

## About the Civil Right to Resist

### ETUDE D'AUTORITE DE DEFENCE DES CITOYENS

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#### Abstract

The right to defense within civil rights reflects the principle of fairness. It also provides a system to prevent the abuse of rights. In Administrative Law, the counterparty's right to defense involves in the civil right to resist. The model of using a right to restrict the power conducts a feasibility of the existence and development of the right to resist. The improvement of this system is the ultimate way to achieve the right to resist.

**Key words:** The right to resist; The power constraint; Construction

#### Résumé

Le droit de défense des droits civils énoncés dans le principe de droit civil de l'équité, mais aussi pour la prévention de l'abus de droit offrant une conception du système. En droit administratif, l'importance relative de direction à droite de la défense implique le droit des citoyens à résister. Le droit de restreindre du droit de résister à la puissance du modèle de l'existence et le développement de la faisabilité, l'amélioration du système est capable de résister à la bonne voie afin d'atteindre l'objectif ultime.

**Mots clés:** Résistance au pouvoir; Limitation de

puissance; Struction de la Construction

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#### 1. THE CONCEPT OF THE CIVIL RIGHT TO RESIST

According to different functions, civil rights can be classified as the right to allocate, the right to claim, the right to defense and the right to establish. The right to defense is corresponding to the right to claim, which is opposite to the right to claim or deny the counterparty's right to claim. In other words, it is a bane of the right to claim, which can eliminate the other party's right to claim or postpone its effect through its exercise. Therefore, the provision of the right to defense in civil law reflects its principles of equality, good faith, and prohibition of right abuse. In public authority-based administrative law, does administrated counterparty have a right to defense as that in equality-based civil law? This raises an issue about the civil right to resist in administrative law.

The civil right to resist has been defined in different ways such as the right to counteract, the right to resist, the right to refuse, or the right to confront. The relevant statement is seldom mentioned in domestic monographs about administrative law. Some authors define it as: the entity of the counterparty's right is 1) the right to involve in administrative management via various forms and ways; 2) the right to resist illegal violation by administrative body in order to protect its legitimate rights and interests<sup>2</sup>.

<sup>2</sup>Fang, S. R. editor (1999). *Administrative Law and Administrative Procedure Law*. The University of Political Science of China Press, p. 99.

Other definitions include: “the civil right to refuse stated in this article means that citizens have eligibilities to resist any illegal administrative action made by administrative body, which is against their legitimate rights and interests. That is to say, they have right to directly confront such an illegal administrative action”<sup>3</sup>. So-called the right to resist is usually referred to the civil right to confront with or refuse to obey the obligations provided by legislation<sup>4</sup>.

The aforementioned definitions are based on the ground of counterparties and endow them with the right to contend with public authorities. However, there are some drawbacks in these definitions. First of all, the rights are only granted to citizens while the rest of counterparties have been ignored. In modern days, due to the complexity of state affairs, a large number of social groups and organizations have emerged and played an important role in administrative activities. With the increasing international exchanges of economy and cultures, more and more foreign organizations and individuals come to China. The first paragraph of Constitution Article 32 states that: “The laws for the People’s Republic of China protect the legitimate rights and interests of foreigners in China and in return they must comply with the laws for the People’s Republic of China”. It shows that the administrative law in China has defined the counterparty’s position for foreign organizations and individuals. In addition, state organizations can also become administrative counterparties under certain conditions. As an administrative counterparty, these organizations and individuals may be also under the threat of illegal or inappropriate administrative actions. Therefore, they should also be an entity to implement this right.

Secondly, the aforementioned definitions point up the administrative actions that illegally violate the counterparty’s legitimate rights and interests. However, such definitions are too narrow. When it exercises its power, an administrative body should follow and comply with the law substantively and procedurally. The actions should not conflict with the law. It is no doubt that any administration must be responsible for its legal liability. However, in the field of administrative activities, the situation is complex so that the regulation of administrative law cannot cover every aspect. It has to leave some necessary free space to administrative activities and a certain degree of discretion to administrative agents in order to improve the administrative efficiency. Such circumstances result in some “legal” but unreasonable administrative actions, like an improper purpose under a cloak of legitimacy. The counterparties can’t do anything to it unless they are granted with the right to resist any violation of their legitimate interests. On the other hand,

if this right is provided as a legal obligation, it will inevitably lead to the abuse of the right.

