



# The Legal Nature of Administrative Blacklists from a Judicial Perspective

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**Abstract.** With the advancement of the social integrity system, China has widely implemented the administrative blacklist system as a tool for administrative management. However, there are significant differences in judicial practice regarding the legal nature of the administrative blacklist, which has resulted in hindrances to the protection of the rights of those affected. Through an analysis of the determination of the nature of administrative blacklists in judicial decisions, this study has identified two main decision modes: the dual-order construction path and the single-order behavioural path. The former considers blacklisted behaviours as antecedent behaviours that do not produce actual impacts, while the latter may determine that the blacklisted behaviours have actual impacts on the rights of those involved. Through a thorough analysis of the adjudication logic of these two paths and their legal effects, this study has revealed the problems in the current judicial determination, including limitations in formal argumentation and insufficient protection of the rights of those affected. Building on this analysis, the study proposes the principle of substantively resolving administrative disputes and suggests that judicial review should prioritize the substantive impact of administrative acts to ensure effective remediation of the legitimate rights and interests of those affected. By standardizing and clarifying the substantive and procedural aspects of administrative blacklist cases in judicial review, this study aims to provide a theoretical basis for optimizing the administrative blacklist system and promoting the construction of the rule of law and the soundness of the social integrity system.

**Keywords:** administrative blacklists, judicial review, legal nature, justiciability.

## 1 Introduction

In recent years, China has been actively promoting the establishment of a social integrity system, and the use of the blacklist system has become a widely used tool for ad

administrative blacklist lawsuits.<sup>1</sup> Different courts may have varying opinions on how to categorize blacklisting behaviour. Some courts have identified it as an administrative management act, an internal supervisory performance act, a credit management act, an information disclosure act, and an administrative confirmation act. These differences in court determinations can lead to varying outcomes in adjudication, making it challenging to effectively protect the rights of individuals involved.

Unfortunately, there is currently no universal standard within the theoretical community for determining the nature of administrative blacklists.<sup>2</sup> Existing studies have focused on analysing and constructing legal concepts within traditional legal frameworks rather than on the practical development of the administrative blacklist system in judicial practice. This study aims to first sort out the different reasons for the characterization of administrative blacklist behaviours in judicial decisions, summarize the rules of court decisions on the attributes of administrative blacklists, analyse their advantages and disadvantages, and finally propose a possible scheme for determining the nature of administrative blacklists.

## **2 Two Paths to Judicial Recognition of Administrative Blacklists**

### **2.1 Double-Order Construction Path**

By analysing the pertinent cases, it has been determined that the characteristics of administrative blacklist cases in judicial rulings follow a two-step pattern. Firstly, there is an initial administrative action, such as being included in the "blacklist" and being documented as bad behaviour or notification. This is followed by the creation of a blacklist through the execution of specific administrative actions, such as imposing administrative penalties, engaging in administrative coercion, or undergoing administrative treatment. The court primarily acknowledged the extant acts of the blacklist as actions that lack tangible consequences for the relevant parties, such as internal administrative actions and acts involving the dissemination of information. In contrast to the inherent characteristics of blacklisted acts, the two-order construction model exclusively regards blacklisted acts as prior actions that do not yield tangible consequences. Only in the event of a subsequent specific administrative act will it exert an influence on the relationship between the relative's rights and obligations. Two primary categories of practice can be identified:

The first is the disclosure of information. For example, in the case of Hangzhou Tianhe Investment Construction Management Co., Ltd. v. Liquid City Housing and Urban and Rural Construction Authority<sup>3</sup>, the party was included in the list of newly added records of bad behaviour in the construction market, and the party that was listed in the record of bad conduct could not undertake business within Liquid City

within the publication period. The court will include in the record of misconduct and disclose information on the facts and actions that have occurred. The arbitration logic is that the court considers that the “operations not to be undertaken within the limits of the city of Licham” are merely the consequences of an administrative act committed in the wake of a “public misconduct” and do not constitute a separate administrative action.

