

Public Participation and Its Limits

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An Observation and Evaluation on Public Hearings as Experimented In China's Administrative Process

I. INTRODUCTION

The law reform that was initiated in the late 1970s in China marked the beginning of a long journey towards the rule of law. Today, if one could listen far enough to any political or social conversations, one would find that "legal reform" and "the rule of law" are words most frequently used. In its earlier stage, however, the law reform focused basically on instrumental use of law as a way to push economic reforms and to attract foreign investment. In this sense, it was regulation-oriented, and this is partly why the idea of "rule of law" in this country has very often been alleged by many Westerners as "rule by law".¹ Later, particularly since 1989, with the enactment of the Administrative Litigation Law of 1989 (ALL), little by little, law reform efforts have been given to the concern of governing the governors. After the ALL, the Administrative Reconsideration Regulation (ARR, 1990), the State Compensation Law (SCL, 1994), the Administrative Punishment Law (APL, 1996), the Administrative Reconsideration Law (ARL, 1999), and the Law on Legislation (2000) reinforced such efforts. Administrative law reforms have gradually become one of the most remarkable aspects of the law reform outlook.

As a result of more than ten years continuing efforts, the administrative law reforms have entailed a new outlook of China's administrative process, of which public hearing as a procedural requirement and a way of public participation in some decision-making and rule-making processes is perhaps the one most remarkable landscape. For example, the APL requires in a general way that "in imposing sanction, the affected parties shall be... given the right to be heard... otherwise, the decision that imposes a sanction shall not be valid." Furthermore, the APL sets forth a "hearing procedure" to govern some particular decision-making process through which administrative punishments maybe imposed upon private parties. The uttering of "the right to be heard" was echoed by the "Price Law", enacted by the Standing Committee of NPC in 1997. Article 22 of this law requires that in price-setting or rate-fixing process, "...government agency shall solicit opinions and comments from related parties." More specifically, Article 23 of this law puts it that "in setting the rate of public facilities or services that may affect the public substantially, or setting price for monopolized products or services, a system of public hearing must be established..."

The statutory demands of public hearing in administrative process as articulated by the APL and the Price Law might be deemed as important signals for more public participation in administrative process, particularly in decision-making contexts. The years after 1996 have witnessed an explosion of legislation with respect to requiring public hearing at both central and local levels. At the same time, the consciousness of the right to be heard of both government officials and common people has been increasing, resulting in very encouraging practices of hearing, especially at local levels.

II. HEARING IN PRACTICE: AN OVERVIEW

Although the APL and the Price Law, as well as the Legislation Law, set forth the procedural requirements of public hearing, those procedural arrangements are nevertheless too general to be applied in most situations. Therefore, continuing efforts are needed to make the hearing requirements more specific and operational. The idea of public participation should not be a "legal slogan" only; rather, there have been existing the public urges to institutionalize this desirable idea, especially during the past few years. Thus, since 1996, many administrative rules and local regulations have been adopted by Ministries and Committees of the State Council and local governments or local people's congresses. What's more, some of those legislation have gone beyond the requirements by the APL or the Price Law, extending public hearing to other regulatory processes. Currently, these legislative efforts have resulted in different forms of public hearings in following regulatory contexts. As we will see, such experiments have shown varieties of novelties, to which we now turn.

A. Hearing in sanction-imposing process

Because the APL's provisions regarding hearing procedure are too general, many central and local agencies have formulated rules to implement the hearing requirements. For example, the Ministry of Education, Ministry of Labor, National Bureau of Customs, National Bureau of Taxation, and the Ministry of Public Security all have adopted their rules to implement the APL within in their jurisdictions respectively. At the same time, some local governments, including Beijing, Shanghai, Shenzhen ,Liaoning Province, Anhui Province, Zhejiang Province, and Shanxi Province, have also adopted rules to implement the APL's requirement. ²

The legislative efforts by various departments and local governments, while specifying hearing procedure in particular regulatory contexts, have also resulted in some serious problems, among which the most notable one is the lack of uniformity. Conflicts between central rules and local rules and conflicts among different local areas

with respect to procedural requirements of public hearing have proved to be very a serious problem, increasing the situation of "fragmentation" of law enforcement.³

B. Hearing in rate-setting/price-fixing process

Although the Price Law of 1997 requires that in setting price or rates for public facilities or monopolized products or services, public hearing shall be conducted by relevant agency to solicit public opinions, it says nothing about how should a hearing be proceeded. In this sense, the system of public hearing remains inspirational rather than institutional. This has caused the consequence that most hearing experiments in price-fixing context were very frustrating. The hearing jointly organized by State Committee on Planning and Development and the Ministry of Information Industry to set rate for telecommunication is a good example. On September 15, 2000, the SCPD and Ministry of Information Industry held a "public hearing" to determine more "reasonable" rates for local and long distance calls, in which government officials, legal experts and economists, and representatives from China Telecom participated. This hearing was not made public, and there are no customer representative permitted to participate. Later interviews with participants and disclosure of the record of the hearing revealed that opinions and arguments of experts had not been considered at all in making final decision. And no reasons were given for rejection to such arguments. No wonder that hearing of this kind has been criticized as a "beautiful flower vase", implying that the procedural requirement of hearing is basically symbolic and useless except for decoration.