In summary, I believe that the definition of the right to resist should be: the administrative counterparty has a procedural right to resist any administrative actions that will violate or have violated its legitimate rights and interests. In the meantime, the administrative counterparty can obtain a relief to temporarily or permanently restrict the administrative action.

## 2. THE NECESSITY OF THE RIGHT TO RESIST

Over the years, the power restriction has been a concern of politics, constitution and administrative law. Many Chinese scholars specialized in administrative law use a model of “restricting a power with another power” to explore the constraint of the executive power by legislation and justice, i.e., introducing a new legislation to regulate the executive power first and then correcting the consequence of illegal and improper exercises of the executive power by the judiciary. This model has played an important role in the constraint of the executive power but it also has inevitable limitations. The legislative constraint is mainly achieved by introducing a new legislation, which has characteristics of retardation and predictability. Because the legislation not only needs to regulate the complex and varied administrative actions but also needs to leave a discretion to administrative body, it leads to a circumstance that the legislation should constrain but cannot effectively constrain the executive power.

The constraint of the executive power by justice is achieved by the following examination of administrative actions. In order to protect the public interest and keep the balance between the executive power and the judicial power, not all administrative actions can be included in the scope of judicial review in any country in the world. Consequently, the judicial power can not involve in the administrative sphere too much and the scope of judicial review is subject to certain restrictions. The court cannot examine the administrative actions within the scope of the judicial review. The review can only be initiated by a lawsuit brought by the administrative counterparty. Sometimes the administrative counterparty may give up the right to sue because of costing, time consuming and the deterrence from the executive power, hence the judicial power cannot actually restrain the executive power. In some specific cases, the court can only conduct a final examination on the facts and legal basis of administrative actions. It is very difficult for the court to fully examine very professional and technical facts and the examination based on the legal basis is easily restricted by

<sup>3</sup>Qi, J. G., Guang, B. Y. (2000). A number of issues about the civil right to refuse. *Law and Business Research*,4.

<sup>4</sup>Wang, X. X. (2001). Invalidation theory about administrative action and the counterparty’s right to resist. *Law*,10.

the interpretation of administrative agents from different point of view and ground. As revealed by an American scholar, "the judicial reviews have many inherent limits in their functions. The intention to establish a judicial review is only to maintain a minimum standard rather than to ensure the most appropriate or the best administrative decision."<sup>5</sup>

Regarding the drawbacks of this model, scholars suggest to use rights to restrict the executive power. Professor Daohui Guo first proposed such kind of theory, in which the restraint strategies include: (1) to distribute the power widely to contend the strength of the power; (2) to exercise the right by the masses, thereby compiling the distributed rights into the power of masses; (3) to optimize the structure of rights, and establish and complete a system of rights parallel to the power structure; (4) to enhance the awareness of civil rights and release the ability of the right to contend the potential of the right; (5) to strengthen the relief of power and exercise the right to resist and supervise; (6) to control the extent of contention without a prejudice to the proper exercise of legitimate rights.<sup>6</sup> This theory has defined the role and the position of administrative counterparty explicitly. However, it discussed all aspects based on the independence of the executive power and civil rights, and the consequent conflict. It has emphasized the external contention of right – power but ignored the penetration of the counterparty's rights into the executive power. Therefore, to achieve an effective control of the executive power, it is necessary to control administrative activities directionally when exercising the executive power. The legislature and the judiciary should supervise the executive power. The counterparty's right should fully intervene in the executive power to form a mechanism to contend the executive power if it does not meet the civil rights or if it is illegal. Although the counterparties have no mandate as state administrative agents or any direct enforceability to administrative body, it does not mean that the counterparties have no binding ability on administrative body. The action of counterparties has a binding ability on administrative body not because such action has the properties of state power. It is because in democratic and civil society citizens have constraints on the government, which is a kind of binding provided by the law. The right to resist, as a kind of binding, is exercised during the operation of the executive power. Its purpose is to allow the counterparty, as an individual, to directly resist the obligation set by administrative body so as to negate the effectiveness and achievement of administrative actions. So it can ensure the exercising of the executive power is following the legal system and ensure the improvement of

administrative democracy.