Secondly, some courts have recognized blacklisted acts to be procedural administrative acts. For instance, in the case of DongFu Group v. Shenzhen City Housing and Urban and Rural Development Authority<sup>4</sup>, the Court found that the determination and reporting of record of adverse conduct was only an intermediate, preliminary act on the publication of data on record of final adverse behaviour, with no practical impact on the rights and obligations of the person concerned. The judgment of the case clearly stated that the determination and submission of a record of misconduct was a procedural administrative act only.

## 2.2 Single-Order Behavioural Path

For a single case of determining the attributes of a blacklist, there are various views of the courts, such as internal management acts, administrative confirmation, administrative treatment, abstract administrative acts, collateral acts, and information disclosure acts.

**Blacklisting is not an Administrative Penalty.** In the case of Zhicheng Construction Company and Jinzhai County Emergency Management Bureau<sup>5</sup>, the Court found that the handling of information on production safety accidents belonged only to the daily supervisory powers exercised by the housing sector in the course of the day-to-day supervision of production safety in construction works, and that it was based on normative documents, which indirectly proved that the information was not an administrative punishment created only by laws, administrative regulations and regulations, and the court ultimately classified it as administrative treatment.

**Blacklisting is an Internal Administrative Act.** In the administrative reconsideration case between Qu Yuyin and the Ministry of Public Security of the People's Republic of China<sup>6</sup>, the court held that the act of inclusion in the blacklist belonged to the internal act of the administrative organ of recording information in the process of administrative law enforcement, and it was not a specific administrative act that set rights and obligations for the parties concerned with the occurrence of legal effects on the outside world, and it did not have any practical effect on the lawful rights and interests of the relative party to the administrative management.

**Blacklisting is an Act of Information Disclosure.** In the case of Hefei City Engineering Construction Supervision Co., Ltd., Hefei City Public Resources Transaction Supervision Administration<sup>7</sup>, the court of first and second instances that the administrative organs are to further regulate the public resources transaction behaviour, the establishment of a sound credit system of the trading market, the relative to make the scoring behaviour, is the bad behaviour of the information on the record and disclosure, did not have to the relative to the property or operation of the rights and obligations of the rights and obligations of the relative to the rights and obligations of the relative to the relationship between the actual impact.

**Blacklisting is an Administrative Process.** In Fengyang Tianlong Water Conservancy Construction Engineering Co., Ltd. v. Xuancheng Xuancheng District Public Resources Transaction Supervision and Administration Bureau<sup>8</sup>, the court denied the characterization of an administrative penalty but ultimately found that it was an administrative treatment of disciplinary action for breach of trust, and unlike the majority of the courts, the court recognized that the act of inclusion in the blacklist had a direct impact on the rights and obligations of the counterparty.

**Blacklisting is an Abstract Administrative Act.** Ltd. v. Fujian Provincial Department of Finance, Fujian Provincial Department of Industry and Information Technology<sup>9</sup>, the court of second instance did not support the view that the court of first instance found that the internal management of the act, put forward a new interpretation, that the National Development and Reform Commission will no longer be included in the 'Credit China' list of bad faith enterprises, the National Development and Reform Commission will no longer carry out the promotion of high-efficiency motors to the information of the verification of the content is not for the specific administrative counterparties to make, belong to the abstract administrative act.

**Blacklisting is an Incidental Act of Administrative Punishment.** In the case of Wu Mou and Beijing Dongcheng District Urban Management and Comprehensive Administrative Law Enforcement Bureau<sup>10</sup>, the Courts of First and Second Instance both held that the inclusion of Wu Mou's administrative punishment resulted in the publication of the bad information platform was an obligation attached to the former's administrative punishment decision, and that its effect was dependent on the appealed punishment decision, and that it did not individually have a practical impact on Wu Mou's rights and obligations.

### 2.3 Differences in Legal Effects of a Judicial Determination of Administrative Blacklists

**Dual-order Construction Path: Blacklisted Behaviour is not Acceptable.** By combing through the cases in line with the dual-order construction model, the court treats the blacklisted behaviour as a specific administrative act of the antecedent behaviour, the behaviour itself does not have a practical effect on the rights and obligations of the relative relationship. It is only when the antecedent act links to the subsequent act that it produces the actual effect of affecting the rights and obligations of the parties, so if the party sues the blacklisting act, the court will often identify it as an internal administrative act, a process administrative act, or an act of disclosure of information. This means that the former behaviour does not belong to the scope of administrative litigation and is not accepted by the court.

