CANADIAN SOCIAL SCIENCE
Vol. **6**, No. **2**, **2010**, pp. 1-19

ISSN 1712-8056
www.cscanada.net
www.cscanada.org

On the Defects of Administrative Monopoly[1] in China's "Anti-Monopoly Law" and Its Improvement

SUR LES DEFAUTS DE LA MONOPOLE ADMINISTRATIF DANS LA "LOI ANTI-MONOPOLE" EN CHINE ET SON AMELIORATION

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Abstract: Regulating administrative monopoly is the major task of China's "anti-monopoly law" and the greatest challenge in its enforcement. "Anti-monopoly law" has done a special chapter on administrative monopoly for the first time, which is a significant breakthrough of our country's legislation on the regulation of administrative monopoly. But, after all, "anti-monopoly law" is a new law, and due to the limitations of legislation, there are many system deficiencies, on the regulation of administrative monopoly in China's "Anti-monopoly law", which make it can not fully come into play. So, it is necessary to perfect the measures that can make up for the system deficiencies.
Key words: anti-monopoly law; administrative monopoly; system defects; measures to improve; economic democracy

Résumé: La réglementation de monopole administratif est la tâche principale de "la loi anti-monopole" en Chine et le plus grand défi dans son application. Pour la première fois, la "loi anti-monopole" a fait un chapitre spécial sur le monopole administratif, ce qui est une percée importante dans la législation sur la réglementation de monopole administratif de notre pays. Mais, après tout, "la loi anti-monopole" est une nouvelle loi, et en raison des limites de la législation, et il

[1] At present and in the foreseeable future in China, administrative monopoly is the main monopoly in the market, which is basically different from the situation that economic monopoly is the main one in market economy countries
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* Received 15 December 2009; accepted 12 March 2010

existe de nombreuses lacunes dans le système de la réglementation de monopole administratif dans la "loi anti-monopole", ce qui l'empêche d'entrer pleinement entrer en jeu. Du coup, il est nécessaire de perfectionner les mesures qui peuvent compenser les défauts du système.

Mots-clés: loi anti-monopole; monopole administrative; défauts du système; mesures visant à améliorer; démocratie économique

FOREWORD

The greatest monopoly problem in the process of Chinese economic transformation and developing market economy is not transnational corporations or foreign-capital enterprise monopoly, not private enterprise monopoly, but widespread administrative monopoly. Administrative monopoly is the result of administrative power's improper intervention in the market after it is distorted and abused, driven by interest, which is essentially administrative malfeasance. Administrative monopoly destroys the order of free competition in the market seriously, hinders the formation of a uniform Chinese market, hampers the effective allocation of social resources, increases social cost and harms the interests of consumers and operators. In addition, administrative monopoly has brought serious political and social harm, hampering China's political restructuring and the construction of harmonious society.[3] So, we can say that without administrative monopoly problem being solved, political democracy and economic democracy can not be achieved in China. Therefore, China must regulate administrative monopoly strictly in the law so as to create a good environment for China's economic and social development.

In august 2008, China's "Anti-monopoly law" gave a special regulation on administrative monopoly, making many breakthroughs in legislation. However, due to various factors unfavorable, there are still many imperfections in the provisions on administrative monopoly in "Anti-monopoly law". Only by constantly perfecting these shortages can China make "Anti-monopoly law" which is called "economic constitution" play its proper role.

1. THE INSTITUTION BREAKTHROUGH OF REGULATING ADMINISTRATIVE MONOPOLY IN CHINA "ANTI-MONOPOLY LAW"

After a legislative process of 14 years, China's "anti-monopoly law" was passed on August 30, 2007, and came into force on August 1, 2008. The provisions on administrative monopoly in "anti-monopoly law" include eight articles in general provisions, the whole fifth chapter and the 51st article in the seventh chapter. Although these provisions can not prevent administrative monopoly completely in present law and political system, they not only reflect the interests and needs of Chinese common people, but also show that China's "anti-monopoly law" has the function of regulating administrative monopoly. For the first time in China, "anti-monopoly law" makes explicit and systematic regulations on administrative monopoly, which shows the progress of china's rule of law. Its main institution breakthroughs are embodied in following aspects:

[3] On April 30th in 2009, the author took advantage of the chance that I was a visiting scholar in University of California, Berkeley, giving an academic lecture named "The Enforcement of China's "Anti-Monopoly Law"" in Stanford University. In the communication after the lecture, I and other Chinese and American scholars both thought that administrative monopoly is the biggest challenge in the enforcement of China's anti-monopoly law and the biggest barrier on the road that China becomes a real market economic country.

1.1 Set a principled regulation on administrative monopoly in general provisions

The eighth clause of "anti-monopoly law" general provisions states that "Administrative departments or organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to eliminate or restrict competition."Setting a principled regulation in general provisions can make accommodate the law to the diversity and complexity of administrative monopoly in realistic economic life. Administrative monopoly in reality is so complex that the law cannot enumerates them completely. The principled regulation gives the Anti-monopoly Law Enforcement Agency discretion which permits it deal with the behaviors that are not clearly included in Chapter 5 but really belongs to the behaviors abusing administrative power to eliminate or restrict competition according to the principle. It can avoid loopholes. At the same time setting it in the general provisions can show the special attention of top legislature on regulating administrative monopoly.

1.2 Enumerate concrete forms of administrative in specific provisions

China's "anti-monopoly law" regulates administrative monopoly behaviors in summary and list. In addition to the principled regulation in general provisions, it also lists specific characteristics of some administrative monopoly behaviors so as to give a comprehensive definition. Listing the concrete forms of administrative monopoly in a special chapter are good for making clear its denotation and external characteristic, which can help the Anti-monopoly Enforcement Agency to judge administrative monopoly behaviors and strengthen the maneuverability of the law. The fifth chapter of "Anti-monopoly law" has totally six clauses discussing the concrete forms of administrative monopoly, which including:

1.2.1 Regulate designating transaction behaviors of executive authority[4]

Designating transaction is an independent form of administrative monopoly in theory (MING Shang, 2008), which is coordinating with the regional blockades and the monopoly of administration departments. But in practice, designating transaction is often a way to achieve regional blockades or monopoly of administration departments. The administrative subjects often designate transactions for local economic interests or the interests of the unit or the department. The basic forms include compulsory sale, compulsory purchase and compulsory use with both operators and consumers as the compulsory targets. Regulating designating transaction activities can preserve the interests of other operators and consumers.

