

Liability for the Tort of Administrative Inaction: Jurisprudential Analysis and Practical Discussion of the Law of State Compensation

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Abstract: This paper examines administrative omission as a distinct category of administrative behavior, focusing on its legal nature, constitutive elements, consequences, and possible avenues for redress. Drawing on both theoretical perspectives and judicial practices, it highlights how administrative inaction can lead to tort damages. The findings reveal that China's State Compensation Law does not provide explicit provisions for liabilities arising from administrative omission, even though its legal significance is comparable to that of administrative actions. To address this gap, the paper argues for incorporating administrative omission into the state compensation framework and stresses the importance of enhanced judicial oversight to broaden relief mechanisms. Furthermore, it proposes the normative theory of protection as an interpretative guide for applying the State Compensation Law to tort cases involving administrative inaction.

Keywords: Administrative Inaction; Tort; State Compensation; Normative Theory of Protection

1. Introduction

The expansion of administrative power in modern societies has increasingly led to infringements on private rights. While active administrative acts are widely scrutinized, administrative inaction—often overlooked—can likewise cause significant harm to individuals, legal entities, and organizations. Academic debate persists over how victims should obtain redress and whether state compensation should apply. Historically, the 1873 Boulanger case in France marked the shift from sovereign immunity to state liability, influencing subsequent developments in Europe, the United States, and Japan, where state responsibility for

inaction has gradually been recognized. By contrast, China's approach to administrative omission remains underdeveloped, lacking a unified legal framework and consistent interpretation of its definition and elements. This paper examines the legal nature of administrative inaction, its historical and comparative evolution, and argues for a comprehensive framework that addresses both administrative acts and omissions within the state compensation system.

2. Definition of Administrative Inaction

China's legal system has long lacked a unified definition of administrative inaction. The 2017 Administrative Litigation Law only adopts an enumerative approach and does not expressly include omissions [1]. The 2023 revised Administrative Review Law, Article 11, covers cases where administrative organs refuse, fail, or delay in fulfilling duties such as paying pensions, granting social security, or performing obligations under administrative agreements. It also contains a "catch-all clause" for other omissions, yet without establishing a general concept. Likewise, the State Compensation Law (Articles 2, 3(5), and 4(4)) and relevant judicial interpretations regulate the consequences of administrative acts but fail to explicitly cover omissions [2]. Hence, in litigation, review, and compensation, administrative inaction lacks a consistent conceptual position, reflecting ambiguity in both legal norms and academic interpretations.

From a jurisprudential perspective, administrative inaction is the failure of an authority to perform its legal obligations [3]. While an administrative act denotes taking certain actions with legal effect, inaction refers to the absence of conduct when law requires action. The essence lies in whether there exists a duty to act and whether the authority is capable of acting. Without a duty, there is no inaction;

without capacity, the situation may fall under “administrative inability to act,” which differs from unlawful omission [4].

Legal obligations of administrative bodies may arise from multiple sources: statutes, regulations, and rules are the most common; but obligations may also derive from administrative agreements, prior commitments, or preliminary actions [5]. In addition, administrative tort duties, such as providing timely relief to injured parties, form part of mandatory responsibilities. Importantly, administrative powers are not merely privileges but functional duties to safeguard public interests. Therefore, failure to exercise such powers also constitutes administrative inaction.

Subjective will is central to identifying unlawful inaction. If an administrative organ is able to perform its duties but intentionally or negligently fails to do so, omission arises [6]. Conversely, inability due to force majeure—such as earthquakes or floods—cannot be classified as unlawful inaction [7]. Administrative acts may be divided into binding and discretionary duties. Although most obligations involve discretion, in situations involving fundamental rights such as life, health, or property, discretion is considered reduced to zero. In these cases, inaction becomes unlawful since the authority has no legitimate room for non-performance [8].

On the issue of illegality, some scholars argue for distinguishing lawful and unlawful omissions [9]. Yet, in my view, administrative inaction is inherently unlawful: once a body fails to perform duties it is both obligated and able to fulfill, it breaches its statutory responsibility to uphold public interests [10]. Unlike private individuals, administrative entities are entrusted with maintaining national public goods; failure to act is therefore a relinquishment of this duty, inevitably leading to rights infringement.

