

## The Liability Immunity Scheme in the Administrative Accountability System of China

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### Abstract

The administrative accountability system should not only function as punishment, but also guidance for government officials. The systematization of accountability procedure is surely the foundation, but it is also worth considering that how to promote the predictability of the result. China should construct the liability immunity system with good faith standard to offer government officials both legality and reasonableness standard. A liability immunity clause could function as guidance and protection in two circumstances, namely the circumstance of administrative decision making and when the rules are ambiguous.

**Key word:** Accountability; Good faith; Immunity from liability

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### INTRODUCTION

The concept of Administrative Accountability was first acquainted to Chinese people and drew huge attention at 2003 when the highly infectious disease, known as SARS (Severe Acute Respiratory Syndromes), broke out in China and two senior government officials resigned because of the incompetency in dealing with the crisis. Since then, the Party and the central government tried to establish an administrative accountability system under

the rule of law by enacting two national regulations, namely “Regulation on the Punishment of Civil Servants of Administrative Organs”<sup>1</sup> and “Interim Provisions on the implementation of the Accountability System for the leader of the Party and Government”<sup>2</sup> (hereafter “the Interim Provisions 2009”). Meanwhile, many local governments have employed their own regulations on administrative accountability like Changsha, Yunnan and Beijing.

Even though administrative accountability has been institutionalized on both central and local levels, it only serves as belated effort to merely inflict punishment on officials after the happening of imputable incidents. However accountability system shall not only function as the Sword of Damocles over every official’s neck to punish incompetency, but also function as the guidance and even protection of officials. The so-called “protection” does not mean to relax the standard of liability and assist officials to escape from their liabilities. However, it means that the standard of liability should be clear and officials shall not be exposed to uncertain and excessive risk of accountability which is the preliminary condition for officials to act confidently and audaciously, especially in the circumstances of administrative decision making and when the rule is ambiguous. Officials should be guided on how to mitigate the potential risk of accountability when deliver their duties. Meanwhile, China’s Government is now under its slimming reform process which entails the removal of government review and approvals. An accountability system with protective and instructional

<sup>1</sup>*Regulation on the Punishment of Civil Servants of Administrative Organs*. (2007). (Promulgated by the State Council directive, April 22, 2007, effective July 1, 2007) St.Council Gaz., No.17. (China)

<sup>2</sup>*Interim Provisions on the implementation of the Accountability System for the leader of the Party and Government*. (2009). (Promulgated by General Office of the CPC Central Committee and General Office of the St. Council of the P. R. China, June 30, 2009, effective June 30, 2009) St. Council Gaz, No.21. (China)

functions could also serve as the impetus for the slimming reform because one of the main reasons that governments are reluctant to give up approval powers is that they are afraid of the potential liability risk. It does not make any sense that on one hand, we want government officials to keep away from the business in certain area, but on the other hand, we would like officials to assume all the liabilities even when they are not imputable to the government. A well-functioned accountability system should be able to tell officials about the boundary of liability and make them feel safe to give up their powers.

Two fundamental requirements shall be met to ensure a well-functioned accountability system. First is the institutionalization of such system which means comprehensive principles and rules shall be set beforehand. Secondly, the outcome of such accountability procedure, to certain extent, shall be predictable. This article will focus on the second point, namely, how to promote the predictability.

The topic of administrative accountability system has been very popular among Chinese scholars since 2004. To research under China National Knowledge Infrastructure<sup>3</sup>, up to 2,746 published theses were presented under the topic of administrative accountability in 2013 and more than 600 doctoral dissertations focused on this topic. The issues of the mentioned theses and dissertations mainly focus on the institutionalization of the administrative accountability system (Zhou, 2006; Hu, 2006; Chen, 2008; Cao, 2011) and some basic theoretical issues (Ren & Fan, 2013) including implementation body of accountability, the classification of liabilities and so on.

The predictability of accountability outcome is another important issue in which many scholars are interested. However, almost all the efforts made by scholars to promote the predictability can be concluded as to make the liability standard clear and definite on the substantive level. In other words, duties and liabilities must be set clearly and definitely to promote the predictability in the case of accountability (Zhou, 2006, p.260, 332; Cao, 2011, p.184). Little effort was made to construct a systematic instrument in order to promote the predictability without addressing the necessity of substantive duty clarification. However, in modern society, because status and documented rules cannot cover all the administrative duties and discretionary power is very common in administration, such systematic instrument to promote predictability of accountability outcome shall be very helpful.

