

Liability for Administrative Offences in China: With Special References to Public Interests and Human Rights

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The article provides a general description of liability for administrative offenses under the PRC legislation. It considers general principles of responsibility for administrative offenses, the system of bodies that impose administrative penalties, the system of administrative penalties and the procedures for imposing them. The authors determine how well it is possible to strike a balance between public and private interests in the legislation on administrative penalties. "Legality" is declared as a basic principle of administrative liability in the PRC. In this article, the authors have concluded that the principle of legality has a rather specific content. Administrative offenses and penalties are not codified in China but are dispersed in a significant amount of laws and regulations. This approach ensures the existence of a fairly dynamic system of administrative measures which guarantee a proper order in the rapidly developing Chinese economy. At the same time, this approach carries a risk of abuse of power by public bodies and excessive state intervention in the life of individuals.

Keywords: Administrative Offence, Administrative Penalty, Human Rights, Imposing Administrative Penalty, Administrative Procedures

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1. Introduction

Legal responsibility for administrative offenses is an independent type of law enforcement measure in the People's Republic of China (PRC). The majority of countries in the world consider administrative offenses as a type of crime. Meanwhile, the PRC as well Germany, Russia, Poland, the Czech Republic, and Slovakia deem administrative responsibility as a specific type of offence. In our opinion, administrative offenses and punishments were added to the legislation of the PRC in the certain extent due to the influence of Soviet law.¹ However, it should be noted that recently a 'hidden' law of administrative offenses has been formed in countries which do not identify administrative responsibility as an independent type of crime. In the UK, for example, sub-statutory crimes (regulatory offences) are stipulated by the regulations established by public bodies.² In the context of modern social challenges, many countries tend to strengthen their administrative control.

Responsibility for administrative offenses, on the one hand, allows China to effectively solve the problems caused by the rapid technological and economic development of the country. In 2016, for example, a large fine of RMB 667,724,176.88 was imposed on Tetrapak for violating antitrust laws.³ Environmental deterioration is a serious challenge for China. In this regard, environmental protection issues also have high importance.⁴ Moreover, despite the improvement of living standards and the quality of healthcare services, in 2020, China faced the COVID-19 epidemic which suspended not only the development of the market and production, but also the normal course of life, urging the Chinese authorities to take extraordinary measures including the application of state coercion measures. For example, on January 27, 2020, the market supervision and Administration Bureau of Dongcheng District of Beijing Municipality inspected a pharmaceutical company within its jurisdiction and found the company selling PM 2.5 nano protective masks at a price of RMB 26 per bag, a price increase of 160 percent over the normal RMB 10 per bag.⁵ The company was suspected of violating the relevant provisions of China's price law, which constituted an illegal act of price gouging. In compliance with the relevant laws and regulations, Dongcheng District market supervision and Administration Bureau imposed an administrative penalty of RMB 100,000 on the company.

Another example is a pharmacy in Fengtai District that had raised the price of a box of masks from RMB 200 per box to RMB 850 per box, resulting in the authoritative body imposing an administrative penalty of RMB 3 million.⁶

In the meantime, the pressing issue is to ensure the legitimate rights and interests of citizens and organizations while applying the administrative liability. Professor Luo Haoqai noted: “Given the practice, more attention should be paid to human rights as opposed to a strong executive with the goal of reducing imbalances.”⁷ Rule of Law and first steps on human rights priority have become popular in Chinese society since the Third Amendment to the Chinese Constitution was adopted in 1999.⁸ These transformations marked the beginning of a new administrative reform in 2004, including changes in the administrative responsibility system. It should be noted that the latest development of administrative law was linked to the WTO requirements. Governments at all levels should abide by law, while they should follow the transparency principle set forth by the WTO law. The publicizing requirement stipulated in the Administrative Licensing Law is a typical example. In addition, after its admission to the WTO, China could no longer use a large number of normative internal documents to govern society. Instead, the government documents, when necessary in line with the WTO regulations, have to be reflected in the form of laws and regulations.⁹

The Law of the People’s Republic of China on Administrative Penalty (adopted at the 4th Session of the 8th National People’s Congress on March 17, 1996) was revised at the 29th Session of the Standing Committee of the 12th National People’s Congress of the People’s Republic of China on September 1, 2017 (hereinafter Administrative Penalties Law: APL).¹⁰ Article 1 of the Administrative Penalties Law stipulates the purpose of this law as ensuring and supervising the effective exercise of administration by administrative bodies, safeguarding public interests and public order, and protecting the lawful rights and interests of citizens, legal persons and other organizations.

