

# Exploration on the Effectiveness of Incidental Review of Normative Documents

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**Abstract:** The newly revised Administrative Procedure Law in 2014 established an incidental review system for normative documents of administrative litigation in China. The establishment of this system is a great progress under the background of legal construction in Socialism with Chinese characteristics, which has shifted the boundary between administrative power and judicial power. Based on the legislative intent and extensive case data, this paper analyzes the present situation of incidental review of normative documents, so as to further explore the dilemma that the results of incidental review of normative documents are not binding on other courts and the enforcement effect of incidental review of normative documents is weak. Based on the practical experience of normative review system in developed countries, this paper puts forward three solutions: establishing guiding cases, information circulation within the judicial system and establishing the revocation system of people's courts, in order to understand the effectiveness of incidental review of normative documents more deeply.

**Keywords:** Normative documents, Incidental review, Effectiveness.

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## 1. Introduction

The Administrative Procedure Law revised in 2014 added two provisions, namely, Article 53 and Article 64, and established an incidental review system for normative documents of administrative proceedings. The establishment of the incidental review system not only made up for the shortage that China's administrative procedure law can only review whether administrative acts are illegal for a long time, but also expanded judicial power under the background of judicial administration. The Interpretation of the Supreme Court on the Application of the Administrative Procedure Law of the People's Republic of China, issued in 2018, further sets more detailed normative requirements for the incidental review procedures and standards of normative documents, and the incidental review system of normative documents with local characteristics in China is basically established in China.

Since the establishment and operation of the system of incidental review of normative documents in China, studies have focused more on the operating status of the existing incidental review device in terms of review standards, review procedures and other matters from the internal perspective of legal hermeneutics, combined with judicial precedents, in order to provide normative guidance for the improvement of the system of incidental review of normative documents. The breakthrough point of this paper mainly focuses on the effectiveness of the incidental review system of normative documents, what problems are faced by the incidental review of normative documents in China at present, and whether this review right can end the effectiveness of illegal normative documents and other follow-up issues. The continuous questioning and answering of these questions is helpful for people to better understand the function of incidental review of normative documents.

## 2. Analysis of the Present Situation of Incidental Review of Normative Documents

The basic rule of incidental review of normative documents in China is that the courts in China have no right to accept and adjudicate the lawsuit against normative documents, but when reviewing the legality of a specific administrative act, they can conduct incidental review of the normative documents on which the administrative act is based and decide whether to apply it in this case. The original intention of establishing the judicial review system of administrative normative documents is to build a three-dimensional regulatory document supervision system and strengthen the supervision of normative documents in order to correct illegal normative documents in effect. Therefore, the system of incidental review of normative documents is an important measure for the legislature to improve the judicial control mode in China. However, this review system is far from the ideal situation in judicial practice, showing a state of not achieving the expected results.

The author used "China Judgment Document Network" and "No Litigation Network" as the retrieval tools, and "incidental review of normative documents" as the key words to obtain the judgment documents from 2014 to July 2, 2021, and deleted the relevant cases of repeated uploading and lack of effective information, and obtained a total of 651 administrative judgment documents in the first instance. Among them, the court ruled that 213 cases were rejected (including the rejection of the request for examination of normative documents alone and the rejection of the request for incidental examination together), accounting for about 32% of the total number of cases. This situation is not controversial in law. The main disputes exist in several types of cases with large judicial discretion space. For example, there are about 22 cases that have not filed applications for review within the statutory time limit and have no justifiable reasons; There are about 104 cases considered by the court not to belong to the

category of normative documents, including about 21 cases of party Committee documents; A total of 205 cases were rejected by the court for lack of relevance (not the basis of the accused administrative act), accounting for a very high proportion of nearly 31%. A total of 107 cases were finally able to enter the substantive examination, accounting for only 16% of the cases, and in most cases, the normative documents were briefly demonstrated by the court as legal and effective, while only 13 cases were strictly examined and considered to have legal defects, which was less than 2% of the total number of cases.

The people's court is more cautious in determining that administrative normative documents are not applicable. The reasons for its determination are mainly focused on the review of whether the contents of administrative normative documents conflict with or are inconsistent with the superior law. Usually, the people's court will determine that the normative documents are illegal and not applicable when the contents violate the provisions of the superior law and the enacting organ has no power to formulate them.

To sum up, in a large number of cases, the court tried to avoid the review of normative documents, or recognized normative documents with obvious defects. The attitude of Chinese courts towards incidental review of normative documents is conservative and negative. The attitude of Chinese courts towards the review of normative documents.

### **3. Validity Dilemma of Incidental Review of Normative Documents**

#### **3.1. The effectiveness of incidental review by the court**

There are three views on the validity of the conclusion of incidental judicial review, namely, the theory of invalidity from the beginning, the theory of "inapplicability" in general and the theory of "inapplicability" in individual cases. The theory of ab initio invalidity holds that the people's court can directly judge the validity of administrative normative documents, and the judiciary has the right to invalidate illegal administrative normative documents. The general theory of "non-application" is mainly based on the practical significance, which holds that the law gives the relative person the right to claim incidental review, and on the other hand, it also gives the court the power to determine the illegality of administrative normative documents. Under the case "not applicable" mode, on the one hand, the application of the administrative normative document in this case is ruled out, on the other hand, the existing review mechanism of the administrative part is activated through the right of judicial suggestion, which is adopted in the current regulations.