**Single-order Behavioural Path: Blacklisting is Partially Acceptable.** Compared with the legal effect of non-actionable because of the determination of blacklisting in the two-step construction, in the single-order behaviour path, the court does not consider blacklisting non-actionable, and some courts, although rejecting the characterization of administrative punishment, recognize that blacklisting type of administrative behaviour has an actual impact on the rights and obligations of the relative, and categorize it as an administrative act of actionable nature. However, some courts are more inclined to determine blacklisted acts as information disclosure acts, internal administrative acts, collateral acts, abstract administrative acts, etc., and the determination of these attributes will likewise result in the case failing to proceed to judicial review. However, compared with the dual-order construction path, the single-order behavioural model does not completely stifle the relative's right to request judicial protection, leaving the relative with the opportunity for judicial relief.

The courts have also shown great difficulty in choosing the logic of their decisions. To further illustrate the differences between these two lines of reasoning, the case of *Chengdu Ampilon Construction Supervision Co. Ltd. v. Nanchong Municipal Bureau of Housing and Urban-Rural Development*<sup>11</sup> will be used as an example for further illustration.

In this case, the court of first and second instance adopted very different attitudes towards blacklisting. The plaintiff was fined for negligence leading to a major safety accident, whereby the defendant published the plaintiff's bad behaviour and administrative penalties on the integrity platform and deducted points according to the management scheme. The court of first instance held that the act of listing the party in the record of bad behaviour and publishing it was an act of information disclosure and that the administrative penalties complained of by the plaintiff did not exist, and therefore dismissed the plaintiff's lawsuit. The case can also reflect the principle of double-order construction, the plaintiff that the deduction of points belongs to the administrative penalty has had a practical effect on the parties, and the court held that the deduction of points as a former act, cannot produce practical legal effect, and will

be characterized as an accessory act. Therefore, the case does not have a specific administrative act on the rights and obligations of the parties to have a practical impact on the relationship. On the other hand, the court of the second instance, from the principle of single-order construction, ruled that the notification contains the deduction of points, and will be included in the adverse conduct record notification and deduction of points as an administrative act that affects the rights and obligations of the relative. The difference in the application of adjudication logic between the first and second instance directly led to the difference in the characterization of the blacklisting act, thus affecting the relative's right to a judicial remedy.

### **3 A Review of Two Judicial Recognition Paths for Administrative Blacklists**

#### **3.1 Deficiencies in the Dual-order Construction Path**

**Two types of Administrative Blacklists That have a Practical Impact on the Rights and Obligations Of Relators.** Actual Prejudice to the Rights of the Relator. For example, in Hangzhou Tianheng Investment and Construction Management Co. Ltd. v. Lishui City Housing and Urban-Rural Development Bureau<sup>12</sup>, the court unanimously held that "shall not undertake business within the city of Lishui" is only a consequence of the administrative act of "bad behaviour publicity", which has deprived the relative of the right to operate, but the court denied its justiciability. Has deprived the relative's right to operate, but the court denied its actionable. This practice deprives the relative of the right to seek judicial relief in the case of actual damage to their rights. In practice, such as the above situation will often occur, included in the blacklist will then naturally produce some constraints, these "constraints" has on the relative rights, but because the court will be included in the blacklisting of administrative acts characterized as non-actionable, and ultimately produce the legal effect is not actionable. This result is undoubtedly unfair to the relative.

**Risk of Prejudice to the Rights of the Relator.** Although some blacklisting behaviours do not affect the rights and obligations of the relative at present, there exists the possibility of being harmed in the future. For example, in the case of Chengdu Ampilon Construction Supervision Co. Ltd. v. Nanchong Municipal Housing and Urban-Rural Development Bureau,<sup>13</sup> the deduction of credit points, although not detrimental to the relative's rights at the time of the deduction of credit points, may affect the relative's future activities. For example, the cumulative deduction of credit scores to a certain number of points will bring about an impact on the amount of enterprise loans, and credit scores may also affect the conditions of enterprise bidding. All of these are a risk of damage to the relator's rights to produce predictable damage. Therefore, in the two-step construction, the court has characterized the

blacklisting act as a non-actionable administrative act and has not adhered to the principle of protecting the relative's rights and interests, which has greatly diminished the relative's rights.