This research will analytically review the general principles of responsibility for administrative offenses under the laws of the PRC and determines how it is possible to successfully maintain balance between public and private interests in the Chinese legislation on administrative penalties. This paper is composed of six parts including Introduction and Conclusion.

2. Definition and Basic Principles of Administrative Penalty

The legislation does not contain a legal definition of the “Administrative Penalty.” Chinese researchers, however, define the administrative penalty as “an administrative sanction for organizations or individuals who violate an administrative law adopted by specific administrative bodies.”¹¹ It is the specific administrative bodies or other legal authorized organizations which lawfully punishes the organization or individual who violates the administrative law if it is not severe enough to warrant criminal punishment.¹² The basic principles of administrative penalty include legality, openness, fairness, and guaranty of protection.

A. Legality

Legality in the context of the Administrative Penalties Law means that the administrative penalty which is not imposed in accordance with law or in compliance with legal procedures must be invalid.¹³ This requirement presupposes, first, that administrative responsibility should be prescribed only by law. In the PRC, the term “law” in this sphere of public relations has a broad interpretation. Chinese legislation on administrative offenses and penalties is not codified; it contains not only the Administrative Penalties Law, but other laws and regulations.¹⁴ This broad approach has its reasons, firstly, due to the fact that administrative responsibility is not considered a serious measure unlike criminal liability. Nevertheless, the Administrative Penalties Law was adopted by the National People’s Congress, which has the highest legislative power enacting basic laws. In contrast with the Criminal Law, however, revision of the Administrative Penalties Law is not an exclusive competence of the National People’s Congress. It can be revised in accordance with the Decision of the Standing Committee of the National People’s Congress.¹⁵

Secondly, administrative responsibility is a reaction of the state to the violation of public order in various spheres of public life which are within the purview of a state body. This approach ensures the existence of a fairly dynamic system of administrative measures which guarantee a proper order in the rapidly developing Chinese economy. At the same time, this approach carries a high risk of abuse of power by the public bodies and excessive state intervention in the life of

individuals. Under these conditions, the existence of a framework law, which is the Administrative Penalties Law, is necessary.

The Administrative Penalties Law was enacted for the purpose of standardizing the creation and imposition of an administrative penalty. Other laws, rules or regulations must comply with this Law. S. Chen noted:

The Administrative Penalties Law clearly limits the authority of laws, regulations, or rules to impose administrative penalties. Moreover, it prohibits the imposition of administrative penalties by other regulatory documents. Hence, any regulation or rule shall be deemed invalid if it exceeds the limits of authority as defined by the Law, or exceeds the scope of punishable action, or the type and severity of administrative penalties as provided by laws or regulations with legal superiority.¹⁶

In practice, however, it is a challenging task because many state and local bodies have the right to impose administrative penalties. Thus, citizens and organizations have to deal with a huge number of legal acts that determine unlawful actions.

The Administrative Penalties Law provides nothing about the administrative offenses themselves; there is no consolidation of general concept, composition, or features of these offenses. Specific administrative offenses are described in laws¹⁷ and even in administrative provisions promulgated by state bodies. Local people's congresses and their standing committees may also enact local regulations; local governments are also authorized to issue local rules, for instance, to supplement or specify national legislation for prevention and control of air pollution (Beijing, Guangzhou, Shanghai),¹⁸ and health care facilities (Shanghai).¹⁹ Chinese legislation supports discretionary regulation of administrative responsibility, as well as administrative bodies which use a broad approach in its application. For example, Article 25 of Public Security Administration Punishments Law of the People's Republic of China provides:

[w]hoever spreads a rumor, or gives false information on a dangerous situation, epidemic situation or public security situation, or adopts other means to deliberately disrupt the public order shall be sentenced to detention for not less than five days and not more than 10 days, and can be concurrently sentenced to a fine of not more than RMB 500 (USD 72); or can be sentenced to detention for not more than five days and a fine of not more than RMB 500 in cases where the offence is relatively minor.

At the same time, some Chinese researchers write that “the provisions for ‘rumors’ prescribed by the Law on Punishment in Respect to Management of Law and Order are among the weapons habitually used by government officials to punish the making of political statements”; “any equation of the making of political statements by citizens to the making of ‘rumors’ or ‘libel’ is obviously in violation of the Constitution.”²⁰ In addition, the above provision of the law is aimed at stabilizing public opinion, which has been firmly enforced in the context of the COVID-19 epidemic to prevent mass hysteria.

