

## JUDICIAL REVIEW OF REGULATORY DOCUMENTS IN ADMINISTRATIVE LITIGATION IN CHINA

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Judicial review of rules or regulations by the government is far from new, but in China it is a novelty. After the latest revision of the Administrative Litigation Law of China (“ALL”) in 2014, courts formally began to have authority to review regulatory documents in administrative litigation.<sup>1</sup> The National People’s Congress of China (“NPC”) implemented a new system of reform through supervision letters to provincial and city people’s congresses asking they correct problems in local regulations (*difangxing fagui*). Relatedly, judicial review of regulatory documents has become a component of legality review and constitutional review in China.<sup>2</sup>

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<sup>1</sup> Zhonghua Renmin Gongheguo Xingzheng Susong Fa (中华人民共和国行政诉讼法) [Administrative Litigation Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 4, 1989, effective Oct. 1, 1990), STANDING COMM. NAT’L PEOPLE’S CONG. GAZ., [http://www.gov.cn/flfg/2006-10/29/content\\_1499268.htm](http://www.gov.cn/flfg/2006-10/29/content_1499268.htm) [<https://perma.cc/RGF8-68E9>] [hereinafter *Original ALL*]. The official translation is Administrative Procedure Law, but in the academic field, it is also often referred to as the Administrative Litigation Law.

<sup>2</sup> CHENG SHUWEN (程姝雯) & WANG XIUZHONG (王秀中), *Quanguo Renda Changweihui Shouci dui Weifa Wenjian Fachu Jiuzheng Dubanhan, Hexianxing Shencha yi Jianzaixianshang* (全国人大常委会首次对违法文件发出纠正“督办函”合宪性审查已箭在弦上) [The Standing Committee of the National People’s Congress Issues Supervision Letters over Enforcement to Correct Illegal Provisions and Constitutional Review is in the Offing], NANFANG DUSHI BAO (南方都市报) [SOUTHERN METROPOLIS DAILY] (Mar. 1, 2018, 00:00 AM), [https://www.sohu.com/a/224542479\\_161795](https://www.sohu.com/a/224542479_161795) [<https://perma.cc/G78G-GSY9>].

The ALL can be taken as the starting point of “rule of law government” (*fazhi zhengfu*) in China, giving ordinary people the right to directly sue the government. Since then, the ALL has played a unique and significant role in pushing forward the rule of law in China, but it also has faced many challenges and criticisms since its inception.<sup>3</sup> Over the past twenty years, scholars and experts from time to time proposed revisions to the ALL. With the growth of various conflicts in China, dispute resolution has received more attention. The Revised ALL was supposed to be on the legislative agenda of the NPC in 2006 but later was postponed due to, among other reasons, disagreement on some important issues.<sup>4</sup> On December 23, 2013, the draft of revision of ALL was first submitted to NPC.<sup>5</sup> Finally, on November 1, 2014, the 11<sup>th</sup> Session of the 12<sup>th</sup> National People’s Congress adopted the revision of ALL after three

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<sup>3</sup> See Neysun A. Mahboubi, *Suing the Government in China*, in DEMOCRATIZATION IN CHINA, KOREA AND SOUTHEAST ASIA: LOCAL AND NATIONAL PERSPECTIVE 141, 141–155 (Kate Xiao Zhou et al. eds., 2014) (discussing the changes and challenges brought by the ALL in China).

<sup>4</sup> The issues in this revision include whether China should and could establish an independent administrative court system or another substitute mechanism to strengthen independence and fairness of administrative litigation, whether the parties can mediate administrative disputes in administrative litigation and how they do so, whether the court should expand the scope of judicial review and to what extent, whether the court should accept and review public interest lawsuits, how to review, how to improve the evidence rules, and how to perfect the litigation categories and evidence rules. See Ying Songnian (应松年) & Yang Weidong (杨伟东), *Woguo Xingzheng Susong Xiuzheng Chubu Shexiang Shang* (我国《行政诉讼法》修正初步设想(上)) [Tentative Ideas on Amending the Administrative Procedure Law of China I], 10 ZHONGGUO SIFA (中国司法) [JUST. OF CHINA] 28 (2004).

<sup>5</sup> *Zhonghua Renmin Gongheguo Xingzheng Susong Fa Xiuzheng'an Caoan* (中华人民共和国行政诉讼法修正案(草案)) [Amendment of the Administrative Litigation Law of the People’s Republic of China (Draft)] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 31, 2013) [hereinafter *Draft ALL*].

reads.<sup>6</sup> The Revised ALL went into effect on May 1, 2015.<sup>7</sup> During the revision process of the ALL and its enforcement, scholars, officials, judges, and related professional people discussed many important issues of the ALL.<sup>8</sup> Among the controversial issues that

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<sup>6</sup> *Zhonghua Renmin Gongheguo Xingzheng Susong Fa* (中华人民共和国行政诉讼法) [Administrative Litigation Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 1, 2014, effective May 1, 2015) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China) [hereinafter *Revised ALL*]. See Xin Chunying (信春鹰), *Guanyu Zhonghua Renmin Gongheguo Xingzheng Susongfa Xiuzheng'an Caoan de Shuoming* (关于《中华人民共和国行政诉讼法修正案(草案)》的说明) [Interpretation on the Draft of Administrative Litigation Law Amendment of People's Republic of China], ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC], [http://www.npc.gov.cn/wxzl/gongbao/2014-12/23/content\\_1892443.htm](http://www.npc.gov.cn/wxzl/gongbao/2014-12/23/content_1892443.htm) [https://perma.cc/6QEZ-DMMT].