1.2.2 List and restrict regional blockades limiting commodities' free circulation[5]

District monopoly hindered the free circulation of commodities and market competition (ZHENG Peng-cheng, 2002), which partitions the market that should be unified into many narrow regional markets. That hampers the free flow and optimized allocation of resources and harms the unified, open, competitive market system. Article 33 of "anti-monopoly law" has set a detailed regulation on district monopoly, while using the fifth paragraph revealing all the details to make all kinds of district monopoly activities being regulated in "anti-monopoly law", considering that the concrete forms of district monopoly are very complex in practice.

[4] Designating transaction, also known as compulsory trade, refers to the actions that administrative departments and other organizations authorized by them go against the principle of equality and voluntariness of market economy and make use of the administrative power given by the State to require, or require in disguised form, units or individuals to deal in, purchase or use only the commodities supplied by the undertakings designated by them. See Article 32 in the "Anti-monopoly Law".

[5] District monopoly, also known as horizontal monopoly or regional blockades, is local protectionism between horizontal administration areas and the most typical, most pervasive and most serious form of administrative monopoly. It mainly includes restricting access and restricting export and restricting access is the most common one. See Article 33 in the "Anti-monopoly Law".

1.2.3 Restrict the activities eliminating or limiting bidding and tendering[6]

Bidding and tendering is a kind of competing procurement method, which requires the principles of openness, fairness and impartiality to insure all the bidders having equal chance so that tenderees are full of choices. Therefore, in keeping with the character of market economy, the bidding mechanism is a kind of normative market transactions, which can optimize the allocation of resources. At present, governments often abuse their administrative power, excluding or restricting nonlocal undertakings to participate local bidding activities in bidding processes. This would destroy the competition mechanism in biddings and separate a unified national market with great harmfulness.

1.2.4 Restrict the activities excluding or limiting investment or establishing branch offices locally[7]

In practice, local governments implement regional protection and exclude non-local undertakings from making investment or establishing branch offices locally for their own interests in some high yield projects, with the concept that every miller draws water to his own mill, which seriously injures the interests of other undertakings and hinders the establishment of a unified national market.

1.2.5 Restrict the activities compelling undertakings to engage in monopolistic conducts[8]

Local governments often promote concentrations of undertakings or compelling them to engage in monopolistic conducts under the pretence of adjusting the industrial structure. This violates the market principles of voluntariness, equality and compensating at equal values, which not only injures enterprises' right to independent management but also distorts market competition heavily. So, this kind of behavior must be regulated.

1.2.6 Extend the scope of administrative monopoly activities to involve abstract administrative act[9]

Due to that administrative behaviors are external expressions of administrative monopoly, we should learn from this method and divide administrative monopoly actions into specific administrative monopoly actions and abstract administrative monopoly actions.

Specific administrative monopoly refers to the administrative monopoly actions imposed on specific administrative counterparts by administrative subjects in the way of specific administrative acts. Its object is concrete and definite and its content and result will directly restrict the competition in the special market and injure the right of related subjects with litigable quality.

The abstract administrative action refers to the action that administrative organs set out normative documents for unspecified persons with a general binding force. Its objects are extensive and not certain(ZHU Wei-jiu, WANG Cheng-gong, 2005). The normative documents as the basis of abstract administrative monopoly action can be applied to again and again in an uncertain period. Administrative legislative act and formulating normative documents are the main expression of abstract administrative monopoly action without litigable quality. The administrative monopoly actions in China are mostly abstract administrative monopoly so that many behaviors restricting competition have legitimacy

[6] Bidding and tendering refers to a kind of market transaction that purchasers put forward the purchase conditions and requirement in advance and invite many bidders to participate in the tender and choose the transaction object in accordance with stipulated procedures. See Article 34 of the "Anti-monopoly Law".

[7] See Article 35 of the "Anti-monopoly Law".

[8] See Article 36 of the "Anti-monopoly Law".

[9] See Article 37 of the "Anti-monopoly Law".

apparently(YING Song-nian,1999).

The reason for this phenomenon is mostly that many law and administrative regulations give the power of formulating rules and regulations or normative documents to various administrative departments without effective supervision and restriction mechanism, which causes that many subjects of administration abuse this legislative authority to expand their power and implement administrative monopoly actions. As the objects of this kind of behavior are unspecified and can be applied to repeatedly, it is more harmful than specific administrative monopoly, which should be restrained strictly(DUAN Hong-qing, 2007). Restricting abstract administrative monopoly is of great significance to the building of a free and fair market competition order in China, which reflects that the China's economic law has the special function of both correcting market failures and adjusting government failures(SUN Jin, 2001).

1.3 Provide Anti-trust Commission(ZHANG Qiong, 2007)

The state council establishes the anti-monopoly committee to be in charge of organizing, coordinating and guiding anti-monopoly work. It broke the legislative tradition that legislation does not involve the institutions expenditure and organization, which embodies the spirit of the modern rule of legal authority.

Most countries have not provided a institution like Chinese Anti-trust Commission, but give all the duties of this commission to anti-monopoly enforcement authority. Under the circumstance that there are more than one enforcement authorities in china, which can not be alter in a short time, it is necessary for the state to establish anti-trust commission to "be in charge of organizing, coordinating and guiding anti-monopoly work"(ZHANG Qiong, 2007). In addition, the work of studies on drawing up competition policies, and formulating and publishing antitrust guide must also only be given to antitrust commission.

1.4 Provide the legal liability of administrative monopoly actions

Article 51 in "anti-monopoly law" provides:" Where an administrative development or an organization authorized by laws or regulations to perform the function of administering public affairs abuses its administrative power to eliminate or restrict competition, the department at a higher level shall instruct it to rectify ； the leading person directly in charge and the other persons directly responsible shall be given administrative sanctions in accordance with law. The authority for enforcement of the Anti-monopoly Law may submit a proposal to the relevant department at a higher level for handling the matter according to law. Where otherwise provided for by laws or administrative regulations in respect of administrative departments or organizations authorized by laws or regulations to perform the function of administering public affairs that abuse their administrative power to eliminate or restrict competition, such provisions shall prevail."

The law stipulates clearly the legal liabilities that the liability subjects of administrative monopoly actions to ensure that the regulation of administrative monopoly can make actual effects.

