

Research on the Pre-Litigation Procuratorial Suggestion of Administrative Public Interest Litigation in China

Zi Wang

*Nanjing University of Science and Technology, Nanjing, China
2414875886@qq.com*

Abstract: *In July 2015, the Standing Committee of the National People's Congress formally authorized the Supreme People's Procuratorate to carry out administrative public interest litigation pilot work in Beijing, Shandong, Jiangsu and other regions. Two years later, the Standing Committee of the National People's Congress decided to write the administrative public interest litigation system into the Administrative Procedure Law, and since then the administrative public interest litigation has formally become a binding legal system. In October 2019, the Supreme People's Procuratorate decided to solve more public welfare problems before litigation as a new direction of work. Compared with some foreign countries, China's administrative public interest litigation system is not yet mature, in-depth research, provisions are not clear, as an important part of the system, there are also many problems in the pre-litigation procuratorial suggestions. In order to ensure the effective implementation of the procuratorial suggestion before the prosecution, to play its legislative role, and to safeguard the public interest from a more powerful perspective of the procuratorial organs, this paper will theoretically analyze the connotation, characteristics and principles of the procuratorial suggestion, and find out the problems in the implementation from the reality, and put forward the author's suggestions.*

Keywords: *Administrative public interest litigation, Public interest, Procuratorial organs*

1. Introduction

1.1. The Connotation of Pre-litigation Procuratorial Suggestion

In the pre-litigation stage, the procuratorial organs urge the administrative organs responsible for supervision to perform their duties according to law by issuing procuratorial suggestions, which plays an important role in safeguarding public welfare in a timely manner. [1] When the procuratorial organ finds that the administrative organ does not perform or does not fully perform its duties, it is an important link to issue a pre-litigation procuratorial proposal to the administrative organ in the realization of the pre-litigation procedure in the administrative public interest litigation. On the basis of full investigation and research, the procuratorial organ realizes the compulsory intervention of judicial power in the anomie of administrative power by issuing a pre-litigation procuratorial proposal to the relevant administrative organ. [2]

The nature of procuratorial suggestions is an important way for people's procuratorates to exercise supervisory functions within the scope of their functions and powers, promote administration according to law, ensure the smooth operation of laws and safeguard the public interests of the state and society in accordance with the provisions of the Constitution and laws.

According to the Provisions on the Work of Procuratorial Opinions of the People's Procuratorate, its connotation includes three aspects: first, the procuratorial organs have the right to conduct on-the-spot investigations on the damage to national and social public interests within their functions and powers; Second, the procuratorial organ shall issue a procuratorial proposal to a specific administrative organ with statutory powers based on the results of the comprehensive investigation, and the administrative organ shall perform its duties within the statutory period and respond to the performance of its duties; Third, the procuratorial organs need to continuously follow up and investigate the performance of the obligations of the administrative organs. The legal effect of the procuratorial suggestion is not only exerted at the moment when it is made, but also on the binding force of the follow-up actions of the administrative organ. If the administrative organ fails to rectify the procuratorial suggestion or the

rectification fails to meet the requirements of the procuratorial proposal, and the national and social public interests are still not relieved, the administrative organ will be sued to the court.

1.2. Characteristics of Pre-litigation Procuratorial Suggestion

The characteristics of procuratorial suggestion before litigation are embodied in two aspects: procedure and entity. Procedurally, by issuing procuratorial proposals to urge administrative organs to correct errors and perform their duties correctly, procuratorial organs decide whether to initiate administrative public interest litigation procedures by evaluating whether administrative organs meet the requirements of procuratorial proposals. Substantially, the pre-litigation procuratorial suggestions play a positive role in ensuring the correct implementation of the law, restoring the infringed public interests and building a government ruled by law. [3]

Firstly, the procuratorial suggestion before litigation is the source of the administrative organ's "obligation to act". The content of the procuratorial suggestion before prosecution determines the content of the litigation request of the procuratorial organ at the stage of prosecution. In the administrative public interest litigation, the pre-litigation proposal procedure and the litigation procedure are continuously related, the former is the necessary procedure for the latter, and the latter does not necessarily occur. When the administrative organ fails to meet the specific rectification requirements of the procuratorial proposal, the procuratorial organ has the right to bring an administrative public interest lawsuit to the court as a defendant, and the litigation request of the lawsuit is the same as that of the procuratorial proposal.

