

The Legal Countermeasure Research of the Government Failure in China's Food Safety Supervision

Yawei Zhang¹

¹ Ph.D. Candidate, School of Civil, Commercial & Economic Law, China University of Political Science and Law, Beijing, China

Correspondence: Yawei Zhang, Ph.D. Candidate, School of Civil, Commercial & Economic Law, China University of Political Science and Law, Beijing, China. E-mail: zhangyawei_cupl@163.com

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Abstracts

The serious food safety problems appeared in china in recent years was mainly caused by the government failure in its food safety administration. Thus, it is very important for us to study the government failure problems in our food administration system if we want to successfully solve our food problems. However, as a socialist country ruled by law, the development of our system should be carried out by our domestic legislation. Therefore, we could effectively address the government failure problems in the food administration and improve our domestic food quality if we borrow ideas from advanced administration system abroad and perfect our native regulatory mode as well as the legislation system.

Keywords: food safety, government failure, regulatory system

1. Overview of Government Failure in Food Safety Supervision

1.1 Definition of Related Concepts

1.1.1 Food Safety Supervision

The domestic scholars, Li Changqi definite the food safety supervision in *Law of Economy* as the editor-in- chief, as the legal executive power of the department of food safety supervision under the state council and local government, aims to implement state function, the system to supervise and manage the food safety.” Specifically, the food safety supervision includes a generalized and narrow supervision. The generalized supervision includes the food safety supervision of governments, related trade association and social organization. However, the narrow supervision just includes the food safety supervision of government. The thesis uses the narrow concepts of food safety supervision, which is the executive department of government as the supervising subject.

1.1.2 Government Failure

Adam Smith proposed in his masterpieces of classical economics-The Wealth of Nations that the government plays as the “night watchman” in society, and let market “the invisible hand” guides the whole social welfare to increase. The interventions of society often decrease the social operating efficiency. After the world economic crisis in 1929-1933, the defects that we solely rely on market mechanisms to ensure social operating is exposed more and more. With the birth of Keynesian, people clearly realized that if we solely rely on market power, we can't solve many social problems such as public goods, monopolization, externalities and information asymmetries. Therefore, in order to correct and overcome the shortcomings of the market, promote the general welfare of society, every country should gradually approve that government should handle the government failure by intervening in social and economic events.

As the public choice school introduced the individualism and broker's theory into the analysis of the political system, people gradually understands the government interference in market exist inevitable drawback, which is the government failure.

The founder of public choice theory, James Buchanan suggested that when the government seeks to make up the market failures, it will inevitably have another disadvantage that is non-market failure of government activities or so called “government failure”.

1.2 The Current Situation of Government Failure in Food Safety Supervision in China

From the frequent national events of food safety, we can easily found the government failure in food safety supervision is comparatively serious. China has continued to increase the executive investment for strengthening the food supervision, and actively perfect relevant laws and regulations, but still not easy to be able to avoid major national food safety events. Behind the major food safety events such as “clenbuterol”, “melamine” milk”, “poison capsule” and “waste oil” with great influences, it always exist the failure of government supervision, the dislocation of supervision and repeat supervision. Especially in many cases of food safety, some government supervisory organs and its supervisors as the unique superintendent of food safety, not only can’t immediately found the food hazard which exist extensively in market, but also conceal the truth after the incidents and help the enterprises which counterfeited products to escape legal sanction. Although the central government food safety supervision invests a large number of sources, the regional organs sometimes offer low-quality supervision and intensify the government failure in china good safety supervision activities.

2. The Specific Reasons for Government Failure in Food Safety Supervision

2.1 Two Specific Reasons for China's Food Safety Supervision of Government Failure

The special quality of food safety supervision is public service which determines the necessity of government involvement. However, in such a long time, the core of legislation and supervisory system in china’s food supervision often points those illegal food producers and sellers, which ignore the supervision and encouragement of food safety superintendent itself. Due to the imperfection of related laws and regulations of china’s food safety and the defects of regulatory system, under great investments of supervisory resources, it still repeatedly happen major food safety incidents in recent years. It shows the government failure in food safety supervision. And the main reasons might explain the phenomenon as the following aspects.

