

## Administrative Litigation Plaintiff Qualification in Germany: Enlightenment to Chinese Law

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### Abstract

German Administrative Litigation System is relatively complete. This chapter starts from the background of German administrative litigation, which analyzes its main objective of “rights violations” standard specifically identified under the subjective litigation and in objective litigation the plaintiff Qualification are in group litigation, litigation and regulating authorities review proceedings. Its value of administrative proceedings, classifications of litigation are affecting the development of the scope of the plaintiff’s administrative litigation system. The author clarifies the main proceedings of Administrative Litigation, supplements objective function and improves the scope of the case. Furthermore, the author clarifies its set standards in Plaintiff Qualification of Administrative Litigation and brings public interest litigation into administrative litigation system to enable citizens, public interest groups and the prosecution have the administrative public interest litigation to sue.

**Key words:** Plaintiff qualification; Subjective litigation; System improvement; Public interest litigation administrative action

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“Plaintiff Qualification” refers to the right of citizens to refer disputes to judicial proceedings for judicial relief. In the actual case, the key point is to judge the degree of

interest relevance of the dispute to the prosecutor, so as to determine whether the prosecutor is the legitimate plaintiff in the case. <sup>1</sup>However, there is no concept of plaintiff qualification in Act of the Federal Administrative Court of Germany (hereinafter referred to as the administrative court law). The act standardizes who can file administrative litigation under what circumstances by defining the function of litigation. The provisions on the relevant system of the qualification of the plaintiff link up the overall background of the current administrative litigation in Germany, thus forming a relatively complete theoretical system and legislative model. Based on the litigation mode in which subjective litigation is supplemented by objective litigation, the subjective litigation takes “the theory of infringement of rights” (Rechtsverletzung) as the standard for the plaintiff to become the plaintiff, and is supplemented by the group litigation, organ litigation and normative review in the objective litigation, which constitute the system of the plaintiff qualification in the administrative litigation in Germany.

### 1. PLAINTIFF QUALIFICATION SYSTEM BASED ON SUBJECTIVE LITIGATION

#### 1.1 Basic Position of Subjective Litigation

The definition of subjective litigation and objective litigation has become a common sample of civil law countries for the function of litigation. In some countries with a civil law system, the function of administrative litigation is generally divided into two categories, one is the protection of subjective public rights, the other is the maintenance of objective legal order. Accordingly, there are two kinds of litigation types: subjective litigation and objective litigation. This classification method was

<sup>1</sup> Black dictionary, Eighth Edition.

first proposed by Léon Duguit of France.<sup>2</sup> In view of its theoretical scientificity and practical operability, it has been widely used by other civil law countries. Based on the division of litigation by its functional value orientation, Germany has gradually derived a set of new theories. “Subjective litigation” mainly refers to the court’s examination of the administrative act applied by the prosecutor. The first focus of this kind of review is to solve the plaintiff’s request that his own interests be damaged, and then to review the legality of his administrative act (Liang, 2006), which more embodies the purpose of power relief; The concept of “objective litigation” refers to the litigation type whose main purpose is to supervise the behavior of administrative public power. In the specific system, it shows that the court reviews the legality of the behavior of administrative public power<sup>3</sup> and pays more attention to the supervision of administration.

The essential structure of administrative litigation generally hinges on its positioning of function value in administrative litigation, that is, subjective litigation or objective litigation. Looking back in the past, there has been a dispute about the value of litigation in the German theoretical circle for some time. Otto Mayer, for example, is a favorer of objective litigation.<sup>4</sup> According to another view, the infringement of personal rights and interests in administrative litigation is the precondition of bringing administrative litigation, and the function orientation of administrative litigation should be based on subjective litigation (Sarwey, 1880). According to articles 1<sup>5</sup> and 19<sup>6</sup> of the basic law of the Federal Republic of Germany (hereinafter referred to as the basic law), anyone who is infringed by public power can bring a lawsuit. Obviously, Germany’s original intention for administrative litigation is to protect individual rights. This administrative litigation system focuses on the relief of civil rights, which makes Germany have a strong sense of subjective litigation when entering the “threshold” of administrative litigation. Article 42, paragraph 2, of the administrative court law

states: “unless otherwise provided by law, the plaintiff may file a lawsuit only when its own rights are infringed by an administrative act, refusal of an administrative act or omission.”<sup>7</sup> The “*seinen Rechten*” stipulated in the law indicates that the plaintiff does not have the conditions to become a plaintiff if an administrative act is objectively illegal, but does not infringe on the plaintiff’s own rights. In this case, the parties to the administrative litigation in Germany have the right to decide whether to sue or not, as well as to change the claim and withdraw the lawsuit after the prosecution, unless otherwise restricted by law. In view of this, the plaintiff’s right of free disposition of the right of action is a significant sign of the nature of subjective litigation (Hu, 1998, p.306). Based on the above content, the functional value orientation of German administrative litigation lies in subjective litigation rather than objective litigation.

## 1.2 Qualification of Plaintiff Under Subjective Action

The difference in the value and orientation of the function of subjective litigation and objective litigation results in the different construction of the plaintiff qualification system in administrative litigation under the two litigation modes. As a result, the qualification criteria for the plaintiff are not the same. Since the German law is the background of subjective litigation, the plaintiff in the administrative litigation is limited to the relative person and related person of the administrative act. Article 19 (4) of the basic law of Germany stipulates that “any person may bring a lawsuit if his or her rights are infringed”.<sup>8</sup> It takes “infringement of rights” (*Rechtsverletzung*) as the “key” to initiate the lawsuit, which establishes the recognition of subjective litigation in German law. Administrative Court Law embodies the specific system of plaintiff qualification in administrative litigation.