Secondly, the pre-litigation procuratorial suggestion uses the mode of "external supervision + self-correction". Administrative public interest litigation involves many fields such as ecological environment and resource protection, assisted by external supervision of procuratorial organs, and "self-correction" by administrative organs responsible for supervision and management can most directly and effectively guarantee public interest. Pre-litigation procuratorial suggestion is essentially the right of procuratorial organs to initiate administrative relief procedures, which not only conforms to the concept of pre-procedure of extraterritorial public interest litigation, that is, to respect administrative priority judgment before judicial intervention and to exhaust administrative relief as the premise, but also guarantees the right of procuratorial organs to choose the most appropriate legal relief procedures according to the different situations of public interest damage. Finally, it changes the traditional attitude of administrative organs being investigated, prosecuted and supervised in administrative litigation, so that they can perform their duties more actively and actively.

Thirdly, the procuratorial suggestion before litigation is a combination of "flexible governance + rigid characteristics". "Flexible governance" is mainly embodied in the fact that the procuratorial organs should initiate administrative public interest litigation with restraint and consideration, because the construction of administrative public interest litigation system is based on the core of administrative power, the leading idea of correcting errors by administrative organs, and the procuratorial organs put forward procuratorial suggestions to the administrative organs before litigation to avoid being sued, so as to give the administrative organs another chance to perform their duties. This reflects our traditional culture of attaching importance to communication and consultation to resolve disputes. On the other hand, the "rigid characteristics" are mainly reflected in the fact that administrative public interest litigation is backed by litigation in addition to procuratorial suggestions. If the administrative organ fails to give a written reply within the legal time limit, or fails to take effective measures to achieve the objectives of procuratorial suggestions after a written reply, it will inevitably be prosecuted.

1.3. The principles to be followed by the procuratorial suggestions before litigation

(1) The principle of public interest. The starting point of China's administrative public interest litigation system is to relieve the damaged public interest. After investigation and verification by the procuratorial organ, if it is determined that the public interest is infringed due to the omission or illegal exercise of power by an administrative organ, the procuratorial organ shall be urged to perform its duties by sending procuratorial suggestions to the administrative organ before litigation, so as to safeguard the damaged public interest.

(2) The principle of litigation efficiency. In the current system of our country, only the procuratorial organs have the right to initiate litigation, and in addition, the procuratorial organs have other work, which makes the work pressure of the procuratorial organs very great, and is not conducive to the timely handling of cases. Through practice, it is found that procuratorial suggestions can be used as the "first

threshold" to solve cases in the pre-litigation procedure, reduce the use of judicial energy, and improve the efficiency of handling administrative public interest litigation cases.

(3) Modesty principle. In the field of public interest litigation, procuratorial organs are faced with the dilemma of choosing between judicial restraint and judicial activism. Judicial activism advocates a positive and open subjective state of justice, while judicial restraint emphasizes a conservative external code of conduct of justice. [4] Nowadays, with the development of the rule of law, we generally support that judicial activism must operate under the restraint of judicial restraint. Pre-litigation procuratorial suggestion involves the intervention of judicial power in the administrative field, which is bound to be between the tension of two judicial philosophies. Procuratorial organs should not only actively exercise their supervisory functions in accordance with their functions and powers, urge administrative organs to perform their duties and restore damaged public interests, but also maintain certain boundaries with administrative organs to ensure the independence and integrity of administrative power and never interfere with the exercise of administrative power.