**Absence of Subsequent Administrative Acts Makes it Difficult to Obtain Remedies for the Rights of the Relator.** In cases that conform to the dual-order construction model, it is not difficult to see that in most cases there is not a subsequent administrative act that can produce actual legal effects, and the former acts of blacklisting are consistently recognized by the court as non-actionable administrative acts, for example, the act of disclosure of information and the process of administrative acts. At this time, if the party sue blacklisting behaviour is illegal, the court will dismiss the party's lawsuit because the blacklisting behaviour is only a prior behaviour. Therefore, if there is only a blacklisting behaviour in the case, there is no specific administrative act resulting from the blacklisting behaviour, it cannot produce the actual legal effect, that is to say, it is difficult for the relative to obtain the right remedy through the judicial path.

### 3.2 Deficiencies in the Single-order Behavioural Path

**Difficulty in Establishing a Formal Argument for not being an Administrative Penalty.** In the single-order behavioural construction, some blacklisted behaviours are ultimately found not to be administrative penalties, and their adjudication logic is that the blacklisted behaviours are based on normative documents, which do not satisfy the premise that administrative penalties must be prescribed by law, and thus deduces that the blacklisted behaviours do not fall under the category of administrative penalties, which can be regarded as a form of formal argumentation. This form of determination based solely on legal norms is problematic, it is not a direct identification of the nature of the administrative penalty, which will lead to the reality of many administrative organs to make the scattered, non-formalized administrative penalties are difficult to incorporate into the regulatory framework of the administrative penalty law, and ultimately make the administrative organs in reality have a greater authority to impose administrative penalties, to circumvent the limitations of the administrative penalty law, and to the detriment of the relative's lawful rights.

**A Finding of Non-actionable Conduct is Equally Prejudicial to the Legal Rights of the Relator.** Acts of Disclosure of Information, Internal Administrative Acts and Acts Incidental to Administrative Penalties. The courts have recognized blacklisted acts as acts that are not actionable, such as acts of information disclosure, internal administrative acts and act incidental to administrative penalties, which are considered in our administrative legal system to be acts that do not affect the rights and obligations of the relative. However, blacklisted behaviours can harm the rights of the relative. Therefore, the adjudication path of considering blacklisted acts such as

information disclosure acts, internal administrative acts and administrative collateral acts conflict with the relevant provisions in China's administrative law.

*Determination of the Nature of an Abstract Administrative Act.* Abstract administrative acts have the characteristics of being unspecified, not directed at a specific individual, and universal in legal effect. However, it is difficult to say that an administrative organ's act of blacklisting a citizen or legal person is a legal act directed at an unspecified object because the blacklisting is directed at a specific administrative relative. For example, in the case of Wu Mou and Beijing Dongcheng District Urban Management and Comprehensive Administrative Law Enforcement Bureau<sup>14</sup>, the court held that the content of "the National Development and Reform Commission will no longer verify the information on the promotion of high-efficiency motors of the enterprises included in the list of bad faith" is not directed at a specific administrative relative, and belongs to the abstract administrative behaviour. But in fact, the list of bad faith is directly for the specific bad faith enterprises, and then no longer on these enterprises to verify the inevitable is also determined. Therefore, it is difficult to say that the act of blacklisting is an abstract administrative act, and this idea of adjudication is problematic.

#### **Uncertainty as to the Nature of the Act of Administrative Processing.**

Administrative processing acts are only a generalized concept, like specific administrative acts. That is to say, the court in practice identified these acts as specific administrative acts with appealability but did not further specify the legal nature of the act, which ultimately led to difficulties in the application of the law. If the act is not recognized as an administrative penalty, administrative coercion, or some kind of specific administrative act with administrative unilateral law, then there will be problems in judging the legality of the act in terms of the procedural and substantive standards afterwards.