### 1.2.1 Plaintiff’s Qualification of the Suit of Annulment

The annulment action (*Anfechtungsklage*) stipulated in Article 42 (1)<sup>9</sup> of German administrative court law provides that the plaintiff can annul or annul an administrative act through litigation. Moreover, according to article 42 (2) of the law, the prosecutor can only bring a lawsuit when his rights and interests are infringed, and he has the right of action. The actionable administrative acts include: administrative act, refusal of administrative act and non action. Only when the rights and interests of the prosecutor are infringed by the administrative act, can a lawsuit be brought. Once only because the administrative act itself is not legitimate, but has not violated the party’s own rights and interests, then the party will not have the right of action, also known as the “subjective right to request”. That is to say, “right infringement” renders the

<sup>2</sup> According to Leon Deese, based on the different nature of the subject matter of administrative litigation, it is divided into two categories: An action that is subject to an administrative act that can produce a subjective legal state (une situation juridique subjective) may be called a subjective action; The lawsuit which is purely objective to judge the legality of administrative act is called objective lawsuit. The former is endowed with the characteristics of relativity and individuality, while the latter has the universality of the ruling effect. See [France] Di Ji, translated by Zheng Ge: *Changes In Public Law*. China Legal Publishing House, 2010 edition, p.140.

<sup>3</sup> Op. Note [3], P. 75.

<sup>4</sup> According to Otto Meyer, the difference between administrative law and civil law lies in that administrative law is mainly realized through administrative enforcement and serves objective law, so it should have corresponding objective functions. [Germany] Otto Mayer, *Deutsches Verwaltungsrecht*, Bd. 1, 1969, Verlag Duncker & Humblot Berlin, S.122-124.

<sup>5</sup> Grundgesetz Art1

<sup>6</sup> Grundgesetz Art19 Abs.4

<sup>7</sup> Verwaltungsgerichtsordnung, §42 Abs. 2

<sup>8</sup> Grundgesetz, § 19 Abs. 4

<sup>9</sup> Verwaltungsgerichtsordnung, §42Abs. 1

limitation of the plaintiff's qualification in administrative litigation.

### 1.2.2 Plaintiff's Qualification of Confirmed Action

In accordance with Article 43, paragraph 1 (Feststellungsklage): "The existence or absence of a legal relationship, or the nullification of an action, may be ascertained by litigation, provided that the plaintiff has a lawful interest in promptly ascertaining it." The plaintiff is required to claim specific interests of confirmation, and there is a certain relationship between the legitimate rights and interests to be confirmed, which requires that the legitimate rights and interests of the plaintiff belong to the prosecutor. If the plaintiff has no interest in the legal rights and interests, then the plaintiff does not have the right of action, which is a necessary condition for confirming the plaintiff. On the contrary, there is no plaintiff qualification if the parties are not related to the legitimate rights and interests.

A series of other types of litigation, such as general action of performance (allgemeine Leistungsklage), action of voluntary (Verpflichtungsklage) and action of confirmation (Fortsetzungsfeststellungsklage), are equally applicable. However, these guidelines must be premised on "infringement of rights". After all, only a party whose rights have been infringed can obtain legal relief and become a qualified plaintiff in the lawsuit.

### 1.3 Specific Identification of "Infringement of Rights"

Compared with other countries, it can be said that administrative litigation in Germany has a more severe limitation on the qualification of the plaintiff. Article 19 of the basic law of Germany and article 42 of the act on administrative courts provide that, in Germany, the limitation on the qualification of the plaintiff in administrative litigation is based on the theory of "infringement of rights" (Rechtsverletzung) in the academic field, that is, only when the plaintiff's "own rights" are infringed, can he become a plaintiff in administrative litigation and be qualified for judicial relief. Article 42, item 2, of the administrative court law stipulates that, "Unless otherwise provided by law, a plaintiff may bring an action only if he considers that his rights have been infringed by an administrative act, refusal of an administrative act, or an act." According to article 113, "where the rights of the plaintiff are infringed by an administrative act or omission of an administrative act, proceedings may also be instituted".<sup>10</sup> Regarding the relevant provisions of "rights", it can be concluded that the plaintiff's litigation power and litigation capacity are derived from the provisions of law (Huang, 2006). Based on relevant laws, rights in administrative litigation are interests protected by law. The law here refers to the provisions in the basic law, the administrative court law and other substantive laws. In Germany, the qualification

of the plaintiff is more of a substantive law issue, which is rarely regulated by the procedural law. It is obvious that "infringement of rights" is the precondition for the initiation of administrative proceedings and substantive review, and this right is not a pure interest. According to German law, prosecution can only be carried out if it is clearly stipulated in the substantive law, and the administrative court can dismiss the prosecution when confirming that the prosecutor does not have the right of action. To some extent, this limitation on "subjective rights" leads to the narrow scope of the plaintiff's qualification in administrative litigation. In specific cases, the administrative court judges whether the plaintiff has administrative litigation qualification mainly through whether the law stipulates that citizens have subjective rights. The legislature has tried to protect subjective rights, enabling citizens to sue in more cases. In fact, the court has expanded the scope of fundamental rights through the principles of the rule of law and the social state and in the light of the fundamental rights of individual freedom and equality. The reality remains that this interest is usually also required to be a legally protected interest in addition to the personal and direct interests of the applicant.<sup>11</sup>

Germany is more strict in legal provisions, which leads to German administrative law scholars breaking through the limitations of the original legal provisions when discussing the standards of plaintiff qualification in administrative litigation. The concept of "subjective public right" and "reflex interest" is introduced, and the criterion of plaintiff qualification in administrative litigation is defined based on this. "Subjective public rights" refers to the compulsory laws and regulations formulated by the people on the basis of legal acts or for the purpose of protecting their personal interests, which can be invoked to the state for a certain request or for the legal status of a certain act. Public power emphasizes the legal status of individuals in public law; Reflex benefit refers to the actual benefit obtained by an individual by virtue of laws and regulations, and the individual shall not make a separate request to the administrative organ.<sup>12</sup> The subjective public right interest refers to the specific behavior that the public law gives individuals to ask the state to do or not to do in order to realize their rights and interests, while the reflective interest refers to the actual interest that the parties obtain because of the provisions of the public law. (see Table 1) In this regard, "The parties' prosecution need not be conditioned on the damage to the economic, political, moral or other interests of the state, but only on the damage to the interests protected by law and therefore subject to subjective rights." Article 42 of the law of administrative court of Germany also clarifies the standard of "infringement of rights". Based on the qualification of the plaintiff in the administrative

<sup>10</sup> Verwaltungsgerichtsordnung, § 42 Abs. 2 ; § 113 Abs. 1, Abs. 5

<sup>11</sup> Op. Note [15], P. 5.