2. Problems in the Implementation of Procuratorial Recommendations before Administrative Public Interest Litigation

2.1. The lack of standardization of procuratorial suggestions before litigation

On the one hand, in the current legislation and judicial interpretation, the provisions of the procuratorial suggestion before litigation are still relatively general and general, without specific and detailed provisions and interpretations for the procuratorial organs to refer to, and the inadequacy of the superior law makes the operation of the procuratorial suggestion system lack of theoretical support. On the other hand, procuratorial suggestions lack the requirements of uniform format and content elements. In addition, the different legal qualities and working attitudes of procurators in different regions and at different levels lead to the fact that some procuratorial suggestions in practice only focus on form and lack connotation.

2.2. Administrative organs do not implement or actively implement the procuratorial suggestions before litigation.

The purpose of procuratorial organs issuing pre-litigation procuratorial suggestions to administrative organs is to urge administrative organs responsible for supervision and management to consciously perform their duties and to relieve the infringed public interests as soon as possible. According to the regulations, administrative organs should perform their duties according to law within two months from the date of receiving procuratorial suggestions and reply to the people's procuratorates in writing. However, in practice, there are still cases that the administrative organs do not implement or actively implement the procuratorial suggestions before litigation, which leads to the state interests and social interests still in a state of powerless relief.

2.3. The result orientation of the review standard for the implementation of the procuratorial suggestion before litigation is too heavy.

Because there is no explicit standard of review at present, some procuratorial organs regard the state of public interest being infringed as a sufficient condition for administrative organs to fail to perform their duties in accordance with the law when they receive and examine on the spot. For example, the case of Hunchun People's Procuratorate v. Hunchun Land and Resources Bureau failing to perform its statutory duties. After hearing the case, the Hunchun Bureau of Land and Resources, after receiving the procuratorial suggestions, conducted a series of actions, such as on-site investigation, issuing a letter of cessation of illegal acts to the offenders, and reporting to the competent authorities, and actively performed its duties both subjectively and objectively. However, in the process of acceptance by the People's Procuratorate of Hunchun City, the fact of damage to public interests still exists, and the results of its implementation are biased towards examination, thus instituting administrative public interest litigation. However, the second instance of the case rejected the appeal request of the Hunchun People's Procuratorate.

2.4. The lack of supervision and guarantee mechanism for the implementation of procuratorial suggestions before litigation

Nowadays, there is a lack of a complete set of tracking and feedback mechanism for procuratorial suggestions before litigation in procedural legislation, and the procedures of issuing, serving, replying and implementing procuratorial suggestions can not be effectively tracked and supervised. For the formalistic procuratorial organs, after issuing procuratorial suggestions before litigation, they do not follow up and supervise, but are only satisfied with the "receipt" of replies from administrative organs. It even ignores the passive, lazy and false rectification of some administrative organs, which leads to the failure of procuratorial suggestions to play a real role. And in the investigation activities of "looking back", some cases that are difficult to enforce the law and involve the coordination of multiple interests have not been effectively rectified, and the procuratorial proposals are just a mere formality. How to overcome these problems, truly play the role of procuratorial proposals, and effectively safeguard public interests is still a difficult problem.

3. Measures to improve the effectiveness of procuratorial suggestions before administrative public interest litigation

3.1. To clarify the detailed rules for the operation of procuratorial suggestions before litigation.

In order to make procuratorial suggestions more effective and prosecutors have laws to abide by, it is necessary to promulgate corresponding laws or judicial interpretations as soon as possible to specify the operation rules of procuratorial suggestions in detail. The author believes that these operational rules should include the following aspects:

First, in what form should procuratorial organs put forward procuratorial suggestions. In other systems, procuratorial suggestions are opaque and not open, but the author believes that the way of service of procuratorial suggestions in administrative public interest litigation is more effective by public announcement. This can not only enhance the attention of administrative organs to procuratorial suggestions, effectively play the supervisory role of pre-litigation procuratorial suggestions in administrative public interest litigation, but also ensure the implementation of procuratorial suggestions through information disclosure and public supervision.