Academic debate continues regarding incomplete actions and formal actions that are substantively inactions. Incomplete actions occur when organs act partially, failing to meet procedural or substantive requirements—for example, granting partial benefits or delaying responses [11]. Formal but ineffective actions arise when an authority acts in name only but fails to achieve the intended legal purpose, such as issuing symbolic documents without substantive effect. Both categories undermine public interests and legal certainty. To fully

protect administrative counterparts, these behaviors should be subsumed under the concept of inaction.

In conclusion, administrative inaction can be defined as the unlawful failure of an administrative organ and its personnel to perform duties they are legally obligated and capable of performing [12]. It encompasses not only absolute omission but also delays, insufficient fulfillment, and ineffective formal actions. Recognizing and clarifying this definition is essential for the improvement of China’s administrative law framework and the expansion of state liability for torts caused by omissions.

3. The Need to Incorporate the Tort of Administrative Inaction into the State Compensation Law

Administrative inaction’s illegality, whether procedural or substantive, inevitably harms the rights of administrative counterparts, a harm that often lacks legal justification. Harm caused to others’ rights without legal basis constitutes illegal infringement (tortious act) or simply, tortious damage.

Theoretically, administrative inaction constitutes administrative tort and should bear administrative tort liability. Legal liability for administrative tort is a form of negative legal evaluation. Therefore, when determining whether the actions of administrative bodies and their public officials should bear legal responsibility, legal grounds are necessary. In China, regulations on administrative tort mainly stem from Article 121 of the “General Principles of the Civil Law of the People’s Republic of China,” which states: State organs or personnel, in the execution of their duties, who infringe upon the legitimate rights and interests of citizens or legal persons and cause damage, shall bear civil liability. This provision addresses the tort liability of state organs and their personnel. Before the “State Compensation Law” of 1995 came into effect, state tort liability was governed by Article 121 of the “General Principles of the Civil Law.”

Following the stipulation of civil tort liability in the “General Principles of the Civil Law,” subsequent laws like the “Administrative Reconsideration Law” and the “Administrative Litigation Law” include provisions on administrative organs’ failure to fulfill legal duties, offering remedies for administrative

inaction. Regrettably, the "State Compensation Law" lacks corresponding content, leaving a significant gap in compensation for administrative inaction infringement. This gap results in many cases of harm caused by administrative inaction, where due to the absence of legal provisions, many administrative counterparts cannot effectively protect their legal rights through the "State Compensation Law" [13].

3.1 Inclusion of Administrative Inaction in the Scope of State Compensation by Law and Judicial Interpretation

The State Compensation Law currently does not explicitly cover administrative omissions. However, the basis for incorporating administrative omissions into state compensation is implied in several articles. Article 2 states that citizens, legal persons, and organizations are entitled to compensation for damages caused by state organs and officials violating their lawful rights. Article 3(5) and Article 4(4) specify the right to compensation for violations of personal and property rights, respectively. Although these do not directly mention administrative omissions, the inclusion of "other unlawful acts" opens the door for judicial interpretation to encompass administrative inaction.

In 1997, the Supreme People's Court interpreted "other offences" in the State Compensation Law as including administrative omissions. This interpretation considers administrative inaction as a violation of administrative duties, thus liable for compensation. This expansion is pivotal in including administrative omissions within the scope of state compensation. The most direct legal basis for including administrative inaction in state compensation is the 2001 (Legal Interpretation [2001] No. 23) This "Reply" acknowledges that administrative organs, notably public security organs, must assume liability for administrative compensation when their inaction causes serious damage. While this "Reply" specifically addresses public security administrative law enforcement cases, it marks a significant step in acknowledging administrative omission liability and protecting the rights of those affected by it.

3.2 International Provisions on Compensation for Tortious Administrative Inaction

Countries worldwide pay significant attention to illegal administrative inactions, with most having clear legal stipulations on state compensation liability, adapted to their legal traditions and judicial practices.