<sup>12</sup> Op. Note [15], P. 5

litigation, the parties are required to have the subjective public rights as a prerequisite. If the content of the plaintiff in the administrative litigation is only aimed

at the infringement of reflex interests, then he does not have the qualification of the plaintiff in the administrative litigation.

**Table 1**  
**A comparison between “Subjective Public Power” and “Reflective Interests”**

Comparison items	Subjective public rights	Reflective interest
Beneficiary scope	Beneficiary identified or determinable	Uncertain
Interests protected by law	Protect public and private interests	Protection of public interest
Legal effect	People’s opinions	People have no right to claim
Nature of interest	Based on legal provisions	Indirect benefit
Interests of belonging	Ascribed to a particular person	Enjoyed by an unspecified number of people
An obligation or not	As soon as a right is claimed, the executive has an obligation to act.	Results of administrative organ’s carrying out administrative functions and powers according to law
Qualification restriction	Set more restrictions	Fewer restrictions

Nowadays, the relaxation of plaintiff qualification standards has gradually become the trend of administrative litigation in various countries with the continuous development of social economy. Against such a backdrop, the qualification system of the plaintiff in Germany is also gradually relaxed. Of course, it does not mean that the boundary between “subjective public rights” and “reflective interests” is blurred, but that the rights of citizens stipulated in the basic law and other laws are included in the scope of public rights. The scope of public rights has been expanded in essence, which enables more subjects to obtain the plaintiff qualification of administrative litigation.

## 2. THE PLAINTIFF QUALIFICATION SYSTEM SUPPLEMENTED BY OBJECTIVE LITIGATION

As a mediator of two interests, the modern state is not in opposition to its citizens. Therefore, the practice of including only personal protection and giving up multiple relationships and conflicts of interest makes the control of administrative courts too narrow (Wöhring, 1985). In accordance with article 1, paragraph 3,<sup>13</sup> of the basic law, “All fundamental rights should be regarded as direct and effective laws, and all state powers should be restricted. “Therefore, fundamental rights have the binding effect and characteristics of objective laws. Based on this, German scholars developed the legal attribute of basic right as objective value decision.” (Zhao, 2011, p.58) As the objective aspect of the fundamental right, the objective value decision provides another dimension for us to understand the fundamental right beside the subjective right. The complementary and juxtaposition of subjective rights and objective values also greatly expands the functions of fundamental rights on the original basis (Zhao, 2011, p.38).

### 2.1 Group Litigation

In view of the background of subjective litigation in Germany and the limitation on the plaintiff’s “own rights” in the administrative court law, Germany seems to exclude the system of administrative public interest litigation in the administrative litigation system. However, through the regulation of group action (Verbandsklage), Germany has gradually broken through the framework of subjective action, supplemented and improved the litigation system mainly based on subjective action, and improved the construction of the plaintiff qualification system. “Group litigation” refers to the qualification and right of action granted to some group litigants, so that they can participate in the litigation for the sake of public interest. Article 42 (2) of the administrative court law stipulates that other laws can stipulate the subject of administrative litigation.

After the second world war, German industry (especially chemical industry) developed rapidly. While bringing economic growth, it also causes serious environmental pollution which damages people’s health. At the end of 1960s, Germany began to formulate and improve the legislation to protect the natural environment with people’s continuous attention to the natural environment (Klöpfer, 1994). There are two types of lawsuits for environmental protection. One is “self-interested group action (egoistische Verbandsklage)”, in which environmental groups can bring administrative lawsuits on behalf of members of groups whose rights have been violated. The other is the “Pure type group action (altruistische Verbandsklage)”, which aims not at personal interests but at protecting the natural environment from infringement, and maintains the order of law through the courts (Lüthge, 1980). In 2002, Germany amended the federal nature protection act based on the requirements of the Convention on Access to Information, Public Participation in decision-making and Access to Justice

<sup>13</sup> Grundgesetz, §1 Abs.3

in Environmental. Article 64 (1) and (2)<sup>14</sup> provide that proceedings may be brought against items 2 to 5 and 7 and 8 of article 45 (1) of the act, without prejudice to one's own rights and interests. Unless the public interest litigation of environmental groups is stipulated in the federal nature protection law and the state nature protection law, it is also involved in the environmental damage law (Umweltsschadensgesetz), the environmental legal relief law (Umweltrechtsbehelfsgesetz umwrg), etc.

## 2.2 Action of Public Authorities

German administrative organs also have the qualification to be the plaintiff in administrative litigation in some cases. The action of public authorities in administrative litigation (Verwaltungsgerichtliche Organkalge) is also called organ dispute (Organstreitigkeit). Such a dispute is not a political disagreement but a legal one; The dispute is not a purely theoretical legal issue, but related to the application of law in specific cases (Roth, 2001). These disputes involve public law disputes between different agencies within different administrative organs or statutory bodies. In fact, organ litigation is not explicitly stipulated in German administrative law. In the past, for a long time, legal disputes within a group or other legal persons were excluded from administrative litigation (Kong, 2012, p.42). In view of the problems gradually appearing in practice and the deepening of the theoretical development, the focus of the dispute turned to whether the administrative power is a legal issue and whether it has the right of action. At the heart of the organ dispute is the organ's "powers and functions (Kompetenz)" or authorization for specific administrative activities. As mentioned above, the German law takes litigation function (task or purpose) as the distinguishing standard of subjective and objective litigation mode. As the carrier of public interests, administrative organs do not involve their own subjective rights in the whole process in order to promote the exercise of power and power for the public, and even file power dispute lawsuits. In Germany,