On January 22, 2020, the network security brigade of the County Public Security Bureau found that some netizens had published false information about the pneumonia epidemic on the Internet. In this regard, the Party committee of the Public Security Bureau attaches great importance to directing the network security brigade to conduct a comprehensive investigation and determine the truth.²¹ After careful investigation the network security police successfully identified the person who had posted the false information. On that day, the lawbreaker Zhou XX (male, Salar, 42 years old) edited a false message about the pneumonia epidemic and sent it to a WeChat group. Han (male, Salar, 27 years old, from Sanlanbahai village, Jiezi town) saw the message and forwarded it to other WeChat groups. Zhou and Han had made and spread rumors that resulted in a negative impact on society. On January 24, in accordance with Article 25 of the Public Security Administration Punishments Law of the People’s Republic of China [中华人民共和国治安管理处罚法] the County Public Security Bureau imposed an administrative penalty of RMB500 on Zhou and Han, respectively.²²

B. Openness

Openness means that regulations on the administrative penalty to be imposed for violations of the law must be published; those who are not published shall not be taken as the basis for administrative penalty.²³

C. Fairness

“Fairness” means that creation and imposition of an administrative penalty shall be based on facts and shall be in correspondence with the facts, nature, and seriousness of the violations of law and damage done to society.²⁴ Fairness can be defined both as a requirement for the reasonableness of the application of

administrative punishments, and as “a requirement for proportionality” between administrative penalty and nature and seriousness of the violation and damage done to society.”²⁵ The guarantee of the validity of imposition of administrative penalties is the rule: if the facts about the violations are not clear, no administrative penalty shall be imposed.²⁶ Administrative bodies shall notify the parties of the facts, grounds and basis according to which the administrative penalties are to be decided on, and shall notify the parties of the rights that they enjoy in accordance with the law.²⁷ Validity means that administrative bodies shall fully heed the opinions of the parties and shall reexamine the facts, grounds and evidence put forward by the parties; if the facts, grounds and evidence put forward by the parties are established, the administrative bodies shall accept them.²⁸ The Administrative Penalties Law establishes guarantees of proportionality. For example, administrative bodies may impose no administrative penalty where an illegal act is minor.²⁹

D. Guaranty of Protection

Guaranty of protection means that a person on whom an administrative penalty is imposed by administration bodies has the right to state their case, to defend themselves, to apply for administrative reconsideration, or to bring an administrative claim in accordance with the Administrative Litigation Law of the People’s Republic of China (2017 Revision).³⁰ Administrative bodies shall not impose heavier penalties on the parties just because the parties have tried to defend themselves.³¹ Those who have suffered damage due to an administrative penalty imposed by administrative bodies in violation of the law have the right to demand compensation in accordance with the law.³²

The above principles result in establishing the administrative bodies authorized to apply administrative penalties, as well as the system and procedures of imposing penalties.

At the same time, the principle of presumption of innocence is not guaranteed by the Administrative Penalties Law. In our opinion, under the rather severe criminal legislation of the PRC, administrative penalties are considered milder measures. The authors have not discovered the entrenchment of the principle of equality before the law when administrative penalties are imposed in administrative proceedings. It should be noted that when a person appeals against

the decisions of administrative bodies, the principle of procedural equality is enshrined. In accordance with Article 8 of the PRC Administrative Litigation Law, the parties shall have equal legal status in the administrative litigation.

3. Bodies Imposing Administrative Penalty

The range of administrative bodies that have the right to apply administrative penalties to offenders is extremely wide and not defined in a single, unified act. For example, according to the Law of the People's Republic of China on Penalties for Administration of Public Security, in the countryside where there are no public security police stations, handling the violations of public security that incur a warning and a fine of less than RMB 50 may be entrusted by the public security body to the township (town) people's government. However, the power of administrative penalty involving the restriction of a person's freedom shall only be exercised by the public security bodies.³³

An essential feature is that, in addition to administrative bodies, authorized organizations are empowered by law to apply administrative penalties. An administrative body may, within the scope of its powers as prescribed by law, entrust an organization with imposing administrative penalties.³⁴ The organization to be entrusted shall meet the following conditions: 1) to be an institution in charge of public affairs established in accordance with the law; 2) to be staffed with personnel who are familiar with relevant laws, regulations and rules, and are experienced in this work; and 3) to have the conditions for organizing and conducting the technical tests or technical appraisal that are needed for testing or appraising illegal acts.³⁵ The entrusting administrative body shall be responsible for supervising the imposition of administrative penalty by the entrusted organization and shall bear legal responsibility for the consequences of the imposition.³⁶

4. Administrative Penalties System

The Administrative Penalties Law stipulates the types of administrative penalties: disciplinary warning; fine; confiscation of illegal gains or confiscation of

unlawful property or things of value; ordering for suspension of production or business; temporary suspension or rescission of permit or temporary suspension or rescission of license; administrative detention; others as prescribed by laws and administrative rules and regulations.³⁷