2. THE SYSTEM DEFICIENCIES ON THE REGULATION OF ADMINISTRATIVE MONOPOLY IN CHINA'S "ANTI-MONOPOLY LAW"

The publishing of China's "Anti-monopoly law" means that the regulating of administrative monopoly has a definite legal basis. However, in the process of establishing this law, administrative monopoly is the most controversial issue, which determines that the law is finally a product of the game between

various interest groups and their compromise. Thus, although the “Anti-monopoly law” prohibits administrative monopoly actions definitely, system deficiencies still exist, embodied in the following aspects:

2.1 There are deficiencies on the regulation of administrative monopoly in “Anti-monopoly law”

2.1.1 The definition of administrative monopoly is not provided

“Anti-monopoly law” has not used the conception of “administrative monopoly” and it just provides “abuse of administrative power to eliminate or restrict competition”, which goes against the definite identification of administrative monopoly.

At the same time, the law has not defined the definition and extent of “abuse of administrative power”. The different understanding of “abuse of administrative power” immediately lead to the difference and confusion in the identification of administrative monopoly.

A common belief is that the essence of "abuse of administrative power" is the abuse of discretionary power, whose main expression is arbitrarily discretion violating statutory goal and obviously violating common sense, which mainly applies to the judgment of freedom administrative behavior. In other words, abuse of administrative power is just one of the illegal administrative activities, which refers to the concrete behavior that subject of administration wrongfully performs administrative power with its competence violating statutory goal (HU Jian-miao, 2000). But such understanding of “abuse of administrative power” would just aim at freedom administrative behavior but not include restrict administrative activities and abstract administrative activities. When it was applied to administrative monopoly, the conclusion will be drawn that the “anti-monopoly law” can just restrict the administrative monopoly activities that executive authority abuses discretionary power, but can not govern restrict the administrative monopoly behaviors that are caused by administrative activities and abstract activities which widely exist in practice. It will narrow the extent of administrative monopoly that is regulated in “anti-monopoly law”, which directly leads to vast abstract administrative monopoly activities free from the legal regulation.

2.1.2 The protection extent of state monopoly is not definitely provided

Article 7 of “anti-monopoly law” provides:“With respect to the industries which are under the control of by the State-owned economic sector and have a bearing on the lifeline of the national economy or national security and the industries which exercise monopoly over the production and sale of certain commodities according to law, the State shall protect the lawful business operations of undertakings in these industries.” This is actually a protection of state monopoly.

In China, owing to the long-term planned economy and the state interfering economy operation overall, people entered into a mindset that the government and the state were the same subject and administrative monopoly was the same to state monopoly. Actually, state monopoly is operated according to public policies and laws formulating by the legislature, which is good for national interests and social public interests and is legal monopoly. But administrative monopoly without legal basis is illegal monopoly, which stands for local interests or department benefits and the benefits of enterprises in this area or this department (SUN Jin, 2003).

Considering scale economies effect and national economy security, state monopoly is necessary in some industry. But the protective scope of state monopoly is not definitely regulated in “Anti-monopoly law”, which makes some state-owed enterprises implement administrative monopoly in the name of state monopoly(ZHU Jia-xian, 2007).

2.1.3 The universal existing problem of reverse discrimination is ignored

Legislative authority may take it for granted that only foreign enterprises and commodities may suffer discrimination, so "anti-monopoly law" just prohibits discrimination against foreign enterprises. However, there are many reverse discrimination phenomena in practice, which is that many regional governments are making a good effort to attract foreign investment because they think "guest speakers are better speakers" and prefer foreign capital. Local private medium-sized and small enterprises are set under pressure. The reason is just that some officers can not get rid of their contorted concept on achievement that foreign capital can bring a large number of capital for this locality that can promote the raising of local GDP and local medium-sized and small enterprises can not do that. The result is that local competitors are restricted even pushed out due to the reverse discrimination against local enterprises. It's a large fault that "Anti-monopoly law" ignores this phenomenon.

2.2 The regulation of Anti-monopoly Commission in "Anti-monopoly law" is not perfect

The main duty of anti-monopoly commission is investigating and assessing competition in the market and formulating competition policies, which is of great significance to guide the market behavior of enterprises and for the national-wide anti-monopoly work. It requires that the members of anti-monopoly commission must have scholarly professional knowledge and satisfy strict appointment conditions.

But china's "anti-monopoly law" hasn't provided the appointment conditions and work rules of the members of anti-monopoly commission, which leads to that the commission are consists of ministry class leaders of each anti-monopoly sections without an expert.[10] This commission has enough authority but can not satisfy the requirement of specialty high efficiency and independence.

At the same time, according to the relevant regulation of the deliberation and coordination agencies of the State Council, as a deliberation and coordination agency anti-monopoly commission has no authorized size and is not enforcing authority, which has no substantial power, especially power of rule making and can not take on the responsibility of "organizing, coordinating and guiding anti-monopoly work" (LI Guo-hai, 2006).

2.3 The regulation of authority for enforcement in "Anti-monopoly Law" is not perfect

2.3.1 The status quo of china's enforcement regime of the "Anti-monopoly Law"

China has taken an anti-monopoly enforcement system of "three levels and multi-institution". The enforcement levels are: (1) anti-monopoly commission; (2) the enforcement agencies stipulated by the State Council to take the anti-monopoly enforcement duty; (3) the relevant agencies in the provincial people's government authorized by Anti-monopoly Law enforcement agency under State Council. Namely the Anti-monopoly Law enforcement agency under the State Council is in charge of organizing, coordinating and guiding anti-monopoly work; concrete enforcement is undertaken by the enforcement agencies stipulated by the State Council; the government of provinces, autonomous regions and municipalities directly under the central government establish relevant anti-monopoly enforcement agencies according to authorization (GUO Zong-jie, 2007).

As for concrete enforcement agency, according to China's current laws and regulations related to anti-monopoly, Commerce Department, National Development and Reform Committee and the State

[10] According to "Notice of the General Office of the State Council on the Main Functions and Members of the Anti-monopoly Commission of the State Council"(No.104[2008]), a committee led by the vice-premier Qishan WANG and consisting of the main leaders of Commerce Department, NDRC and SAIC was founded on December 28,2008.