<sup>14</sup> Gesetz über Naturschutz und Landschaftspflege (Bundesnaturschutzgesetz-BNatSchG) §64 „ (1) Eine anerkannte Naturschutzvereinigung kann neben den Rechtsbehelfen nach §2 des Umwelt-Rechtsbehelfsgesetzes, ohne in eigenen Rechten verletzt zu sein, Rechtsbehelfe nach Maßgabe der Verwaltungsgerichtsordnung einlegen gegen Entscheidungen nach §63 Absatz 1 Nummer 2 bis 4 und Absatz 2 Nummer 5 bis 7, wenn die Vereinigung 1. geltend macht, dass die Entscheidung Vorschriften dieses Gesetzes, Rechtsvorschriften, die auf Grund dieses Gesetzes erlassen worden sind oder fortgelten, Naturschutzrecht der Länder oder anderen Rechtsvorschriften, die bei der Entscheidung zu beachten und zumindest auch den Belangen des Naturschutzes und der Landschaftspflege zu dienen bestimmt sind, widerspricht, 2. in ihrem satzungsgemäßen Aufgaben- und Tätigkeitsbereich, soweit sich die Anerkennung darauf bezieht, berührt wird und 3. zur Mitwirkung nach §63 Absatz 1 Nummer 2 bis 4 oder Absatz 2 Nummer 5 bis 7 berechtigt war und sie sich hierbei in der Sache geäußert hat oder ihr keine Gelegenheit zur Äußerung gegeben worden ist. (2) §1 Absatz 1 Satz 4, §2 Absatz 3 und 4 Satz 1 des Umwelt-Rechtsbehelfsgesetzes gelten entsprechend.

the following conditions are required to bring an organ lawsuit<sup>15</sup>: (1) Article 40 of the law on administrative courts stipulates that disputes over administrative power are public law disputes of non-constitutional nature. (2) It is necessary to have the right of action, and the right claimed by it must belong to the right of the organ. In organ litigation, the time limit for litigation is relatively relaxed. If the dispute under the local organic law is filed as a general claim for payment or confirmation, the time limit need not be observed. However, the litigation right may be lost if the lawsuit is filed too late (Friedel, 2003, pp.370-378).

In a strict sense, organ litigation is not one of the types of litigation stipulated in the German administrative litigation, but the general term of the proceedings concerning the internal disputes of different organs.

## 2.3 Review of Legal Norms

In theory, normative review (Normenkontrollverfahren) is analogous to the review of abstract administrative acts. Citizens file applications for review of regulations issued pursuant to the building code and of statutory compliance applications (Antrag) that are subordinate to state law. The applicant is not required to have an interest relationship with the applicant, that is, "infringement of rights" is not taken as an element of the qualification of the plaintiff.

Article 47 of the administrative court law stipulates the procedure of normative review or appeal for normative review (Normenkontrollklage), which refers to the procedure for the applicant to submit to the court for review of the norms formulated by the relevant administrative organ. The significance of this system design lies in its binding function (Bündelungsfunktion)<sup>16</sup>: First, it ensures the legality of legal norms and the uniform application of laws and regulations. Secondly, this kind of preventive and universal judgment can also save litigation resources by avoiding the filing of relevant individual lawsuits in the future.<sup>17</sup> Such specifications are either abstract, that is, independent of individual cases; It is either specific, that is, it is placed in the judgment of a particular case. In this regard, the administrative

<sup>15</sup> For example, as a result of a city government's decision to expand the city's free swimming pool, if the township Congress considers the incident to be under its jurisdiction, it can claim that its authority has been violated and appeal to the administrative court. In Germany, the typical organ disputes include local organization disputes and university disputes, among which the local organization disputes are the main organ disputes, which are related to the German local autonomy system. See Li Huizong: A Study On The System Of Organ Dispute In German Local Autonomy Law. Published in New Theory Of Contemporary Public Law (2), 2002 Edition Of Yuanzhao Publishing Company, Page 217.

<sup>16</sup> Verwaltungsgerichtsordnung: Kommentar, § 47, Rn. 2. (<https://beck-online.beck.de>). Verwaltungsgerichtsordnung: Kommentar, § 47, Rn. 2. (<https://beck-online.beck.de>), Time Surfed November 18, 2016

<sup>17</sup> Op. Note [31], p. 339.

court can start the procedure of regulating litigation based on the damage of the plaintiff's own interests. For example, Article 47, paragraph 2,<sup>18</sup> of the administrative court law provides that it can be reviewed by the courts in the form of a public action, or it can be reviewed by a judge requesting a statutory interpretation from the constitutional court. Pursuant to article 47, paragraph 1,<sup>19</sup> of the act on administrative courts, the superior administrative court may, within the jurisdiction of the trial, review, upon application, regulations promulgated by the building code and other regulations that are at an intermediate level under state law. In this article, the prosecutor only needs to file an application (Antrag), and whether or not his or her "rights and interests" have been infringed is not a necessary condition. In Germany, the action of normative review has the nature of subjective action and objective action. Normative review procedure is not only a procedure to maintain objective legal order, but also serves the protection of subjective public rights. In judicial practice, the content and effect of judgment of administrative courts are often greater than the scope of protection of the rights proposed by the applicant, which therefore emphasizes on objective litigation in nature.