Second, what are the contents of the procuratorial suggestions. The author believes that it should not only include the fact of public welfare damage found in practice, but also have sufficient evidence to support it. For the illegal acts of administrative organs, we should not only have sufficient and detailed factual evidence to support, but also have relevant legal provisions to reason and demonstrate.

Thirdly, the procuratorial proposal should be detailed and appropriate. In order to avoid that some procuratorial suggestions in practice only suggest that the corresponding organs take effective measures to correct illegal acts, the suggestion part of the procuratorial proposal should be concrete and feasible, clarify the duties performed by the administrative organs according to law, and at the same time do not affect the necessary discretion of the administrative organs, so as to avoid that the procuratorial suggestions are too vague and lose their effectiveness, so as to restore the damaged social interests. [5]

3.2. Strengthen the communication in the implementation of procuratorial suggestions before prosecution

The administrative organ is the direct executor of the implementation of the law, and the procuratorial organ is the supervisor to examine whether the law is legally implemented, both of which have the relationship of supervision and being supervised. In the field of administrative public interest litigation, this "supervisory relationship" is manifested in the form of issuing procuratorial suggestions before litigation and instituting litigation to urge the administrative organ to perform its duties according to law. [6] Both of them are produced by the National People's Congress, responsible for it and supervised by it. How to strengthen the communication between them in the implementation of procuratorial suggestions before litigation in the field of administrative public interest litigation, the author believes that:

First, explore the exchange mechanism of innovative personnel. As far as the current practice is concerned, the cooperation between procuratorial organs and administrative organs is only reflected in some areas, while the administrative public interest litigation involves many aspects of social life. In order to promote the sound development of the administrative public interest litigation system, we can

start with expanding the scope of exchange personnel and improving the level of exchange personnel, not only to absorb grass-roots staff into the circle of exchanges, Adding the mainstay of procuratorial organs and administrative organs to the personnel exchange system is undoubtedly of great benefit to the smooth development of the work of both sides.

Second, we should learn from local experience and establish a linkage mechanism for law enforcement. In order to implement the administrative public interest litigation system and solve public interest problems in a timely and effective manner before litigation, procuratorial organs at all levels throughout the country are actively exploring new ways of working. Looking at the whole country, Fujian procuratorial organs have explored the participation of relevant administrative departments involved in the case invited by the procuratorial organs. After the meeting, all parties cooperated with the round table mechanism and Henan procuratorial organs to explore such measures as business exchanges, joint meetings, law enforcement information sharing and case clues transfer among the departments involved.

The joint efforts to protect the ecological environment of the Yellow River Basin and the new model of "river length + chief procurator" to manage the river according to law have created new experiences by taking advantage of the local situation and topographic characteristics. In addition, in the exploration of exchanging experience, other advanced places provide a reference model for solving the problem of difficult coordination of joint law enforcement by multiple administrative organs.

3.3. Establishing "Six Methods" to Evaluate the Effectiveness of Pre-litigation Procuratorial Recommendations

Method 1: Time node control. Whether the administrative organ can fully and effectively complete the rectification within the legal time limit is the criterion to judge whether the procuratorial suggestions before litigation are implemented. In reality, there are usually three time points involved in the issuance of pre-litigation procuratorial proposals, namely, the statutory period of rectification and response, the period of rectification and the period of grace for procuratorial organs. In addition to the result orientation, the procuratorial organs also need to refer to the behavior orientation, not only to verify the specific behavior of the administrative organs, but also to judge whether they have the subjective intention to implement the procuratorial suggestions and safeguard the public interest according to the specific behavior of the administrative organs.

Method 2: Reply to the system review. The procuratorial organ is required to examine the content of the administrative organ's rectification reply in written form, which should cover all the suggested rectification contents of the procuratorial proposal in terms of connotation and extension. After receiving the written rectification reply from the administrative organ, the procuratorial organ needs to compare and analyze the illegal acts pointed out in the procuratorial proposal one by one in order to examine whether the written rectification reply covers all the contents of the procuratorial proposal. There are three criteria: First, whether there are missing items, which should include every content of the procuratorial proposal. Second, whether it is specific or not, the behavior and results of performing duties should be specific and detailed. Third, there is no evidence, not empty talk, the need for additional evidence to support.

