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Anti-administrative monopoly and its legal rules in China

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ADMINISTRATIVE MONOPOLY AND THE LEGAL REGULATIONS OF ANTI-ADMINISTRATIVE MONOPOLY IN CHINA

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ABSTRACT

In the process of establishing and improving China's market economy, the concept of *Administrative Monopoly* has drawn wide attention from all sectors of society. The study of this phenomenon has become the focus of political and economic reforms.

China is presently in the course of reforming its economy. As a result, there arose Administrative Monopoly. The Administrative Monopoly in China has specific characteristics; therefore, it is a real problem in China's economic development that needs to be tackled immediately. The Administrative Monopoly is demonstrated in a wide spectrum and has seriously restricted China's economic development.

The paper can be divided into three chapters:

The first chapter includes two sections and is the theoretical basis to the study of Administrative Monopoly ---its concept and characteristics.

The second chapter expounds the harms of Administrative Monopoly and analyses its causes.

The last chapter is the mainstay of this thesis and discusses the target of this article, namely, the legal regulation of anti-Administrative Monopoly in China.

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INTRODUCTION

The Chinese government decided to shift its focus and emphasize on modernizing the country's economy in 1979. Thus, it carried out reforms and opening policies. The means of economy, administration and legislation are expected to join the same goal in leading and regulating the country's economic activities.

During the process of establishing and implementing the Market Economy System in China, the problem of Administrative Monopoly gave rise to wide attention and grumble from all circles of the society due to its complex and extensive harmfulness. Issues such as industry monopoly, local protectionism, government restriction of trade, etc., not only counteracted the function of market mechanisms, infringed the rights and interests of the market principals, but also worsened the corruption in the political system, which as a result is blocking the course of reforming the economic system.

Research on Administrative Monopoly in China's academic field is mainly related to the form, cause, and effect of the Administrative Monopoly as well as the anti-Administrative Monopoly measures. While severe bifurcations exist in various aspects of the Administrative Monopoly issue, some of the research produced reasonable opinions and shed light on theoretical viewpoints.

Administrative Monopoly is one of the major barriers which affect the healthy development of market economy in China. At the same time, it is an urgent task to be tackled because China has become a member of World Trade Organization (WTO), which requires fairness in competition among its member countries. The Administrative Monopoly in China is unique as it has been developed concurrently with the economic reform and political reforms. However, there does not appear to be any effective countermeasure to solve the problem at present.

This paper, which includes three parts, conducts a general analysis and dissertation on the

issue of China's Administrative Monopoly and proposes a series of legal solutions to deal with it.

CHAPTER I: THE LEGAL DEFINITION OF ADMINISTRATIVE MONOPOLY AND CHARACTERISTICS

This chapter can be divided into two sections. In the first section, the concept of Administrative Monopoly is introduced. In the second, the different characteristics of Administrative Monopoly are compared.

Section I: The Concept of Administrative Monopoly

In China, the concept of "monopoly" was introduced at the time when China's socialist market economic practice and market economic system were gradually established and when scholars were still occupying themselves with the study of monopoly or restricted competition. Attempts were made to draw distinctions between the traditional monopoly among the main players in the market and those in restricted competition acts.

Presently in China, there is no statutory definition of Administrative Monopoly in current law, nor is there theoretical concept of Administrative Monopoly in academic field. Therefore, the question as to whether an Administrative Monopoly exists continues to be a matter of controversy.

I. The Existence of Administrative Monopoly

The main points of view can be summarized as the following:

The first point of view recognizes the existence of Administrative Monopoly.

The second point of view recognizes the existence of Administrative Monopoly, but regards Administrative Monopoly the same with state monopoly; it holds that Administrative Monopoly is essentially sustained through administrative means and a strict hierarchy of administrative organizations.

The third point of view does not recognize the existence of Administrative Monopoly.

We believe that Administrative Monopoly exists as a classification of monopoly relative to economic monopoly, and has its own unique nature.

Administrative Monopoly has a dual nature: economic and administrative. The process of its formation is administrative, with the intervention of executive powers. And its negative effects are roughly the same with those of economic monopoly. In fact, the existence of Administrative Monopoly is an objective reality, but it has only been given different names. Most scholars recognize its objective existence.

II. The Definition of Administrative Monopoly

The main differences between the existing concepts:

There are a lot disputes on the definition of Administrative Monopoly in the academic field. The disputes are mainly centered on the following areas:

A. Different Interpretations on the Scope of Monopoly Principals

"Government and its subordinates", "Government and government departments", "the executive authorities of the local government and the national economic management", "the executive authorities of government or its authorized units," "administrative principal" and so on.

We believe that the implementing principal of main Administrative Monopoly should include executive authorities and organization authorized by laws and regulations, i.e. "administrative principals."

Specifically, the likely implementing bodies of Administrative Monopoly include not only the central and local governments and their departments, but also their immediate agencies and dispatching agencies, including certain administrations authorized by laws and regulations.