### 3. TYPED ADMINISTRATIVE LITIGATION PLAINTIFF QUALIFICATION

In terms of the exploration of the qualification of the typed administrative litigation plaintiff, the exploration in Germany is also of typical significance, which is praised by many scholars. For example, some scholars believe that "Germany's provisions on the qualification of administrative litigation plaintiff are the most perfect." (Jiang and Liang, 2011, p.337) The typification of administrative litigation restricts the development of plaintiff qualification in administrative litigation. Professor Wang Mingyang discussed that "in all kinds of administrative litigation, the qualification of the parties, the content of the request, the power of the judge, the procedure of the litigation and the effect of the judgment are not identical. Therefore, for the sake of practicality and research, classification is necessary" (Wang, 1988, p.664). In view of the administrative disputes arising from specific administrative acts in administrative litigation, the qualification of the plaintiff in administrative litigation is one of the conditions for the prosecution of administrative litigation, which requires us to specify different standards for the qualification of the plaintiff for different types of litigation in judicial practice and distinguish the differences in details. "Administrative proceedings in various countries are still customarily conducted in a certain form, form or type. The plaintiff may only seek

relief from the administrative court for the infringement he has suffered, and the administrative court may only seek relief from the prescribed type of litigation. The format of this type of litigation or the form of judgment is called "the type of administrative litigation." (Klagearten des Verwaltungsprozesses) In each specific administrative case, the plaintiff can only request the administrative court for a certain judgment in a certain category. Accordingly, the administrative court may and shall be a judge only to the extent prescribed by law." (Cai, 2001, p.225)

The type of administrative litigation is generally defined in the administrative court law of Germany, which is also called exemplification. Its main feature is that the type of litigation is generally defined or guided in its administrative court law. Most of the types of litigation and the conditions of prosecution are to be supplemented and improved by the court in judicial practice (Liu, 2004, p.44). Action of form (Gestaltungsklage), action of conformation (Feststellungsklage) and action of performance (Leistungsklage) are specifically listed in article 43, paragraph 2, of the administrative court law. "If the plaintiff's rights can be satisfied by a suit of formation or a suit of payment, no such confirmation is required; However, this paragraph shall not apply to the confirmation that an administrative act is invalid."<sup>20</sup> According to the German law, there are only three types of litigation types, but the implied types of sublitigation. Although it is not explicitly listed in the administrative court act, it includes: the action of cancellation (Anfechtungsklage), the action of obligation (Verpflichtungsklage), the action of continuing confirmation, etc. When the plaintiff makes a claim, the court shall choose the appropriate type of action.<sup>21</sup> According to article 88 of the administrative court law, the court shall not exceed the claims, but shall not be bound by the content of the application.<sup>22</sup> Different types of litigation have different requirements on the qualification of the plaintiff.

Referring to the action of cancellation and the action of duty, article 42 (2) of the administrative court act makes it clear that, unless otherwise provided by law, the plaintiff may bring an action only if he believes that his rights have been infringed by an administrative act, refusal of an administrative act or omission. This article is a rule of principle, which makes clear that "infringement of rights" is the condition for the qualification of the plaintiff in the affirmation lawsuit and the obligation lawsuit. This article is similar to the provisions of article 2 of the administrative procedure law of Chinese, that is, the plaintiff must have been infringed in order to be qualified as a plaintiff in the administrative litigation. In addition, according to article 43, paragraph 1, of the German act on

<sup>18</sup> Verwaltungsgerichtsordnung, §47 Abs.2

<sup>19</sup> Verwaltungsgerichtsordnung, §47

<sup>20</sup> Verwaltungsgerichtsordnung, §43 Abs.2

<sup>21</sup> Ausführlich dazu Kopp/ Schenke, VwGO, §88

<sup>22</sup> Verwaltungsgerichtsordnung, §88

administrative courts: the plaintiff shall have a legitimate interest in the timely recognition when the existence or invalidity of a legal relationship is required to be confirmed through litigation. This clause is the specific stipulation of the German law on the qualification of the plaintiff in the confirmation lawsuit, that is to say, the prosecutor must have an interest in the legitimate rights and interests of the plaintiff in the confirmation lawsuit, which is the premise of the initiation of the confirmation lawsuit. In other words, the prosecutor cannot grow into the plaintiff in the confirmation if the prosecutor has no interest in the matter to be confirmed, that is, not qualified as a plaintiff. The normative review procedure of Article 47 and the public representative system of articles 35 and 36 of the administrative court law of Germany should not be based on the premise of infringing their own interests.

In summary, the plaintiff qualification of different types of administrative litigation has different requirements in view of the different classification of administrative litigation in the German administrative court law, but is not a unified provision and standard. Such a standard is more conducive to the parties in practice to distinguish the different types of administrative litigation, better grasp the essence of the plaintiff qualification in administrative litigation.

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## 4. TO THE PLAINTIFF QUALIFICATION OF ADMINISTRATIVE LITIGATION IN CHINA

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### 4.1 The Functional Value of Administrative Litigation

Based on the above analysis of German law, it can be seen that the function and value orientation of administrative litigation restricts the overall construction of administrative litigation plaintiff qualification system. The value of administrative litigation lies in that it can not only protect the rights and interests of the administrative counterpart, but also maintain the authority of the state public authority. Compared with Germany, the function value of administrative litigation in China is not clear. As a result, many people look too narrowly at the issue of plaintiff status in administrative litigation. For example, it's widely believed that abstract administrative act should be included into the scope of accepting cases of administrative litigation in order to enlarge the qualification of plaintiff, but there is no practical theoretical basis. According to article 1 of the administrative procedure law, the purpose of administrative litigation in China is to lay equal stress on both. "The exercise of the value of the administrative litigation system depends on the start of the whole litigation process by the parties, because both the purpose of the administrative litigation and its own value. If there is no litigant to bring a lawsuit, then the operation value of the whole lawsuit can be zero. Therefore, it is

necessary to protect the litigant's litigation purpose in legislation and judicial practice, so as to reflect the value of administrative litigation itself." Obviously, both the maintenance of administrative rights and interests and the supervision of the realization of administrative purposes are based on the premise of the plaintiff to bring a lawsuit. However, the purpose of administrative litigation directly affects whether the plaintiff has the conditions and is willing to bring the case to court since litigation is a passive means.