2.1.1 The Legal Monopoly of Custodial Right

According to the relevant regulations of Food Safety Law and the decision of State Council on further strengthening food safety, the food safety supervision is almost completely monopolized by the government administration. And such “Legal monopoly” supervision model very easily causes government failure in food safety supervision as following two aspects.

Specifically, first of all, in China's food safety supervision field, government agencies are the main provider of legal food safety supervision. And child-custody lacks the efficient supervision from social aspects. Due to the monopoly of china’s government agencies on food safety supervision services, under the condition that lack reference substance, the social public at weak position and news media not only can’t give judgment on the efficiency of current food safety supervision resources and application of funds, but also can’t find and propose the problems which exist in supervision organizations, and supervise it.

Thus, under such circumstance that lacks supervision, we based on “rational agent” theory. On the one hand, based on the government’s own interests, government very easily ignore that food safety supervision need massive funds and human input, rarely provide supervision public services with obvious economic returns and investment resources into other items with quicker returns. On the other hand, in order to avoid mistakes, the government superintendent of food safety can ignore the efficiency of supervision activities and deliberately complicate the decision-making process. Once they made some mistake, as long as in accordance with process, individual doesn’t need to shoulder the responsibility. The lack of supervision is caused by the monopoly of supervisory power which will directly decrease the efficiency of supervision activities and cause the supervision failure.

In addition, due to the development of increased food production enterprises’ professional skills, we undertake efficient food safety supervision which need advanced supervision technologies and human costs. Due to nonexistence of the competition for custodial right, china’s food safety supervision agencies generally lack the motivation to develop. And maintaining the state quo becomes their priority. However, due to the fierce competition in china’s food market, the food production enterprises as the supervised party generally continue to improve its production technologies and illegal means. Therefore, the monopoly of supervisory power will lead to supervision can’t inspect the illegal acts of enterprises because of backward technology and can’t immediately prevent the conditions of its illegal activities. For instance, “the industrial gelatin-toxic capsule” occurred in recent days. Due to the standstill of official supervision technologies and index update, the quality supervision departments don’t test the massive toxic capsule and found serious problems until the counterfeiting was exposed by news media. After subsequent investigation of part of news media, they found that a lot of manufacturing enterprises of gelatin and capsules fro medicines are used to such counterfeiting means. Under

such situation, the superintendent of china's government can't grasp the detecting techniques of industrial gelatin at all. Even in the list of non-food substances and abusable food additive which would be illegally added in food issued by the Ministry of Health which doesn't include the detecting techniques of industrial gelatin. It fully reflects the backward of the detecting techniques and index of china's food and drug agencies. And the backward of such techniques determine the supervision agencies can't efficiently finish relevant supervision mission.

Therefore, under the circumstance of legal monopoly, because the superintendent of china's government lack of social supervision and the thrill of competition, they can't provide efficient supervision services when consume massive manpower and material resources. And such monopoly cause the standstill and absence of food safety agencies' supervision.

2.1.2 The Supervisory Power Causes Information Asymmetry

The achievement that the superintendent supervises market is greatly determined by how well the superintendent understands the relevant information, which is no exception in the activities of food safety supervision. However, when the governments supervision agencies as the only superintendent, it will possibly cause information asymmetry in the following aspects and finally decrease the efficiency of supervision.

First of all, for government regulators and food production enterprises, due to the various kind of products in food industry, different kinds of production technologies and modes, the broad range of knowledge, the government's supervision agencies need massive and precise information and personnel who specialize in various techniques for assisting supervision. And governments will cost huge expense to pay for this. Because the governments are constrained by supervision resources and supervision costs, they can't have the fund and talent foundation to match various kinds of the supervised. Therefore, if we only rely on the governments to supervise the food industry, it will generate relatively information asymmetry that the superintendent relative to the supervised enterprises. However, while state power agencies undertaking a series of clear supervision modes and the legislation and policy-making activities of illegal results, because it can't obtain accurate and enough information to support, it will make relevant laws and regulations with blindness and hysteretic nature even cause low efficiency of supervision activities.