Administration of Industry and Commerce are in charge of the concrete enforcement of the "Anti-monopoly Law". Besides, anti-monopoly enforcement agencies may come down to several industry regulation organizations, such as SERC, CBRC and CIRC and so on. The anti-monopoly enforcement agencies are likely to fall into the situation of "3+X"(WANG Jian, 2007). It brings many drawbacks inevitably.

2.3.2 The drawbacks of current anti-monopoly enforcement system

(1) Lacking independence. Commerce department, national development and reform committee, the state administration of industry and commerce and their subordinate bodies are all the components of the government. According to administration principles, they are directly leaded by governments at all levels and tied to executive authorities tightly. The intention of protecting local enterprises or some big business often exists behind administrative monopoly in china. The relationships between some governments and enterprises are so complex that it is very difficult to investigate them. If the anti-monopoly enforcement agency doesn't have enough independence, it can't fight against the governments' behaviors of abusing administrative power to limit competition and can't restrict administrative monopoly actions effectively (WANG Jian, 2006).

At the same time, all these enforcement agencies are under the ministries and commissions directly under the state council, which results that the level of anti-monopoly enforcement agencies is low without enough authority and that they can't keep their independence because their competent departments as subordinate organizations, especially national development and reform committee, are the main institution in charge of formulating and executing national macro-economic policies. NDRC has ever published some regulation with the quality of administrative monopoly, such as "Stopping of Acts of Dumping at Low Price Provisions" published by NDRC in 1999, much less CBRC, CIRC and so on. The result is that it is difficult for the anti-monopoly enforcement agencies to execute the law independently and fairly.

(2) Lacking professional law enforcement officials. The anti-monopoly enforcement officials in the institutions mentioned above are general administrative staffs who mostly lack specialized knowledge of economics and law. Administrative monopoly is usually very complex and comes down to various branches of knowledge, which makes the enforcement officials unequal to the anti-monopoly enforcement work.

(3) Lacking definite rules of power. As there is powerful administrative power behind administrative monopoly, the anti-administrative monopoly enforcement agency must have definite and strong power when it regulates administrative monopoly. Only in this way can it have definite legal basis while regulating administrative monopoly and eliminate the interference from executive authority to play its role truly. But the "Anti-monopoly Law" just provides the power of inspection, inquiry, consult and reproduction to anti-monopoly enforcement agencies without definite regulation of other power.

(4) Lacking a unified coordination mechanism. At a result of the restriction from various interests and legislative technique, the current provisions about enforcement agencies in "anti-monopoly law" are just a compromise to current system. The system of multi-sector disrupt enforcement causes the situation that different enforcement agencies fight for jurisdiction or pass the buck and the problem of supervision excess, vacancy and dislocation, which results the defects that their power and responsibilities are not well matched and the enforcement is of high cost and low efficiency. Even worse, duplicate law enforcement makes the measurement and enforcement criterion inconsistent, which violated the requirement of market economy uniform rules and damages the fairness of enforcement result (YOU Quan-rong, 2006).

Meanwhile, the "anti-monopoly law" hasn't provided a definite provision about the relationship between anti-monopoly enforcement agencies and industry regulation authorities. China sets up competent authorities or regulation authorities in the industries of power, railway, oil, banking, security which affect the national economy and the people's livelihood. When the enterprises in these industries carry out administrative monopoly, which authority should be in charge ,the regulation authority or the anti-monopoly enforcement agency? And which law should be applied to, the laws of industry regulation

or the "anti-monopoly law"? They are the problems that can't be avoided in the process of anti-administrative monopoly in China (LI Guo-hai, 2006).

2.4 The legal liabilities of administrative monopoly provided by the "anti-monopoly law" are imperfect

2.4.1 The principle that other laws and regulations govern is unreasonable

According to the section 2 of Article 51 of the "Anti-monopoly Law", some administrative laws and regulations are prior to the "Anti-monopoly Law" established by Standing Committee of the National People's Congress, which will weaken the authoritativeness of this law and affect its enforcement effects. The industries of telecommunication, power, banking, postal service and railway all have their own regulators and competent authorities. If these institutions all have other regulations whose have higher legal authority than the "Anti-monopoly Law", the will "Anti-monopoly Law" exist only on paper? And China's "Anti-monopoly Law" has many provisions of industrial policies about social public interests. Although these contents are rational in part, they make enterprises and governments able to implement administrative monopoly by arguing that industrial policy is prior in the name of "social public interests"(LI Hai-tao, 2008).

2.4.2 The regulation of legal liabilities of administrative monopoly is imperfect

Article 51 of the "anti-monopoly law" provides where administrative department and other organization eliminate or restrict competition, the department at a higher level shall instruct it to rectify; the leading person directly in charge and the other persons directly responsible shall be given administrative sanctions in accordance with law. The problem of this regulation is that the law just provides administrative responsibilities to administrative monopoly actions, which is different from the regulation of economic monopoly actions.

On the one hand, the "anti-monopoly law" provides administrative liabilities and civil liabilities to economic monopoly actions and just provides administrative liabilities to administrative monopoly; on the other hand, the administrative liabilities of them are different, where administrative sanction is the main type of administrative liabilities of economic monopoly actions while administrative punishment is the main type of that of administrative monopoly actions(WANG Xiang-ye editor, 2008). Administrative monopoly inevitably damages the civil rights and interests of some other enterprises while protecting some enterprise, and invades the civil rights and interests of consumers, which should bear civil liability certainly. Besides, administrative monopoly violates administrative law, civil law and criminal law, which determines that the liability of administrative monopoly must be a compositive liability including administrative liability, civil liability and criminal liability(WANG Wen-jie, 2004).

Meanwhile, the liability of "instructing it to rectify" is hard to be applied in legal practice because the subject who can request the department at a higher level to instruct it to rectify and the time limit of instructing it to rectify and the legal liability of refusing rectifying are all not definitely provided. Besides, "instructing it to rectify" is not a sanction in itself, which just requires the violator to perform statutory obligations, correct unlawful act, remove negative effects and rehabilitate, so it is educative but not punitive in essence, which is usually replied to administrative inappropriateness and violation of law of administrative procedure as a relief. However, as administrative monopoly violates the law obviously, it is a kind of serious administrative violations of laws, but not administrative inappropriateness and not violation of law of administrative procedure. So it is inappropriate to apply "instructing it to rectify" to administrative monopoly(SUN Jin, 2009). The "anti-monopoly law" should formulate that the authoritative agency should declare that the administrative monopoly act of subjects of administration is invalid but not restrict them to rectify.