Administrative penalties may be created both by law, administrative or local regulations. Different types of administrative penalties may be created by law. However, an administrative penalty involving the restriction of a person's freedom can only be created by law. Administrative penalties, with the exception of restricting a person's freedom, may be created by administrative rules and regulations. Administrative penalties, with the exception of restriction of a person's freedom and rescission of a business license of an enterprise, may be created by local regulations.³⁸

The list of punishments is not exhaustive. For example, Article 26 of the Exit and Entry Administration Law of the People's Republic of China stipulates that exit and entry border inspection authorities shall order foreigners who are denied entry into China to return to their home country, and shall force the return of those who refuse to do so.³⁹ While waiting to return, the aforesaid foreigners shall not leave the restricted zones. Article 77 of the Exit and Entry Administration Law provides that foreigners accessing foreigner-restricted areas without approval shall be ordered to leave promptly; where circumstances are serious, such foreigners shall be detained for not less than five days but not more than ten days. The text records, audio-visual data, electronic data and other articles illegally obtained thereof by the foreigners shall be confiscated or destroyed, and the tools used for the aforementioned purposes shall be confiscated.

Neither the minimum nor maximum fines are established in the Administrative Penalties Law. The limits are set in other laws containing penalties for offenses in one area or another. For example, the highest administrative fines in China are set for violations in business and protection of competition as well as for violations in environmental protection. In accordance with Article 5 of Provisions on the Administrative Punishment of Price-related Violation (2010 Revision), in case any business operator, in violation of Article 14 of the Price Law, manipulates the market price by collusion which causes the soaring of commodity price, he/it shall be ordered to make correction, be subject to confiscation of illegal gains, and be imposed of a fine of not more than five times the illegal gains. If there are

no illegal gains, he/it shall be imposed of a fine ranging from RMB 100,000 up to RMB 1 million, or be imposed a fine of RMB 1 million up to RMB 5 million if the circumstances are relatively serious; or if the circumstances are serious, he/it shall be ordered to cease business operation for rectification, or be revoked of his/its business license by the industrial and commercial administration.⁴⁰ In accordance with Article 83 of the Water Pollution Prevention and Control Law of the People's Republic of China (2017 Revision), in case any entity commits any of the following conduct in violation of this Law, the administrative department of environmental protection of the people's government at or above the county level shall order it to take corrective actions; order it to restrict production or suspend production for rectification; and impose a fine of not less than RMB 100,000, but not more than RMB 1 million on aforesaid entity. If the circumstances are serious, the department shall order it to suspend its business operations or close down with the approval of the people's government which has the requisite approval authority.

Administrative penalties are most often relative and alternative. Public authorities have wide discretion in choosing the type of punishment taking into account the circumstances of the case. Thus, in accordance with the Law of the People's Republic of China on Penalties for Administration of Public Security, a refusal to execute the decision or order lawfully issued by the people's government in an emergent situation shall be given a warning or shall be fined not less than RMB 200.⁴¹ If the circumstances are serious, the offender shall be detained for not less than 5 days but not more than 10 days, and may be concurrently fined RMB 500.⁴² For example, on February 20, 2020, a resident of Linko County was fined RMB 200 for violating the announcement of the city quarantine due to the threat of pneumonia caused by COVID-19 infection.⁴³

It is important that the procedure of imposing administrative penalties is dependent on the type and seriousness of the offence. For example, suspension of production or business, rescission of a business permit or license or imposition of a comparatively large amount of fine can be imposed only by a hearing.⁴⁴

The purpose of punishment under the laws of the PRC is not only punitive, but also educational. In accordance with Article 5 of the Administrative Penalties Law, in imposing administrative penalty and mandating corrective action to illegal acts, the penalty shall be combined with education so that citizens, legal persons

and other organizations shall become aware of the importance of observing law.

5. Procedures of Imposing Administrative Penalty

There are three different procedures for imposing an administrative penalty: Summary Procedure; Ordinary Procedure; Procedure of Hearing.