In the civil law tradition, France recognized state compensation liability as early as 1873 in the Blanco case, abandoning the tradition of the state not bearing compensation responsibility. French law generally limits liability to faulty official acts. As Mr. Wang Mingyang notes in his "French Administrative Law," official faults can take three forms: poor implementation of duties, failure to perform duties, and delayed implementation of duties. In French administrative law, all illegal acts, including administrative inaction, constitute official faults leading to compensation liability. Similarly, Germany, another civil law country, pioneered compensation liability for administrative inaction in the 1920 Sledge Case. In 1981, Germany enacted the State Compensation Law, Article 1(1) of which states: "Government departments must perform relevant obligations, failure of which can lead to judicial decisions and orders for compensatory damages." This underscores that duty responsibility is central to German compensation liability.

Japan's legal system, influenced by both civil and common law due to historical and war factors, reflects this in its state compensation approach. Japan's State Compensation Law, in principle, holds the state or public bodies liable for damages caused by public officials exercising power through intentional or negligent unlawful acts. However, the law does not explicitly address compensation for administrative inaction. Japanese jurisprudence has been traditionally conservative about compensation for administrative inaction but has gradually shifted since the 1970s to better realize national safety and welfare. Japanese scholars recognize sustained administrative inaction as infringing citizens' rights to public power protection, undermining the legal authorization to administrative bodies. A landmark case in Japanese jurisprudence, the November 1971 Supreme Court Civil Case Collection Vol. 25, recognized the state's liability for inaction in the Ido City Land Planning Case. In Taiwan, Article 2 of the State Compensation Law clearly stipulates the state's liability for civil servants' intentional or negligent unlawful acts infringing people's

rights and freedoms, including in cases of failure to perform duties.

In the common law tradition, before 1947, British monarchs were governed by two principles: the king could only be a plaintiff, not a defendant, and the king could do no wrong. Thus, the monarch couldn't legally bear tort liability. Post-World War II, UK administrative law evolved significantly, leading to the 1947 Crown Proceedings Act. This Act, in Article 2, stipulated the Crown's tortious liability, including for actions performed by servants or agents. The US legal system, heavily influenced by British common law, long followed the sovereign immunity principle, originating from the 1821 *Cohen v. Virginia* case. The principle was consistently applied until the 1946 enactment of the Federal Tort Claims Act, which expanded the US government's liability for negligent or unlawful acts or omissions by government employees, as specified in Section 1346(b) [14]. These examples illustrate that foreign countries have established comprehensive state compensation systems. Despite theoretical evolution from nonexistence to recognition, ultimately, these systems have incorporated compensation for torts caused by administrative inaction into their state compensation frameworks.

3.3 Theoretical and Practical Basis for Incorporating Administrative Inaction into the State Compensation Law in China

In China, the development of the state compensation system for administrative omissions, founded on theories like public authority and reflective interests, represents an evolution from non-existence to a structured legal framework. Administrative subjects, failing to fulfill their legal obligations (including delays and incomplete actions), infringe upon the rights of citizens and organizations, constituting an administrative tort of omission. Scholars argue that such infringements, based on illegal actions of administrative bodies, should incur tort liabilities under private law [15]. However, for public authority acts, civil law provisions are deemed inapplicable, necessitating public law-based compensation.

The public right theory, originating in German law and adopted in Japan and Taiwan, dictates that citizens can invoke a statute to demand certain legal behaviors from the state. Historically, this theory has evolved, particularly

with the advent of welfare states, extending from administrative law to constitutional provisions of basic rights. Public right initially focused on direct relatives of administrative actions but expanded to include third-party rights infringements and factual interests protection. Under welfare state ideologies, the right to claim against public power for administrative omissions emerged, laying the groundwork for state compensation systems. Reflective interest theory, highlighting the collateral benefits of statutes aimed at public interests, suggests that individuals can't claim state compensation for personal interest infringements [16].

Most countries now recognize the necessity of state compensation for damages arising from administrative inaction. In China, efforts to modernize the administrative system reflect an increasing emphasis on lawful governance and the government's expanding responsibility for the protection of citizens' welfare. The evolving administrative law reflects a shift towards prioritizing citizen survival and well-being, bolstering the study of compensation systems for administrative omissions in such a societal framework.

4. Institutional Design for the Inclusion of Administrative Inaction in State Compensation

4.1 Establishment of the Constituent Elements of State Liability for Administrative Inaction

After confirming that the state should bear liability for illegal administrative inactions, not all such cases necessarily trigger compensation. Several constitutive elements must be satisfied:

1). Objective existence of inaction. Administrative inaction refers to an entity's failure to fulfill legal duties, marked by illegality rather than force majeure. This includes delay or incomplete performance of both procedural and substantive obligations. While discretionary duties allow latitude, they become binding in situations involving fundamental rights such as life, health, or property.

