

# On The Boundary of Setting Administrative Punishment By Local Regulations

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## Abstract

Article 12, Paragraph 3 of the newly revised "Administrative Penalty Law" officially establishes the "supplementary administrative penalty setting power" system, granting local regulations the legislative authority to supplement and create administrative penalties within the existing regulatory fields of higher-level laws, and substantially expanding the regulatory capacity of administrative regulations and local regulations in the field of administrative penalty setting. The legislative purpose of this provision is to respond to the institutional demands in complex legislative practices. However, there are significant differences in the academic community's normative interpretation of this provision: in a narrow sense, it is advocated that the supplementary setting must not break through the framework of the existing types of illegal acts in higher-level laws, while in a broad sense, it is recognized that local regulations can create new types of illegal acts. However, there are different levels of understanding regarding the specific scope of creation. Based on a systematic interpretation of the normative connotation of Article 12, Paragraph 3 of the Administrative Penalty Law, which states that "laws and administrative regulations do not provide for administrative penalties for illegal acts", this article advocates breaking through the traditional power-controlling thinking paradigm and constructing a three-dimensional review standard system that includes the legitimacy of the purpose, the necessity of the means, and the legality of the procedure, with the aim of consolidating the legal basis for the supplementary setting power of administrative penalties.

## Keywords

Local laws and regulations; Administrative punishment; Supplementary power of establishment.

## 1. Theoretical Disputes Over The Supplementary Setting of The Scope of Administrative Penalties

According to the provisions of Paragraph 3 of Article 11 and Paragraph 3 of Article 12 of the Administrative Penalty Law revised in 2021, where the law does not set administrative penalties for specific violations, administrative regulations may add corresponding penalties based on the needs of law implementation. If neither laws nor administrative regulations provide for it, local regulations may also supplement the setting of administrative penalties in the process of implementing higher-level laws. The above-mentioned "Supplementary power provision" aims to address the practical demands in legislative practice by expanding the boundaries of administrative penalty setting authority between administrative regulations and local regulations, alleviate the limitations of their governance effectiveness, and focus on resolving institutional predicaments such as the singularity of administrative penalty types, repetitive legislative regulations, and insufficient regulatory intensity. The legislative value orientation of this clause presents a dual dimension: it is necessary to establish a regulatory framework for the expansion of administrative power, and at the same time, reserve necessary

institutional flexibility space for administrative regulations and local regulations to create administrative penalties, so as to promote the scientific construction and substantive improvement of the legal system in a dynamic balance.[1]

There are theoretical divisions in the academic circle regarding the scope of application of the power to supplement administrative penalties, and there are two interpretation paths: the "narrow view" and the "broad view". Scholars who hold the view of the "narrow sense" all believe that the exercise of supplementary setting power must not exceed the framework of the existing types of illegal acts in higher-level laws. Yang Weidong believes that the supplementary setting authority of local regulations should be limited to the scope of "when the higher-level law has established the constituent elements of the illegal act but has not clearly defined the types of penalties, detailed provisions may be made on specific penalty measures." [2] Zhang Xiaoyu believes that Article 12, Paragraph 3 of the "Administrative Penalty Law" should be interpreted as "When a higher-level law has already made legislative norms for specific administrative management fields but has not allocated administrative penalties for specific violations, local regulations may supplement and set corresponding penalties for the implementation of the higher-level law." [3] In a broad sense, it is acknowledged that the supplementary setting power encompasses the institutional space for creating new types of illegal acts, but there are different cognitive levels regarding the specific scope of creation. Ying Songnian and Zhang Xiaoying believe that "under the premise of not conflicting with the higher-level laws, local regulations should be granted the legislative authority to add new types of illegal acts beyond the types stipulated in the higher-level laws based on the actual needs of local governance." [4] In her subsequent research, Zhang Xiaoying proposed a revision, suggesting that the supplementary setting of illegal acts should be limited to the category of illegal acts that are homogeneous or related to the acts stipulated in the higher-level laws. [5] Cheng Qingdong believes that when higher-level laws fail to regulate specific matters or have regulatory loopholes, local regulations may exercise the power of supplementary establishment based on the needs of social governance.[6]

