

Preliminary Study on the Damage Compensation Issues of Administrative Guidance Practice in China

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Abstract

The practice of administrative guidance can be traced back to the post-world war second era in Japan. It has got a great development in 1960s and made a great contribution to the recovery of Japan's economy. Soon afterwards, the United States, UK and other western countries have also put it into extensive application, which benefited those countries a lot. China has a long history implementation of administrative guidance, but because administrative power takes the dominant position in social management, administrative guidance still do not achieve enough legalization. While administrative guidance has achieved several notable successes in China, the incidental damages it exerted on interest relevant counterparts also cannot be ignored. For the sake of interest relevant counterparts, a thorough study should be led in order to study the issues of compensation caused by administrative guidance and build a perfect compensation system of administrative guidance eventually.

Key words: Administrative guidance; Administrative guidance act; Damage compensation

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INTRODUCTION

As a non-obligatory administrative method, administrative guidance is flexible and is more likely to achieve

administrative goals than mandatory measures. But because administrative guidance has not achieved enough legalization till now, there are loads of examples that interest relevant counterparts cannot receive compensation when their rights are damaged by illegal administrative guidance. Hence, the most urgent task for China is, according to the principle of "once there is a damage, there is a remedy", to put the damage compensation of administrative guidance under the examination of judicial review from the perspective of legislation.

1. THE PREREQUISITE QUESTIONS OF DAMAGE COMPENSATION OF ADMINISTRATIVE GUIDANCE

Administrative guidance started out in Japan after world-war two, which was considered as a new-type mean of public administration adapting to the modern market economy. As a chance to transform the traditional function and establish a new image of government, administrative guidance has been applied throughout the whole world including China (Guo, 2013). However, as a new-type managerial mean, it has created great controversies both in academia and practice circle. Besides, the unsound administrative guidance system is usually the critical reason for disputes between public agencies and its counterparts. Because of its optional characteristic, administrative guidance is different from common administrative action in several ways, such as the elements of validity, dispute solutions and remedy procedures, etc. Hence, the precondition of a systematic and effective administrative guidance compensation mechanism is to clear essential issues of administrative guidance system, those issues are as follows.

1.1 The Fundamental Implication and Executive Subject of Administrative Guidance

There are more than a dozen kinds of concepts about administrative guidance. Although those concepts are

different from each other, they all stick to unified standard on basic issues. Specifically, administrative guidance has the following characteristics: Firstly, the executive subject of administrative guidance is administrative agency; secondly, the methods of administrative guidance are guidance, advice, suggestion and those carry an optional characteristic; Finally, administrative guidance cannot produce direct legal effect. According to the above opinion, administrative agency is the only executive subject, which is not precise in fact. Nowadays, administrative agency are not the only executive subject of administrative act, lots of organizations and groups that are authorized by laws and regulations also have the right to practice administrative guidance, for example, Association of Consumers(AOC), China Green Food Association(CGFA) can disclose the unhealthy products to consumers. Hence, the definition criteria of practical subject should not only refer to organizational laws but also consider the authority of one subject.

1.2 The Nature of Administrative Guidance

According to the above analysis, organizations and groups which bear public management function can also implement administrative guidance action. It is reasonable and scientific to adopt a liberal interpretation of the definition of administrative guidance, for a large proportion of management methods of those organizations and groups are optional. In practice, we should regard those optional methods as administrative action, since administrative guidance act is also included in the sphere of administrative action and also is an optional action, hence, those actions all should be regulated by some sort of procedures and operative standards.

1.3 The Type of Administrative Guidance

Table 1
Three Types of Administrative Guidance

Type	Practical subject	Purpose	Method
Regulative/ prohibitive	Administrative subject	Regulate and restrict behaviors that violate public interest	Warning/ reminding/ persuasion
Adjustive/ mediatory	Administrative subject	Settle disputes between the administration counterparts	Mediation/ advice
Assistive/ suggestive	Administrative subject	Promote the development of administrative counterparts and guarantee their legitimate rights	Advice/ guidance/ support/ encouragement

As to the type of administrative guidance, there are several partition methods. With the analysis of different opinions about those methods, it is obvious the theory featured by “three dimension of function” put forward by Lin Jidong is the most reasonable partition method. According to this

theory, administrative guidance can be divided into three types (Lin, 1988, pp.437-438).