### 3. THE ACHIEVEMENT OF THE RIGHT TO RESIST

In Germany, the civil right to resist has been confirmed by Basic Law. The Basic Law for the Federal Republic of Germany Article 20 provides that: "Legislation should follow the constitutional order. Administration and justice shall comply with the law and other legal norms ... All Germans have the right to resist any attempt repealing the above orders if other countermeasures are not available". The law for the Republic of China has provisions that counterparties have rights to resist abusive charges and fines. Administrative Punishment Law of the Republic of China Article 49 provides that when the executive authorities and law enforcement officers confiscate the fine on the site, they must issue the parties a unified receipt that is provided by the financial sectors of provinces, autonomous regions, and municipalities. Without receipts, the parties have the right to refuse the penalty.

The counterparty's right to resist has a characteristic of immediateness and negativity on the executive power. If it is applied improperly, it would prejudice the exercising of the executive power and reduce the administrative efficiency. Therefore, the right to resist should be exercised with an appropriate standard. To set the violation of the counterparty's legitimate interests as an important element of the right to resist is the most substantial standard for the exercising of the right to resist. Either administrative body or counterparties can assure this standard. Because the executive power is endowed with a *de facto* force, the dispute between the parties that requires prompt actions must be subject to the Presumptive legality of the executive power. According to the legislation development status, the popularity of legal literacy, the quality of law enforcement officers, and the extent control of the right to resist by counterparties in China, I believe that the right to resist should be constructed on the following aspects:

1) The administrative actions without legal basis. To administrate according to law is the basic principle of administrative law. Therefore, citizens have an absolute right to resist any administrative action without legal basis. For those controversial to the legal basis, citizens can exercise the right to resist with the prior determinative force of administrative law. Civil remedies can be sought later.

2) The administrative actions without any reasons. The counterparties have an absolute right to resist any

<sup>5</sup>Gellhorn, E., Levin, R. M. (1996). *Administrative law and process in a nutshell*. Huang, L. translation, Chinese Social Sciences Publishing House, p. 45.

<sup>6</sup>Guo, D. H. (1997). *The legal spirits of the times*. Hunan Press, p. 294-299.

administrative actions without reasons. However, the matters, which are related to national defense, foreign affairs, and national security, are exemptions.

3) The administrative actions beyond the powers. Ultra vires is an action abusing the state power to deceive the counterparties. Therefore, the counterparties have an absolute right to resist it.

4) Any actions violating legal procedures.

5) Any actions detrimental to the counterparty's human dignity and the right to privacy.

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## REFERENCES

Bodenheimer, G. (1999). *Jurisprudence: The Philosophy of Law*

*and Legal Methods*. Deng, Z. L. Trans. China University of Political Science Press.

Chen, X. M. (2001). *Basic Theory of Public Law for the Federal Republic of Germany*. Shandong People's Publishing House.

Qi, J. G., Guang, B. Y. (2000). A Number of Issues About the Civil Right to Refuse. *Law and Business Research*, 4.

Saiful, M. P. (2006). *Administrative Law for the Federal Republic of Germany*. Zhou, W. trans. Shandong People's Publishing House.

Wang, X. X. (2001). Invalidation Theory About Administrative Action and the Counterparty's Right to Resist. *Law*, 10.

Yu, A. A. (1999). *Administrative Law for the Federal Republic of Germany*. Tsinghua University Press.