This article would propose to employ liability immunity scheme with good faith standard in China's administrative accountability system to promote the predictability of the outcome. The first part would

introduce an existed liability immunity clause which recently came into effect in Shanghai Municipality and analyze the merits and shortcomings of such clause. The second part would run a comprehensive analysis on the necessity and feasibility of a well-functioned liability immunity scheme in China. The third part would expound two scenarios in which liability immunity scheme is applicable. The fourth part focuses on the good faith standard based on which officials shall seek for liability immunity.

## 1. LIABILITY IMMUNITY CLAUSE EMPLOYED BY SHANGHAI MUNICIPALITY

In April 2013, Shanghai Municipality published "decisions on the promotion of reform and innovation (draft)"<sup>4</sup> It deemed to be the first official document that contained a liability immunity clause, which indicated that to promote innovation and allow failure, neither the departments nor the officials should be negatively remarked in performance appraisal or inflicted with any kinds of liabilities in the circumstance that the outcome of their decisions did not meet the expectation as long as they followed the decision-making procedures and did not pursue personal interest. This clause drew attentions of the public because it is a milestone to demonstrate a new perspective to protect innovation and to promote reformation by enacting a liability immunity clause.

This clause, however, is more of a declaratory effect rather than a practical one, because some shortcomings compromised the effectiveness and practicality of this clause. Firstly, the preliminary conditions of the immunity, which are following procedures and no personal interest, are standards *pro forma*. Furthermore, lack of substantive standards could lead to rigidity of application and over-protection of irresponsible officials. Discretionary indolence would happen if the rules only require officials to follow rules and not to pursue personal interest. Secondly, this immunity clause exempts officials from any kinds of liabilities, from civil liability to even criminal liability, which is not appropriate. Only Judges could tell whether someone should take criminal liability after completing all the rules of criminal procedural law and the standing committee of Shanghai Municipal People's Congress is NOT duly authorized to exempt anyone from this procedure or the liability. Besides, it is not necessary to protect officials from criminal liability with such clause because the complicated procedures of criminal procedural law and the high standard of beyond a reasonable doubt in criminal offences could function as a much better protection. Therefore, even though this clause

<sup>3</sup> A popular academic research engine in China, also known as CNKI.

<sup>4</sup> The draft document will not be effective until passed by legislative authorities like the standing committee of Shanghai Municipal People's Congress.

is groundbreaking in the sense to protect officials from being exposed to excessive risk and anxiety, it could lead to administrative indolence and nonfeasance because of the lack of substantive standard.

An amended version of this document has been passed by the standing committee of Shanghai Municipal People's Congress and became into effect on July 19<sup>th</sup> 2013. In the amended version, a new substantive standard of duty of care was introduced to the immunity clause. However, even though this duty of care (勤勉尽职) standard is substantive, it is still an unclear criteria and it does not fully deliver the requirement on how should an official act in a decision making scenario<sup>5</sup>. There should be a more definite standard with higher requirement for officials to follow when they seek for liability immunity.

Therefore, this article proposed to build a liability immunity scheme with *good faith* as the standard which consists of formalized and substantive requirements. The concept of *good faith* is a new concept in Chinese administrative law but the content of such duty is consistent with the existing and well-developed concept, duty of loyalty, which is inherent to the core value of government officials and has been documented between doctrines of "Civil Servant Law of the People's Republic of China (2006)"<sup>6</sup>.

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## 2. THE NECESSITY AND FEASIBILITY OF LIABILITY IMMUNITY SCHEME IN CHINA

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### 2.1 The Necessity of Liability Immunity

The administrative accountability system in China is still on its primary stage where it is used as belated measure to punish officials when the expected result is not delivered. Such accountability system with result-oriented standards has led to two major problems. The first problem is the randomness and arbitrary decisions in application of accountability. With the vast development of internet and social network, "netizens (net citizens)" are able to create huge pressure on governments by raising the

attention of certain incidents and urge governments to initiate accountability procedure (Hu, 2014). However, such irregular way to initiate accountability procedure is NOT a right way under the rule of law. Furthermore, accountability system becomes a way to mitigate people's wrath and when netizens avert their attentions, the resigned officials are usually reinstated to other positions (Lian, 2012; Hu, 2011; Chen, 2011). Secondly, result-oriented accountability system created a negative direction that the more works you undertake, the more risk of accountability you have to take. In other words, it encourages officials to avoid making decisions and choose administrative indolence. This arrangement could lead to an undesirable situation where incompetent officials remain in their positions just because they did not do anything while competent officials may be punished for the efforts and attempts they made that did not meet the expectations. Therefore, it is very crucial and necessary in China to alleviate above negative effects caused by the existing accountability system and the liability immunity scheme can be the answer to solve both of the above problems.