2. THE DEFECTS OF ADMINISTRATIVE GUIDANCE SYSTEM IN CHINA

Nowadays, with the rapid growth of China’s socialist marketing economy, administrative guidance plays an important role in every field of social life. Because of its soft and flexible characteristic, administrative guidance can deal with loads of social problems resulted from the high speed development of society. Administrative guidance can exert macroeconomic regulation to the society to promote its healthy development. However, while recognizing the positive role played by administrative guidance, the negative aspect of it also cannot be neglected. For example, public officials usually take advantage of the so-called merits of administrative guidance, such as flexibility and choosability to obtain profits for themselves, which result in many disputes with administrative counterparts. In fact, defects existing in the administrative guidance system of China are mainly as follows (Tan, 2007, p.25).

2.1 Procedure of Administrative Guidance Action Is Unsound While Its Legalization Is Insufficiency

While receiving popularity throughout the whole world, administrative guidance action also is condemned for its own obvious defects. In order to deal with its defects, each country has restored to legislation to regulate and constrain the practice of administrative guidance action, and the most influential legislation is *The Administrative Procedure Law in 1993* of Japan. So far, there is no specific legislation in China except specific rules of administrative guidance in certain areas, such as *the administrative department for industry and commerce administrative guidance rules* which is issued by the State Administration for Industry (SAIC). Hence, the implementation of administrative guidance in China mostly bases on polices and other general laws. However, under normal circumstances, those general laws do not have specific provisions regarding the procedure of administrative guidance action, which is easy to result in illegal guidance of executive subject and causing disputes between executor and administrative counterparts.

2.2 Public Officials Still Have Not Established a Correct Concept Towards the Purpose of Administrative Guidance

In China, executive power has a dominant place in the management of public affairs and officials in public agencies usually hold a strong attitude towards administrative counterparts in the process of dealing with public affairs. Consequently, the administrative guidance which is obviously an option one converted into a compulsory management method. Besides, quite a number

of publics seem to consider the administrative guidance action is vested the same legal validity just as other enforceable administrative actions. When administrative guidance action is converted into a compulsory one, the options of counterparts are limited and their rights will be damaged because of the illegal action practiced by public officials. However, in practice, there are loads of such situations sprouting out in daily administration (Mao, 2000).

2.3 Transparency of Administrative Guidance Action Is Insufficient and Has a Low Degree of Public Participation

Compared to compulsory actions which are usually made by formal executive orders or even administrative legislation, administrative guidance action has less conflicts and is much more efficient, and due to its potential mandatory virtue, the administrative purpose can also be achieved (Yan, 2011). Because of its informal characteristics, public officials do not have to issue formal documents and other written materials when they carry out an administrative guidance action. For example, the county magistrate may recommend a specific wheat cultivar to peasants in a verbal way, etc, such situation is quite normal in the administrative process. However, because of lacking of transparency, the public administrations rarely solicit opinions from publics or convene demonstration meetings, which result in loads of unreasonable and illegal administrative guidance actions that blind the cognition of publics and cause serious damage to their legitimate rights and interests.

3. CONSIDERATIONS ABOUT THE DAMAGE COMPENSATION OF ADMINISTRATIVE GUIDANCE ACTION

The remedy of administrative guidance refers to the activities that citizens, corporate and other organizations demand related authorities to settle disputes with the subjects of administrative guidance and make out legally binding decisions (Xu, 2006). The establishment of administrative guidance relief system mainly has the following meanings: (a) A necessary requirement of implementation of the principle of reliance protection. If public agencies violate the reliance interest of interest relevant parties but do not provide them with reasonable compensation, the public credit of them will be damaged irretrievably which will cause bad effects on the communication with interest relevant parties and affect the implementation of the administrative purpose (Duan, 2008); (b) The necessary requirement of implementation of responsible administration. The purpose of administrative guidance relief system is to remedy interest loss of interest relevant parties, it requires enforcers of administrative guidance assume appropriate administrative responsibility for their illegal or unreasonable actions.

Besides, establish an effective accountability system of administrative guidance is necessary for the system of administrative guidance relief which can guarantee the quality of administrative guidance and avoid illegal and unreasonable actions (Du, 2012, pp.7-8). As the pivotal aspect of administrative guidance relief system, the issues of damage compensation deserve a deep study from both academia and practical sphere.

