuance of procuratorial recommendations faces many challenges. For example,

due to the overlapping of internal responsibilities of some administrative organs and the lack of transparency in the division of powers, the relevant administrative subjects cannot be determined when many cases occur.^[2]

3.1. Proof and confirmation of illegal facts

In the practice of pre-litigation procedures, the preliminary evidence collected by the people's procuratorate is sometimes only two on-site photos, sometimes the on-site inspection and verification report, and sometimes the on-site inspection and the investigation letter of the surrounding units, neighborhood committees and village committees. It can be seen that there are some differences in the procuratorial organs' understanding and collection of the preliminary evidence. The amount of evidence that the procuratorial organ can collect is directly related to the administrative organ's determination of illegality and the degree of illegality. Therefore, even if the administrative litigation is guided by the principle that the defendant bears the obligation of providing proof, the procuratorial organ should collect preliminary information as comprehensively as possible within its capacity.

3.2 Legal characterization of illegal acts by administrative organs

After there is preliminary evidence to prove that national and public interests have been damaged, the next step of the procuratorial organ should be based on evidence and laws and regulations to demonstrate and reason, to be precise in the characterization of illegal acts, to clarify the responsible subjects, and to pinpoint the nature of the illegal acts. On the premise of ensuring the quality of the procuratorial suggestions, procuratorial organs urge the responsible subjects to restore public interests, and require administrative organs to perform their duties in accordance with the procuratorial suggestions, At the same time, prevent procuratorial organs from arbitrarily initiating pre-litigation procedures without a clear legal basis. In practice, can procuratorial suggestions be made based on the plan of Functional configuration, internal organization and staffing? The author believes that, in the absence of other laws, regulations and rules, procuratorial organs can't quote the plan of Functional configuration, internal organization and staffing

3.3. Suggestions for rectification

Pre-litigation procuratorial suggestions include the administrative agency's determination of illegal facts, the laws and regulations, and rectification suggestions. The determination of illegal facts and the legal bases are the qualitative aspects of the illegal acts of the administrative organs, while the enumeration of rectification suggestion is the quantitative part. In practice, the details of the

content of the rectification recommendations suggested by the procuratorate are different. Some procuratorial suggestions put forward broad requirements such as asking administrative organs to take effective measures and correct illegal acts in a timely manner; some procuratorial suggestions put forward abstract requirements such as allowing administrative organs to strengthen legal awareness, improving law enforcement procedures and regulating law enforcement behaviors; some procuratorial suggestions will put forward specific requirements such as investigation, punishment, and require offenders to correct behavior.

To what extent should the rectification suggestion put forward by the procuratorial organs be specific? The author believes that procuratorial suggestions should combine qualitative accuracy with quantitative ambiguity, after procuratorial suggestions have precisely identified the illegal acts of administrative organs, the rectification recommendations should not be too detailed, and administrative organs still need to be given a certain amount of discretion. In administrative public interest litigation cases, to fully restore the damaged public interests, it is the key that the professionalism and cooperation of the administrative organs are fully mobilized. After all, procuratorates and courts are the enforcer of judicial power. They neither have sufficient expertise to make decisions on behalf of administrative organs nor perform their duties. More importantly, the purpose of the administrative public interest litigation system is not to reduce the administrative organs' administrative discretion.

4. THE POSITIONING OF PRE-LITIGATION PROCURATORIAL SUGGESTIONS IN ADMINISTRATIVE PUBLIC INTEREST LITIGATION

4.1. The procuratorial suggestion has the nature of legal supervision

It is an effective means for procuratorial organs to exercise legal supervision power and supervise administrative power through procuratorial power. The power of procuratorial suggestion itself is the manifestation of the procuratorate independently exercise of constitutional rights, and it has its own independence. Embedding it into the administrative public interest litigation system only makes it more profound in practice, rather than covering up its original appearance - the exercise of constitutional rights. In the process of exercising their functions and powers, the procuratorial organs should pay attention to the division of functions and boundaries between administrative organs and judicial organs. Especially in the process of supervising the administrative illegal acts or administrative omissions of the administrative organs, it is necessary to respect the first judgment and the

administrative discretion of the administrative organs, and maintain the modest judicial position of the procuratorial organs.^[3] The procuratorial suggestion has the nature of legal supervision, but this does not mean that new statutory duties will be set for the administrative organ. procuratorial suggestions do not have mandatory legal effect and predictable prior effect, and do not directly intervene in administrative legal relations.^[4] In the procedure, the administrative organ does not implement the procuratorial suggestion, and it should not be identified as the reason for the administrative omission.