## **4 Paths to Judicial Remedies for Blacklisting**

### **4.1 Substantive Resolution of Administrative Disputes as a Principle**

The identification of the nature of blacklisted acts in judicial practice is confusing and often remains a legal conceptual discussion.<sup>15</sup> Judicial activities on the blacklisting of the nature of the determination of efforts, the continuation of China's legal doctrine of tradition, that is, only when a legal act by the provisions of the law with the justiciable administrative behaviour mode, the administrative relative to obtain the right to judicial relief. However, in judicial practice, this way of determining the nature of administrative behaviour often causes the court to exclude the relative's rights relief means. In other words, the nature of a certain type of administrative activity in the law

is not clear, the court will often take self-protection way, and this type of administrative activity will be excluded from the scope of administrative litigation relief. Although the court decided "by the law", the administrative dispute still exists and has not been substantially resolved, and the rights of the relative have not been effectively protected.<sup>16</sup> For example, the court will blacklist behaviour identified as information disclosure and other non-actionable behaviour, ignoring the administrative behaviour and the relative impact. The determination of the nature of the blacklisted act is not important; what is important is to achieve the substantive settlement of administrative disputes and relief of the legitimate rights and interests of the administrative relative.

## **4.2 Substantive Criteria for Judicial Review of Blacklisting**

First, the judicial organ should examine whether the blacklisting of the relative by the administrative organ conforms with the rule of legal reservation in the principle of legality. Legal reservation means that exclusive legislative matters, such as restrictions on the basic rights of citizens, should be stipulated by the legislature through laws.<sup>17</sup> For example, according to the provisions of the Legislative Law, the determination of tax rates can only be stipulated by law, and local legislation shall not set up disciplinary measures such as "raising taxes and fees for defaulters", otherwise it is tantamount to a disguised breakthrough of the requirement that "issues involving the major rights and interests of the citizens can only be enacted by the National People's Congress and its Standing Committee, or by its explicit authorization". Focus on reviewing whether the departmental rules and regulations, normative documents, etc., on which the blacklisting act is based, are based on laws or administrative regulations, decisions and orders of the State Council, which set norms that derogate from the rights of the relative, for example, by restricting the right to operate after the perpetrator is included in the list of subjects with bad faith.

Secondly, in the judicial review, the court needs to examine whether the administrative organs make the blacklist behaviour strictly abide by the principle of proportionality. The principle of proportionality<sup>18</sup> contains three levels of connotation: first, the principle of fitness for purpose, which requires the judicial organs to focus on examining whether the administrative organs have a legitimate purpose in including the defaulters in the blacklist. The second is the principle of appropriateness, which requires that the administrative authorities must supplement the implementation of the purpose of blacklisting or publicizing the bad behaviours of the defaulters and other measures. Third, the principle of minimum damage, which requires that the application of a series of blacklist disciplinary measures must uphold the principle of minimum damage to the relative.

### 4.3 Procedural Standards for Judicial Review of Blacklisting

Judicial organs review the procedural legality of blacklisted acts and may refer to the Administrative Punishments Law. Administrative organs lack the concepts of procedural legality and due process in the application of blacklists and thus have greater discretion and arbitrariness. The underlying procedural rights and interests of the blacklisted relative should be protected by law, which is also a way to effectively monitor and restrict the exercise of administrative power. For example, in the Measures for the Administration of Market Supervision and Administration of Serious Violations of Law and Bad Faith Lists, it is stipulated that parties refusing to fulfil an administrative decision shall be included in the list of serious violations of law and bad faith and that the procedures for notification, hearing, service, and handling of objections shall be implemented concerning the procedures for administrative penalties. Although we do not affirm that the blacklisting behaviour belongs to the administrative penalty, it is undeniable that the blacklisting behaviour does have an actual negative impact on the relative's rights and obligations, which leads to the similarity between it and the administrative penalty decision that both of them have the characteristics of the negative evaluation of the relative, so to a certain extent the court can refer to the procedural provisions of the Administrative Penalty Law for review. For example, before deciding to blacklist, the administrative organ shall inform the party of the content of the blacklisting to be made and the facts, reasons, and bases, and inform the party of the rights of the statement, defence, request for a hearing, etc. by the law. The relative has the right to make statements and pleadings, and the administrative organ that makes the blacklisting decision must fully listen to the relative's views.