3.1 Whether Need to Limit the Type of Guarantee Execution Measures of Administrative Guidance Action?

Given to the assurance of effectiveness of administrative guidance action, the legal system in various countries worldwide allows their public officials to adopt guarantee execution measures in the process of administrative guidance. However, plentiful questions go along: whether the need to limit the type of guarantee execution measures? What kinds of guarantee execution measures are reasonable? What methods should not be included in the sphere of guarantee execution measures of administrative guidance action? In fact, due to its optional characteristic, administrative guidance action does not have a compulsory effect and administrative counterparts can choose to obey or disobey it. Therefore, public officials should not regard administrative penalty and other compulsory measures as guarantee execution measures in order to achieve the purpose of administrative guidance action. On the contrary, within the scope of their functions and powers, public officials can restore to some optional methods, which have some sort of de facto coerciveness, interest temptation and spirit instructiveness.

3.2 Whether the Damage Compensation Caused by Guaranteed Execution Measures Should Be Compensated?

In practice, how to deal with the situation that guaranteed execution measures exert damage to the legitimate right of administrative counterparts? Through analyzing, the reasonable way is to consider the characteristics of guaranteed executive action and the situations of damage compensation before discussing the issues of damage compensation: Firstly, damages which are resulted from compulsory guarantee execution measures should be compensated on the basis of *National Compensation Law* for its obvious illegal virtue. On such a condition, the implementation of administrative penalty and arbitrariness cannot find its legitimacy basis and is easily to be classified as illegal administrative action which may be included in judicial review and compensate for counterparts' damage; Secondly, damages caused by advisory administrative guidance action cannot be compensated for its lack of compulsory characteristic. However, it does not mean that such actions will not do harm to rights of administrative counterparts. For example, under the background of urbanization, village cadres come to the peasants' house everyday in order to persuade

them to transfer the possession of lands to real estate developers. Although such behavior is not compulsory, it may exert bad influences on villagers' normal life and cost them a lot of time even money. According to the principle "once there has been damage, there will be a relief", should not such damage be compensated? In conclusion, leading research on such issues can truly advance the rule-by-law course of administrative guidance action.

3.3 Whether Damages Caused by Nonfeasance Can Be Compensated?

The above two kinds of situations mainly demonstrates damages caused by positive action of public officials. As to the damages caused by nonfeasance of administrative guidance, whether public institutions have the responsibility to compensate? According to the theory of administrative law, public agencies cannot spurn the obligation of administrative guidance in case they need to assume adverse consequences of it, for they do not perform duties of protecting the legitimate rights of publics. For example, fishery department should release weather forecast timely regardless of any unforeseen meteorological condition that may cause serious accident in the future. In conclusion, nonfeasance of administrative guidance should be supervised by powerful agencies and relative officials must bear the liability of misconduct, the most important thing is, make compensation for counterparts' damages resulted from the nonfeasance.

3.4 How to Distinguish the Nature of Two Different Types of Compensation Which Is Resulted From Administrative Guidance Action?

In fact, it is not merely the illegal administrative guidance action that could result in damage compensation, actions which are legal but unreasonable or the lawful conditions changes after actions have been made are also have probability to compensate for counterparts' loss. The distinction between these two actions is their status of legitimacy, for illegal actions, counterparts can file a suit that request judges to revoke illegal actions and rule the public agencies to compensate their damage; As to the rest situation, because actions themselves do not violate the mandatory provisions of statues, counterparts cannot seek a revocation from court. In order to atone their loss, counterparts should negotiate with public agencies that carry out those actions or they can require courts make affirmation judgments along with the amount of indemnity decision (Jia, 2010, pp.25-26).

4. QUESTIONS THAT SHOULD BE CLEARED ABOUT THE COMPENSATION OF ADMINISTRATIVE GUIDANCE SYSTEM

In consideration of the imperfections that root in administrative guidance system of China, there are

numerous situations that the legitimate interests of interest relevant parties are damaged by administrative guidance executors. Hence, putting administrative guidance into the sphere of administrative relief and regulating the power of public officials is an urgent issue at that moment, for a reasonable and effective relief system not only can promote the performance of administrative guidance but also can advance the democratic and scientific level of administration. In this process, China should learn the advanced experience of foreign countries along with the consideration of its own situation (Du, 2012, p.12).

