

# On the Dilemma for the Mechanism about Incidental Review of Normative Documents and Solution

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**Abstract:** *The system of incidental review of normative documents based on Articles 53 and 64 of the Administrative Procedure Law of the People's Republic of China is characterized as "cautious" and "poorly run". The real-life dilemma faced by the specific embodiment of is following: the content of the review is limited to "the provisions of the administrative act sued"; containing "joint party and government documents" attribute of the normative documents are often avoided review; review results are weak, the court is difficult to "put forward proposals to deal with". In this regard, the court should adhere to the basic principle of "comprehensive review"; in the face of joint party and government issuance, the party committee should take the lead in clarifying the criteria for joint issuance and reducing unnecessary joint normative documents; when dealing with the review results, a combination of incidental review and record review mechanism can be established to ensure that the court's recommendation function is effectively implemented.*

**Keywords:** *Incidental Review, Administrative Litigation, Normative Document*

## 1. Background of the problem

Articles 53 and 64 of the Administrative Litigation Law of the People's Republic of China (hereinafter referred to as the Administrative Litigation Law) stipulate that "citizens, legal persons or other organizations shall request an incidental review of administrative regulatory documents" and "the court shall determine the legality of such regulatory documents", which means that China has established a court-led mechanism for reviewing regulatory documents. It is worth noting that this mechanism gives the court the "right to review" administrative normative documents, aiming to find out whether an administrative normative document is in compliance with the relevant laws and regulations, that is, to review the "legality" of the administrative normative document. This mechanism makes up for the shortcomings of the traditional administrative litigation framework, which only reviews the legality of administrative acts, and greatly extends the reach of judicial decisions, leaving it to the courts to review normative documents incidentally, which not only means the displacement of the boundary between administrative and judicial power, but is also "regarded as a sign of social progress"<sup>[1]</sup>

It is true that the mechanism of incidental review of normative documents is an innovation of China's legal document supervision system, and the administrative litigation law has taken a cautious step in giving the courts the right to review normative documents. Since the review of normative documents should be complete including the review of "constitutionality" and "legality", and "constitutionality review" is still in a difficult exploration stage for various reasons, the separate review of "legality" will be a separate review of "legality". The power of "lawfulness review" is given to the court alone to pursue practical possibilities, which is indeed valuable. However, the cautious attitude shown by the provisions of the administrative litigation law and the unique judicial environment and judicial culture in China, it seems that the incidental review mechanism of normative documents does not fully achieve the expected effect. So much so that, from the perspective of practice, the mechanism of incidental review of regulatory documents is reflecting the characteristics of "caution" and "poor operation".

## 2. The real dilemma of incidental review of normative documents

### 2.1 The content of the review is limited to "the provisions on which the administrative act is based"

As mentioned above, incidental review of normative documents, as a set of judicial control devices, is a typical "external administrative law" mechanism, and this set of external control techniques, based

on "embedded courts", "institutional capacity" and other constraints, has not fulfilled the intended rigid constraint function, and local courts have also developed various strategies to circumvent the application of incidental review devices, showing a "malfunctioning" state in general.

Before the amendment of Article 53 of the Administrative Litigation Law in 2014, there was an "invisible review" of normative documents in China's judicial practice, because in general administrative litigation cases, the court often takes the initiative to find the laws and regulations and corresponding normative documents based on the administrative acts made by the administrative organs. After the amendment of Article 53 of the Administrative Litigation Law in 2014, this "invisible review" was actually transformed into a legally enforceable mechanism. Meanwhile, Article 148 of the Interpretation on the Application of the Administrative Litigation Law, adopted by the Judicial Committee of the Supreme People's Court on November 13, 2017, makes general provisions on the content of judicial review of administrative normative documents in terms of the elements of authority, procedural elements and legal basis, and lists five situations in which administrative normative documents are not legal.<sup>[2]</sup> The reality is that the court in the review of the lawfulness of the normative documents, often will only be the administrative action of the normative documents "based on the provisions" of the review, and the legality of the full text of the normative documents to avoid talking about, ignoring the legality of the formulation of organs, ignoring the principle of legal reservation.

For example, in the case of "Xu Yuning v. Wulian County, Shandong Province, Social Medical Insurance Business Department, which did not reimburse medical expenses", the court found the administrative act unlawful because Article 5 of the Implementation Measures involved in the case was inconsistent with the provisions of the normative documents of the higher law. The case is a typical case of reviewing the provisions of the basis of the administrative act being sued, in fact, this is also the majority choice of the court in the incidental review of normative documents, the review of the provisions of the basis of the administrative act being sued gradually solidified, in fact, is contrary to the original legislative intent of Article 53 of the Administrative Procedure Law.