However, this is not to say that experiments of public hearing in rate-fixing contexts are completely a failure. As a matter of practice, some local governments have tried to institutionalize hearings in the context of price-fixing or rate setting. For example, in January 1999, Shanxi provincial government adopted the "Hearing Procedures for Policy-Making", which clarifies key issues of hearing procedure, including situations in which public hearing procedures must be applied, selection of participants of hearing, qualifications of hearing officials, and so forth. The rule also emphasizes transparency of hearing process by providing that journalists may observe hearing process and may report to the public. Other provinces such as Zhejiang and Guangdong have adopted similar regulations or rules.

As a response to public criticism and an effort to institutionalize the hearing procedure in price-fixing or rate-setting contexts, the State Committee on Planning and Development declared in September 2000 that a Regulation on Hearing Procedures in Price-fixing Process had been formulating. Later, on July 2, 2001, this rule was issued by the Committee, and came into force as of August 1, 2001.⁴ The rule can be deemed as a giant step

forward in terms of institutionalizing public hearing. It stipulates that an index of matters requiring public hearing shall be formulated and made public. It also provides specific requirements concerning the principles of hearing, the qualifications of hearing officer, the qualifications of participants, and other procedural requirements for operating a public hearing. More importantly, the rule emphasizes that a record of hearing must be maintained and in case opinions or arguments held by participants of hearing are rejected, reasons must be given. However, the rule does not clarify whether judicial review shall be available if participants are not satisfied with the process of hearing or the outcome made thereof.

C. Hearing in rule-making process

The Law on Legislation provides that in making laws and administrative regulations, legislative bodies should "solicit opinions and comments from the public through symposiums, hearing, or other channels..." However, the law says nothing with respect to how a symposium or a hearing should be organized or conducted. The State Council soon after the enactment of the Law on Legislation, issued a notice on implementing the law, but again keeps silence in how a hearing procedure should be constituted. As result, the general promise of public participation in rule-making process to a practical extent remains inspirational.

Nevertheless, soon after the enactment of the Legislation Law, Shenzhen local people's congress standing committee passed the first procedural regulation governing public hearing in rulemaking context, and experimented with hearing in rulemaking process for the first time on November 28, 2000. After the encouraging experiments in Shenzhen, a similar rule was soon formulated by Guangxi Autonomous Region government on Oct. 11, 2000, providing the scope for application of hearing, qualifications and amounts of participants, and procedures for processing arguments and opinions offered in hearing. The active experiments of public hearing have once again shown a notable fact that, quite contrary to what had been widely believed, the law reform in China has been to a large extent advanced through a "bottom-up" way.

D. Experiments of hearing in other adjudicatory processes

In addition to punishment-imposing and price-setting processes, in other administrative decision-making process, such as regulatory processes relating to license-issuing, government supervision over individuals, hearing procedures have also been employed. Below are some examples: ⁵

1. In Oct. 1999, the National Committee on Economics and Trade issued a rule for hearing procedure in investigating industry damages caused by dumped or subsidized export products. According to the rule, in

investigating antidumping or countervailing cases, hearing procedures shall be followed.

2. In Anhui Province, a local regulation, Hearing Procedure for Government Budget Supplementing was adopted in 1999. It requires that if government agencies apply for more expenses than its original budget, and if the requested amount is more than 500, 000 RMB, hearing procedure must be applied to determine whether or not the requested budget should be permitted.

3. In the City of Huainan, in east China's Anhui Province, a government legislative document issued in 2000 requires that in any decision-making process, agency must ensure the right to be heard of affected parties. This rule, named Procedure Rules of Hearing for Non-Sanction-Imposing Adjudicatory Process, essentially extends the application of hearing procedure to a much broader area.

4. In Shanghai, the local people congress issued a regulation in July 2000, requiring that in monitoring contract format, and in adjudicating disputes arising from thereof, agency must provide an opportunity to be heard at the request of affected parties.

