



Analysis on the countermeasures of typical problems in the legality examination of china's administrative normative documents

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Abstract

In order to solve some common problems existing in the legality review of administrative normative documents, it is necessary to put forward targeted suggestions on the basis of analyzing typical problems. For example, by changing the form of issuing documents, raising the rank of issuing documents, and preventing matters that exceed statutory powers; drafting normative provisions in strict accordance with the law to ensure that the expressions of the provisions are in harmony with the superior law; avoiding the improper setting of administrative licenses, penalties and other terms; strengthening evaluation and review to eliminate the decrease of the legal rights and interests of administrative counterparts or the increase of their obligations; clarifying the scope of statutory responsibilities of the unit, and strictly forbidding the increase or decrease of the statutory responsibilities of the unit; paying attention to soliciting opinions and information feedback to avoid affecting the economic activities of market entities; strictly abiding by and implementing the formulation procedures of normative documents.

Keywords: administrative normative documents, legality review, countermeasure analysis

Introduction

In recent years, various regions and departments in China have continuously strengthened the formulation, supervision and management of administrative normative documents, and have achieved certain results. However, the phenomenon of arbitrarily issuing documents and issuing “absurd” documents still exists to varying degrees.^[1] Although China's laws and regulations, such as the Constitution, the Legislative Law, the Administrative Litigation Law, and the Ordinances for the filing of regulations and rules, have established review systems such as filing review and incidental review of normative documents, due to the fact that legal hermeneutics does not provide a sound judicial review standard, the operation effectiveness of the judicial review power of normative documents is limited.^[2] Therefore, it is still necessary to further explore and improve the relevant theoretical research on the legality review mechanism of administrative normative documents.

Administrative normative documents, in addition to the administrative regulations, decisions, orders, departmental rules and local government rules of the State Council, are formulated and publicly released by administrative organs or organizations authorized by laws and regulations to manage public affairs in accordance with statutory powers and procedures. This type of document is a document that involves the rights and obligations of citizens, legal persons and other organizations, which has general binding effects, and is repeatedly applied within a certain period of time.^[3] According to the conceptual definition of administrative normative documents, three basic characteristics can be summarized: the first is abstraction, that is, the normative documents stipulate abstract administrative actions rather than notifications of specific matters; the second is externality, which refers to the externality of management content in normative documents,^[4] that is, it involves the rights and obligations of citizens, legal persons and other organizations, rather than the management norms and working systems implemented internally; the third is repeated applicability, which has general binding force on people and things within its jurisdiction and can be applied repeatedly within a certain period of time.^[5]

At this stage, the review modes of administrative normative documents in China mainly include three review modes: constitutionality review, legality review, and appropriateness review. Constitutionality, legitimacy, and appropriateness review together constitute a compound review system for normative documents with Chinese characteristics. Although there are differences between them, they are also related to each other, so as to achieve the all-round supervision of the constitutionality, legitimacy and appropriateness of normative documents.^[6] Among them, the legality review modes in China's legislation mainly includes five review systems: prior approval, subsequent revocation, filing review, reconsideration review, and judicial review.

The formulation of administrative normative documents has a wide range of subjects and simple procedures. It is the administrative management code of conduct formulated by the administrative organ in the administrative management process with the largest number, the highest frequency of application, and the widest scope of

application. The legality review of administrative normative documents is mainly divided into external review by judicial organs and internal review by administrative organs. In the practice of the legality review of normative documents, although the internal restraint, supervision and review of the administrative organ system are difficult to get rid of the constraints of its own limitations, its comprehensive and efficient review method can strictly control the typical problems in the legality review of administrative normative documents from the macro level, and urge the issuance units of normative documents to restrict and avoid common typical problems in the stages of drafting, soliciting opinions, promulgation and implementation. Therefore, reviewing the legality of administrative normative documents is an important measure to ensure the legitimacy and effectiveness of normative documents issued by administrative organs.