Some scholars excluded the central government from the scope of Administrative Monopoly principals. We believe that the central government should be included in the scope of Administrative Monopoly and be regulated if its administrative conducts in economic management deviate from the original purpose for establishing the executive powers and thus constitute undue restrictions on competition.

B. Does Administrative Monopoly Regulate Act or State?

We believe that Administrative Monopoly is different from economic monopoly in the sense that there is no state of monopoly. Only the administrative principals' abuse of administrative power and implementation of monopolistic conduct constitute Administrative Monopoly.

Therefore, Administrative Monopoly means monopolistic conduct, acts of abusing administrative power to restrict competition by the administrative principals.

C. Is Administrative Monopoly Illegal?

We believe that Administrative Monopoly deviated from the modern law concepts of fair competition, overall interests of the society, economic freedom and economic democracy, etc., which are the essential values on which the modern legal system, especially the modern economic legal system are built.

Administrative Monopoly is an offence with a dual offensive nature: offensive to both economic law and administrative law. Although Administrative Monopoly is conducted by specific people, i.e., executive officials or members of other administrative organizations, the executive officials or members of other administrative organizations can not carry out the Administrative Monopoly in their personal names. Instead, Administrative Monopoly is only decided and implemented in the name of the administrative principal. Therefore, Administrative Monopoly manifests the will of the administrative principal, rather than the will of its individual members. Thus Administrative Monopoly should be a collective offence.

Based on the above analysis, we can come to this concept: Administrative Monopoly are the acts of administrative principal (central and local governments and their departments or organizations authorized by laws and regulations) to prevent the formation of a competitive market and impair the order of market economy, which are implemented by means of using executive power and making the country's laws, administrative regulations and rules, etc, for the protection of the interests of that department, locality and enterprises under its administration.

Section II. The Characteristics of China's Administrative Monopoly

As China's economic structural reform is only 30 years old, the imprinting of planned economic system has not completely faded away. In the process of transition, there are needs for ideological changes and coordination of many relations. In particular, the relationship between the government and the market, and the enterprises has not been completely adjusted. Therefore, a typical Administrative Monopoly was formed in China, which has the following characteristics:

I. The Diversity of the Manifestations of Administrative Monopoly

In China, Administrative Monopoly is manifested in various forms, which include regional monopoly, trade monopoly, and other monopolies implemented by using executive power.

A. Regional monopoly

Regional monopoly is the acts of government and its functional departments to build market barriers by illegal administration. It is commonly known as local protectionism, also called regional trade barriers.

For example, in early 1997, to stop the inflow of fertilizer manufactured in other areas, the government of Gushi county in Henan Province specifically issued blockage documentation, which stipulated that "in order to protect the fertilizer production in this county, all purchases of carbon

from other areas by any individual or organization are prohibited. For any offence, the purchase and illegal gains will be confiscated. Furthermore, penalties will be imposed in accordance with related regulations, and the major officials of the township people's government and major administrative agencies will be held accountable for the administrative and economic liabilities.

B Industry or Trade Monopoly

Industry or trade monopoly is the act of national industrial administration to restrict competition within certain industry or trade by means of exercising administrative power and public authorities. It is mainly reflected in the enterprises or enterprise groups that have dual identities in both administration and business. They participate in the economic activities as enterprises. At the same time they perform administrative function in its own industry as governmental agencies.

For example, China Yangtze River Project Development Corporation, China National Petroleum Corporation both have administrative authorities.

C Other Monopolies Implemented by Using Executive Power

For example, mandatory trade and mandatory joint restriction of competition - mandatory joint pricing, mandatory joint refusal to sell or purchase. Such situation is reflected in the collapse of Fujian Longma Groups ("Longma"). Fujian Longma Group was once the "king" of national agricultural vehicles. Fujian Motor Industry Group Company, as the administrative agency of motor industry, encouraged Longma to take over the debt ridden Fujian Motor Factory under its administration in 1999, undertaking all the factory's rights and liabilities.

With the "match making" of the local government, Longma first formed a corporation group, and subsequently annexed companies without discretion. At the most, Longma has nearly 100 enterprises under its umbrella. By March 2001, Longma Group was eventually forced to close down due to its scattered resources, poor management and heavy debt burden. As a result, thousands of workers became jobless.

II The Complexity of Implementing Principals of Administrative Monopoly

The implementing principals of Administrative Monopoly consist of not only the country's executive organs, which include the central and local governments, but also the legislative bodies, i.e., the National People's Congress (NPC) (some of the state monopoly laws and regulations are enacted by NPC), the Provincial People's Congress, and so on (there is a likelihood that the provincial People's Congress formulates local laws and regulations to protect local government's Administrative Monopoly), and the judiciary branch (some of the judiciary agencies have exhibited obvious tendency of local protectionism in the judicial process).

During China's transition period, some forms of Administrative Monopoly, while playing

certain role in making up for the market defects, are more for the individual and local interests. Even the monopoly of the naturally monopolizing industries, its original purpose is not to compensate for the market defects, but to serve as an extension of the highly centralized Administrative Monopoly under the planning system.