The "Anti-monopoly Law" provides administrative liability and civil liability to the three kind of economic monopoly actions while only two kinds of administrative liabilities of "restricting it to rectify" and "administrative punishment" which are not yet measures of administrative sanctions to

administrative monopoly. This "Different punishment to the same illegal act" makes the rule of legal liability of administrative monopoly act vary unreasonable.

2.4.3 Exclude the jurisdiction of the Antimonopoly Law Enforcement Agency over the sanction subject against administrative monopoly act

Article 51 in the "anti-monopoly law" provides that the direct sanction subject against administrative monopoly act is "higher authority" and the anti-monopoly law enforcement agency only has the suggesting right but no punishment power and can't make a penalty decision directly. This will weaken the anti-monopoly law enforcement agency's ability of regulating administrative monopoly act, which goes against the achievement of the law's due function. The reasons are as follows:

Firstly, the higher level and subordinate office of government agencies trend to protect each other. In addition, there are often local interests or departmental economic interests behind administrative monopoly act, and many monopoly acts are carried out according to the order of the higher level or with its silent blessing.

Secondly, due to this provision, although the anti-monopoly law enforcement agency has presented a proposal, the higher level may act upon the proposal and may not act upon it because the proposal is not compulsory.

Finally, on the one hand, "higher authorities" is not a certain authority or even a certain judicial authority. If the higher authority is authorized to correct the illegal acts of its subordinate authorities, the law should provide a series of procedures such as registration, investigation, adjudication and so on. On the other hand, the complexity of administrative monopoly determines the high degree of professionalism of its enforcement, which demands for the law enforcement officials with enough knowledge of the science of law and economics which is often lacked by the officials in the "higher authorities" (YANG Lan-pin, 2006).

2.4.4 There is no provision about the legal liability of the enterprises benefiting from administrative monopoly and their executives

The "Anti-monopoly Law" hasn't provided corporate liability to the enterprises benefiting from administrative monopoly, which means that the benefiting enterprises can just share the profit of administrative monopoly act without any liability and carry out administrative monopoly however they like. The "Anti-monopoly Law" has not either provided any kind of liability to the enterprises' executives. In other words, the subjects of liability of administrative monopoly do not include the executives of the business operators such as directors, managers and so on or other persons directly liable. So they would push their enterprises to carry out administrative monopoly for high monopoly profits.

Leaving out the corporate liability of benefiting enterprises and personal liability of their executives is actually a kind of encourage and connivance of the administrative monopoly acts carried out by enterprises and their executives by the law.

2.5 The judicial remedy system for administrative monopoly in the "Anti-monopoly Law" is not perfect

According to the 12th article of "administrative procedural law"[11], abstract administrative acts are excluded from the scope of the court accepting cases. And according to the provision that "The authority for enforcement of the Anti-monopoly Law may submit a proposal to the relevant department at a higher

[11] The provision is that: "The people s courts shall not accept actions concerning administrative rules and regulations, or decisions and orders with general binding force formulated and promulgated by administrative organs."

level for handling the matter according to law" in the 51st article of the "Anti-monopoly Law", the law hasn't give the anti-monopoly law enforcement agency the power of dealing with abstract administrative monopoly actions directly and the anti-monopoly law enforcement agency can just suggest the executive authorities carrying out abstract monopoly actions or the higher authority change or revoke this action but it has no power to order them change or revoke them directly. So the provision of abstract monopoly in "anti-monopoly law" is not practical actually, and the abstract administrative monopoly actions can't get judicial remedy.

China hasn't established judicial review structure for specific administrative monopoly, and although a case about specific administrative monopoly is accepted by the court, the court can just declare the specific administrative action invalid or revoke it, but can not try the order, instruction or reply as the basis of the action. The result is that although the specific administrative action is declare invalid or revoked, the order, instruction and reply as its basis are still valid, which make the administrative monopoly be able to revive.

Meanwhile, the "anti-monopoly law" just provides administrative approaches as the remedy for administrative monopoly and it hasn't provide the enterprises and consumers injured by administrative monopoly with neither the right of filing a civil lawsuit nor the right of bringing an administrative lawsuit. The corporate and consumer victims can just start the supervision procedure by impeaching or accusing it to the higher administrative authority or petition letter, or expose it with the help of news media. However, these remedies are indirect and weak, far from being enough to protect their lawful rights and interests(SHANG Ming-zhu editor, 2008).

3. IMPROVEMENT MEASURES OF CHINA'S ANTI-MONOPOLY LAW AGAINST REGULATING ADMINISTRATIVE MONOPOLY

3.1 Make detailed rules for implementation of Anti-monopoly law

There are only 8 charters and 57 articles in China's Anti-monopoly law, broad-brush, principled and flexible. There are various problems in the application of a specific case such as ambiguity comprehension and difficult to define. The implementation of Anti-monopoly law is highly specialized which demand the clarity of law. Therefore, to improve the actual operation, we need to make detailed rules for implementation of Anti-monopoly law as soon as possible. Only by this can ease the problem of too principled regulations fundamentally, which resulted that many provisions do not have practical operation and caused implementation difficulties. The "*procedure provisions for industry and commerce preventing from excluding or restricting competition by abusing administrative power*" issued by the State Administration for Industry and Commerce on 1st July, 2009 have great active effect but far away from satisfaction.

At meanwhile, we should pay attention to the coordination between the current "Price Law" and various industry supervision law and modify the "Anti-Unfair Competition Law" so as to avoid the conflict among different about administrative monopoly.

3.2 Improve the defects on administrative monopoly of Anti-monopoly Law

On the contents about administrative monopoly of Anti-monopoly Law, we should improve from such aspects:

3.2.1 Defining the conception of administrative monopoly

The Anti-monopoly Law limited administrative monopoly as "excluding or restricting competition by

abusing administrative power". Such provisions can not cover all administrative monopoly. We should define the administrative monopoly as "excluding or restricting competition by illegal administrative behaviors. The connotation of "illegal administrative behaviors" is much more than that of 'abusing administrative power", which could regulate all kinds of administrative monopoly comprehensively. Besides, we should clear that the "law" should be limited to constitution, law and administrative rules and regulations. If it expands to regulations or local laws and regulations, there may cause the problem of administrative bodies creating rights for them to implement monopoly.