Firstly, well-functioned liability immunity scheme could put an end to the result-oriented accountability system and other factors, besides result, should also be considered for accountability. Duties of administrative branch have become more complicated with the development of society and making discretionary decisions is indispensable component of officials' daily work. However, making the right decision does not necessarily lead to an expected result, because from the situation in which the decision is made, no one could tell exactly what would happen in the future and it is unfair to punish someone for his or her bad luck. Therefore, it should be avoided punishing officials merely based on the result or outcome of their decisions, and the situation in which the decision is made should be the primary element to consider. Furthermore, to implement liability immunity scheme could urge the decision-maker in the accountability system to consider not only the result, but also the comprehensive situation, when whether negligence exists or whether liability should be inflicted is decided.

Secondly, liability immunity scheme is a pre-condition of an efficient government because it could alleviate officials' fear and anxiety for excessive risk and encourage officials to deliver their duties confidently. A strictly implemented accountability system without due protection of officials would obviously result in discretionary indolence because reasonable officials, in such scenario, would choose to do nothing instead of making any efforts that could get them into trouble. Therefore, a safe harbor created by liability immunity scheme could set officials free from worries and anxiety about potential liability to a large extent.

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<sup>5</sup> The amended clause states that to promote innovation and allow failure, neither the departments nor the officials should be negatively remarked in performance appraisal or inflicted with related liabilities as allowed by law in the circumstance that the outcome of their decisions did not meet the expectation as long as they followed the decision-making procedures with duty of care and did not pursue personal interest. See Art. 11, decisions on the promotion of reform and innovation. (Promulgated by the Standing Comm. People's Cong. Shanghai Municipality, June 19, 2013, effective June 20, 2013), Gazette of the Standing Comm. People's Gong. Shanghai Municipality, No. 6, 2013 (China).

<sup>6</sup> *Civil Servant Law of the People's Republic of China*. (2005). (Promulgated by Standing Committee of The National People's Congress, April 27, 2005, effective January 1, 2006) St. Council Gaz No.18, (China).

## 2.2 The Feasibility of Liability Immunity in China

Two feasibility problems with the implementation of liability immunity should be addressed before any further discussion.

Firstly, many people argued that the immunity clause could release officials from their liabilities and could be a shield for their irresponsibility (Zhang, 2013). Indeed, lax enforcement of accountability rules is the current situation in China. However, another situation of strict enforcement without due protection of good faith officials is not welcomed as well. Moreover, to build a liability immunity scheme is consistent with the idea of strict enforcement of accountability because it prevents liabilities from being inflicted on the wrong person.

Secondly, liability immunity scheme is supplementary to the substantive principle of imputation. Even though the principle of imputation in the area of administrative accountability has not yet been settled officially by the central legislative authority in China, we may still summarize two different kinds of principles of imputation from existing regulations and documents. The first one is *subjective fault standard* which was adopted by “the Interim Provisions 2009”, symbolized with expressions like “*gross negligence in decision making*” or “*negligence in delivering duties*”. The second principle of imputation is *rule-violation standard* which was adopted by, for example, “Measures on Administrative Accountability of Beijing Municipality”<sup>7</sup>, symbolized with expressions like “*in violation of procedural rules*” or “*in violation of existing legal duties*”. In fact, either one of the two principles has its limitations. Subjective fault standard could lead to arbitrariness and randomness because of the ambiguous and subjective expressions. Meanwhile, even though rule-violation standard is relatively clear and definite, it is NOT applicable when there is no rule or the rule is ambiguous. Therefore, liability immunity scheme can serve as a supplementary arrangement to assist principles of imputation and protect officials from undue risk.

## 3. THE APPLICABILITY OF LIABILITY IMMUNITY CLAUSE

### 3.1 Scenarios in Which Liability Immunity Clause Is Applicable

Liability immunity shall not be applicable in every scenario of accountability because it is a case-by-case scrutiny and decision makers enjoy great discretion in deciding whether officials could be exempted under the immunity or not. Only in two scenarios the liability

immunity doctrine could be invoked and applied. The first one is administrative decision making scenario and the second one is scenario where the rules are ambiguous or discretion is involved. In other scenarios where rules are clear and definite or no discretion is left for administration, there is no need for liability immunity to promote the predictability of the accountability outcome.