III. Economic Monopoly and Administrative Monopoly Intertwined and Infiltrated

In China, Administrative Monopoly is closely intertwined with the natural monopoly, which is the cause of long time confusion in people's mind of administrative monopolies and natural monopolies. People mix up the government administration and modern supervision, so that decision-makers have difficulty to grasp the essence of the problem of the monopolistic industry. In consideration of the overall interests of the society and political stability, it is necessary for the government to exercise control over the naturally monopolistic industries. Although similar provisions on the government's control over natural monopoly have been made, the context of the control over natural monopoly in western countries is different from that of China. The Control of the natural monopoly in western countries was founded on the objective laws of market economy development, with the purpose of overcoming market failure and government failure. China's control of natural monopolies was built on the old planned economy system; strongly overshadowed by the planned economy system, with the purpose of restricting market access.

China's market mechanism is not fully developed, thus the phenomenon of abuse of monopolistic position by the enterprises of naturally monopolistic industries taking advantage of its connections with administrative departments is not uncommon, which severely damaged the interests of consumers. An example is the fee competition in the telecommunication industry in 2004. Unicom and Mobile, the two telecom operators compete with each other to lower standard mobile phone charge. However, the Ministry of Information Industry and the National Development and Reform Commission jointly issued "Notice on Further Strengthening the Supervision of Telecom Charges and Related Matters," prohibiting reduction of fees and charges in competition. It is obviously inappropriate to exercise regulation over naturally monopolistic industry through executive order, and the content of regulation is targeted at legitimate market competition in the market.

CHAPTER II. THE CAUSE OF CHINA'S ADMINISTRATION MONOPOLY AND ITS HARM

Section I. The Cause of Administration Monopoly and the Reason of Its Existence

The causes of administration monopoly formed during Chinese reform period are complicated and unique. The cause of it can be analyzed and traced to following aspects:

I. Ideological Root Cause: Administration Intervening Economy

The historical tradition of non-division between government and business and the administrative ideology of government intervening business are the ideological root cause for the administrative monopolistic conduct.

China had a history of over 2,000 years of feudal society, in which there was no division between government and business, and the executive authorities, other than being restrained by the imperial authority, had all the decision making powers. In a society in which the executive power played an absolute role, scholars, farmers, workers and businessmen were all constrained by the government, and their business were all conducted under the close control of the government. From this a historical tradition of non-division between government and business was gradually formed.

After mid-Ming Dynasty, with the birth of capitalism, commodity economy was formed in certain scale. However, the country's intervention in the circulation of commodities remained severe.

The feudal ideology of central concentration of power led to the administrative consciousness of government intervening business. The executive power played a determinative role in the country's economic activities. This consciousness has been widely accepted and become a collective consciousness.

After the People's Republic of China was founded, China practiced strict planned economy

system, under which Administrative Monopoly, instead of being eliminated, was elevated and became state monopoly. After the reform and open policy was implemented, although market economy system was established, the habitual consciousness of administrative authorities intervening economy still plays a role, as the administrative concept formed in social history could not be changed during a short period of time.

II System Root Cause: The Organizational Reform Is Not Thorough

The contradiction and the conflict between the new and the old system are the system roots which causes the Administrative Monopoly.

Since the founding of the PRC, China had a history of over 30 years' highly concentrated and highly centralized planned economy, under which the conduct of enterprises completed determined by that of the government.

After the implementation of the reform and open policy, China carried out the government restructuring. However, presently China's political restructuring lags behind the in the economic reform. Due to the influence of planned economy, the multiple status of the government has not been changed. The government did not exercise control over the enterprises that are still in monopoly position in accordance with the regulations of the market economy. Instead, the government allows those enterprises to abuse their monopolistic advantages in economic activities and impair the interests of the consumers. Meanwhile, all levels of government, under the pretext of administering industries and maintaining market order, engage themselves in various anti-competition activities and regulate the industries that are not naturally monopolistic by means of executive orders, policies, and other executive means.

III. Direct Cause: Conflict of Interests among Regions, Departments

Under the planned economy system, the regional and sectional benefits conformed to the interests of the central government, and therefore there were no interest conflicts among all parties.

The Administrative Monopoly arises from unreasonable distribution of financial interests. Before the economic restructuring, China implemented the planned economy system, under which the economic objectives were assigned by the officials of superior authorities.

The economic management was based on administrative signals, under which a three-level fiscal system is practiced: the state level, the province level and county level. The central government determines the fiscal income and expenditure of all levels. Under the planned economy system, the interests of different regions and department were all coordinated by the central government, thus there was no conflict of interests amount them.

After the implementation of the reform and open policy, China implemented financial decentralization and the administrative decentralization in the financial system, and increased the administrative authority of regions and industries. Thus the enterprises' quality of management in a certain region or under a certain department would directly impact the local fiscal income.

Each region and department, now each having its own collective interest, start to have conflict of interests among them. For example: The issue of Three River Field toll station reflected the conflict of interests in road use in Sichuan Province between Chengdu City traffic control authorities and Xindu Region. To ensure the economic interests of the companies under its administration, the traffic control authorities did everything possible to set up toll stations, while Xindu Region tried hard to avoid the toll stations to protect local development. Thus occurred the incident that the local government built toll free road and relocate toll stations

IV. External Causes: Defective Legal System Results in Lack of Effective Constrain for Administrative Monopoly

The defects are reflected in multiple aspects including legislation, law enforcement and judicial practices.