Analysis of typical problems in the legality review of administrative normative documents

In accordance with the requirements of “comprehensively implementing the legality review mechanism of normative documents” in the *Guiding Opinions of the General Office of the State Council on Comprehensively Implementing the Legality Review Mechanism of Administrative Normative Documents*, it is a must to strengthen the scientific and legality review of administrative regulatory documents from the source. The research team sorted out 114 pieces of regulatory documents that were countersigned, solicited opinions and specially reviewed, according to the laws and regulations of a certain department, and summarized the common problems found in the review. Among them, a total of 89 problematic files were found, and the probability of problematic files is about 78%. Especially at the stage of drafting and releasing the draft of administrative normative documents for comments, there is a lack of systematic and scientific legality review, expert review, evaluation and demonstration, which is prone to have some obvious problems.

By analyzing and summarizing the typical issues in the legality review of normative documents, it can be briefly summarized into the following seven basic types: the type that exceeds the legal powers, the type that is inconsistent with superior laws, the type that improperly sets administrative licenses, administrative penalties and administrative enforcement, the type that impairs the legitimate rights and interests of the administrative counterparts or increases their obligations, and increase or decrease the legal responsibilities of the unit, the type of illegal intervention in the economic activities of market entities, and the type that does not comply with the formulation procedures of normative documents.

Countermeasures and suggestions for typical problems in the legality review of administrative normative documents

Change the form of document issuing, raise the rank of document issuing, and eliminate matters beyond legal authority

Among the typical issues in the legality review of the normative documents, the issue of surpassing statutory powers mainly arises in the aspect of “no basis to stipulate the responsibilities of local government”. In this regard, when the drafting unit of normative documents involves the responsibilities of local governments or other departments, it should adopt methods such as changing the form of issuing documents, improving the rank of issuing documents, jointly issuing documents and adjusting the objects of issuing documents, so as to avoid the occurrence of matters suspected of exceeding its authority, such as “no basis to stipulate the responsibilities of local governments” or “no basis to stipulate the responsibilities of other departments”.

Draft normative articles strictly in accordance with the law to ensure that the expressions of the articles are in harmony with the superior law

From the overall situation of the review of the legality of normative documents, the problem of “inconsistency with the higher-level law” occurs frequently, and the problem of inconsistencies between the normative documents and the higher-level law is the most prominent. For example, the lower-level law supplements expands items that are not specified by the upper-level law, and how to determine whether it constitutes a conflict or inconsistency is a common problem encountered by the drafting unit of the normative document. In this regard, the issue of “inconsistent with the higher-level law” that arises in the review of the legality of normative documents should clearly define the connotations of “illegal setting” and “supplement”.

First of all, the drafting unit of the normative document needs to be consistent with the provisions of the superior law in the initial stage of drafting; Secondly, if the rights and obligations of the administrative counterpart are uncertain or the business department insists on writing it but cannot find a legal basis, the word “in accordance with the law” can be added. Finally, when reviewing the legality of normative documents, the review organ needs to pay attention to verifying whether it is inconsistent with the superior law when it involves the rights and obligations of the administrative counterpart, and to perform strict control duties.

Avoid the improper setting of administrative licenses, penalties and other terms

Regarding the improper setting of administrative licenses and administrative penalties for lack of legal basis, in the absence of a basis for higher-level laws, the drafting unit of normative documents should avoid using expressions suspected of administrative licenses, such as qualification review, evaluation, review, and approval. Pay attention to perfecting and enhancing the cohesive expression of legal liability clauses. Normative documents cannot set penalties, and it is generally inappropriate to make specific penal provisions. Instead, they should make bridging provisions for the existing provisions of relevant laws and regulations. When reviewing

the legality of normative documents, the review organ needs to pay attention to the verification of whether there is a lack of legal basis for the setting of administrative licenses and administrative penalties when it involves clauses of administrative licenses, administrative penalties and others.