In addition, due to governments' monopoly of custodial right, it will cause the information asymmetry of food safety between superintendent and consumers. Some countries introduce industry associations and consumer protection organizations, jointly become the food safety supervision agencies and share the information of food safety supervision. On contrast, the supervision agencies of china's governments at all levels as the unique superintendent at actual supervision, it almost monopolizes all information of food safety. Therefore, food production enterprises naturally conceal its food quality information and the channels for providing food safety information are not smooth. Under such condition, ordinary consumers can't obtain reliable information of food safety.

In summary, due to the existence of the statutory monopoly of food safety supervision mode, there exist unavoidable information asymmetry between the superintendent of china's government and enterprises, internal agencies and consumer's enterprise. And such information asymmetry will affect the accuracy of the legislation of food safety supervision and policy-making activities. On the other hand, because the consumers can't obtain effective information of food safety, it will lead to the consumers can't get the protection, and finally lead the inference of governments at the market deviate the intended target and generate the supervision failure.

2.2 *The Accountability of Superintendent and Incenting Lack of Mechanism*

According to public choice theory, in the field of food safety supervision, government regulators also have a "broker" of the property and also have the trend of abusing power. And it possibly supervise from the view of own maximum interests. As Montesquieu said, "All the people with e the power will easily to abuse power, which as an unchangeable experiences. The people with power won't stop abusing, until reach the limit." Once we lack efficient power supervision and job motivation for them in system design, superintendent will possibly fail to comply with his duty of supervision, and actively "rent" his power of supervision. Or they will be passively "captured" by the food enterprise under his supervision, become benefit union, support and protect the illegal acts of enterprises in the dark. Rent-seeking behavior which caused by absence of supervision and incentives, not only seriously damage the fair competition environment between market and enterprises and intensify the deformity of resource allocation, but also lead the supervision goal of governments deviate from the social interests and greatly decrease the supervision efficiency of the governments in food safety. The final consequence is the great absence of governments in food safety supervision, which lead to the government failure. Therefore, china's legislation implements re-supervision and make system design, in which the absence will easily cause the absence and low efficiency of supervision activities. Then, it will lead to the government

failure.

3. The Legal Countermeasures for China Overcoming Government Failure in Food Safety Supervision

3.1 Establishing the “Variety Supervision Based” Multi-Sectors Horizontal Supervision Model

Currently, there are two major supervision models for all countries supervising the food safety: the first one is centralized supervision model. It means there will exist a relatively centralized department to co-ordinate the entire supervision system which is adopted by Britain and Canada. And another typical supervision model is multi-sectors supervision model. It means the food safety supervision is implemented by multi-sectors. And each sector performs different duties. China and the United States implement such supervision model. Reviewing china’s supervision system, years’ supervision experiences shows that the current segmented supervision model in china exist a lot of problems, such as low supervision efficiency, the work with unfair division, and subject to liability is unclear. It directly cause there are massive government failure in china’s food safety supervision field.

As for the changes in food safety supervision mode, some domestic scholars tend to establish a centralized supervision model. It will centralized the supervisory power on a few sectors to solve the current problem that china’s the supervisory right is not clear among china’s multi-sectors. However, due to china’s large territory, a large number of food varieties and manufacturing enterprises. Now, it’s very difficult to establish an independent food safety supervision departments to regular all supervisory right and work of food safety. And “in order to make the innovation of mechanism could better integrate into society, when designing supervisory agencies, we should prefer to seek deign in current administrative framework and form of organization. It’s not proper to create organizational pattern which is greatly different from the form of organization of current administration system. And make it can be successfully operate. In other words, supervisory agencies have innumerable links with administrative department and should plane on the premise that maintaining the integrity of organizational form of administrative system. Therefore, perfecting the food council system which establishing in china’s food safety law, strengthening the coordination function of food safety council, can promote the china’s supervisory model form “segmented supervision based, variety supervision supplemented” to “segmented supervision supplemented, variety supervision based”. The transition of multi-sectors mechanism is a stable and practical improved model.