A . The Task to Perfect Legislation Is Arduous

The constitution, as the nation's fundamental law, should include explicit provisions to limit the government authority. The government's exercise of authority must be limited within certain scope.

China's constitution, however, did not explicitly lay out the government's scope of authorities. Further, it is quite common that the government has no existing legal basis or no sufficient legal basis to refer to in its economic administration. Take the antimonopoly law for example, even though it took over ten years to draft and get final approval in 2007, the law still has many defects.

Moreover, China's administrative law system, which started late and is weak, can hardly keep up with the new right and obligation relationship developed in the rapid marketization process. In the current administrative laws and regulations, the measure of administrative obligations is too light, the penalties for administrative offenses are also too light, and thus there is not sufficient deterrent power. Some legal and regulations are ambiguous and vague, leaving too much space for interpretation, which caused difficulties in enforcement or left too much to discretion. Some laws are obviously outdated and no longer suit the economical development, but they are not revised or adjusted in a timely manner. An example is the post and telecommunications law, which was promulgated in the 80's and has obviously fallen behind the economical development. This issue will be expounded specifically in latter part of the thesis.

B .The Law Enforcement Cannot Enforce Law in Accordance with Law

In law enforcement, the mentality of regarding the law as a tool of ruling over people still commonly exists. So do the notion of special privileges and the concept that administrative power is above the law. In the relationship between the collective rights and individual rights, collective rights are meant to protect individual rights. However, as collective rights has long been infiltrating and expanding over market and economic activities, even personal lives, plus public interests have overbearing power, personal rights are often infringed by people taking advantage of collective rights.

Certain law enforcement staff regards themselves as the embodiment of law and neglected the fact that they themselves are to be constrained by law. As a matter of fact, what truly impacts social order is not the number of laws and regulation, but the power structure and the means of exercising power, as well as the degrees to which the collective right agencies observe and implement the laws and regulations. When power goes unchecked, policies, laws and regulations tend to be distorted from time to time.

C. Judicial Independence Needs to Be Consummated

Presently, judicial practice are frequently intervened and interfered by governmental authorities. A major threat to the judicial fairness and independence is so-called “the judicial localization.” The judicial results of cross-region economic disputes are often determined by which side has jurisdiction.

D. Monitoring Mechanism Is Not Well Established, Resulting in Lack of Effective Monitor

At present, China has not established a set of transparent administrative decision-making, execution, and surveillance mechanism. Thus it is hard to exercise effective monitoring to execution of powers that lack of transparency. Governmental power going unchecked means malfunction or loss of effectiveness. When law loses effectiveness, the people in power can rule over law, abuse law, deprive other people of their rights at will, and maliciously brush aside free transactions. Therefore, whether the governmental conduct can be regulated, and whether the privatization of collective rights can be avoided, are directly related to the success or failure of the development of market economy and legal system.

Section II. The Harm of Administrative Monopoly

I. Administration Monopoly’s Harm to Economy

A. Administrative Monopoly Has Harmed the Order of Competition

Administrative Monopoly is the abuse of administrative power by the administrative principal to directly restrict competition. As the opposite of competition, it has hindered the formation of a unified and open market, and hindered the establishment and perfection of the market competition mechanism, thus has seriously harmed and counteracted competition. In addition, Administrative Monopoly has also hindered the enterprises from increase their competitiveness, because the monopolistic enterprises, depending on their monopoly status to make huge profits, do not possess real market surviving strength. The end of their monopoly status is often the end of their days.

B .Administrative Monopoly Has Harmed Economic Freedom

The freedom of management is the basic right under the market economy condition. The market management principal should have sufficient decision making power in production and management. However, Administrative Monopoly repels, restricts and hinders competition, limit the market management principal's production management, or forces the management principal to engage in (or not engage in) certain transactions. It forces the management principal to give up economic decision making power, have no choice but to adhere to the administrative authorities, at the same time ruthlessly let the management principal undertake all losses thus caused, hence has severely damaged the management principal's freedom of management. Meanwhile, from the consumers' perspective, consumers originally have the right to choose commodities and services. However, Administrative Monopoly often restricts consumers' purchase behavior, thus deprives consumers of low-priced quality commodities, which violates the consumers' free will and no doubt has impaired consumers' freedom of consumption.

II. The Social Harm of Administrative Monopoly

A .Administrative Monopoly Gives Rise to Corruption

Administrative Monopoly is an important factor in causing corruption and damaging the government's image. The essence of administrative monopoly is illegal administration. It illegally increases the administrators' discretion, exercises abnormal interference in economic activities, and disturbs the nation's administrative order. Administrative principals, in regulating economic activities, ordinarily have their own special interests. We cannot eliminate the possibility that they interfere with economic activities and exercise monopoly out of their own economic interests and to seek benefit for their own region or department. The departments and regions that are protected no longer make efforts to increase their own competitiveness, but instead spend a lot of money on bribery so as to obtain the protection of related agencies. This leads to collusion of government and business, trade of power and money and other serious social corruptions. Government's abuse of administrative power hinders the achievement of social public objectives, thus inevitably damages government's image in the public, tarnishes its reputation, and shakes its political position.

