

Exploring the Relationship between China’s Social Credit “System” and the Administrative Punishments Law: Reinforcement or Re-punishment?

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May 24, 2021

The Nexus between APL and SCS

- What is the relationship between
 - punishments (行政处罚) under the Administrative Punishments Law (APL) and
 - the Social Credit “System” (SCS) joint punishment or discipline (联合惩戒) mechanism?
- Are blacklisting and joint discipline measures under the SCS, intended to bolster enforcement of administrative punishments and compliance generally, essentially “administrative punishments” themselves that should be governed by the APL?
- The revised APL seems to have been influenced by experience under the SCS and in turn appears to be influencing procedural improvement of the SCS
 - Their respective goals expressed differently but overlap in seeking to safeguard public interests, maintain public order, educate public on compliance, and protect the public’s lawful rights and interests
- They are mutually reinforcing

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The Nexus between APL and SCS

- **Administrative punishment decisions** are a [the?] major component of **public credit information** (公共信用信息) that is to be shared among government departments and disclosed to the public under SCS
- These punishment decisions serve as
 - Evidence of “untrustworthy” (失信) conduct or acts
 - And as legal basis for listing on a regulatory agency’s seriously untrustworthy subjects list (严重失信主体名单), commonly referred to as a blacklist
- **Blacklisting** in turn triggers [may trigger?] adverse market access, project qualification and other constraints and disciplines (约束和惩戒)
 - by the deciding agency and
 - by other agencies, under the SCS’s main enforcement tool, the controversial joint discipline (联合惩戒) mechanism
- So, important to understand both bases and procedures for imposing administrative punishments and blacklisting/joint discipline

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The Nexus between APL and SCS

- December 2020 State Council guidance (**SCS Legalization Opinions**; 国务院办公厅关于进一步完善失信约束制度构建诚信建设长效机制的指导意见) reaffirms that agency designations of untrustworthy acts must be based on legally effective documents
 - Including written administrative punishment decisions (行政处罚决定文书)
- Those included in a blacklist must have been found to have committed *seriously illegal* -- and therefore seriously untrustworthy -- acts within the blacklisting agency’s jurisdiction

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The Administrative Punishment Law

- The APL regulates the enactment, investigation and implementation of administrative punishments, imposed by government authorities
- APL does not prescribe punishments for specific acts; that is left up to sectoral legislation.
- Instead, it stipulates:
 - the *types* of punishments – such as fines, license revocations and administrative detention
 - the *authority* to enact and impose them
 - rights-protective *procedures* the government must follow to impose administrative punishments

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The Administrative Punishment Law

- Normally must provide alleged offenders with:
 - Notice of intent to impose punishment and the basis therefor
 - Their right to:
 - ✓ Defend their actions, including through public hearings in certain cases, prior to a punishment decision
 - ✓ Receive a written decision
 - ✓ Appeal the final decision administratively (行政复议) and in the courts (行政诉讼)
- The entire administrative punishment process must follow the principles of legality, fairness, openness, and proportionality
- The APL is said to have introduced *due process* into Chinese administrative law when enacted in 1996

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The Administrative Punishment Law: Transparency

- The original APL did not require disclosure of punishment decisions or their major details, due to early and continuing concerns over alleged privacy and commercial secrets protection and social stability
 - Indeed, some commentators characterize publicity of administrative punishments as a kind of punishment itself – what do you think?
- State Council began promoting transparency around administrative punishment decisions in 2014 “to increase public confidence” and incentivize compliance under policy documents and departmental rules
- 2021 revised APL explicitly requires disclosing final punishment decisions, as well as any modification, revocation or invalidation thereof
 - But only those having an undefined “**definite social impact**” must be published
 - Will this qualification be harmonized with SCS disclosure requirements of administrative punishment decisions a PCI?

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The Administrative Punishment Law

- Its recent revision, taking effect July 15, 2021, provides, for the first time, a definition of “administrative punishment” (行政处罚):
 - An action by an administrative organ taken in accordance with the law to discipline (惩戒) citizens, legal persons and organizations
 - For non-criminal violations of the administrative management order
 - That reduces their rights and interests or increase their obligations
- The key issue is whether an administrative action taken in response to a violation *reduces rights* or *increases obligations*
- An order to correct unlawful acts or situations within a given time period, for example, is *not* considered an administrative punishment
 - Correcting an illegality does not reduce rights or increase obligations beyond what the law provides and requires

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What is administrative punishment?

- The revised APL identifies administrative punishments to include:
 1. warnings and the newly added **circulating a notice of criticism (通报批评)** -- traditionally an administrative sanction within the government bureaucracy, seen as *reputational penalty* as applied to the public
 2. fines and confiscation of illegal proceeds or property;
 3. suspending or revoking a license and the newly added **reduction of qualification levels (降低资质等级)**, previously imposed, for example, on entities under construction, energy conservation and planning laws;
 4. ordering operations suspended (**责令停产停业**), and the newly added **ordering closure (责令关闭)**, **restricting production and operational activities (限制开展生产经营活动)**, and **restricting employment (限制从业)**;
 5. administrative detention, which can only be imposed by public security organs **and other organs designated by law with power to restrict physical liberty**; and
 6. other administrative punishments provided for by laws or State Council regulations.