### ***2.2 Normative documents containing the attribute of "joint party and government issuance" are often circumvented for review***

The normative documents in the mode of "joint issuance of party and government" are not rare in reality. In fact, this kind of normative documents is a very difficult problem in China's administrative jurisprudence, highlighted by the fact that the boundaries of such normative documents are very "blurred" and highly politically biased in nature, so in practice, the courts often choose the most prudent and cautious approach in the face of such normative documents. That is, to actively avoid examining them. For example, in the cases of Zhang Guoqing v. Shengzhou Bureau of Land and Resources and Minhe Helin Breeding Cooperative v. Minhe Country People's Government Livestock Administrative Dispute, the court basically ignored the governmental elements in the document and invariably chose the statement that "the document under review is a party committee document, not a statutory normative document, and is not within the scope of review" to avoid the review.

Thus, although Article 53 of the Administrative Procedure Law gives the people's courts the power to review normative documents in a significant sense, in the face of complex realities, especially "sensitive" documents such as "joint party and government documents", the people's courts often adopt a "hands-off" approach. The people's courts often adopt a "hands-off" approach. This is contrary to "locking power into the cage of the system" in the comprehensive rule of law.<sup>[3]</sup>

### ***2.3 Weak review results and difficulty in "recommending treatment"***

Article 64 of the Administrative Litigation Law stipulates that "If the people's court, after examining an administrative case, finds that the normative documents stipulated in Article 53 of this Law are not lawful, it shall not take them as the basis for determining the lawfulness of the administrative act, and shall make recommendations to the formulating authority to deal with them." We can learn that the people's court can make two parts of action after reviewing the normative documents on which the administrative act is based.

The first is to determine that the administrative act being sued based on the normative documents are not legal, can not be used as the basis for the administrative act being sued; the second is to make recommendations to the relevant authorities to deal with. The first "found that the normative documents are not legal" has been a large number of practice by the people's courts, it can be seen that the people's courts in the administrative action based on the legality of the normative documents more easily, there is

no "political pressure and burden". The second "to the formulation of the organ to make recommendations" appears to be some strong "court" of difficulty. Because although Article 64 of the Administrative Procedure Law gives the court the right to comment on and reject the application of administrative normative documents, the court can only not apply them in individual cases, and thus the court considers that the administrative normative documents are illegal and its actions can neither affect other administrative law enforcement activities nor the hearing of other administrative cases. Even if the people's court proposes to the enacting authority to amend or repeal the relevant normative documents, the result is often the two sides laughing and talking about the end of the matter. In the light of some political rules or considerations, it is difficult for the people's courts to forcefully ask the enacting authority to amend or repeal the unlawful normative documents, which makes the effect of the people's courts' supervision of administrative normative documents in the legislative purpose of administrative litigation law greatly reduced.

### **3. The dilemma solution for incidental review of normative documents**

#### ***3.1 The court should adhere to the principle of "comprehensive review"***

For the people's court only for the administrative act based on the provisions of the review, and ignore the review of the entire normative documents, should reiterate the importance of adhering to the principle of "comprehensive review". As some scholars say, administrative litigation of the administrative normative documents "need to review comprehensively, comprehensive judgment", although in administrative cases, can affect the rights and interests of citizens, legal persons or other organizations is generally the normative documents of individual provisions, but in our In our review, not only need to review the relevant provisions of the normative documents, but also need to have a review of the formulation authority of the normative documents, the legal basis for the formulation of normative documents, and other aspects of the formulation process, so as to judge the legality of the normative documents.<sup>[4]</sup>

There is a proven mechanism available to understanding this problem. For constitutionality review and legality review are two main mechanisms to establish the supremacy of constitution and law, to realize good law and good governance and to realize the unity of legal system.<sup>[5]</sup> However, in practice, the legality review often takes precedence over the constitutionality review, which makes it difficult for the constitutionality review to play a wide role. First of all, it must be confirmed that legitimacy review and constitutionality review must exist at the same time, in the case of no need of constitutionality review, legitimacy review plays a crucial role, the most ideal design is "God to God, Caesar to Caesar" type of each role. In order to ensure that the review of constitutionality can work in its proper place, this paper suggests that the NPCSC, which has the power to interpret the Constitution, should set a standard for the scope of the review of constitutionality through the method of constitutional interpretation. Relevant normative documents within this standard must be reviewed for their constitutionality first, not their legality. Normative documents beyond this standard are not subject to the limitation of priority, and according to the usual practice, only in the absence of relevant legal provisions for constitutional review.