B.Administrative Monopoly Affects Social Justice

Administrative Monopoly creates serious unfairness of social distribution including unequal opportunity of competition among economic principals, which has enlarged the gap between the rich and the poor.

First, due to the fact that different regions and industries receive different treatment in economic administration under Administrative Monopoly, the economic principal can hardly have equal opportunity of competition.

Secondly, from the perspective of fairness of distribution, the essence of Administrative Monopoly is trade between power and money, which will inevitably lead the flow of large monopoly profits into the hands of people in power. The monopoly profits come from deprivation of general consumers. Thus occurred the phenomenon that social wealth is being transferred from the general public to the people in power, which enlarged the gap between the rich and the poor.

The more crucial issue is that this redistribution of social income is not the result of market mechanism, but the product of marriage between power and money, bearing no relationship with economic efficiency. Therefore, the unequal distribution caused by Administrative Monopoly is not an unequal distribution in terms of market economy. Instead, it is a serious social unfairness of distribution. Due to the existence of Administrative Monopoly, certain people are placed in a seriously unbalanced condition, both economical and psychological, which affects the general public's confidence in the government, and increases factors of social instability.

CHAPTER III. ANTI-ADMINISTRATIVE MONOPOLY AND ITS LEGAL REGULATION IN CHINA

Section I. The Status Quo of Legal Regulation of Administrative Monopoly

I. The Current Status of Legal Regulation of Administrative Monopoly

A . Legislative Status

There are about 20 legal documentations currently in effect that control administrative monopoly. They can be categorized as follows based on their content and forms:

1) Comprehensive Legal Documentations That Regulate Administrative Monopoly

Article 3 in "Interim Provisions on Developing and Protecting Socialist Competitions" (hereinafter referred to as "Competition 10 Rules") issued by the State Council on October 17, 1980, explicitly stipulates: "In economic activities, with the exception of certain products designated by the nation to be specifically carried by certain agencies or units, no monopoly or exclusive dealing is allowed." This the first time the issue of anti-monopoly is raised. Article 7 of the "Anti Unfair Competition Law" passed by the NPC Standing Committee on September 2, 1993 states: "The Government and its affiliated departments shall not abuse its administrative power to restrict people to purchase the products of designated operators, or restrict the normal business activities of other operators.

Article 22, paragraph 1, article 23, section 45, 47 of "Law on Pricing" enacted in 1997 are related to regulation of administrative monopoly. The Law provides restrictions on government pricing practices, such as, the government, in the process of pricing, is to conduct investigation on price and costs, collect feedbacks from consumers, businesses and related parties; it is to set public utility prices and public interest service prices that are related with the interests of the general public, commodity prices produced by monopolistic businesses, and other government coordinating prices; it is to establish hearing systems in the process of pricing. The Law also provides

administrative penalties for violations.

The “Law on Bidding Practice” that was publicized in 1999 and came in effect in 2000 regulated the administrative monopoly in bidding activities.

“The Anti-monopoly Law of the People’s Republic of China” approved on August 30, 2007 will become in effect on August 1, 2008. While the issue whether it is necessary to oppose monopoly remains in dispute in China’s anti-monopoly law, Article 8 of the approved Anti-monopoly Law explicitly provides that executive authorities and agencies authorized by law to regulate public affairs are not allowed to abuse administrative power and exclude or restrict competitions. Chapter V of the Law cited acts of abusing administrative power and restricting competitions, including mandatory transactions, hindering cross region free flow of commodities; excluding or restricting bidding by enterprises from other areas; excluding or restricting flow of foreign capital into local market; forcing business operators to engage in monopolistic activities; formulating administrative regulations to exclude or restrict competitions.

2) Specific Legal Documentations Prohibiting Regional Blockade and Sectoral Monopoly

“Notice on Breeding Regional Blockage and Further Invigorating the Market” enacted in November 1990 provided more specific regulations prohibiting regional blockage and sectoral division than Competition 10 Rules. The Notice cited various manifestations of regional blockage and sectoral division

“Regulations on Prohibiting Regional Blockage in Market Economic Activities” enacted by the State Council in April 2001 stated the main manifestation of regional blockage, and provided procedures to deal with abstract administrative monopoly, authorized agencies to handle various specific blockading acts, and legal responsibilities.

3) Regulations on Prohibiting Restriction of Competition by Public Utility Enterprises

The State Administration for Industry and Commerce issued “Certain Regulations on Prohibiting Restriction of Competitive Activities by Public Utility Enterprises” in December 1993, which cited acts of restricting competitions by public utility enterprises: restricting users and consumers to purchase and use supplementary products provided by them only, prohibiting purchase and use of similar products provided by other business operators that satisfy technical specifications; forcing users and consumers to purchase unnecessary products or parts they provided; forcing users and consumers to purchase unnecessary products provided by operators they designated; in the name of checking on quality and performance, preventing users and consumers to purchase products from other operators that do not meet their technical requirements; refusing, suspending or reducing supply to users and consumers who decline their unreasonable

conditions, or overcharging them; and other acts of restricting competitions.