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How does blacklisting work?

- Each regulatory department determines which violations of their rules are serious enough to require placing the offender on a blacklist, its seriously untrustworthy subjects list (**严重失信主体名单**)
- The blacklist information is shared throughout the listing department's system and with other regulatory departments and the general public:
 - On the agency's website
 - Through the SAMR-managed National Enterprise Credit Information Publicity System in the case of enterprises and other covered entities
 - On Credit China website managed by the National Development and Reform Commission
- Other departments encouraged to take administrative punishments into account when dealing with the blacklisted individual or company on regulatory matters within their jurisdiction over which they have discretion, such as public procurement or licensing qualification

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How does joint discipline work?

- They may also formally agree with the blacklisting agency to impose disciplines (惩戒) within their own sector on blacklisted persons, pursuant to published inter-departmental joint memoranda of understanding (**Joint MOUs**), *if* there is a legislative basis for imposing such discipline
 - See, State Council May 2016 Joint Discipline-Reward Opinions (国务院关于建立完善守信联合激励和失信联合惩戒制度加快推进社会诚信建设的指导意见)
- For example, if the transportation department punishes a company for seriously violating road safety legislation, the securities authorities can agree under a Joint MOU with the transportation department to disqualify that company from making an initial stock offering
 - This is legal (and not an administrative punishment) because securities legislation prohibits initial offerings by companies that have been given administrative punishments for serious violations in other sectors within the prior three years

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How does joint discipline work?

- Other disciplinary measures (SC May 2016 Opinions, MOUs, September 2016 CCP-SC Judgment Defaulter Credit Supervision Opinions):
 - Restrictions or greater scrutiny of market entry, professional credentialing, or licensing
 - Restrictions on participation in government procurement, projects, resource trading
 - Reduced access to government benefits, e.g., financing and grants
 - Higher level of regulatory scrutiny, e.g., inspections
 - Public identification (shaming)
 - Restrictions on personal spending, serving as director, supervisor or senior management of comparable enterprise or entity
 - Most extreme: exclusion/debarment from sector, temporarily or for life
- Newly added administrative punishments in the revised APL of reducing qualification levels and restricting production, operations and employment overlap with some constraint and disciplinary measures listed in May 2016 State Council Joint Credit Actions Opinions and MOUs
 - Intended to provide a basis in law for imposing such measures through department rules?

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Is the SCS credit discipline mechanism legal?

- Professor Peng Chun of Peking University Law School found, in an unpublished study (彭焯, 失信联合惩戒制度的法治困境及出路基于对41份央级惩戒合作备忘录的分) that most identified untrustworthy behaviors and associated discipline measures set forth in 41 Joint MOUs among central departments do have an explicit legal basis, and thus are legal in the formal sense
- However, Professor Peng criticizes the practice of disciplining both the company or organization and its various responsible personnel, encouraged under 2016 SC Joint Discipline-Rewards Opinions, unless there is a legal basis in applicable substantive law for holding both liable
- Some Chinese scholars argue that blacklisting itself, which is intended to impose reputational harm through its disclosure to signal credit risk to the public, should have been included as an administrative punishment under the revised APL

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Is the SCS credit discipline mechanism legal?

- Joint discipline system also criticized for violating the double-jeopardy principle of not punishing the same act twice, once through administrative punishment and a second time through (possibly multiple) additional disciplinary measures from other departments, even if legally based
- Some observe certain disciplinary constraints under the blacklist and discipline system are more severe, longer-lasting and broader in scope than the original administrative punishment they are meant to reinforce, and constitute a re-punishment for conduct on which the administrative punishment was based
- Therefore, the argument goes, placing a company or individual on a "blacklist" and imposing joint disciplines should require following the procedural requirements of the APL

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APL-type due process procedures and discipline process

- In fact, SCS disciplinary measures are increasingly subjected to due process procedures, including public input on new proposed punishment rules, similar to those strengthened in revised APL
- December 2020 SCS Legalization Opinions
 - call for ensuring that untrustworthy disciplinary measures imposed pursuant to the blacklist and joint discipline mechanisms are strictly based on laws, regulations and CCP or State Council policy documents
 - discourage over-penalizing small infractions
 - require compilation, with expert and *public input* and periodic updating, of a national basic catalog of such authorized measures

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APL-type due process procedures and discipline process

- If departmental rules proposed to fill gaps in blacklisting standards, draft standards must be
 - released for minimum 30-day *public comment* period and
 - disclosed through Credit China and other websites after enactment
 - subjected to periodic third-party assessment as to their efficacy
- *Before being blacklisted*, parties should be *notified of the facts, legal basis and their rights*
 - Include *right to object* to the proposed action and *receive a response* within a deadline
 - Right to file administrative appeals or litigation concerning blacklisting

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APL-type due process procedures and discipline process

- More detailed procedures for being listed, getting off blacklist, credit repair, and credit commitments in the works
 - E.g., July 2019 draft SAMR Serious List Joint Discipline Measures, May 2021 NDRC Draft Credit Repair Measures
- Such social credit-related procedural safeguards are already codified in general terms in some provincial regulations, but not yet national social credit-specific legislation