3.2.2 Defining the scope of "the industries concerning the state economic lifeline and state security"

According to China's specific conditions, we should make clear that only the minor military industry belongs to "the industries concerning the state economic lifeline and state security", whose administrative monopoly should be protected. And also we should make clear the scope and extent of these industries and sanction those who unauthorized expand their scope and extent (SUN Jin, 2009. Or ZHU Jia-xian, 2007, p.143).

3.2.3 Clarifying that prohibiting reverse discrimination

For the universal issue of reverse discrimination, to protect the fair position for both local and foreign enterprises and maintain a fair economic order, the Anti-monopoly Law should clarify that the local government should not do any reverse discrimination against local private small and medium enterprises and prohibiting any reverse discrimination.

3.3 Improve the regulations on Anti-monopoly Committee

The function decide that the Anti-monopoly Committee is not equal for anyone, who should have comprehensive knowledge including law, management and economic and so on. We should learn from the foreign concerning practice, setting up a rigorous process of personnel selection and qualification review and the committee should including jurists and economist at least. At the same time, to enable the coordination mechanism anti-monopoly committee really play a role, the committee should be granted economic participation economic policy decision-making rights and the rights of issuing inhabitation of specific administrative monopoly and the power of advising to stop those local regulations which violate the anti-monopoly law and other substantial power.

3.4 Improve the regulations of implementation agency of anti-monopoly

For the disadvantage and current situation of enforcement agency of anti-monopoly, n the processing of improving the enforcement agency of anti-monopoly e should persist:

3.4.1 The principle of high independence

The high independence of anti-monopoly enforcement agency is a premise to ensure the just and efficiency.

As the great power of monopoly, administrative monopoly especially, if the enforcement agency is not independent, the anti-monopoly law can not be practiced and the task of anti-administrative monopoly can not be achieved. (LI Guo-hai, 2006, p.103)Therefore, it should ensure the enforcement officers the independent power to deal with administrative monopoly from system design. To ensure the just and independence of anti-monopoly enforcement agency, there should be some provisions to regulate the obligations of the enforcement officers. During the tenure the enforcement officers should not sever any duties in other organs or enterprises or in other ways to participate in market transactions. Meanwhile, the rights of enforcement officers should be protected by the system, and they can not be dismissed or

removed without legal process and statutory subject matters to ensure the independence of agency and officers. If the officers fail to do their duties, they will be deprived from the enforcement officers for life long, except that they should be removed from their duty and they are accountable for their respective liabilities.

3.4.2 Specialization of the enforcement officers

The main difference of anti-monopoly law and other laws is its high principle and technical, which decide the complexity and great impact of the cases of the anti-monopoly enforcement. All these elements require deep professional knowledge and superb business technology. The practice of anti monopoly in foreign countries illustrate that anti-monopoly is not an ordinary job can be handed by any administrative staff. We should accelerate the construction of a high-quality professional anti-monopoly law enforcement staff to response to China's administrative monopoly.

3.4.3 The principle of clear authority

As long as the anti-monopoly law enforcement agencies are granted clear authorities, the task of anti-monopoly can be achieved. China's Anti-monopoly Law only provide inspection right, interrogation right, checking right and copying right, all these rights may be not enough when regulating economic monopoly and it is more tough to regulate those administrative monopoly with great administrative background.

In the light of special nature of administrative monopoly, reference to the foreign practice, the anti-monopoly enforcement agencies should be granted the following rights: rule-making right, administrative examination and approval right, administrative compulsory measures (such as force to stop, force to dissolve, seal and seizure) administrative penalty right, administrative decision right, administrative punishment recommendation right and the right of transferring to the judicial to dispose(YOU Quan-rong, 2006, p.98). Besides, for the concrete administrative monopoly behavior, they should be granted regulation dissent right, that is, when regulations are possible to cause administrative monopoly, they should make objection to the appropriate higher authority or the higher Standing Committee so as to remove the regulations which violate the anti-monopoly law.

3.4.4 The principle of multi-agency coordination

In the view of the present occasion of China' multi enforcement agency of anti-monopoly law, it is necessary to coordinate the relationship of the three main enforcement agency, that is , the State Administrative for Industry and Commerce, Development and Reform Committee and Commerce Department. In the process of law practice, they should communication with each other and share the information and even establish joint conference system like the Central Bank, Stock Supervisory Committee, Bank Supervisory Committee and Insurance Supervisory Committee to ensure the uniformity of the identification and treatment of the same or similar cases to guarantee the fairness and authority.

Meanwhile, it is also necessary to coordinate the relationship between anti-monopoly enforcement agencies and other industry regulators. Most of China's monopoly industries have their own supervisory agencies. If each industry regulators get the exclusive jurisdiction for the industries they supervised, then the anti-monopoly enforcement agencies will be of no use. Because when the industry regulators implement their tasks they will stand by the supervised party. Most of China's realistic administrative monopoly is mainly from these supervised industries. In this point, we should draw on foreign experience, there's no right to deal with administrative monopoly cases for the industry regulators (GUO Zong-jie, 2007).

Finally, when the conditions are ripe, it is necessary to build an independent anti-monopoly implementation agency, which is directly under the State Council and its finance system and personal system is independent. For the local branch implement agencies should adapt vertical leadership.

3.5 Improve the liability system of administrative monopoly

3.5.1 Unify the legal liability of administrative monopoly

As before the Anti-monopoly Law was issued, some industry regulators are responsible for the industry competition order, such as Bank Supervision Committee and Electric Power Supervision Committee. These departments made their own industry law, such as Telecommunication Act, Air Law, Electric Power Law and some other issued law, Anti-unfair Competition law and Price law. These regulations are contradictory against the Anti-monopoly law on the legal liability of administrative monopoly. It is ought to alter and delete those regulations which violated the Anti-monopoly Law so as to build effective coordination and combination system and unify the legal responsibility of administrative monopoly law (Mingzhu Shang editor, 2007,p.247).

3.5.2 Improve the administrative liability system of administrative monopoly

First, it is to improve the contents of administrative liability of administrative monopoly subjects. Anti-monopoly law limited the administrative liability of administrative monopoly subjects to "correct ordered by the higher authority", which can not play the role of reprimand. It should also include dismissing the illegal administrative action, declaring null, administrative compensation and administrative punishment. Among these, the dismissing the illegal action and declaring null are set for abstract administrative monopoly.