The judicial review of administrative normative documents adopts incidental review, so the effectiveness of the review results is also conservative and incidental. The court can only choose whether it is applicable according to the trial results, but has no right to dispose of the documents on its own. If the court considers that the normative documents on which the administrative act is based are legal after examination, it shall be taken as the basis for determining the legality of the administrative act; If it is considered illegal after examination, it shall not be used as the basis for the people's court to determine that the administrative act is legal, and it shall be clarified in the judgment. As mentioned above, the handling methods of incidental review by the court include putting forward judicial suggestions and putting on record. Some

scholars have summarized the conclusion of the review as that the court has three rights in incidental review: the right to judge illegally, the right to refuse to apply and the right to choose to apply. Obviously, the effect of incidental review by the court is conservative and soft, and it has no mandatory effect. The court cannot confirm invalid or revoke illegal administrative normative documents.

#### **3.2. Problems existing in incidental review by the court**

In China's system of incidental review of normative documents, people's courts at all levels have the right to make a decision not to apply the incidental review of normative documents when trying cases, but the court's decision has only case effect and cannot directly abolish or declare the normative documents under review invalid. Therefore, the effectiveness of incidental review of normative documents extends to the conclusion that other courts should treat the normative documents of the court that made the decision illegally.

The court's judgment only has case effect, so its judgment reasons and conclusions are not binding on other courts. If the conclusions of the courts at all levels on normative documents are inconsistent, it will affect the unity of the legal system and judicial authority. For the problem of inconsistent understanding among courts at all levels, some scholars put forward the idea of information sharing, suggesting that an information system for incidental review of normative documents should be established within the national court system, and local courts should input the review situation and conclusions into the system for other courts to inquire. This idea of information sharing can, to a certain extent, alleviate the problem that courts at all levels have different understandings of normative documents, which is conducive to the realization of the same case and the same judgment. However, this incidental review information system still belongs to the internal system of the court system, and only has the function of recording and sharing. The previous judgments made by individual courts cannot become binding guiding cases, and it is impossible to bind other courts and prevent other courts from making opposite determinations.

The negative attitude of the court towards the procedure of incidental review of normative documents is closely related to the weak effectiveness of incidental review of normative documents, in addition to the serious administrative problems of the courts in China and the realistic social factors closely related to justice and administration.

In judicial practice, the court's judicial review of administrative normative documents put forward by interested parties does not have the force of enforcement. The Administrative Procedure Law entrusts the court with the review of normative documents, but the result of the review is to put forward "handling opinions" to the relevant administrative organs. The Administrative Procedure Law stipulates that the organs that accept judicial suggestions will inform the people's courts of the handling results according to the relevant circumstances, but in judicial practice, the administrative organs also ignore the suggestions of the judicial organs and finally fail to inform the people's courts of the handling results. Therefore, the incidental review of normative documents in the new law is only a formality but not implemented in essence, so it is necessary to make the suggestions of judicial organs compulsory.

## **4. Analysis and Reference of The Overseas Norm Review System**

Drawing lessons from the experience of normative review system in developed countries with foreign legal systems can provide ideas and experience for solving the problem of the effectiveness of incidental review of normative documents in China, especially the review systems in the United States and Germany.

### **4.1. Decentralized normative review system in the United States**

In the case of *Marbury v Madison* in 1803, Justice Marshall made it clear that it is the responsibility and obligation of the court to interpret the meaning of the court. Therefore, the power of constitutional interpretation in the United States belongs to the court. Similarly, the court can examine whether the legal norms conform to the original intention of the constitution. The court referred to here does not refer exclusively to the Federal Supreme Court, and all federal courts can conduct normative review. Therefore, judicial review in the United States is a decentralized and specific normative review model. Courts at all levels have the right to review, but it must be based on the existence of individual cases, and the court's review conclusion only binds the case and has no abstract effect. Although courts at all levels in the United States have no right to revoke unconstitutional laws, they can only not apply them. This may lead to different opinions of courts at all levels on whether the law is unconstitutional, and the laws that are deemed unconstitutional by the courts still exist effectively. However, the judgment made by the American court will become a precedent, which will not only bind the subsequent judgments of the same court, but also bind the lower courts. To a certain extent, this reduces the diversity of the review conclusions of the courts at all levels, and realizes the same case and the same judgment, at least within the courts.