Insist on comprehensive review can not only improve the quality of normative documents from all aspects, and promote the increase of administrative efficiency, the most critical is to protect the legitimate rights and interests of administrative counterparts. Adhere to the comprehensive review of normative documents, is a key accumulation of experience in the process, for the future might be implemented in the abstract administrative act of judicial review to provide a key basis.

#### ***3.2 Party committees take the lead in clarifying the criteria for joint issuance and reducing unnecessary issuance***

The implementation effect of such normative documents is often higher than that of normative documents formulated by administrative organs alone. This is why there is the problem of administrative organs trying to circumvent the review of the people's courts by jointly issuing documents with the local party committees to improve the efficiency of implementation.

In this regard, the local party committee should take the lead in establishing clear standards for joint issuance, minimize unnecessary joint issuance, and minimize the blind spot for the accompanying review of regulatory documents. Most of the results of the constitutionality review mentioned above are handled by "internal communication", which is in line with the traditional cultural background and current situation formed in Chinese society for a long time. Moreover, the constitutional review itself has the

political function of "dialogue and consultation".<sup>[6]</sup> Facts have proved that the mode of "internal communication" is not only effective, but also will become the main way of constitutional review for a long time in the future. Is the use of a single "internal communication" way of dealing with the unconstitutional normative documents, can make the system of review of constitutionality is too thin and constitutional responsibility to reflect, therefore, this article suggested, should is reference significance to the existing, to "undo" "abolished" and dealing with the "internal communication model", the constitution of constitutionality review case event or constitutional case as the guidance, appropriating for the constitutionality review body to release its political pressure.

Above all, this is not only the maintenance of the supervision system of regulatory documents of administrative organs, but also the implementation of the Fourth Plenary Session of the 18th CPC Central Committee clearly pointed out that "adhere to the rule of law, leading cadres at all levels should take the lead to comply with the law, take the lead in accordance with the law" advocate.

### ***3.3 Establish a combined mechanism of incidental review and archival review to ensure the function of suggestions of the people's court***

The court has the power and duty to review. First of all, the court's active review of normative documents is a reflection of the legislative spirit of the Administrative Procedure Law. Administrative litigation should be fair to resolve administrative disputes, fully protect the rights and interests of citizens, effectively supervise the administration in accordance with the law, and maintain the correct implementation of the law. Secondly, the court's review of the legality of the normative documents related to the administrative act being sued is also an established rule of law and judicial interpretation. For this purpose, the court must make a correct judgment on the legality of the normative document on which the administrative act under appeal is based. Thirdly, historically, the original law did not expressly provide for incidental review of normative documents, and the courts are also reviewing them ex officio on their own initiative. Finally, limiting the period of time for parties to file a review is also not in line with the actual situation of administrative litigation in China and the law of litigation, which is not conducive to practical operation.

In this, it is quite noteworthy that the judicial advice copied to the filing organs of the expansion of the procedural design, to some extent, to achieve a formal collusion between the incidental review and filing review model, is expected to open the pivotal channel between the judicial control of normative documents and filing review of these two types of devices, give full play to the "judicial organs in the review process of discovery, verification and evaluation of the role of ..... promoting the formation of the judiciary in a certain degree to assist the exercise of filing review power of the subject compound, multi-level review mechanism"<sup>[7]</sup>.

If the people's court puts forward suggestions to the relevant normative document formulation organ and it is difficult to carry out practically, the potential "copy function" in the incidental review of the people's court can be expanded. In 2015, Article 21 of the Interpretation of the Supreme People's Court on Some Issues Concerning the Application of the Administrative Procedure Law of the People's Republic of China (Interpretation (2015) 9) and Article 149 of another (interpretation (2018) 1) reflect that the people's court can improve its effectiveness and authority with the help of "high-level promotion" and "external borrowing". Therefore, in view of the above problems, we can force the administrative normative document making organs to respond to the suggestions of the people's courts by combining the mechanism of collateral review and archival review. This can not only improve the supervision effect of normative documents, but also realize the cooperation between people's Congresses and courts, legislative organs and judicial organs, give full play to the advantages of their respective institutions, and carry out three-dimensional governance of administrative organs and their normative documents.

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