2). Actual damage to legitimate rights and interests. Article 2 of China's State Compensation Law requires demonstrable harm to citizens, legal persons, or organizations. Compensation is confined to statutory

rights—such as property, intellectual property, and personal rights—while illegal or revoked interests are excluded. Beyond explicitly defined rights, interests inferred from legislative purpose may also qualify [17].

3). Causal link. Establishing causation is more complex in omission cases, where harm often arises indirectly. In state compensation, causation is assessed both factually and legally. Factually, harm may stem directly or via third-party actions. Legally, if inaction transforms potential risks into actual harm, the non-action itself becomes the causative factor, thereby satisfying the requirement for state liability.

4.2 The Attribution Principle for State Compensation in Administrative Inaction

The attribution principle is fundamental to establishing liability for administrative inaction. The 2010 revision of China's *State Compensation Law* deleted the term “illegal” from Article 2, signaling a shift away from strict illegality as the basis of attribution. However, Articles 3 and 4 still condition compensation for infringements of personal and property rights on illegality, creating tension and leaving omissions without explicit regulation. Compared with civil tort liability, the framework for administrative compensation remains underdeveloped, particularly regarding passive conduct [18].

Among competing doctrines—illegality, fault, and no-fault—the fault presumption principle is best suited for omissions. This principle presumes fault once the plaintiff proves damage and causation, shifting the burden to the administrative body to demonstrate faultlessness. Its adoption is justified on several grounds. First, illegality in omissions inherently implies fault: failure to perform mandatory duties cannot be excused without strong justification. Second, under the prevailing concept of law-based governance and China's gradual transition toward a service-oriented administrative model, higher standards are required in the exercise of public power. Unlike the traditional fault principle, which focuses solely on the subjective fault of individual officials, administrative organs—as legal rather than natural persons—must assume institutional accountability for their omissions [19]. Accordingly, delays, incomplete performance, or purely nominal fulfillment can all trigger presumed fault, thereby reinforcing protection

of administrative counterparts' rights.

4.3 Theory as a Specific Interpretation Guideline for the State Compensation Law

Recent judicial practice has applied protection norm theory to refine the scope of liability. In *Li Baiqin v. Erqi District Government* (2018), the plaintiff sought intervention against an allegedly illegal construction project. The Supreme Court dismissed the claim, holding that the law in question protected public rather than individual interests. By applying reflective interest theory, the Court distinguished between subjective public rights, which confer enforceable claims, and reflective interests, which merely provide incidental benefits [20].

This approach, rooted in German administrative law, underscores that not all benefits derived from public law norms are actionable. Only when a statute explicitly intends to protect individual rights do citizens possess standing to claim compensation. Reflective interests, while factually advantageous, lack legal enforceability. This distinction prevents abuse of administrative litigation and clarifies the boundaries of compensation.

For state compensation, however, the rationale differs from litigation: the aim is not to correct illegality but to remedy harm to individuals under the principle of fairness. Thus, when administrative bodies breach duties whose purpose includes protecting specific individuals, those individuals should be entitled to compensation. Integrating protection norm theory into the *State Compensation Law* offers a coherent interpretive tool for omissions, ensuring legitimate victims receive remedies while filtering out frivolous claims.

5. Conclusion

Administrative inaction not only harms the legitimate rights and interests of administrative counterparts but also contradicts China's principle of governing according to law, hindering the advancement of the rule of law. Administrative entities should bear state compensation responsibility for the tortious harm caused by administrative inaction. Establishing this system of state liability for administrative inaction infringement not only maximally protects the legitimate rights and interests of administrative counterparts and reduces illegal administrative actions, but also signifies the maturation of China's

administrative law theory. This is essential for promoting the comprehensive advancement of the rule of law and establishing a governance framework based on legal principles. Currently, there is still much confusion in the legal theoretical and judicial practice communities regarding the state compensation responsibility for administrative inaction. Given this, it is necessary to refine China's public law theory and the theory of administrative inaction.

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