The discussion on the narrow definition of the power boundary for supplementary setting of administrative penalties is mainly based on the interpretation methods of the relevant provisions of the "Administrative Penalty Law". The normative stability advantage of this theory is significant, which can provide clear normative guidance for the legislative subjects of administrative regulations and local regulations, and prompt them to maintain a proactive and prudent legislative attitude when exercising the power of supplementary establishment. However, compared with the broad sense, the narrow sense has limitations in the definition of normative boundaries. In the local legislative practice before the revision of the new law, even in areas where the higher-level laws had already established the framework of administrative management systems, the practice of local regulations achieving institutional innovation by adding new types of illegal acts was already widespread. If the legal space for local legislation to carry out innovative regulation through supplementary setting of administrative penalties is completely denied, it will lead to a large-scale legal crisis in the existing local legislative practice, which is obviously contrary to the basic reality of the rule of law practice. In contrast, in a broad sense, it is more in line with the original institutional intention of the revision of the "Administrative Punishment Law" and can more fully realize the legislative effectiveness. However, this theory is rather complex in practical operation and it is difficult to construct a concrete framework for the exercise of the power to supplement administrative penalties. In view of this, this article intends to take Article 12, Paragraph 3 of the "Administrative Penalty Law" as the analytical starting point, and through a systematic interpretation of the normative connotation of "laws and administrative regulations not providing administrative penalties for illegal acts", clarify the normative boundaries of supplementary setting power, and provide a legal interpretation path for the institutional innovation needs in local legislative practice.

## 2. Supplement the Normative Connotation of Setting Administrative Penalties

According to Article 12, Paragraph 3 of the Administrative Penalty Law, the prerequisite for local regulations to exercise the power to supplement and set administrative penalties is that "the higher-level law has not yet allocated corresponding administrative penalty measures for specific illegal acts." This element sets a legal boundary for the exercise of power by local regulations at the regulatory level, that is, its regulatory scope is limited to the areas of illegal acts not covered by higher-level laws. Therefore, the legal doctrinological interpretation of the connotation of "illegal acts" and the applicable circumstances of "not stipulating administrative penalties" is the core element in defining the boundaries of local regulations for supplementing the setting of administrative penalty powers.

### (1) The connotation of "illegal acts"

According to the normative connotation of administrative penalties as stipulated in Article 2 of the Administrative Penalty Law, an illegal act is characterized as a punishable act that disrupts the administrative management order. Based on the principle of legality of administrative penalties, the punishable acts must strictly follow the explicit provisions of legal norms, and "legal norms need to clearly stipulate the patterns of the acts to be punished and their legal consequences to build the certainty of the expected acts", [7] thereby forming institutional constraints on the arbitrary interference of administrative power in citizens' rights. However, in a narrow sense, from the perspective of the application of administrative penalties, the interpretation of illegal acts as merely violating the prohibitive or obligatory norms of higher-level laws shows an excessive tendency of limitation, making it difficult to effectively expand the regulatory space of local legislation in the field of administrative penalty setting.