### **4.2. Centralized normative review system in Germany**

Compared with the decentralized norm review system in the United States, Germany is a centralized norm review system. Germany established the Federal Constitutional Court, a specialized court, which is mainly engaged in normative review, with its focus on reviewing the constitutionality of laws and administrative orders. The working procedure of the federal court mainly accepts three kinds of normative review, namely, whether a certain norm violates the Constitution, whether it is submitted by a specific institution, whether it is submitted by an ordinary court and whether it is submitted by an ordinary citizen. No matter how different these three procedures are in starting, it is important that the unconstitutional judgment made by the federal constitutional court has abstract effect and the unconstitutional norm is invalid. If the judgment made by the Constitutional Court is declared invalid *ab initio*, then the law will be cleared, and it is not necessary for legislators to clear it separately; If the judgment made is a declaration of inconsistency, then the legislator should revoke the specification by law or make amendments, which is the obligation of the legislator.

Although China's judicial system and tradition are far from those of the United States and Germany, and the scope of review conducted by Chinese courts is limited to incidental

review of normative documents other than laws, regulations and rules, rather than constitutional review. However, the above two national review models still provide ideas in the direction of establishing case guidance for incidental review of normative documents.

## **5. Thoughts on Solving the Problem of Regulating the Effectiveness of Incidental Review of Documents**

### **5.1. Establish guiding cases**

Referring to the normative review system in the United States, similar to the incidental review system of normative documents in China, the results of each review only have case effect, but the United States is a case law country, which can achieve the consistency of positions within the court by following the precedent principle. In China, even the Supreme People's Court's judgment is not binding on grass-roots courts. In recent years, the case guidance reform in the Supreme People's Court can be considered to have some color of following precedent. The cases selected by the Supreme People's Court have the effect of reference application. If the case attached to the review of normative documents can be selected as a guiding case, other courts can refer to the case, and the same case can be judged within the court. Of course, it is also difficult to select all the cases attached to the review of normative documents as guiding cases, that is, it is necessary to ensure that the court's judgment reasons are justified. If the court's judgment reason itself is improper, it obviously cannot be selected as a guiding case.

### **5.2. Information flow within the judicial system**

In the court system, an announcement system is established through the Supreme Court, and a platform for information announcement is set up in the provincial high courts, so that the conclusion of the incidental review that has been tried can be announced and information can be circulated in time, and the conclusion of the review can be announced as the conclusion of the court system. For example, after hearing a case involving the review of normative documents, a court publishes its conclusions and judicial suggestions on the platform to clarify the relevant contents. In this way, the problem of different review standards and repeated review in all courts in the country can be solved. The advantage of this system is that it does not necessarily declare the legal effect of the normative documents involved, but it simplifies the workload of judges in reviewing the same normative document by means of information inquiry, and most of the final conclusions tend to be consistent, thus achieving the de facto universal "non-application" effect.

### **5.3. Establish the revocation system of the people's court**

Referring to the revocation system of laws deemed unconstitutional by the German Constitutional Court, China should also give the people's courts the revocation system of normative documents with defects after review. This is the most ideal and difficult mechanism to realize, and this scheme can completely solve the effectiveness problem of the existing system of incidental review of normative documents. However, this scheme faces great difficulties under China's legal system. According to the Constitution of our country

and the Supervision Law of the Standing Committees of People's Congresses at Various Levels in People's Republic of China (PRC), the Standing Committee of the National People's Congress has the right to revoke illegal normative documents, and the administrative organ at a higher level or the people's government at the same level has the right to revoke or change illegal normative documents, but the court is not given the power to revoke illegal normative documents.

## 6. Conclusion

The report of the 19th National Congress of the Communist Party of China clearly stated: "Strengthen the implementation and supervision of the Constitution, promote the review of constitutionality and safeguard the authority of the Constitution." This is the first time that the "constitutionality review" has been written into the report of the Party Congress, which shows the Communist Party of China (CPC)'s determination to deepen the practice of comprehensively administering the country according to law and promote the modernization of state governance in the new era. Writing the incidental review of normative documents into law is only the starting point of the development of administrative litigation law. We should deeply analyze the relationship between this system and other systems and the possible problems. Based on the analysis of the current situation of incidental review of normative documents, this paper finds out the problem of its effectiveness. Therefore, it is suggested to further clarify,

strengthen and enhance the effectiveness of the conclusions of incidental review of normative documents by guiding the gist of case adjudication or guiding the case itself, and at the same time, the problem can be solved from both academic and technical perspectives.

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## References

- [1] C.Y. Xin, Interpretation of the Administrative Procedure Law of the People's Republic of China. Bei Jing: Law Press, 2014, ch. 139.
- [2] Charles Beard, et al. Great usurpation of power: discussion on judicial review at the turn of the 19th and 20th centuries in America. New York: Springer-Verlag, 2009, ch.124-130.
- [3] S.N.Ying, editor-in-chief: Interpretation and Comments on the Revised Provisions of the Administrative Procedure Law of the People's Republic of China. Bei Jing: People's Court Press, 2015, ch. 170.
- [4] N. Kawasaki, "An analysis of the judicial review mode in the United States," M.S. thesis, Dept. Law. Eng., Osaka Univ., Osaka, Japan, 2013.
- [5] M. Young, Exploration of judicial review in the United States. Mill Valley, CA: University Science, 2017.