The above mentioned liability immunity doctrine adopted in “decisions on the promotion of reform and innovation” by Shanghai Municipality is a typical immunity applied to administrative decision making scenario. Decisions made to innovate or to reform would withstand great risk because no reform or innovation is guaranteed to be successful. Thus officials who make such decisions should be exempted from certain liabilities as long as they followed explicit procedures and act out of good faith.

Similarly, immunity clause should also be applicable to scenario where rules are ambiguous or discretion is involved, because the result of official’s reasonable action is not necessarily to be successful. Take *Openness of Government Information Legislation (hereinafter OGI)* for an example.

Chinese Central Government enacted “*Regulation of the People’s Republic of China on the Disclosure of Government Information*” (passed by the State Council, No.492, 2007), many rules of which, however, were ambiguous and abstract. For example, exceptions of government information that should not be disclosure are stipulated in article 14 with only one sentence that Administrative organs shall not disclosure any information related to state secrets, business secret and personal information. There are no further official interpretation expounding the above concepts and how to implement such article. In practice, thousands of rejections of disclosure are issued based merely on this article and a huge amount of related disputes arises each year on the implementation of this article. The chief judge of the administrative court of the People’s Supreme Court directly criticized this article as “too abstract, too ambiguous and hard to be implemented” in his book (Li, 2013, p.210; Wang, 2013). Therefore, without appropriate protection like liability immunity scheme, reasonable officials would choose to not disclose any information that may fall between the ambiguously defined exceptions. It is not hard to imagine that a lot of information that should have been disclosed is kept inside the government because officials are reluctant to take the risk.

Therefore, liability immunity scheme should be adopted and applied in such situation to help officials make the right decisions rather than “safe” decisions. Besides, Among 95 countries that have enacted unified OGI law or regulation, 30 countries employed liability

<sup>7</sup> *Measures on Administrative Accountability of Beijing Municipality*. (2011). (Promulgated by Beijing Municipal People’s Government, June 16, 2011, effective, October 1, 2011), Beijing Municipal people’s Government Gaz. No. 16 (China).

immunity of good faith clause like England, Australia, Canada, New Zealand, India and Thailand<sup>8</sup>.

### 3.2 Scope of Liability Should the Liability Immunity Clause Cover

How far liability immunity clause should reach to protect officials is a crucial question. As mentioned above, criminal liability should not be exempted simply by the immunity clause because criminal procedural law and standard of beyond reasonable doubts have provided appropriate and tested protections. Furthermore, civil liabilities or liabilities for damages shall not be covered by liability immunity clause in China, because China does not allow officials to be sued directly for damages caused by act of duty. Therefore, the scope of liability should be contained within the administrative branch, namely the administrative accountability system. Officials who meet the standard of immunity can be exempted from administrative punishment or administrative liability. Furthermore, performance appraisal is a national test for every government official in China and the result of such appraisal matters a lot about officials' career because promotion or demotion shall be decided based on the result of performance appraisal. Thus, the liability immunity clause shall also protect officials who meet the good faith standard from being negatively remarked in the appraisal.

## 4. THE GOOD FAITH STANDARD

### 4.1 Good Faith Standard in the U.S. Administrative Law

In the U.S., people can not only file law suits against government for tort, they may also directly sue the government officials who carried out the alleged tortious act. On the other hand, to protect officials from excessive risk of law suit, "qualified immunity" is employed to exempt officials who act on good faith from any law suits filed for damages (Wang, 2005, p.786, 787). Even though this qualified immunity is only applicable to liabilities for damages and it is very different from the immunity scheme this article proposed, it is still valuable experience to examine the standard of good faith in the context of the U.S.

Objective reasonableness standard of good faith was first developed in the case of *Harlow v. Fitzgerald* 457 U.S. 800 (1982). The court stated that when government officials performing discretionary functions are entitled to qualified immunity if their conduct does not violate

established statutory right of which reasonable person would have known. The objective standard was further developed and the test of reasonable officer is introduced in *Anderson v. Creighton*, 483 U.S. 635 (1987). The court indicated that the purpose of qualified immunity was to give officials with abilities to anticipate liabilities and officials should be aware of the fact that they will not be held liable as long as their actions are reasonable due to legal rules clearly established at time action was taken. In other words, the actions are reasonable if reasonable officers could have believed such actions are lawful.