Specifically, in order to form such mechanism, the legislation could consider make such adjustment in the following aspects.

First of all, establishing the segmented supervision system with supervision based. Due to technologies an information resources are relatively concentrated, china’s multi-sectors segmented supervision model can relatively finish the single segmented food safety supervision better. However, due to china’s food varieties cover a wide range, the production process of food usually centralized the complicated process and different raw material products. It lead to the legislators is very difficult to design a segmented model which suit for most of food varieties. As for food, the mistake of a process will affect the quality of the whole product. Therefore, we unscientifically segmented the food supervision will directly lead to the overlapping functions of massive departments and supervisory gap in actual operation. It greatly leads to waste the supervisory resources of governments and decrease the supervision efficiency.

In addition, the current food safety council system is the system innovation for china solving the defects of segmented supervision. However, in order to solve china’s current food safety supervision problems, we need to establish a coordination department with authority which superior to current the supervisory department of state council to coordinate the supervisory contradiction among different ministries and clear its duty of supervision. According to the regulations of current food safety law, food safety council only posits in top deliberation and coordination agencies. According to the second items of the article IV of *food safety law*, it ruled that “health administrative departments of state council shoulder the general coordination functions of food safety, and is responsible for evaluating the risk of food safety, the formulation of food safety standards, the disclosure of food safety information, the quality indentified conditions of food test institution and formulation of inspection specification, organize to inspect the major incidents of food safety. It is the coordination function of food safety supervision that the health administrative department actually implements among ministries. On the one hand, the food safety council doesn’t have the actual power for supervising superintendent. On the other hand, the health administrative as the agency has same level with our supervisory ministry is very difficult to supervise other ministries. After the establishment of food safety council, there occurred several food safety incidents with great influence, such as waste oil, stained bread, a drop of fragrant, poisonous cowpea. From above incidents, we can see that the operation of the mechanism don’t work well. Therefore, in order to solve the ambiguity of power and duties, inefficient coordination of china’s current food safety supervisory department. The law should give

the food safety council more functions to let it shoulder the deliberation and coordination of supervisory department. It can formulate the supervisory power which is more authorial and actual for current supervisory department and strengthen the efficiency of food safety supervision.

China has intensified food safety supervision in the country's catering service sector, an official of China's food and drug safety watchdog said. Food safety authorities will hold discussions with people in charge of restaurants known to have serious food safety risks, Bian Zhenjiang, deputy head of the State Food and Drug Administration (SFDA), said at the launching ceremony of a national food safety promotion campaign on Monday. The authorities will also inspect restaurants blacklisted for food safety problems more often and reveal relevant information to the public, Bian said the SFDA has issued about 30 regulations to improve food safety and sanitation levels of the catering sector and has selected 1,116 model restaurants for their food safety across the country. Several food safety scandals rattled the nation in 2011, including restaurants serving food cooked with "gutter oil," which recycled oil is made from kitchen waste dredged from gutters behind restaurants. In March, chiefs of McDonald's China were "invited" for a talk by the SFDA and were urged to apologize to consumers after a leading TV station exposed one branch of the fast-food chain selling expired products.