A. Summary Procedure

Summary procedure means that an administrative penalty may be decided forthwith and is possible if: 1) the facts about a violation of the law are well-attested and there is a legal basis; 2) the citizen involved is to be fined not more than RMB 50 or the legal person or other organization involved is to be fined not more than RMB 1,000, or a disciplinary warning is to be given; and 3) the party does not refuse to accept the decision on administrative penalty made forthwith.⁴⁵

B. Ordinary Procedure

Ordinary procedure means that administrative bodies shall conduct an investigation in a comprehensive, objective and fair manner, and collect relevant evidence.⁴⁶ When necessary, they may conduct inspection in accordance with the provisions of laws and regulations. After an investigation has been concluded, the leading members of an administrative body shall examine the results of the investigation and make the decision about imposing an administrative penalty. Before imposing a heavier administrative penalty for an illegal act which is of a complicated or grave nature, the leading members of an administrative body shall make a collective decision through deliberation.⁴⁷

C. Procedure of Hearing

An administrative body, before making a decision on an administrative penalty that involves ordering the suspension of production or business, rescission of a business permit or license, or imposition of a comparatively large fine, shall notify the party that it has the right to request a hearing. If the party requests a hearing, the administrative body shall arrange for the hearing. When the hearing is concluded, the administrative body shall make a decision regarding the imposition

of an administrative penalty.⁴⁸

It should be noted that certain laws establish the specifics of proceedings in cases where certain types of administrative offenses have been committed.⁴⁹ For example, the Public Security Administration Punishments Law of the People's Republic of China regulates the procedure of imposing administrative penalties in detail.⁵⁰

6. Review

There are both administrative and judicial procedures for reviewing rendered decisions on administrative penalties in the PRC. Chapter VII of the Administrative Penalties Law provides the grounds for correction of the decision by bodies at a higher level or relevant departments when imposing an administrative penalty without statutory basis or by altering the types and range of administrative penalty, without authorization or in violation of the legal procedure for administrative penalty or in violation of the provisions concerning entrusting an organization with imposition of administrative penalty.⁵¹

This is explained by the fact that “powerful state control is an important characteristic of the Chinese state legal tradition.”⁵² It is unique that Chapter VII of the Administrative Penalties Law establishes the legal responsibility of bodies and officials that impose administrative penalties. Legal responsibility includes both compensation to the parties in accordance with the law and criminal responsibility. For example, if administrative bodies do not transfer cases to judicial bodies for investigating criminal responsibility, but impose administrative penalty instead of criminal penalty, the administrative bodies at higher levels or the relevant departments shall order them to make correction.⁵³ Also, those who practice irregularities for personal gain, cover up violations or conspire to violate the law shall be investigated for criminal responsibility by applying *mutatis mutandis* the relevant provisions of the Criminal Law.⁵⁴ Following this rule and other similar norms, the legislation obviously seeks to balance the administrative discretion of officials for imposing administrative penalties, including the question of whether there has been a criminal offense or administrative violation. Judicial review of a rendered decision is regulated, as mentioned above, by the Administrative

Litigation Law of the People's Republic of China (2017 Revision).⁵⁵

7. Conclusion

The Administrative Penalties Law was revised in 2017 for ensuring and supervising the effective enforcement of safeguarding public interests and public order, as well as protecting the lawful rights and interests of citizens, legal persons and other organizations. It played a significant role in providing the basic principles of administrative responsibility such as legality, openness, fairness, and guaranty of protection. Simultaneously, a more detailed analysis of the legislation on the responsibility for administrative offenses in the PRC shows that Chinese legislation on administrative offenses and penalties is not codified, but relevant laws and regulations can be found everywhere. The range of administrative bodies that have the right to apply administrative penalties to offenders is extremely wide and not defined in a single, unified act. The list of punishments is not exhaustive. Administrative penalties, with the exception of the restriction of a person's freedom and rescission of business license of an enterprise, may be created by local regulations. Although administrative penalties are most often relative and alternative, public authorities have wide discretion in choosing the type of punishment, taking into account the circumstances of the case. The Administrative Penalties Law establishes the guarantees of proportionality. For example, administrative bodies may impose no administrative penalty when an illegal act is minor. This approach ensures the existence of a fairly dynamic system of administrative measures which guarantee the proper order in the rapidly developing Chinese economy.

Further, this approach carries a risk of abusing power by the public bodies and excessive state intervention into personal life. There is still a need for improving this legal institution towards strengthening the rule of law and protection of the constitutional rights of citizens. This can be also facilitated by the codification on liability for administrative offenses by establishing an exhaustive list and clear boundaries for administrative penalties. We presume that a positive aspect involves the existence of three different procedures of imposing administrative penalties: Summary Procedure; Ordinary Procedure; and Procedure of Hearing.

It is important that the procedure of imposing administrative penalties should depend on the type and gravity of the offence. Constitutional rights can be guaranteed by judicial review of the decisions on administrative penalties. In our opinion, however, the principle of guaranteed protection could be strengthened by recognizing the presumption of innocence and the principle of equality before the law in the procedures of imposing administrative penalties.

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