4) Regulations on Prohibiting Mandatory Joint Ventures

“Opinions on Forming and Developing Enterprise Groups” issued by the State Commission for Restructuring the Economy in 1987 emphasizes that formation of enterprise groups must abide by the principal of encouraging competition and preventing monopoly. Within one industry, it is generally not encouraged to have one monopolising enterprise. Competition within industry is encouraged so as to promote technological progress and improving economic efficiency. Those provisions constrain administrative mandatory joint venture.

B. The Status of Law Enforcement

There is an evolution process in China's anti-monopoly law enforcement, though there are some anti-administrative monopoly laws and regulations. For example, since 1984, the Government has issued much documentation prohibiting party and governmental agencies to operate business. However, the operation of business by party and governmental agencies has never been stopped. After the "Anti-Unfair Competition Law" was enacted, the harm to consumers and operators that administrative monopoly caused grew increasingly obvious, and the anti-monopoly voice in academic field was increasingly strong. Under these circumstances, the government strengthened its measures of anti-monopoly.

At the level of central government, the State Administration of Trade and Commerce conducted law enforcement dedicated to dealing with administrative monopoly consecutively in 2000 and 2001. At the level of local government, many local trade and commerce administrative agencies tried to overcome difficulties and obstacles, searched the ways for law enforcement in anti-administrative monopoly, and managed to stop certain monopolistic activities by means of administrative suggestions and administrative warnings. However, those law enforcement activities appeared to be quite limited due to lack of a specific dedicated anti-monopoly law enforcement agency. Although Article 10 of "Anti-monopoly Law" provides that anti-monopoly law enforcement is carried out at two levels: central and local government, the provision is not carried out because the Law is not implemented till August 1, 2008.

II. Defects in Regulations of China's Administrative Monopoly

Stated above are China's existing legislations that regulate administrative monopoly. Those legislations in practice effectively control administrative monopoly. We have to reflect on the question: What are the defects in China's current anti-monopoly legislation? The defects of China's current anti-administrative monopoly legislation can be analyzed as follows:

A. Lack of Systematic Legislation

There need a systematic legislative mechanism to regulate administrative monopoly. The existing regulations of administrative monopoly are scattered among various laws, administrative regulations and rules. As mentioned above, currently the following laws are in practice that contains anti-monopoly content: "Anti-monopoly Law," "Anti-Unfair Competition Law," "Law on Pricing," and "Law on Bidding." Besides, legal documentations that regulate administrative monopoly are mostly in the form of administrative regulations, departmental rules, local regulations, and local governmental regulations. Those legal documentations lack a unified systematic legal basis as guiding principal, and vary in effectiveness. Inconsistencies in regulations between central government and local government, those among local governments, even conflicts, are quite common. They cannot form a coherent anti-administrative monopoly legal system, thus leaving large blank in legislation. For example, forcing enterprises into joint venture is a form of administrative monopoly, but not a single legal documentation includes it in the scope of legislation.

B. Incomprehensive and Flawed Liability Formulation

This problem is reflected in the following areas:

1) Some legal documentation only provides that practicing certain administrative monopoly acts is illegal, but fail to impose legal responsibilities on such practice. For example, "Interim Regulations on Developing and Protecting Socialist Competitions" does not have any liability provision at all.

2) Some legal documentation provides that administrative monopoly principal shall undertake legal responsibilities, but fail to provide what liabilities, and how to undertake those liabilities. For example, "Notice on Breaking Regional Blockage and Further Invigorating Commodity Circulation" provides: "For those who continue to practise regional blockage after the issuance of this Notice, liabilities shall be impose on the superiors of the perpetrators." Such provision is too general and hard to be implemented.

3) Some legal documentation only provides that administrative principal shall undertake the legal responsibilities, but fail to provide that people directly responsible in administering agencies shall undertake responsibilities; or vice versa. Such provisions are not comprehensive.

C. No Designated Law Enforcement Agency for Anti-monopoly

"Anti-Unfair Competition Law" is China's first regulatory legal documentation that provides for enforcing agencies of administrative monopoly. "Anti-Unfair Competition Law" states that the enforcing agencies of administrative monopoly are government and "the equal and superiors of its subsidiaries." This provision is rather vague in that there are five levels in China's government structure, and each level of government consists of many agencies. Therefore, other than provincial government, "the equal or superior" of any level of government or its agencies is a plural number instead of a singular. Anti-monopoly law enforcement agencies should have higher authorities so as

to have real deterrent force over the perpetrators. Presently China's legislation have not authorize the enforcing agency to power to prosecute administrative monopoly. Further, prosecution of one administrative agency by another is not deterrent enough. Less when conflict of interests exists among the administrative agencies, or even worse, when "the equal or superior" are the beneficiaries of the administrative perpetrators.