Then, it is to improve personal liability of administrative monopoly subjects. Although the administrative monopoly action was made on the name of administrative executive authority, the policy-makers and practitioner are those persons directly in charge and other responsible persons. Therefore, the person directly in charge and other responsible persons should take personal responsibility. Anti-monopoly Law should increase the personal liability of administrative monopoly subjects. At the same time they should make clear the means and application conditions of liability.(WANG Yan-lin 2005,p.73)

3.5.3 Improve the civil liability system of administrative monopoly

The subject of administrative monopoly is a bit special, most of which are the government and its organs. According to Article 121 in the "General Principles of the Civil Law" in china, administrative organs can also be the subject of civil liability.

From the perspective of civil law, administrative monopoly act is an action infringing the property rights of the operators who are restricted in competition, which belongs to the scope of civil tort. Therefore, if an administrative monopoly act causes economic loss to citizens, legal persons or other organizations, the doer should bear civil liability(SUN Jin, 2009, *Journal of law application*). The liability method may include stopping the infringement, eliminating the obstruction, compensating for the damage and so on according to the provision in the "general principles of the civil law", among which compensating for the damage is the most important. We can learn from the 20th article in the "law against unfair competition" and provide definitely the calculation method of administrative monopoly damage compensation, scope of compensation and just claim.

3.5.4 Improve the criminal liability system of administrative monopoly

As a kind of unlawful act, the social harms caused by administrative monopoly act are far more serious than some economic crimes in the "Criminal Law", so it is necessary to take some measures of criminal law to restrain it. And Article 397 in china's "Criminal Law" provides that "State personnel who abuse their power or neglect their duties, causing great losses to public property and the state's and people's interests, shall be sentenced to not more than three years of fixed-term imprisonment or criminal

detention; and when the circumstances are exceptionally serious, not less than three years and not more than seven years of fixed-term imprisonment." As you see, china's "Criminal Law" confirms that administrative monopoly act may violate criminal law under certain conditions.

Internationally, it is a common practice in many countries' anti-monopoly laws to set or strengthen criminal liability in anti-monopoly law and criminal liability is a legal means of the essence to stop administrative monopoly effectively. For example, Article 21 of Chapter 6 in the Law of the Russian Federation on Competition and the Limitation of Monopolistic Activity on Goods Markets said that "the federal administrative authorities, administrative authorities in Russian federation departments and municipal officials, commercial organizations, non-profit organizations and their operators, citizens (including personal entrepreneurs) will be pursued to bear civil, administrative or criminal liability when they are sentenced to have violated anti-monopoly law." America also published the "Antitrust Criminal Penalty Enhancement and Reform Act" in 2004 and increased antitrust criminal penalty.

China's anti-monopoly law should add criminal liability and set that the person directly involved in a serious administrative monopoly will be condemned of set term of imprisonment together with a fine. It can make some flexible design on the system arrangement and do not pursue the subject of administrative monopoly to bear criminal liability but just pursue its responsible personality to bear criminal liability(YANG Wei, WANG Wei-nong, 2007).

3.5.5 The subject exercising the power of sanction on administrative monopoly should be Anti-monopoly Law Enforcement Agency

According to the provision in china's anti-monopoly law, the subject exercising the power of sanction on administrative monopoly is the "higher authorities", the anti-monopoly law enforcement agency just has the right of proposing suggestions, and it does not the power of sanctions. According to the general understanding, the anti-monopoly law enforcement agency is, of course, the subject of punishing administrative monopoly acts because there are many common grounds between the sanction of administrative monopoly and that of economic monopoly and the anti-monopoly law enforcement agency can deal with it professionally. On the contrary, the higher authority of administrative monopoly can't punish administrative monopoly acts effectively as they are not professional and trend to protect their subordinate bodies. So it should be provided that the anti-monopoly law enforcement agency has the power to punish administrative monopoly and at least be given the compulsory power of proposing sanction suggestion.

3.5.6 Set up a provision of sanction on the corporate liability of the enterprises benefiting from administrative monopoly

Administrative monopoly is just like bribery and every administrative monopoly act has its beneficiary which is the enterprise being protected. If only the subject of administrative monopoly and its officials are punished while the enterprise benefiting from it is not punished, the enterprise would just enjoy the profits from administrative monopoly without bearing the risk of it, which is obviously unfair. Therefore, we should set up a provision of sanction on the corporate liability of the enterprise benefiting from administrative monopoly, and pursue it to bear civil or administrative liability (such as compensation, revoking the business license and so on) according to its subjective viciousness and the objective results. If the circumstances are serious the unit should be investigated criminal liability according to the criminal law and be imposed a fine.

3.5.7 Set up a provision of sanction on the personal liability of executives of the enterprise benefiting from administrative monopoly

In sharp contrast with China, all the countries having anti-monopoly law in the world definitely provide that directors, managers and other senior management members will bear corresponding legal liability if the enterprises they work in carry out monopoly act illegally because the monopoly acts carried out by

operators need to go through the decision-making phase and implementation phase and the directors, managers and other senior management members are the decision maker and executor(YOU Quan-rong 2006, p.182). The situation is more obvious on administrative monopoly. If the executives of the enterprise benefiting wouldn't bear legal liability for the administrative monopoly act of the enterprise, the legislative purpose of the "anti-monopoly law" will be very difficult to be realized.

So, the "anti-monopoly law" should provide that unless the directors, managers and other senior management members can prove that they have made proper efforts to prevent the enterprise carrying out the administrative monopoly act, the executives of the enterprise should bear corresponding legal liability for the monopoly act.

3.6 Establishing a judicial remedy system for anti-administrative monopoly

3.6.1 Establishing the per se rule for administrative monopoly

The core problem of anti-monopoly is to establish a proper illegality judgment rule. Per se rule and reasonable rule are the two basic principles to judge monopoly illegality.

When determining whether an act is administrative monopoly, if the per se rule is adopted, the plaintiff only need to prove that the market share of the monopoly enterprise is more than a certain amount or its act is prohibited by the law. Then, even though the defendant considers the act will promote competition, the law will identify it as an administrative monopoly act and penalize or prohibit it. If the reasonable rule is adopted, the court needs to determine it after measuring the act's influence on the market roundly case by case. If the act restricts competition in form and has the function of promoting competition or other social overall benefits at the same time, the act will be considered to be legitimate. And only the act restricting competition unreasonably is illegal. On this ground, some scholars in china argue that the reasonable rule should be adopted to identify an administrative monopoly act (YU Dong-hua, 2008).