## 5 Conclusion

As an important tool for regulating the behaviour of administrative subjects and promoting the construction of a social credit system, administrative blacklists are playing an increasingly important role in practice. However, its impact on individual rights has triggered extensive discussions. By analysing the legal nature of administrative blacklists in-depth, this paper reveals the problem of its balance between the protection of public interests and the respect of individual rights. In the future, to improve the administrative blacklist system, it is necessary not only to improve the legislation, clarify its legal status, and strengthen the constraints and supervision of the power of administrative subjects, but also to ensure the full protection of the rights of the relative. Through the establishment of a more just, transparent system design and implementation mechanism, ensure that the blacklist can effectively safeguard social order, as well as prevent undue violations of the legitimate interests of citizens and enterprises, thus promoting the rule of law construction and the healthy development of the social integrity system.

## References

1. M. Zhang, Legal aspects of the "blacklisting" system, *Journal of Tianshui College of Administration*, 2018, pp. 100-105.
2. F. Liu, X. Xu, Study on the behavioral nature and justiciability of administrative blacklists, *Journal of Party School of Fujian Provincial Committee of the Communist Party of China (Fujian Institute of Administration)*, 2023, pp.73-81. doi:10.15993/j.cnki.cn35-1198/c.2023.04.016.
3. Hangzhou Tianhe Investment Construction Management Co., Ltd. v. Liquid City Housing and Urban and Rural Construction Authority, (2015) Zhejiang Xing Shen Zi No. 313.
4. DongFu Group v. Shenzhen City Housing and Urban and Rural Development Authority, (2015) Liu Xing Chu Zi No. 00019.
5. Zhicheng Construction Company and Jinzhai County Emergency Management Bureau, (2020) An Hui 1524 Chu No. 7.
6. Qu Yuyin and the Ministry of Public Security of the People's Republic of China, (2017) Jing Xing Jian No. 1280.
7. Hefei City Engineering Construction Supervision Co., Ltd., Hefei City Public Resources Transaction Supervision Administration, (2019) Anhui 01 final No. 58.
8. Fengyang Tianlong Water Conservancy Construction Engineering Co., Ltd. v. Xuancheng Xuancheng District Public Resources Transaction Supervision and Administration Bureau, (2019) Anhui 18 final No. 145.
9. Ltd. v. Fujian Provincial Department of Finance, Fujian Provincial Department of Industry and Information Technology, (2019) Min 01 final No. 519.
10. Wu Mou and Beijing Dongcheng District Urban Management and Comprehensive Administrative Law Enforcement Bureau, (2019) Jing 02 final No. 1365.
11. Chengdu Ampilon Construction Supervision Co. Ltd. v. Nanchong Municipal Bureau of Housing and Urban-Rural Development, (2018) Chuan 13 final No. 132.
12. Hangzhou Tianhe Investment Construction Management Co., Ltd. v. Liquid City Housing and Urban and Rural Construction Authority, (2015) Zhejiang Xing Shen Zi No. 313.
13. Chengdu Ampilon Construction Supervision Co. Ltd. v. Nanchong Municipal Bureau of Housing and Urban-Rural Development, (2018) Chuan 13 final No. 132.
14. Wu Mou and Beijing Dongcheng District Urban Management and Comprehensive Administrative Law Enforcement Bureau, (2019) Jing 02 final No. 1365.
15. M. Wu, Legal Regulation of Administrative Blacklisting System - Based on Typology Research and Administrative Process Theory Perspective, *Journal of Hubei University of Economics (Humanities and Social Sciences Edition)*, 2022, pp. 85-91.
16. H. Cheng, Modernization of administrative trials and substantive settlement of administrative disputes, *Application of law*, 2023, pp. 79-91.
17. Y. Zhang, Analysis of the principle of reservation of laws in constitutional and administrative law, *Human resources management*, 2017, p. 395.
18. D. Zhang, Study on the application of the principle of proportionality in administrative trials, *Journal of Wuhan Metallurgical Management Cadre College*, 2023, pp. 26-30.

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