It should be noted that the American qualified immunity is not immunity from tort liability; rather, it is immunity from the law suits. Therefore, judge will decide whether qualified immunity is applicable at early stage of a tort case before any substantive hearing like discovery<sup>9</sup>. Besides, whether official is liable for tort liability is usually a matter of fact and decided by jury. In contrast, the availability of qualified immunity is a matter of law and should be decided by judge. Therefore, in a later case *SAUCIER v. KATZ*, 533 U.S. 194 (2001), judge refused to examine the reasonableness of the act because if qualified immunity had the same objective reasonableness standard as a tort case, the reasonableness of the act would be double counted which was not necessary. A new two-part test was employed in the case of *Saucier* that (a) whether the alleged fact constitutes a violation of constitutional right; (b) if so, whether the right is clearly established at the time of the alleged misconduct. The two-part test was reversed in the case of *PEARSON v. CALLAHAN*, 555 U.S. 223 (2009), because the rigidity of the test would unnecessarily prolong some cases. However, the idea of not examining the reasonableness of alleged misconduct for qualified immunity was affirmed in later cases.

Rules stated in above cases could be summarized into three points. Firstly, the need to invoke good faith immunity exists only when discretion is involved; Secondly, good faith immunity is only available when rules are not clearly established; thirdly, objective reasonableness test is a direct way to examine good faith, but it was abandoned because of redundancy.

### 4.2 The Content of Good Faith Standard in the Context of Chinese Administrative Law

The requirement of good faith is rooted in government officials' duty of loyalty. Officials' duty of loyalty consists of both legal and moral responsibility which is the ethical basis of administrative accountability (Jiang, 2013, p.36). Unlike directors' duty of loyalty to their employers or the shareholders, in corporate law, officials' duty of loyalty does NOT belong to their employer which is the government. In fact, government officials' duty of loyalty should belong to the constitution and law (Jin & Jiang, 2008, pp.11-17). Therefore, the content of good

<sup>8</sup> All the information and figures are included in a non-profit database co-provided by a Europe-based NGO, Access Info Europe and a Canada-based NGO, Center for Law and Democracy. These two organizations completed a world-wide rating and ranking process of 95 countries which have nationally unified OGI law or regulation in 2013. About the process and result of the ranking please see the website. Retrieved from <http://www.rti-rating.org/> (visited 8 October 2014).

<sup>9</sup> See *MITCHELL v. FORSYTH*, 472 U.S. 511 (1985).

faith standard should be consistent with the requirement of duty of loyalty. Officials should be confirmed to be in good faith as long as they act out of their respect to the constitution and law.

The constitution and law to which officials' loyalty and respect belong, is not limited to the existing statutes or doctrines, but also includes legal principles like the principle of proportion, principle of reasonableness and principle of purposiveness. Therefore the standard of good faith would be met if the official fulfils both formality requirements like follow the procedural rules and substantive requirements like reasonableness and purposiveness.

### 4.3 Criteria and Test for Good Faith Immunity

The content of good faith revealed abstract principles that officials should follow. However, objective standard is still necessary to identify the act in good faith for practical reason. The standard of reasonableness employed by the supreme court of U.S. before 2001 is a feasible answer to the objective standard. Namely, in the situation in which the alleged misconduct is made, whether a reasonable officer would believe such conduct or decision is lawful and appropriate. In fact, such practice to use an imaginary reasonable person as a criterion for negligence has been very common in China, especially in the area of tort law and criminal law (Jiang, 2007, pp.11-17; Zhang, 2011, pp.554-55).

Therefore, to decide whether a conduct or decision is made in good faith, a reasonable officer should be assumed to have the same position with the actual officer. And if this reasonable officer would have believed the conduct or decision to be lawful and appropriate in the same situation, the actual officer should be confirmed to have acted in good faith and thus, enjoy the liability immunity arrangement.

## CONCLUSION

Liability immunity scheme should be introduced into administrative accountability system of China. As a safe harbor for officials, liability immunity scheme can not only provide the impetus for officials to actively and confidently deliver their duties, but also promote the predictability of accountability outcome. Accountability system could, therefore, function as protection and guidance for officials. Furthermore, implementation of liability immunity scheme is supplementary to the principles of imputation in the accountability case and result-oriented accountability system would be adjusted by the immunity scheme to consider more on the situation when alleged misconduct is made. Last but not least, the objective reasonableness standard of good faith consists of not only the legality or formality criteria, but also substantive criteria like the principle of proportion and purposiveness.

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