5. In Beijing, it is interesting to note that hearing has been also introduced to the process of imposing disciplinary sanction upon students. According to a report of People's Daily on April 16, 2001, this has been practiced by some high schools, such as Beijing NO. 189 High School.

6. In the City of Wuxi, in east China's Jiangsu Province, a "Hearing Commission" has been established, comprising of some 30 members who are local elite. These commissioners may participate in adjudicating disputes between agency or state-run public facilities and private parties. For example, they have been very often invited to adjudicate medical disputes.

7. In the City of Qingdao, in east China's Shandong Province, public hearings were held in order to set reasonable tuition fee for high schools and universities, which, like in other parts of this country, are run by the central or local governments.

The practices of public hearing as mentioned above exemplify the social phenomenon that hearing has become a key word not only in the legal scholarship, but also in interactions between the government and private parties. Although there is no systematic empirical research regarding the practices of hearing, thus it is impossible to make general evaluation, these examples may nonetheless very impressive and encouraging. However, a careful examination of the hearing procedures as set forth by laws and rules may warn against over-optimism. There exist a lot of problems that are plaguing the current system of public participation through public hearing.

III. WHAT'S WRONG WITH THE PUBLIC HEARING? AN ASSESSMENT

Given the general reality that public hearing as a statutory requirement is very inspirational but not institutional,

its practical effectiveness is questionable due to the lack of legal mechanisms to achieve impartiality, fairness, and transparency of a public hearing. By examining provisions regarding hearing procedures provided by current laws and regulations, I believe the following problems are most critical and are crying for solutions.⁶

1. Procedural requirements of hearing as set forth by central departments and local governments are conflicting with each other. This may cause difficulties in terms of uniform law enforcement, and may raise the question of comparative injustice.
2. The qualifications of participants are not specifically clarified, thus, from a practical point of view, it leaves too much discretion for agency to determine who can participate and who can not.
3. The qualifications of presiding official or hearing officials are not clarified. Under the current system, hearing officials are usually officials of relevant agency entrusted with administrative enforcement, and therefore are incompetent in terms of procedural neutrality. An independent body of hearing examiners needs to be created to achieve procedural impartiality and fairness.
4. The scope governing application of hearing procedures needs to be expanded to cover agency actions that may greatly affect citizen's liberty. Under the current system, hearing procedure shall not be followed in imposing administrative detaining or decision of education through labor upon individuals. This is inconsistent with many international human rights documents, including the International Covenant on Civil and Political Rights.
5. The process of hearing needs to be more open to the public. Arguments and reasons offered in hearing proceedings should be made public except laws clearly put otherwise.
6. Ex parte communications must be prohibited in decision-making hearings, otherwise a perceived unfairness will destroy public faith in the system.
7. The principle of exclusiveness of hearing record must be established in decision-making through formal hearing. If agency is permitted to consider materials not included in the hearing record, the practical effectiveness may be ruined to a great extent.

IV. CLOSING REMARKS

The idea and practices of public participation through public hearing in administrative process show ambivalence of the government. Since it is still in its starting point, public hearing as procedural requirements to curbing arbitrary exercise of power and to safeguard individual rights has a long way to go. However, we have reasons to believe that to improve the system might be easier than to start it. In improving the system of public participation in administrative process through public hearing, we should encourage more experiments by local governments. At the same time, a uniform Administrative Procedure Act should be made to maintain minimum uniformity of

administrative procedures, including procedures for public hearing.⁷

注释:

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¹ Some Chinese legal scholars have been criticizing the instrumental use of law. Most Western legal scholars who have been observing Chinese legal system and the law reforms had also claimed that the rule of law is virtually "rule by law", indicating that the use of law in China is instrumental.

² Chinese versions of corresponding regulations and rules are available in Internet. For detailed information, visit <http://www.google.com>.

³ The "fragmentation" of China's legal system is indicated by Professor Stanley B. Lubman. See, Stanley B. Lubman, *Bird in Cage*, Stanford University Press, 2000.

⁴ <http://www.cctv.com/special/362/0/32245.html>

⁵ The detailed material can be found at <http://www.google.com>.

⁶ For a detailed analysis of these problems, see Luo Haocai and Wang Xixin, *Administrative Procedure and the Construction of Rule of Law in China*, in 3 *China Administrative Law Review*, 2000; see also Wang Xixin, *Administrative Procedure Reforms in China's Rule of Law Context*, in *Columbia Journal of Asian Law*, Vol.12, No. 2, 1998.

⁷ The proposed Administrative Procedure Act (APA) has been under intensive research and drafting process since 2000. At present time, the framework of this law is submitted to the NPC Standing Committee Legal Affairs Working Commission. General principles and detailed procedures have been proposed in this law to govern the public hearing

proceedings.

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