According to the provisions of article 1 of the administrative procedure law, the administrative litigation in China seems to construct the mode of both subjective litigation and objective litigation. Based on the provisions of the administrative procedure law, the qualification of the plaintiff in China is defined as "citizens, legal persons or other organizations that have an interest in the administrative act that infringes upon their lawful rights and interests", and the scope of accepting cases of administrative litigation is limited to specific administrative acts. Although normative documents can be reviewed after the amendment of the new law, the premise is that normative documents infringe on their own legitimate rights and interests. "Maintaining and supervising the administration of administrative organs according to law" seems to be a by-product of "civil litigation", which has not been embodied in the legislation of administrative litigation and judicial practice. "The difference between such cognition and legal provisions seems to have doomed that it is difficult to compose a" harmonious song "in the construction and realization of administrative litigation in China." (Xue and Yang, 2013)

Considering the importance of administrative purpose, it is necessary to clarify the functional orientation of administrative litigation before establishing the plaintiff qualification system of administrative litigation in China. After all, only in the context of clear administrative litigation function value positioning, can we clarify the definition of administrative litigation plaintiff qualification system, can we construct a more reasonable administrative litigation plaintiff qualification system. Because the emphasis of subjective litigation is different from that of objective litigation, the background of subjective and objective litigation will directly lead to the difference of plaintiff qualification in administrative litigation. In subjective litigation, the plaintiff's qualification will be relatively narrow, more emphasis on responding to the plaintiff's claims, while in objective litigation, the plaintiff's qualification will be relatively loose, but also more focus on the supervision of administrative power. Referring to the existing litigation mode in China, the relevant departments can learn from the system construction in Germany, which focuses on subjective litigation and is supplemented by objective litigation. However, it does not mean a stiff transplant. From the perspective of the existing administrative litigation

system in China, the overall setting is biased towards the background of subjective litigation. For example, “abstract administrative act” is not included in the scope of accepting cases, and the plaintiff can be seen from the provisions of litigation based on the two standards of “legitimate rights and interests” and “interests”.

In the mode of subjective litigation, the prosecutor can bring administrative litigation to the court to protect his own rights and interests due to the infringement of legal rights and interests, while the objective litigation will bring normative review and public interest litigation (discussed below) into the scope of administrative litigation. Only by clarifying the background of litigation can the standards be clarified in the construction of the plaintiff qualification system. In this way, we can better realize the purpose of supervising administrative organs to exercise their functions and powers according to law as expected in the first article of the administrative procedure law of China.

#### 4.2 Types of Litigation

In contrast, China has not established a mature type of administrative litigation. In the whole field of litigation, litigation typing is one of the most basic research methods. Its purpose is to “summarize social disputes according to certain standards, and lay a social empirical foundation for the design of corresponding litigation relief approaches or the remedy of litigation system loopholes.” This kind of classification can avoid the waste of resources in judicial practice, and can provide prosecutors with more clear and effective rights protection. At the same time, the relevant personnel can treat the specific request of the plaintiff in the administrative litigation, the object of the dispute, and the court’s judgment from multiple perspectives, according to their common ground in the basis of the integration of classification. This typifies the conditions of the prosecutor and the proceedings. To a certain extent, this practice is conducive to clarifying whether the prosecutor has the qualification of plaintiff, further dividing and stipulating the qualification of plaintiff in detail, so as to effectively reduce the consumption of judicial resources. Therefore, the classification of administrative litigation will also have a profound impact on the qualification of the plaintiff.

In view of the fact that the types of litigation in China are in principle generalized, and the types of litigation such as revocation, alteration and performance are indirectly recognized by the types of exemplified judgments, while the judicial interpretation and practice are allowed to develop other types of judgments, the interpretation of several issues in the administrative procedure law is a kind of judgment that the parent law does not have to confirm the illegality and invalidity of specific administrative acts (Lin, 2010). The Administrative Procedure Law and the interpretation of certain problems divide the Administrative litigation decisions into six forms, and the types of Administrative

litigation in China are implicit in the whole system of Administrative litigation. In practice, the type of administrative litigation is determined according to the power of the judge at the time of judgment, which is not clearly stipulated in the law (Jiang and Liang, 2009, p.680).

Nowadays, with the continuous enrichment of the trial practice in China and a lot of theoretical discussions, China has made a lot of achievements in the research on the typing of administrative litigation. For example, in judicial practice, through the six judgments of administrative litigation judgments, the relevant personnel divided the types of administrative litigation into the corresponding six types, such as the litigation types of confirmation, cancellation, alteration and performance. Many achievements have also been made in theoretical research, such as Zhang Zhiyuan’s research on the structure of administrative litigation types, Zhao Qinglin’s research on administrative litigation types, Wang Danhong’s research on the status and role of litigation types in the Japanese Administrative Litigation Law -- from the perspective of the revision of the administrative litigation law of China. At least, from the perspective of the current written norms, the administrative litigation type system constructed in the way of non-plaintext has developed into a relatively mature stage (Liu, 2013).

It should be noted that we should also face up to the actual situation of the implementation of the administrative procedure law in China at the present stage. In view of the fact that the majority of Chinese citizens do not have a thorough and detailed understanding of the administrative procedure law, which is a law of “civil litigation” and only remains superficial, it is inappropriate to divide the types of litigation into too many details, which will lead to the blind obedience of prosecutors and difficulties in judicial application. Therefore, it is suggested that the existing types should be specified in law. Both judicial personnel and citizens of administrative cases have experienced from the promulgation of the administrative procedure law in 1989 to the promulgation of the interpretation of certain issues in 2000 to the amendment of the administrative procedure law in 2014. After more than 20 years of development, we have a better understanding of the types of administrative litigation that already exist. Judges are more adept at using them, while prosecutors are more likely to find their way through the proceedings. In addition, it is important to note that the types of administrative litigation discussed above are not closed. It serves only as a guide and cannot be excluded from judicial relief because the plaintiff’s claim does not conform to certain provisions (Jiang and Liang, 2009, p.343). For the types of administrative litigation proposed by scholars in the theoretical field, the court should not take restrictive measures. That is to say, the court should still accept the case when it meets the other legal conditions of accepting the case in the act of administrative litigation if the plaintiff



of administrative litigation can not clearly distinguish which kind of administrative litigation his administrative case should belong to, so as to satisfy the needs of current judicial practice in China.