D. Related Civil litigation System Lagging Behind

It has been over ten years since the Administrative Procedural law was implemented in 1990. With the deepening of reform, the original system design no longer suits the social development. First of all, administrative monopoly was not included in the scope of litigations. Even though the Superior People's Court gave a general interpretation in November 1999 on the scope of jurisdiction, i.e., the general rule is to take a case; decline is exception, to which a plaintiff can refer when bringing an administrative suit, the court can decline the case for lack of jurisdiction, because such case is not explicitly stated in the scope of jurisdiction. Secondly, the rule that abstract administration can not be sued makes most administrative monopoly practices "free form litigation." Administrative agencies mostly implement administrative monopoly by means of administrative regulations or other regulatory administrative documentations. One reason for that is due to the characteristics of administrative monopoly. Another reason is they can effectively escape judicial proceedings. The provision that abstract administrative monopoly cannot be sued deprived most administrative monopoly victims of their litigation rights.

Section II Construction of Anti-monopoly Legal System in China

Administrative monopoly has become a hard issue in China's contemporary economic life. The existing anti-monopoly legislation appear effectless in the status of administrative monopoly status. A comprehensive anti-administrative monopoly legal system must be constructed to deal with administrative monopoly effectively. This legal system should take constitution as its basis, dedicated anti-monopoly law as its core, supplemented by other related substantive laws, guaranteed by administrative procedural law, with each part correlating with another, and jointly undertaking the historical duty of anti-administrative monopoly.

I. Constitution Is the Basis of Anti-monopoly legal system

Firstly, the existence of administrative monopoly is closely related with lack of legal regulations that deal with the relationship between government and enterprises, between central government and local government. These two categories of relationships are within the scope constitution. All regulations in the anti-administrative monopoly legal system must be based on the fundamental principals of constitution. We propose legislation in the form of amendment to constitution to adjust the relationship between government and enterprises, making freedom of business operation the fundamental right of an enterprise, which the government shall not violate under any pretext, other than the necessity of maintaining macro-economic stability. Clearly distinguish the authorities of central and local government in the constitution, explicitly providing that central government only exercise macro control and regulation, leaving the economic

administration function to the local government. Clearly define the authorities in financial control between the central and local government.

Secondly, anti-administrative monopoly requires the constitution to have a complete checking system for constitutional violations. China presently has an imperfect checking system for constitutional violations, which is reflected in the following areas:

1. The vagueness of checking principals. Checking agencies of constitutional violations have not been set up. The constitution provides that the right of checking for constitutional violation is to be exercised by the nation's supreme power organs. However, the constitution provides at the same time that the local People's Congress has right to withdraw various inappropriate ("inappropriate" refers first of all to constitutional violation) regulatory documentations issued by the standing committee of the People's Congress of the same level, by the people's government of the same level, by the people's congress of the lower level; the State Council and local people's government at each level have right to withdraw inappropriate documentations issued by subordinating departments of government of the same level, by people's government of lower level. Those provision make the checking principals of constitutional violation vague, leaving violation checking in the position of "anyone can do, but virtually nobody cares."

2. The people's court, which applies law, has no right to interpret constitution, while the Standing Committee of the National People's Congress, which has right to interpret constitution, does not apply law. This situation leaves the checking power of constitutional violation in null.

II. Anti-monopoly Law Is the Core of the Legal System of Anti-Administrative Monopoly

The anti-monopoly law presently in practice only cited acts of administrative monopoly, but is still lacking in provisions imposing legal responsibilities.

On administrative responsibilities, it is necessary to impose administrative responsibilities on civil servants working for administrative monopoly principals, as well as on administrative monopoly principals. The administrative responsibilities that the administrative responsibility principals undertake can be provided in the following forms: removal of violative acts, revocation and administrative compensation. Administrative monopoly is practiced in the forms of abstract administration, to which the most effective restraint is revocation. Therefore, removing violative acts, declaring them null are effective forms of liabilities to eliminate administrative monopoly. As administrative monopoly tend to cause economic loss to related people, administrative compensation should become an important way that administrative monopoly principals undertake responsibilities.

In this area Article 2 of "State remedy Law" provides: "When state government and staff of state government, in illegitimately exercising power, violate the legal rights of individuals, legal persons or other organizations, the victim has right to seek compensation in accordance with this Law." However, this provision is too simple and general. Anti-monopoly law should include explicit provisions on the scope and application procedures of the law. The main form of

responsibility undertaken by civil servants working for administrative monopoly principals is administrative penalties. The existing anti-monopoly legislation has similar provisions, but they are too general. Anti-monopoly law should specify them.

On criminal liabilities, in China's criminal law, the only form of criminal liability an organization undertakes is fine. The main source of funding for administrative monopoly principal is financial allocation, thus imposing fine on the principal is to impose liabilities on tax payers. That is unfair to tax payers, and does not punish the principal either. However, only imposing administrative responsibilities does not effectively sanction administrative monopoly. Strict criminal liabilities must be imposed. Criminal liabilities on administrative monopoly principals can be waived, but those on civil servants working for administrative monopoly principal must be imposed.