In addition, some scholars have warned that the core content of pre-litigation procuratorial suggestions in administrative public interest litigation means that litigation activities should always focus on the subject matter of litigation, which is more conducive to the realization of the original purpose of the public interest litigation system.^[5]

4.2. Prosecutorial Suggestions are the unity of procedural and substantive

In practice, administrative public interest litigation procuratorial suggestions are generally regarded as a pre-litigation procedure, a statutory pre-procedure that must be performed before a lawsuit is filed.^[4] Undoubtedly, all mentioned before is the procedural aspect of procuratorial suggestions. Procuratorial suggestions are made to administrative organs through pre-litigation procedures, and the purpose of urging relevant administrative organs to solve most of the damage to public interests by performing their duties in accordance with the law. According to the data published on the official website of the Supreme People's Procuratorate of China, from January to December 2018, in the field of public interest litigation cases, the procuratorial organs filed and handled 59,312 natural resources and ecological environment cases, and handled 53,521 pre-litigation cases. The rectification rate of administrative organs for pre-litigation procedures reached 97%.

It is a necessary procedure for procuratorial organs to submit procuratorial suggestions to administrative organs, but this does not mean that procuratorial suggestions can only exist as a pre-procedure of administrative public interest litigations, and procuratorial suggestions also have independent and substantial value. The follow-up of procuratorial suggestion is not guaranteed by direct coercive force, but the nature of procuratorial suggestion is still substantive. The content of procuratorial suggestions are substantive and specific. Most administrative public interest litigation cases stop at pre-litigation procedures, which means that most administrative agencies have made rectifications in accordance with the requirements of procuratorial suggestions. If they think that procuratorial suggestions are completely procedural, then how to

explain the cases that were settled in the pre-litigation stage?

In addition, although the procuratorial suggestion is not enforceable, the procuratorial organ can initiate proceedings on the grounds that the administrative organ does not implement the procuratorial suggestion, and the procuratorial suggestion and the litigation request should be consistent in content in principle, because the administrative organ is in accordance with the procuratorial suggestion. When performing duties and rectification, the procuratorial organ judges whether to file an administrative public interest lawsuit based on whether the administrative organ responds effectively and promptly to the procuratorial suggestion. The criterion is the procuratorial suggestion. The reason for the initiation of the administrative public interest litigation procedure is that the illegal administrative organ failed to perform its duties in accordance with the provisions and purposes of the procuratorial suggestion, so the litigation request should be equal to or less than the scope of the procuratorial suggestion that is if the illegal administrative organ satisfactorily fulfills a certain requirement in the procuratorial suggestion, the request should not appear in the claim. From the perspective of fairness, the litigation request should be a matter that the illegal administrative organ has not completed in the procuratorial suggestion. After the administrative public interest litigation procedure is over, if the administrative organ loses the case, the enforceable judgment will finally make the requirements in the procuratorial suggestion fulfilled.

5. CONCLUSION

Clarifying the positioning of pre-litigation procuratorial recommendations in administrative public interest litigation in China, on the one hand, which is of great significance to the positioning of pre-litigation procedures since the rise of administrative public interest litigation system in recent years, and is also conducive to urging administrative organs to perform their legal duties. On the other hand, it also makes up for the shortcomings of the delay in relief and high litigation costs in litigation procedures. However, pre-litigation procedures cannot replace litigation procedures. At present, procuratorial organs are also actively exploring how to properly judicialize the pre-litigation procedures of administrative public interest litigation, and standardize the pre-litigation procedures for administrative public interest litigation, including improving the quality of procuratorial suggestions and ensuring administrative agency's objection right and internal supervision. The administrative public interest litigation system will enter a more mature stage. How to get rid of the predicament of the lack of judicial elements in the pre-litigation procedure of administrative public interest litigation? How to restrain the procuratorial

organ's substantive judgment power facing the risk of insufficient control? These will be the focus of future academic research.

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