The author disagrees with this viewpoint. Considering China's actual condition, the illegality judging principle of administrative monopoly act should adopt the per se rule, which is mainly because: (1) the criterion of per se rule is explicit. If the per se rule is put to use, as there is a explicit boundary line between the legal and illegal, it is very easy to judge if an act is administrative monopoly act. At this stage that legal experience is extremely scarce, the professional quality of the judges and anti-monopoly law enforcement officials it requests is low, which suits China's actual conditions. On the contrary, the reasonable rule is equivocal. It requires analyzing and comparing the reasonable and unreasonable facts of the concrete behavior. For lack of a explicit legislative guideline, the definiteness and consistency of this rule is weak and it is very flexible, so the discretion of the judges and law enforcement officials is definitive, which is a big challenge of the judicial structure and the quality of the judges and law enforcement officials. So, in this way, the reasonable rule can be applied in China (ZHENG Peng-cheng, 2005). (2) The per se rule can save the litigation cost of anti-monopoly sanctions. When per se rule is used, the court or anti-monopoly law enforcement agency hearing the case can validate an act illegal without too much investigation and the plaintiff has a good chance to win. If use the reasonable rule to judge illegality, the investigation will last long and its procedure is complicated, and the litigation costs too much. As there are too many administrative monopoly acts now in China, the use of reasonable rule will bring a heavy burden to anti-monopoly law enforcement agency and administrative monopoly can't be dealt with timely and effectively.

3.6.2 Establishing a judicial review system for abstract administrative monopoly acts

One of the significance of judicial power reflects in its judicial review function (WANG Xi-gen, 2006, p.103.). A famous judge named Cardozo in America once said, as a tool for social control, the primary function of law is judgment (JI Xiao-nan, 2001, p.47).

Judicial review reviews the activities of state organs exercising state power and it is an important legal

system generally establishing in modern democratic countries under the rule of the law. Judicial review includes two aspects: one is that the court reviews the legislation of legislature, which is called unconstitutional review; the other one is that courts review administrative acts of executive authorities. Specific to administrative monopoly in China, the regulation of abstract administrative monopoly is the difficult and key point of antitrust work. As the "Administrative Procedural Law" excludes abstract administrative acts from the scope of accepting cases, a large number of abstract administrative monopoly acts can't enter into the procedure of judicial review without the judicial review system. The establishing of judicial review can entitle victims of administrative monopoly and anti-monopoly law enforcement agency to sue abstract administrative monopoly to the court for revoking or correcting this administrative regulation or administrative approval paper and compensates for their loss. The court can clear up these "bad laws" which cause administrative monopoly by reviewing regulatory documents of executive authorities such as administrative regulations.

3.6.3 Establishing a prior review system for abstract administrative monopoly acts

Specific to the problem that the executive authorities in China often abuse their power of publishing regulatory documents with general binding force, it is necessary to grand the power of prior review of the administrative laws and regulations, administrative rules and other standardized documents relating to competition published by administrative executives to the Anti-monopoly Commission. If the Anti-monopoly Commission thinks that relevant provisions may lead to administrative monopoly, it can prevent its promulgating and implementing. If the Anti-monopoly Commission thinks that some administrative laws and regulations, administrative rules and other standardized documents violate the "Anti-monopoly Law", it can revoke those published by the executive authorities below provincial level directly, and it can request the State Council reviews and revokes those published by executive authorities at provincial level within a specific time limit.

3.6.4 Establishing Public Interest Litigation System against administrative monopoly

Public interest litigation is not a vested legal terminology. The theory of public interest litigation was introduced into china in 1990s from abroad, and the earliest one was economic public interest litigation (HAN Zhi-hong, RUAN Da-qiang, 1997). Public interest litigation against administrative monopoly refers to that when the illegal acts of subjects of administration cause or may cause that administrative monopoly occurs and damages social public interest in some domain, any citizen, state organ or public organization can bring a suit against executive authorities for public interest under their own name in a people's court. As public interest litigation against administrative monopoly has the characteristic of public welfare, it should be different with traditional civil action. China should break through the rule in General Principles of the Civil Law that a plaintiff must be the "direct interested person" in the "Anti-monopoly Law" and any citizen, legal person and other organization can bring a suit against administrative monopoly in the court once they discover administrative monopoly acts. For example, the private litigation in the enforcement of anti-monopoly law in America permits that for threatening loss or loss caused by violation of antitrust law, both corporate victims and common citizen can file a claim or acquire injunctive relief.

Establishing public interest litigation against administrative monopoly is meaningful to China. On one hand, most of administrative monopoly actions in china are conducted in the form of abstract administrative acts without specific victim or with a wide range of victims. In this situation, although people are injured indeed, they can't exercise their litigation rights because they lack the awareness to protect their rights or the ability of protecting their rights or can't bear the high litigation cost. The establishing of public interest litigation against administrative monopoly can strengthen the protection and salvation of administrative monopoly victims. On the other hand, the public interest litigation against administrative monopoly can strengthen the peoples' ideal of anti-administrative monopoly and arouse the citizens' initiative of participating and supervising anti-monopoly law enforcement and

supervise and restrict administrative monopoly acts and anti-administrative monopoly enforcement acts.

CONCLUSION

We should realize clearly that in current China administrative monopoly is not only a legal problem and it has a very complicated relation with political system and economic system. Under the situation that political restructuring lags behind and economic system reform hasn't succeeded completely, although many administrative monopoly has been broken, administrative monopoly will exist for a fairly long time and will continue cause much damage to china's economy and society because there are often departmental, regional even individual economic interests and political interests hiding behind administrative monopoly. To fundamentally solve the problem of administrative monopoly, relying on the "Anti-monopoly Law" is far from enough and it needs that china deepens political restructuring actively and checks and balances administrative power effectively and reforms economic management and collocates resources reasonably and establishes the rule of non-economic administrative power and highlights the serviceability and finiteness of administrative power and pulls off the aim of "limited government", "service-oriented government" and "government by law" so as to eliminate the breeding ground of administrative monopoly from the origin and create a economic and social environment for the better enforcement of the "Anti-monopoly Law".

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