III. Administrative Review Law and Civil Procedural law Are the Safeguard of Anti-Administrative Monopoly Legal System

Administrative review and civil litigation are important ways to remedy the damages to the rights of the administrative monopoly. Although "Administrative Review Law" include certain abstract administration in the scope of administrative review, it has obvious limitations:

1) Included in the scope of administrative review are only regulations issued by the departments under the State Council, by each level of people's government above the county level and their agencies, by the township people's government, not the rules made by the ministries and commissions of the State Council, or by the local people's government. However, many administrative monopolistic decisions in economic activities are made based on the departmental and local governmental rules. There is no administrative review for this part of administrative monopoly.

2) Application to review abstract administration only is not allowed. Application to review abstract administration is allowed only when application to review specific administrative acts is raised. If the abstract administrative act has not been applied yet, it can be applied for administrative review at all.

To effectively remedy the damage to the victims of administrative monopoly, we propose the following amendments to "Administrative Review Law":

1) Include all abstract administration in the scope of administrative review.

2) Complete procedures for applying to review abstract administration, providing for allowance for administrative review of abstract administration only.

According to China's Civil Procedure Law, "citizens, legal persons or other organizations, if believing that certain specific administrative acts performed by administrative agencies or staff of such agencies have violated their lawful rights, have right to bring suits in the people's court in accordance with this Law." This Law for the first time provided for China's judicial checking system, but has obvious limitations:

1) The court only litigate cases on specific administrative acts performed by administrative agencies, not cases on abstract administration. However, administrative monopoly is mostly exercised in the form of abstract administration. Therefore, from the perspective of existing law, administrative monopoly is not much litigable.

2) People who are allowed to bring administrative suits are limited to administration recipients in a narrow sense, i.e., external administration recipients. Internal administration recipients are not allowed to bring suits. However, victims of administrative monopoly are not limited to external recipients. Instead, local government or governmental agencies are often harmed as well. According to existing law, however, victims in this category cannot seek remedy under civil procedure law.

We propose the following amendments to the civil procedure, which is the final barrier to regulate administrative monopoly:

- 1) Include abstract administration in the scope of judicial review.
- 2) Authorize dedicated agencies for anti-administrative monopoly to bring suits against administrative monopoly.

IV. Improve the System of state remedy for Administrative Monopoly

To remedy the loss suffered by the recipients of administrative monopoly, to protect the lawful rights of those recipients, and to combat the proliferation of administrative monopoly, we believe that it is crucial to improve the liability provisions on the state remedy system in the "State remedy Law."

Article 4 of "State remedy Law" provide that victims have right to seek remedy for the violations of their lawful property rights caused by the state administrative agencies and staff thereof in exercising their power. However, state remedy must be within the scope of "State remedy Law." Certain harms caused by administrative monopoly is not within the scope this Law, thus leaving administrative monopoly liabilities uncompensated.

As to how to improve the remedy system of administrative monopoly, we believe the following:

First of all, include harms caused by administrative monopoly in the scope of "State remedy Law." Here the major obstacle is the provision of "Civil Procedural Law" that abstract administration cannot be sued, which leaves liabilities of administrative monopoly unremedied under "State remedy Law." Therefore, as stated above, the foremost task is to expand the scope of administrative review and civil litigation, and include abstract administration in the content of the Law, together with specific administrative acts. Then explicitly provide for remedies for harms caused by administrative monopoly through amendment to the Law.

Secondly, improve the channels through which recipients of administrative monopoly can petition for state remedy, so that the recipient, when petitioning for state administrative remedy, can have the three options to protect their lawful rights, namely, seeking state remedy from administering agencies only, seeking state remedy by petitioning for administrative review, or seeking remedy through civil litigation.

CONCLUSION

Administrative monopoly is the outcome of planned economy, with a result of counteracting competition and harming consumer interests. It is detrimental to the market economy, impairing economic development, depriving freedom of competition, giving rise to corruptions, and harming the fairness of society.

In the transition period in China, there exist conflict of interests among different regions, departments and enterprises due to unreasonable distribution of financial interests. The defects and lagging behind of the legal system leaves administrative monopoly unrestraint, which hindered the development of market economy.

Administrative monopoly is illegal monopoly. It is necessary to clearly define the authorities of government and administrative agencies, restrict the abuse of power by monopolistic enterprises, and protect the rights of consumers and lawful business operators, so that China's economy can continue to develop in a healthy way.

It is crucial to regulate administrative monopoly by constructing a comprehensive legal system, with each section of law correlating with one another. It is necessary to make explicit provisions and additions of anti-administrative procedures to existing laws to overcome the vagueness and ineffectiveness. It is necessary to impose liabilities and provide remedies for administrative monopoly.

It needs to be noted that different countries in the world have different concepts of monopoly and different ways of dealing with them. Each country's practice has its own national characteristics, such as, American Antitrust, Japanese prohibition of private monopolies, Germany ant cartel. These are successes legal regulation experiments aboard, which are worthwhile for us to refer to.

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