Strengthen evaluation and review, and prevent damage to the legitimate rights and interests of administrative counterparts or increase to their obligations

When it comes to the typical issues of increasing the obligations of an enterprise without a basis, such as the provision of “reporting, filing for approval, and filing” for the enterprise without a basis, it is necessary to further strengthen the assessment and review to prevent the legal rights and interests of the administrative counterparts from being derogated or increasing their obligations. First of all, the drafting unit of normative documents should pay attention to the use of expressions that may detract from the legal rights of the administrative counterparts or increase the types of obligations. When it comes to expressions such as “reporting, filing for approval, and filing”, it is necessary to carefully verify the basis of the superior law. Secondly, in matters that involve “decreasing the legal rights and interests of administrative counterparts or increasing their obligations” in accordance with the law, it is necessary to pay attention to social risk assessment and expert assessment. Thirdly, pay attention to real-time feedback from society and enterprises in the stage of soliciting opinions for normative documents. Finally, when reviewing the legality of normative documents, the review organ should also carefully review the expressions of common problems such as “reporting, filing for approval, and filing”.

Clarify the scope of statutory responsibilities of the unit, and forbid the increase or decrease of the statutory responsibilities of the unit

In view of the fact that some normative documents have increased or reduced the statutory responsibilities of the unit, the statutory responsibilities of the unit should be clarified during the drafting stage of the normative documents, and the statutory responsibilities of the unit should not be increased or decreased without a certain basis. Before normative documents are filed for approval, when reviewing organs reviews the legality of normative documents submitted by drafting units, they need to improve the responsibility mechanism, strengthen investigation and punishment, and avoid the problems such as increasing or reducing the statutory responsibilities of the unit.

Pay attention to soliciting opinions and information feedback to avoid affecting the economic activities of market entities

In the process of reviewing the legality of normative documents, although there are fewer types of illegal intervention in the economic activities of market entities, they have a greater impact on the economic activities of market entities. Special attention should be paid to the solicitation of opinions during the drafting stage of normative documents. Those that have a significant impact on the vital interests or rights of an enterprise shall, in accordance with the requirements of the *General Office of the State Council on Fully Hearing the Opinions of Enterprises and Industry Associations and Chambers of Commerce in the Process of Drafting Administrative Rules, Regulations, and Administrative Normative Documents*, fully listen to the opinions of various representative enterprises, industry associations, chambers of Commerce and lawyers’ associations, especially the opinions of private enterprises, labor-intensive enterprises, small and medium-sized enterprises and other market entities; If a specific industry is involved, the opinions of relevant industry associations and chambers of Commerce shall be listened to; If a specific region is involved, the local economic and social development level and industrial layout characteristics shall be fully considered, and the opinions of local trade associations, chambers of commerce and lawyers’ associations shall be fully listened to.

Strictly abide by and implement the formulation procedures of normative documents

In the drafting stage of normative documents, drafts should be drawn up in strict accordance with the law, focusing on self-examination and self-checking of the substantive content and procedural matters of normative documents. Before the normative documents are prepared for reviewing, the review organ shall conduct the review of the legality of the normative documents. The review organ can conduct the review of normative documents in a certain logical sequence. For example, in the formal review stage, it first examines the main qualifications and powers of the organ issuing normative document, and reviews the procedural specifications and the form of issuing documents. In the substantive review stage, more attention should be paid to the review of the content, scope and application conditions of administrative normative documents.

Conclusion

An administrative normative document is an important law enforcement basis for an administrative organ. Ensuring the legality, scientificity and rationality of the formulation of administrative normative documents is an important guarantee for improving the level of law enforcement by administrative organs. According to the classification and analysis of common problems in the legality review of administrative normative documents, the theoretical refinement and summary of the corresponding typical problems is to solve the common problems in the legality review of administrative normative documents and propose corresponding countermeasures. The key to analyzing and improving the recommendations is not only helpful for providing reference for the internal

review of normative documents by the administrative organs, but also for promoting the timely and efficient discovery and resolution of problems by the administrative organs during the internal review stage.

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