From the perspective of local legislation, the framework for interpreting illegal acts should not be confined to a single dimension of violating specific provisions of laws and administrative regulations. Firstly, at the legislative system level, local legislative power is exercised by local people's congresses and their standing committees. As the representative organs of public opinion, legislative acts naturally have a democratic and legitimate basis. The risk of infringing upon citizens' rights is significantly lower than that of administrative law enforcement acts. The regulatory approach of imposing excessive restrictions on local legislative power for the purpose of preventing the abuse of administrative power has an excessive preventive tendency. Secondly, in terms of the supply of legal norms, laws and administrative regulations, as national legislation, have the characteristic of universality. In the face of the special demands of local governance, there is inevitably a lag and limitation in the supply of norms. Micro-regulation of local legislation is neither practical nor necessary in substance, and may instead undermine the institutional effectiveness of local governance. [8] Thirdly, the institutional design of the "Administrative Penalty Law" regarding the power to supplement penalties indicates that although the specific norms of higher-level laws constitute an important benchmark for local legislation to determine the legality of acts, they are not the sole basis for setting administrative penalties. It clearly stipulates that "local regulations may supplement the setting of administrative penalties for violations not explicitly stipulated by laws and administrative regulations in order to implement them." This reserves the necessary space for institutional innovation for local legislation.

The value orientation of law fundamentally shapes the administrative order framework it pursues, and the design of institutional rules always revolves around the legislative goals. Take Article 1 of the Road Traffic Safety Law as an example. It clearly states that maintaining traffic order, preventing accident risks, safeguarding personal and property safety, and optimizing traffic efficiency are its legislative purposes. For the purpose of this legislation, all behavioral patterns that may disrupt traffic order, induce accident risks, cause damage to rights and

interests or reduce traffic efficiency may be included in the evaluation scope of potential illegal acts. Although whether to set specific regulatory provisions for certain behaviors during the legislative process requires a comprehensive consideration of multiple factors such as social costs and enforcement effectiveness, this does not prevent such behaviors from being regarded as potential targets for legal regulation. Therefore, when local legislation determines illegal acts in specific administrative management fields, it should take whether the act substantially hinders the administrative law order established by the higher-level law as the criterion for judgment. When the higher-level laws lack specific behavioral norms, the substantive violation of the legislative purpose should become a key factor in judgment, rather than being mechanically confined to the wording of the articles. This criterion for judgment, by aligning with the value core of higher-level laws, can not only ensure the spiritual unity between local norms and central legislation, but also reserve space for institutional innovation in local governance within the scope of legal provisions. In view of this, the term "illegal acts" in the third paragraph of Article 12 of the new Administrative Penalty Law, which states that "laws and administrative regulations do not provide for administrative penalties for illegal acts", should be interpreted in a broad sense: it not only includes specific illegal acts that violate the explicit behavioral norms of higher-level laws, but also covers abstract illegal acts that, although not explicitly stipulated, deviate from the legislative purpose.

### (2) The understanding of "no administrative penalty provisions have been made"

Under the framework of formal logic, in the category of administrative violations, "no prescribed administrative penalties" and "prescribed administrative penalties" form a mutually exclusive and contradictory relationship in terms of conceptual extension. Their connotations are in a negative opposition, and the former takes the negation of the normative content of the latter as the basis for conceptual construction. Accordingly, to accurately interpret the normative meaning of "laws and administrative regulations do not provide for administrative penalties for illegal acts", it is advisable to first analyze "laws and administrative regulations have already stipulated administrative penalties".

In the normative interpretation system of the old "Administrative Penalty Law", the central legislative body's determination of "administrative penalties already stipulated by laws and administrative regulations" followed a strict "domain theory" interpretation path. [9] According to this interpretation framework, "administrative penalties have been stipulated by laws and administrative regulations" specifically refers to the behavioral forms where the higher-level laws clearly configure administrative penalty provisions. Correspondingly, "laws and administrative regulations do not stipulate administrative penalties" points to two types of normative situations: First, although laws and administrative regulations establish behavioral norms, they do not allocate corresponding legal responsibilities, resulting in a normative gap where "there are behavioral norms but no legal consequences". Secondly, laws and administrative regulations have neither established behavioral norms nor assigned legal responsibilities for abstract illegal acts that deviate from the legislative purpose, resulting in a double absence of "no behavioral norms and no legal consequences". The common feature of these two situations lies in that the subject implementing the act will not bear the legal consequence of administrative penalty due to the act.