4.1 Kinds of Administrative Guidance Actions That Should Assume the Responsibility of Damage Compensation

According to the above analysis, the following kinds of administrative guidance action should bear the obligation of compensation: (a) Nonfeasance. Preceding part of this article has expounded the issues about compensation of nonfeasance and need not be repeated here. What calls for special attention is that, under many circumstances, some actions ostensibly conform to the feature of administrative guidance but lack of essential elements, which are frequently utilized by public officials to avoid responsibility. Therefore, a deep analysis of the essential elements of administrative guidance action is urgent, which is beneficial to make a right judgment about the nature of such actions; (b) Mandatory administrative guidance action. According to provisions of statutes, the kinds of enforceable administrative actions mainly include executive order, administrative coercion, administrative penalty, etc. On the foundation of the above analysis, damages caused by those actions can be compensated according to *The National Compensation Law* with certainty. While the most important thing is, an administrative guidance action should be considered as a mandatory one if it possesses a compulsory character. (c) Illegal administrative guidance action. The judgment standard of illegal administrative action includes the following aspects: factual error, procedural flaw, misfeasance, excess of authority, etc. Compared to general administrative action, the judgment standard of illegal administrative guidance action is more flexible in practice by adding loads of subjective factors that make it easier to exert infringements to publics' rights. Therefore, how to establish a more unified judgment standard is an urgent research subject. (d) Guarantee measures with mandatory features. The enforceable guarantee measures also can result in damage compensation. Besides, not only such measures but also some unenforceable measures may become direct factors to publics' loss.

4.2 Dilemmas of Administrative Guidance Relief System

Because the administrative authority continuously holds a dominant position of public administration in China and at present, China still make a deep study on the

effects of the administrative guidance. With a deficient administrative guidance system, the interests of publics are often damaged by public officials who execute administrative guidance. However, because administrative guidance action does not carry a compulsory characteristic on the theoretical level, people barely can retrieve their losses according to *The National Compensation Law*, which usually put those interests relevant parties in a dilemma. The main reasons that cause this situation are as follows (Yu, 2009, pp.23-29): (a) Scope of administrative guidance is unclear. The conception of modern administrative guidance is derived from Japan after world-war two, now it is often called as “informal administrative action”, “simple type administrative action”, “optional administrative action” and so on in most western countries (Mo, 2009, p.219). However, whatever in academia or practical sphere, China still has not reached an agreement towards administrative guidance in its territory. As a result of that, the administrative guidance mechanism in China is unsystematic and deficient, which put enormous side-effects on the construction of relief system; (b) Provisions in statutes also are the obstacles for putting the administrative guidance action under the judicial review. According to the provisions in *The National Compensation Law*, citizens, corporate and other organization can require compensation according to the relevant provisions once their legitimate interests are damaged by public officials. They can file a lawsuit targeting the issue of damage compensation or ask court to resolve their indemnity claim in the trial of a relevant litigation. However, before the new judicial interpretation of *The Administration Procedural Law* was issued by supreme people’s court in April, 2015, the main legal basis that was applied by courts of all levels is the judicial interpretation of *The Administration Procedural Law* that was issued by supreme people’s court in 2000. The interpretation of 2000 has ruled out the administrative guidance action from the scope of administrative litigation. In order to enlarge the scope of administrative litigation, the Standing Committee of the National People’s Congress revised *The Administrative Procedure Law* last year and the Supreme Court issued a new interpretation on the basis of this new version law which has abandoned the limitation on administrative guidance in the old interpretation. According to the new one, administrative guidance is not clearly ruled out from the scope of judicial review, which is rather beneficial to legalization of administrative guidance and the protection of publics’ rights. Nevertheless, no matter the level of central government or local governments, laws and regulations barely make explicit stipulations about the damage compensation of illegal administrative guidance actions but more blurry ones that requires several preconditions before publics can get compensation. Because all of those, interest relevant parties whose

legitimate rights are damaged cannot be compensated and have to suffer the consequences of administrative guidance actions. (c) The procedure of administrative guidance relief system is unreasonable. The paragraph two of article nine in *The National Compensation Law* stipulates that compensation claimants should put forward their indemnity claims to the organizations with compensatory obligations or to the courts during the trial of related administrative cases. The fourteenth article stipulates that if organizations with compensatory obligations do not make out compensation decisions within the required time, compensation claimants can file a suit from the date of expiration. What can be seen from those two provisions is that if compensation claimants just want to petition for compensation alone, they should bring those petitions to organizations with compensatory obligations; Moreover, compensation claimants also can apply compensation claims during the process of administrative reconsideration and administrative litigation. Although the new interpretation of *The Administrative Procedure Law* no longer excludes administrative guidance outside the scope of judicial review, courts still are not considered as places where compensation claimants can be protected against illegal and unreasonable administrative guidance. Moreover, organizations with compensatory obligations often reluctant to assume the responsibility for compensation, nor they are willing to commit their illegal and unreasonable actions. In conclusion, the present judicial proceedings are not effective for publics to protect themselves from improper administrative guidance actions and restrict remedy measures that can be restored by compensation claimants.