### 4.3 Public Interest Litigation as Supplement

Essentially speaking, the administrative public interest litigation<sup>23</sup> should be that citizens and organizations enjoy the right to safeguard the public interest through public interest litigation, and finally make the public interest obtain effective judicial relief. On the one hand, administrative litigation in China still lacks the channels to protect public interests; On the other hand, administrative public interest litigation in China's judicial practice is obviously common. However, due to the lack of relevant provisions in law, the court always ruled that the plaintiff is not qualified to accept the case, and rejected a large number of administrative public interest litigation cases. The lack of supervision has resulted in many administrative actions violating the public interest. In fact, it is undeniable that a large number of illegal administrative acts that harm public welfare exist in reality. In the author's view, administrative public interest litigation should use the objective litigation theory, with the help of the law, to make special provisions on the types and scope of administrative public interest litigation. It is necessary to properly include the public interest into the scope of accepting cases in order to restrict and supervise the illegal administrative acts that harm the public interest and save the litigation resources which are not sufficient.

a. The establishment of administrative public interest litigation based on objective litigation mode

In China, the administrative litigation system mostly defines the qualification of the plaintiff by the provisions of "interests" and "legitimate rights and interests", which is the requirement for the qualification of the plaintiff under the subjective litigation. Public interest litigation is also based on the form of "taking self-interest as the form and taking public interest as the purpose", that is to say, the litigation is initiated by individual victims through flexible litigation form or elaborately designed litigation strategy, but aimed at safeguarding the social public interest (Lin and Ma, 2011). However, in view of the fact that the public interest litigation in the form of self-interest is subjective litigation, there are inevitably limitations in the application of individual cases. The author believes that we can refer to the German model in administrative public interest litigation. However, the concept of administrative

<sup>23</sup> Concerning the appellation of "administrative public interest litigation", there are different opinions at home and abroad, and there are some disputes. Through the investigation and comparison of foreign systems, the author believes that no matter what kind of appellation, its connotation is basically the same, involving how to carry out judicial relief for acts that harm national interests and social public interests. Therefore, this paper adopts the term of "administrative public interest litigation".

public interest litigation is not put forward in Germany, which however is included in the administrative public interest litigation through objective litigation. In the mode of subjective litigation, the relevant departments in China are supplemented by objective litigation and adopt the mode of objective litigation for public interest litigation. Considering the organization and professionalism of procuratorial organs and public interest organizations, they should not be restricted by the interests, but can directly bring lawsuits against administrative acts or rules and regulations that violate public rights.

b. Plaintiff's qualification of administrative public interest litigation

Nowadays, the diversification of the plaintiff's qualification in administrative public interest litigation has become an inevitable trend. In this regard, many scholars in the theoretical circle of China also have many discussions. It's widely believed that, on the one hand, it is necessary to give the subject of the plaintiff's scope in the administrative procedure law the right of action, that is, citizens, legal persons and other organizations; On the other hand, it is necessary to expand the scope of the plaintiff on its original basis, including administrative organs, public welfare organizations and procuratorial organs into the scope of the plaintiff in administrative litigation. Certainly, the wider the plaintiff's qualification of administrative public interest litigation, the better from the perspective of safeguarding the public interest. In addition, the feasibility in judicial practice ought to be reassessed, and whether it has the operability in judicial practice should be considered from all aspects. According to the author, there should be the following litigants:

#### 4.3.1 Plaintiff Qualification of Citizens in Administrative Public Interest Litigation

The newly amended law has made specific provisions on civil public interest litigation after the amendment of the civil procedure law in 2012, which has achieved considerable results in the implementation in recent years.<sup>24</sup> Against such a backdrop, public interest litigation can be incorporated into the system of administrative litigation, and citizens can be granted the plaintiff qualification of

<sup>24</sup> Handling public interest litigation cases according to law. The number of public interest litigation cases brought by procuratorial organs and social organizations reached 1919. Based on the judicial interpretation issued by the Supreme People's Procuratorate, the trial rules of public interest litigation cases are clarified. The Guangdong court publicly adjudicated the first public interest litigation case of sharing bicycle consumption in China, and adjudicated that the operator returned the deposit as promised, protected the legitimate rights and interests of consumers, and promoted the standardized development of sharing economy. The courts in Jiangsu, Shandong and other places tried the case of insulting the fire martyrs in accordance with the law, and defended the glory of heroes with legal justice. Excerpted from the report on the work of the Supreme People's court in 2019 (full text). <https://www.chinacourt.org/article/detail/2019/03/id/3791943.shtml>, People's Network, On May 25, 2019.

administrative public interest litigation. However, we can see that the citizens of China are still in a relatively weak stage of legal awareness in the judicial practice. It is possible to waste judicial resources to give citizens the qualification of plaintiff in individual administrative litigation. Therefore, it is necessary to restrict the plaintiff's qualification of citizens, take subjective litigation as the leading factor, and take infringement of their own rights and interests as the premise before bringing a lawsuit.