### (3) Summary

By elaborating in depth on the normative connotations of "illegal acts" and "no administrative penalties stipulated", the supplementary normative extension of setting administrative penalties has been clearly clarified. It covers two typical forms in the higher-level law: "having behavioral norms but no legal consequences" and "having no behavioral norms and no legal consequences". The former refers to situations where specific behavioral norms of higher-level laws are violated but there are no corresponding penalties, while the latter targets behaviors that, although not violating specific norms, essentially deviate from the legislative value goals

and may reduce the efficiency of administrative order. The two jointly form the normative boundary for supplementing the setting of administrative penalties: among them, the element of "illegal acts" limits the innovative space for local legislation in the determination of illegality, requiring it not to exceed the necessary limits for maintaining the order of higher-level laws. The element of "no administrative penalty stipulated" establishes the functional positioning of supplementary setting, that is, it can only play the role of institutional supplementation when the supply of higher-level legal norms is insufficient. Accordingly, when local legislative bodies exercise the power of supplementary establishment, both their authority to create rules and the applicable scenarios must be based on the premise that no penalty provisions are made in the higher-level laws, and they are always subject to the value constraints of the legislative purpose of the higher-level laws.

### **3. Supplement and Set The Application Restrictions of Administrative Penalties**

After breaking through the traditional thinking paradigm of power control, how to achieve a dynamic balance between the allocation of local legislative power and the improvement of governance efficiency in the implementation of the "Administrative Punishment Law" has become a core issue. Although merely adhering to the supplementary authorization mechanism under the framework of legalism can maintain the formal compliance of the exercise of public power, it is difficult to establish the substantive legitimacy foundation for it. Based on this, from a more open normative perspective, the power to supplement and set administrative penalties should be subject to three substantive elements: the legitimacy of the purpose, the rationality of the means, and the legality of the procedure. These three dimensions jointly form the legitimacy basis for supplementing and setting administrative penalties, ensuring that the penalty mechanism can not only achieve the predetermined regulatory goals but also meet the essential requirements of a country under the rule of law for the rationality of the means and the standardization of the procedure.

#### **(1) The legitimacy of the purpose**

The core function of supplementary setting power lies in ensuring the institutional adaptability of laws and administrative regulations during their implementation across the country. From the perspective of normative attributes, the supplementary setting power is essentially the legislative authority of local regulations at the level of legal liability allocation. [10] Accordingly, when local regulations exercise the power of supplementary formulation, they must maintain systematic coordination with the value orientation, basic principles and specific norms of higher-level laws in the substantive dimension. The normative basis is mainly reflected in the dual constraints of the Legislation Law and the Administrative Punishment Law. Specifically, the legislative activities of supplementing the setting of administrative penalties should be included in the scope of "local affairs legislation" as stipulated in Article 73 of the Legislation Law and adhere to the normative guidance of the central legislative purpose. Only when the legislative purpose is highly consistent with the value orientation can the adaptive adjustment of legislation to social development be achieved, effectively safeguarding public interests and promoting the process of building a law-based country. At the same time, in accordance with Article 12, Paragraph 3 of the Administrative Penalty Law and Article 72, Paragraph 2 of the Legislation Law, the normative content of supplementary setting power must have a substantive connection with the demands of local governance. It is required that when local regulations create supplementary penalty rules, they must fully consider the particularity of regional economic and social development.

However, it should be made clear that the differentiated normative design of local regulations based on regional characteristics must strictly follow two fundamental principles: Firstly, if

supplementary penalty rules deviate seriously from the actual regional governance or contain institutional designs that are contrary to local development goals, they violate the legislative requirements of the Legislation Law and the Administrative Penalty Law regarding "based on actual needs", and should not be regarded as institutional arrangements that conform to local governance characteristics. Secondly, the original intention of the supplementary setting power system is to ensure the local transformation of the spirit of higher-level laws. By refining the rule design, it strengthens the protection of public interests and citizens' rights and interests, and thus has inherent institutional legitimacy. Conversely, if supplementary norms deviate from the legislative purpose and value core of the higher-level law, even if there are normative gaps in the higher-level law, local legislative bodies shall not exceed their authority boundaries to create additional penalty rules.