Method three: track and verify the effectiveness. Procurators verify the effect of rectification by means of open and secret visits and visits. Clear inspection means that the identity and the administrative organ participate in the rectification and acceptance together or go to the site to check and accept the results by themselves. Unannounced visits, as opposed to open visits, do not reveal their true identity and investigate the rectification situation. Visit, that is, to inquire about the masses and grass-roots organizations around the place involved, and to understand the relevant situation from the masses. Investigation is mainly manifested in on-site inspection, trial inspection of relevant facilities and equipment, and collection of relevant data and information.

Method four: regular return visits to prevent rebound. Procurators are required to make regular visits to administrative public interest litigation cases of ecological environment pollution, such as dust pollution, straw burning and domestic waste, which are easy to rebound, to prevent the rebound of rectification.

Method five: expert demonstration support. Public interest litigation cases in the fields of ecological environment, cultural heritage protection, food and drug safety and land, mine reclamation and greening are often highly professional, so it is very difficult for the procuratorial organs to understand and verify them, and the strength of the procuratorial organs of "specializing in technology" does not lie in this. Therefore, it is necessary to introduce industry experts or third-party professional organizations to make

suggestions on the rectification plan and check the rectification results.

Method six: public hearing evaluation. That is to say, inviting administrative organs, units or individuals related to the case to participate in the public review of public interest litigation cases and evaluating the effect of rectification can not only improve the procuratorial suggestions from the procedure, achieve fairness and openness, but also expand the influence of procuratorial suggestions and reach the hearts of the people from all levels.

4. Conclusion

The establishment of administrative public interest litigation system is a major breakthrough in the protection of public interest in the rule of law in China, and also a major progress in the rule of law. Pre-litigation procedure plays an extremely important role in the immature administrative public interest litigation. Through the form of procuratorial proposals, it urges the administrative organs that fail to perform their statutory duties or abuse their powers to perform their duties. Because of the scientific nature of procuratorial suggestions and the promotion of various forces in practice, procuratorial suggestions have achieved the greatest social public welfare benefits at the lowest judicial cost.

From the perspective of theoretical support and practical operation, we can see that the system of administrative public interest litigation initiated by procuratorial organs is still groping forward. Although there are still many shortcomings, its impact is still enormous. This paper puts forward some suggestions, hoping to contribute to the development and improvement of the pre-litigation procedure of the administrative public interest litigation system, in order to achieve higher achievements in the future construction of the rule of law.

References

- [1] *Civil and Administrative Procuratorial Office of the Supreme People's Procuratorate, Practice and Exploration of Public Interest Litigation by Procuratorial Organs, China Procuratorial Press, 108 (2017).*
- [2] Wang Mingyuan. *On the Development Direction of Environmental Public Interest Litigation in China: An Analysis Based on the Theory of the Relationship between Administrative Power and Judicial Power [J]. China Law, 2016 (1): 49-68.*
- [3] Zhang Bin, Zhang Yibo. *Analysis of the Basic Theory of Pre-litigation Procedure of Administrative Public Interest Litigation [J]. People's Procuratorate, 2017 (4): 62-65.*
- [4] Wang Li. *Research on Judicial Democracy in Contemporary China [M]. Beijing: China University of Political Science and Law Press, 2016: 86.*
- [5] Hou Jinping, Chen Dingliang, Zhang Feng. *Review on the Practice of Pre-litigation Procedure of Administrative Public Interest Litigation [J]. Journal of Soochow University (Law Edition), 2020, 7 (2): 78-86.*
- [6] Xie Wenbo, *Win-Win Mechanism of Administrative Public Interest Litigation, Shanghai Journal of Law Studies, Vol. 8, 2019, pp. 15-24.*