#### 4.3.2 Plaintiff Qualification of Administrative Public Interest Litigation of Public Interest Organizations

In the several drafts of amendments before the revision of the administrative procedure law in 2014 and the University's proposals for amendment, it is proposed to incorporate public interest litigation into administrative litigation, and clarify the qualification conditions of the main body of administrative litigation, so as to prevent the occurrence of abuse of litigation caused by the opening of administrative public interest litigation.<sup>25</sup> There are two main theories about the qualification of plaintiff in administrative public interest litigation in the theoretical circle of China at present. One is the subjective speech, which considers that the infringement of one's own rights and interests is the premise of obtaining the qualification of plaintiff; Another view is dominated by objectivity. In view of public interest litigation for the protection of public interest, the relevant subjects can not only take their own rights and interests as the premise of litigation. As long as the public interest organizations meet the requirements of laws and regulations, they will have the plaintiff qualification of administrative public interest litigation, without the requirement of "interest relationship". As the ancient said: In terms of grasping knowledge, one's specialty may be different. In the maintenance of public interest, because of its own professional resource allocation, public interest organizations can be more targeted, directional and efficient in the administrative public interest litigation. It is necessary to put forward specific requirements for the qualification of public welfare organizations, such as the provisions of the environmental protection law of China and its interpretation on Several Issues concerning the

<sup>25</sup> In the opinion of the sixth session of the Standing Committee of the 12th National People's Congress on the deliberation of the draft amendment to the administrative procedure law, Article 9 concerning administrative public interest litigation, some members of the Standing Committee proposed to increase administrative public interest litigation. It is suggested that procuratorial organs, social organizations with the nature of public welfare, and citizens, legal persons or other organizations indirectly damaged should be allowed to file administrative public interest litigation in food hygiene, product quality, ecological environment and other fields. In order to prevent the abuse of litigation, the qualification of the subject of public interest litigation can be made clear.

application of law in the trial of environmental civil public welfare litigation cases.<sup>26</sup>

#### 4.3.3 Plaintiff's Qualification in Administrative Litigation of Procuratorial Organ

The procuratorial organ, as the supervision organ of Chinese law, should have the qualification of plaintiff to bring administrative public interest litigation. Article 129 of the constitution of the people's Republic of China stipulates that the people's Procuratorate is the supervisory organ of law. It is also a form of realizing its supervision power to bring administrative public interest litigation by procuratorial organ. The procuratorate is composed of legal professionals, who have professional quality in litigation, and can discover the behavior of infringing public welfare in time, which has obvious advantages. On July 1, 2015, the Standing Committee of the National People's Congress specially authorized the Supreme People's Procuratorate to carry out the pilot work of public interest litigation in some areas. It is also a great progress in China's public interest litigation even if there are many limitations in this authorization, such as the limitation of the scope of the case, the limitation of the pilot area and the limitation of the litigation procedure. These practices have proved that the people's procuratorate has the ability to act as the plaintiff of administrative public interest litigation in judicial practice.

<sup>26</sup> According to Article 58 of the environmental protection law: "Social organizations meeting the following conditions may bring a lawsuit to the people's court for acts that pollute the environment, damage the ecology and damage the public interests: (1) Relevant departments shall register with the Civil Affairs Department of the people's government at or above the level of city divided into districts according to law; (2) relevant departments shall be specialized in environmental protection public welfare activities for more than five consecutive years without any illegal records. Social organizations that meet the provisions of the preceding paragraph shall file a lawsuit with the people's court, which shall accept it according to law. Social organizations that file lawsuits shall not seek economic benefits through lawsuits."

According to Article 3 of the interpretation on the application of law in the trial of environmental civil public interest litigation cases: "A city divided into districts, an autonomous prefecture, a league or a region, a prefecture level city not divided into districts, or a Civil Affairs Department of a people's government at or above the district level of a municipality directly under the central government may be recognized as the Civil Affairs Department of a people's Government at or above the city level divided into districts "as prescribed in Article 58 of the environmental protection law." According to Article 4: "if the purpose and main business scope determined in the articles of association of social organizations are to safeguard social public interests and engage in environmental protection public welfare activities, it can be recognized as" specialized in environmental protection public welfare activities "specified in Article 58 of the environmental protection law." The social and public interests involved in a lawsuit brought by a social organization shall be related to its purpose and scope of business. " According to Article 5, "if a social organization has not been subject to administrative or criminal punishment for engaging in business activities in violation of the provisions of laws and regulations within five years before bringing a lawsuit, it can be deemed as" no illegal record "as stipulated in Article 58 of the environmental protection law."

## CONCLUSION

Referring to the revision of administrative procedure law of China in 2014, there is no great breakthrough and substantial change in the plaintiff's qualification. It can be said that the modification of the scope of the case and the additional review of the regulatory documents have widened the restrictions on the plaintiff's qualification from the side. This change requires us to give prosecutors more space in judicial practice. At the same time, the improvement and development of the plaintiff qualification system will inevitably promote the realization of the administrative rule of law in China. On this issue, Germany's plaintiff qualification system of administrative litigation and its related judicial achievements are excellent models for us to absorb and digest. First of all, it is necessary to make clear the function orientation of the administrative procedure law of China. The subjective and objective litigation background will directly lead to the difference of the plaintiff's qualification in administrative litigation. It's time to combine the current law and judicial practice, and put forward the mode of subjective litigation supplemented by objective litigation to build the plaintiff qualification system of administrative litigation. This paper attempts to clarify the existing types of administrative litigation in China from the side, fix the existing types of litigation in the form of law, and include other types of litigation in judicial practice. The public interest litigation will be included in the scope of administrative litigation, so as to establish it as the public interest litigation under the objective litigation mode. The prosecutors will be divided into three categories, so that citizens, public interest groups and procuratorial organs have the right to sue, and can file administrative public interest litigation.

The historical experience enlightens us that we can only learn from the appropriate experience of advanced countries. It is necessary to relax the limitation of plaintiff's qualification in time, further consider the legitimacy and rationality, and enhance the plaintiff's status as the main body of litigation, so as to truly establish the plaintiff's qualification system in line with China's national conditions in legislation. In this way, our administrative litigation can break through the bottleneck period as soon as possible and meet the new height. Moreover, it requires a certain time and more space to seek better changes and breakthroughs.

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