### (2) Rationality of means

The principle of proportionality, as the fundamental guideline for regulating encroachment administrative acts in the field of administrative law, its normative value lies in establishing the judgment criteria for the rationality of administrative acts, building a system barrier against the abuse of power, and thereby consolidating the normative foundation of substantive rule of law. This principle encompasses three dimensions: the appropriateness of means, necessity, and the balance of legal interests. Article 5, Paragraph 2 of the Administrative Penalty Law, by establishing the legal requirement of "proportionality between the offense and the penalty", essentially internalizes the normative spirit of the principle of proportionality, that is, the setting and application of administrative penalties must form a gradient correspondence with the factual attributes, social harm and severity of the circumstances of the illegal act. With the development of constitutional dogmatics, the principle of proportionality has risen to a constitutional rule of law principle, exerting direct binding force on the exercise of legislative power.

In the normative practice of supplementary setting of administrative penalties in local regulations, the regulatory effectiveness of the principle of proportionality is specifically reflected as follows: First, in the review stage of the necessity of penalty setting, it must be limited to legitimate legislative purposes such as safeguarding public interests, ensuring administrative order, and achieving the function of punishment and education, and strictly exclude the intervention of irrational purposes such as local protectionism and law enforcement agencies seeking improper benefits. Secondly, in terms of the selection of penalty measures, the principle of minimum infringement should be adhered to. Among the multiple options that can achieve administrative management goals, the penalty method that imposes the least restrictions on citizens' rights and interests should be given priority to avoid excessive interference in the private self-governance domain. Thirdly, in the dimension of balancing legal interests, it is necessary to ensure a reasonable proportional relationship between the public interests pursued and the possible reduction of private rights and interests through cost-benefit analysis methods, and prevent the occurrence of the phenomenon of institutional alienation where "means deviate from the purpose".

### (3) Procedural legality

Although relatively rare in practice, the phenomenon of lower-level laws creating new elements of illegality, responsible subjects or illegal circumstances in the implementation of higher-level laws objectively exists. Although such accessory legislation may give rise to rationality disputes, it has the practical necessity of making up for the lag in norm supply. It should be noted that both power restriction and delegation are substantive control measures. In the face of complex and changing governance scenarios, the timeliness dilemma of legislative responses is inevitable. Against this backdrop, establishing a strict procedural regulation mechanism is more institutionally rational. According to the normative requirements of Article 12, Paragraph 3 of the Administrative Penalty Law, when local regulations supplementally set administrative

penalties, they must fulfill procedural obligations such as holding hearings and arguments, providing written explanations by the formulating authority, and submitting special reports during the filing review. This provision establishes the standard of due process for norm creation by strengthening procedural constraints, and the procedural regulation itself constitutes the ultimate procedural guarantee for ensuring the legality and rationality of the supplementary setting of administrative penalties by lower-level laws.

#### 4. Conclusion

To achieve the regulatory objective of "coordinating legislative reservation with moderate decentralization", it is necessary to dynamically define the normative boundaries of supplementary setting authority through the method of purposive interpretation, and implement differentiated authority allocation plans in combination with the characteristic classification of local legislative demands, thereby expanding the autonomous discretion space of local legislation at the institutional level. At the level of power operation, it is necessary to strictly follow the procedural regulations of Article 12, Paragraph 3 of the Administrative Penalty Law, simultaneously establish a multi-participation mechanism, smooth social supervision channels, and integrate the wisdom of civil governance. By strengthening the procedural requirements for written supplementary setting explanations, the substantive rights of the public to participate in the process are guaranteed, ultimately achieving the dual reinforcement of the legitimacy basis and legal justification of local supplementary administrative penalty norms.

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