4.3 The Relief Methods of Administrative Guidance Compensation in China and Improvements Should Be Made in the Future

Objectively, because administrative guidance has some obvious differentiated characteristics from common administrative actions, as to the question whether administrative guidance should be reviewed by court, China should avoid go to any extreme. On one hand, considering to the functions of administrative guidance, it is unwise to put all sorts of administrative guidance without differentiation; On the other hand, it is also unrealistic to exclude it from judicial review uniformly otherwise the executive power would lose the necessary supervision and restraint. A more feasible way is to establish a set of unified standard in order to decide what kinds of administrative guidance action can be reviewed by judges and the core of this standard should consider the unique characteristics of such actions, for example, legislators should exclude real optional actions from the scope of administrative litigation (Pan, 2014). Given present circumstances and legislations, interest relevant counterparts can resort to the following methods in order to get damage compensation if they think their legitimate

rights are injured by public agencies or organizations in the process of executing administrative guidance.

4.3.1 Petition to Organization With Compensation Obligation or Its Superior

The so-called complaint system is known as administrative petition system, which is also considered as a relief system that people can apply to administrative agencies in order to protect their rights. There are many differences between relief systems throughout the whole world, but almost all countries regard such method is featured with an administrative characteristic. Because of the special characteristic carried by internal administration, counterparts often cannot get relief from administrative reconsideration and litigation restrained by nature of disputes. Meanwhile, complaint system is conducive to a direct communication by administrative agencies and its counterparts, avoiding direct collision in the process of judicial review. Therefore, constructing a perfect complaint system caters to the requirement of modern administration trend (Yuan, 2007). While their rights is damaged by illegal administrative guidance, counterparts can require the organization with compulsory obligations to recompense their losses directly or they can appeal to its superior, such a method is often considered more quickly to get compensated than the formal ones like administrative reconsideration and litigation. However, many subjects of compensation are reluctant to make up for the losses of counterparts and their superiors also have no incentives to rectify their inadequate actions. Hence, in the future, it will be very important to establish a mechanism in order to make sure public institutions can make out decent judgments involving themselves, which are also significant for the protection of publics' rights.

4.3.2 Require for a Compensation in the Process of Administrative Reconsideration

Essentially, administrative reconsideration is an internal supervisory method that administrative agencies can employ to correct their illegal or unreasonable behaviors by themselves. Such an authority is possessed by administrative agencies from the very beginning of their foundation and is not endowed by legislation. Although China still does not make it clear that people can resort to administrative reconsideration regarding to the administrative guidance action, the relevant legislations do not stipulate an exclusive provision either. A more practical way is, China should consider standards of "fact of damage" and "causal relationship" in order to enlarge the scope of administrative reconsideration to the administrative guidance.

4.3.3 Require for a Compensation in the Process of Administrative Litigation

Litigation is the last straw people can use to protect themselves from administrative infringement. As to the remedy aiming at administrative guidance, judicial

review also holds an important position. At present, China should include administrative guidance into judicial review by enlarging interpretation of article twelfth in *The Administrative Procedural Law*; Besides, central government and locals should modify the relevant rules and regulations on the basis of this new procedural law in order to get administrative guidance action be reviewed by court. In this way, the counterpart can ask the courts to lead judicial review towards illegal administrative guidance along with a deliberation about indemnity claim.

4.3.4 File a Separate Damage Compensation Petition to the Court

Administrative guidance can be brought into the sphere of judicial review with a certainty according to the intent of administrative procedural law and other relevant legislations. Besides, *The National Compensation Law* and *The Administrative Compensation Rules* have not excluded administrative guidance from the scope of compensation clearly, but people often face with huge resistance in filing separate damage compensation to court. In fact, as to the dominant position held by administrative agencies, enlarging the scope of litigation can only get a little effect. What China should do in the future is to modify *The National Compensation Law* in order to endow people with a power to file separate damage compensation petitions to the court.

CONCLUSION

Although the method of administrative guidance has been widely used in all areas of social management, compared to traditional administrative ways, it is insufficient in systematization and standardization. As the development of administrative theory and practice, the unsystematic, non-redeemable and dysfunctional characteristics of administrative guidance will be gradually exposed. Therefore, to promote the legalization of administrative guidance and play its real function, China is confronted by an urgent need to modify its relevant rules and legislations, by constructing the administrative guidance compensation system gradually considering the combination of theory and practice, it is possible to solve the compensation disputes caused by administrative guidance thoroughly and safeguard people's legitimate rights and interests with unprecedented degree.

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