First of all, combining the special property of food industry and the feature of multi-sectors supervision model, china's food safety legislation could consider to scientifically classifying the food varieties by using food safety science, and make the single supervisory department finish the supervision of any kind of food from "field to table". At the same time, strengthening the function of food safety council, and helping it to play a role of specialized coordination and plan among multi-sectors. When china's multi-sectors supervising the same food, such supervision model not only helps to decrease the overlapping functions and supervisory gap, but also decrease the connection problems of multi-sectors segmented supervision because the information among departments can't be smoothly delivered. When occur any food safety problems, it can avoid the situation that each department avoids responsibilities by classifying the food varieties and supervisory responsibilities. It also can motivate the superintendent of governments seriously and efficiently implement its food safety supervision obligations, avoid supervision failure.

3.2 Establishing the Relatively Independent Longitudinal Food Safety Supervision Personnel and Financial System

From china's food safety incidents in recent years, we can see that local protectionism always has a great influence on food safety supervision. in china, although business sector, quality inspection departments, the Food and Drug Inspection and Quarantine Bureau and other food safety supervision department under the guidance of their superiors supervisory authorities in the work, according to the Article V of food safety law states" local People's Government above country-level is responsible for the unified leadership, organization and coordination of the food safety supervision management of administrative areas. " the power of appointment and removal personnel and the number of fiscal appropriation of local food safety supervision agencies are controlled by the local government, it usually cause the local governments intervene the local food safety supervision for protecting local enterprises, even publicly protect the conditions of illegal enterprises. Therefore, it is will necessary to establish the food safety supervision system which is vertical management from the central to local in legal system and make the local accept the vertical leadership from the superior supervisory department, and let the personnel and fiscal of current local food safety supervision department free from the local compilation. So it can get rid of the influence from the local interests, can implement supervision autonomously and are actually responsible for social public interests.

3.3 Establishing the Customer Supervision Mechanism

Since the food safety problem have some special features, the food's defects are always not easy to be perceived and most of the defects of the food would need a long period in order to make fairly harmful result on human bodies. Thus, consumers as the long-term food buyers, the information provided by them would have high value in food safety supervision. However, the tunnel for consumers to provide food safety information is not that fluently in China. On the one hand, although it is sure that the consumers would hope to safeguard their legal rights when they face up the food defects. But in reality, the consumer would have to bear high cost for their right defense. In order to get tiny amount of compensation, consumers would need to pay thousands of yuans as cost of expert testimony and even have to bear long term of contentious procedure. Apart from that, the food producer also have superiority in both knowledge and capital background than common consumers. Therefore, in the circumstances that the food safety supervision lacks certain motivation mechanism and opened right protection channels, it would made the food consumers to swallow insult and humiliation silently when they face up food infringements. However, such defects in the supervision would make the regulators and the society hard

to find those important food safety information with limited supervision resources and would also improve the possibility of the happening of major food safety incidents. Therefore, in order to prevent those food safety incident to happen again, it is recommend to reference those foreign experience such as building consumer reporting mechanism with reasonable encourage and rewards, which not only motivate consumers to participate in food safety regulation, but afford the supervision agencies with convenient and cost-effective regulating information. On the other side, it is also valuable to build some federal association aimed for consumer rights. And permit them to participate in lawsuit for consumers. And these mechanisms would help the government supervision agencies to pre-discover the privy food safety information and contain it in a small range, in order to reduce the government failure in food supervision, and provide a more efficient supervision environment.

4. Conclusion

The food safety supervision relate to many citizens' daily life in China, so it is worth to pay enough attention to this field. Although large amount of resource has been injected in this supervision field, the problems such as the monopoly of regulatory authority, the complex of the organization, the lack of incentive in supervision mechanism cause the final government failure in food safety supervision in China in recent years. And this article have provide some suggestions such as strengthen the supervision and incentive system of the regulators, improve the social supervision mechanism and improve the information disclosure and access system in order to overcome the failure of China's food safety regulatory regime. And it should also be underlined that the food safety regulation should not rely on either the government intendance or the social supervision solely. The reasonable mechanism would unite these two supervision mechanisms together and makes the market mechanism and the administrative supervision reach a common collaboration and crate complementary advantages, which in return would help to overcome the failure situation in recent years food safety supervision and ultimately improve the overall quality level of food in China.

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