New challenges for Chinese Administrative law: domestic and WTO pressures

STALS staff (www.stals.sssup.it)

Overview and goals of the research

This project aims at analyzing the latest developments in Chinese Administrative Law and making some proposals of legislative reform which could help meeting the requests to this end coming from the domestic scenario or form external actors (either the WTO or others).

In order to reach our goal we are going to structure the research as follows:

1. we shall sum up the main events in the Public Administration reform’s latest developments, with the objective of highlighting the peculiarities of the Chinese model;
2. we shall identify the main reasons underpinning such evolution of Chinese Administrative Law;
3. in the third phase of our work we shall reflect on the need for change urged by the WTO;
4. finally, we shall dwell on some possible legislative proposals regarding the evolution of the Chinese Public Administration.

The members of the research unit will be highly qualified young researchers and outstanding scholars coming from several legal disciplines (International Public law, Administrative law, WTO law, Constitutional law).

The legislative and scholarly background on Chinese Administrative Law

As Jianfu Chen stressed in his book on the transformation of Chinese Law,¹ in the early 1980s only a handful of scholars studied administrative law, and the first textbook in this field was published only in 1983; afterwards the situation evolved, and “by the mid-1990s, theories on administrative law were described as ‘exploding’”.

Under the normative point of view, the main statutes regarding this process are: (i) the Administrative Litigation Law of the PRC 1989, (ii) the State Compensation Law of the PRC 1994, (iii) the Law of the PRC on Administrative Punishments 1996, (iv) the Law of the PRC on Administrative Supervision (1997), (v) the Implementing Regulations (2004), (vi) the Administrative Reconsideration Law (1999), and (vii) the Administrative Licensing Law 2003 (effective as of 1 July 2004).

The Chinese system of administrative law is thus a real a work in progress, closely related to both China’s evolving political system and to the changing role of the Chinese State in the field of economic governance. Besides, while there is a large (and even growing) scholarship focusing on China’s administrative law, yet some fundamental issues hold unresolved. For instance, we usually think of administrative law as being related to a political system of checks and balances, wherein courts applying administrative law constrain executive action. However, we know that China’s official political ideology rejects separation of powers and checks and balances doctrines.

In the English literature some works are available and give account of the emergence of Chinese Administrative law, but many of them focus on the separation of powers between Legislature and Executive (the rule of law’s side of the question) without paying much attention to the activity of the Public Administration, conceived as a specific part of the Executive power.

There is also a massive literature on possible policies and strategies for a reform of the Public Administration: they convey a vast support to the idea that there is a need for an “americanization” of national administrative system, since such a process could help fulfilling the need for change coming from international and international organizations’ pressure.

We will try to combine this approach with the necessity of consistency with the specific features of the present Chinese Administrative system. We shall therefore single out two issues: (i) the linkage between transparency and efficiency of Administrative action and (ii) the role of the citizen before the Public Administration (that is, the available set of legal remedies against the PA’s activity and participation issues).

With regard to the system of legal remedies against the activity of the PA scholars² usually point out:

- the close relationship between administrative bodies and business – subsidiaries under government bodies;
- the lack of independence of supervisory bodies;

- the significant discretion powers of administrative bodies in relation to rule-making and interpretation;
- the apparent lack of success of administrative reconsideration system;
- the general lack of rights awareness;
- the weakness of the administrative supervision system (only partially reinforced by the 2004 regulations);
- the wave of criticism regarding procedural aspects (see the draft documents issued by Supreme Court in 2004 to improve procedures).

**The impact of WTO law on the Chinese administrative law**

The second field of research that we have elected is by the relationship between citizen and State in the Public Administration. In this respect, a very important role for the recent reforms in China was played by path to WTO membership: “China’s WTO transition is likely to establish uniform, transparent and efficient rules that govern the relationships among workers, enterprises, central governments and local governments. . . . Reforms that China must undertake to align its system with that of the WTO will turn China into a normal market economy”\(^3\).

Moreover, it was said that the WTO will also have a significant impact on possible and further reforms touching the issue of transparency:

> “Under the general rubric of transparency, the WTO regime seeks to impose procedural standards on national regulatory regimes to the extent that these affect trade, as a result of which the domestic administrative law systems of WTO members are now a “key feature” of the WTO agenda. Indeed, many make the argument that WTO developments, together with possibilities under the North American Free Trade Agreement (NAFTA) for challenging decisions made by the domestic trade regulatory bodies of NAFTA member states, may herald the development of an “international administrative law.””\(^4\)

According to many authors, the WTO accession will trigger a deep reform of the Chinese legal system. According to Ostry, for example: “[H]owever imprecise the GATT/WTO definition of transparency, the core of the definition goes to the heart of a country’s legal infrastructure, and

---


more precisely to the nature and enforcement of its administrative law regime. Importantly, the current nature of China’s administrative legal infrastructure lacks this trait.¹⁵

Organization of the work

The work shall be developed over two years: during the first two years it will focus on the reconstruction of the Administrative Law framework existing in China. The second year shall be devoted to the drafting of some monographic volumes or collections, resulting from national and international workshops. These volumes will collect some reform proposals intended to meet the requests coming from the WTO institutions, along with other suggestions aimed at improving the quality and efficiency of the Chinese Public Administration. In the implementation of our research project we will take avail of the international experience achieved by the Sant'Anna School, especially thanks to the STALS project (Sant'Anna Legal Studies), which was successfully launched just over a year ago, and whose findings are available at www.stals.sssup.it. The working language will be the English.

Participants

1. Prof. Paolo Carrozza, Full Professor of Comparative Constitutional Law, Scuola Superiore Sant’Anna di Pisa;
2. Prof. Petros Mavroidis, Full Professor in WTO Law at Columbia Law School and Université de Neuchâtel;
3. Dr. Lorenzo Casini, Researcher in Administrative Law at La Sapienza, Rome and research fellow at NYU School of Law-IILJ;
4. Giacomo Delledonne, STALS staff;
5. Filippo Fontanelli, PhD Candidate at the Scuola Superiore Sant’Anna, Pisa, Hauser Global Scholar 2009-2010 NYU Law School;
6. Dr. Giuseppe Martinico, STALS Senior Assistant Editor and Post Doc Fellow at the Scuola Superiore Sant’Anna;
7. Marco Mazzarella, PhD Candidate at the Scuola Superiore Sant’Anna, Pisa;
8. Marta Simoncini, PhD in Administrative law, University of Pisa;

References