<sup>7</sup> Revised ALL (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 1, 2014, effective May 1, 2015) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.

<sup>8</sup> Among these issues, the proposal to establish a separate and independent administrative court system outside of the present standard court structure—similar to maritime courts which were operating well at that time and railway courts which were already abolished—was debated and discussed at the 2012 Annual Conference of China Society of Administrative Law. It was later supported by many scholars, judges, and officials, but did not happen. At that time, the NPC already adopted the former existing judicial reform methods as an alternative plan to the independent administrative court system, including elevating the jurisdiction of the administrative cases in which the government above the county level is the defendant to the intermediate courts and authorizing the higher courts to establish circuit tribunals in one provincial region. But now in Beijing, Shanghai and Guangzhou, the new courts with cross administration regions were established. They all mainly accept and try administrative litigation cases, so they can be regarded as a kind of administrative court. Lin Hua (林华), *Zhongguo Xingzheng Faxue Yanjiuhui 2012 Nian Nianhui Zongshu* (中国行政法学会 2012 年年会综述) [Summary of Annual Conference of Chinese Society of Administrative Law in 2012], 26 XINGZHENG FAXUE YANJIU (行政法研究) [ADMIN. L. REV.] 138, 138–144 (2013); Ma Huaide (马怀德), *Xingzheng Shenpan Tizhi Gaige de Mubiao: Sheli Xingzheng Fayuan* (行政审判体制改革的 目标: 设立行政法院) [To Establish Administrative Court is the Objective of Reform of Administrative Trial System], 3 FALV SHIYONG (法律适用) [JOURNAL OF LAW APPLICATION] 8, 8–11(2013); Qiao Wenxin (乔文心), *Kua Xingzheng Quhua Fayuan: Pochu Sifa Difanghua Fanli* (跨行政区划法院: 破除司法地方化藩篱) [Cross-district Court: Break Barriers of Judicial Local Protectionism], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S COURT DAILY] (Nov. 14, 2016).

were being debated fiercely, expansion of judicial review was clearly an eye-catching topic. As Professor Hu Jianmiao said, “the changes in the scope of administrative litigation could serve as the barometer of the advancement of the rule of law in China”.<sup>9</sup> Professor Yang Weidong also argued: “As to the case scope, the promulgation of the ALL is just the start of questions rather than the end of questions.”<sup>10</sup> Proposals that “abstract administrative actions” as described below can be reviewable in the administrative litigation were put forth long ago.<sup>11</sup> There was wide agreement among scholars and other commentators that abstract administrative actions should be included in judicial review, but some insisted that not all abstract administrative actions were appropriate for review in the litigation process.<sup>12</sup> In different revision suggestions submitted by the

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<sup>9</sup> Hu Jianmiao (胡建淼), *Zhongguo Xingzheng Susong Fanwei de Yanbian yu Quxiang: Huading, Xianzhi, Huifu, Tuozhan* (中国行政诉讼范围的演变与趋向: 划定, 限制, 恢复, 拓展) [Changes and Trends of Scope of Administrative Litigation in China: Designation, Limitation, Recovery and Expansion], 23 ZHENGFA LUNTAN (政法论坛) [TRIB. OF POL. SCI. & L.] 3, 3 (2005).

<sup>10</sup> Yang Weidong (杨伟东), *Xingzheng Susong Shouan Fanwei Fenxi* (行政诉讼受案范围分析) [Analysis on Case Scope of Administrative Litigation], 26 XINGZHENG FAXUE YANJIU (行政法学研究) [ADMIN. L. REV.] 84, 85 (2004).

<sup>11</sup> See Shi Hongxin (石红心), *Lun Chouxixiang Xingzheng Xingwei de Sifa Shencha* (论抽象行政行为的司法审查) [On Judicial Review of Abstract Administrative Actions], 26 YANJIUSHENG FAXUE (研究生法学) [GRADUATE L. REV.] 28, 29–33 (1996) (discussing the rationales and the importance of judicial review over abstract administrative actions). In 1997, several judges from the basic courts discussed the necessity and the possibility of expanding judicial review to abstract administrative actions. See Qian Cuihua et al. (钱翠华等), *Chouxixiang Xingzheng Xingwei Nengfou Tiqi Susong de Tantaoyan* (抽象行政行为能否提起诉讼的探讨) [Discussion about Whether Can Sue the Abstract Administrative Actions], 16 ZHENGZHI YU FALV (政治与法律) [POL. SCI. & L.] 20, 20–25 (1997) (listing different judges’ views on if and how to conduct judicial review on abstract administrative actions).

<sup>12</sup> Zhan Zhongle (湛中乐), *Zhongguo Xingzheng Susongfa Xiuzheng* (中国行政诉讼法修正) [The Amendment of the Administrative Procedure Law of China], 7 ZHONGGUO FAXUE QIANYAN (中国法学前沿) [FRONTIERS L. CHINA] 211, 214 (2012); Xue Gangling (薛刚凌) & Li Chunyan (李春燕), *Xingzheng Susongfa Xiuding zhi Jiegou Moshi Yanjiu* (行政诉讼法修订之结构模式研究) [Study on the Structure and Models of Revision of Administrative Litigation Law], 2 JIANGSU SHEHUI KEXUE (江苏社会科学) [JIANGSU SOC. SCI.] 116, 120 (2005). See Guo Shaofeng (郭少峰), *Beida Xuezhe Tijiao Xingzheng Susongfa*

Supreme People's Court, several universities, and the China Society of Administrative Law, judicial review of regulatory documents was mentioned.<sup>13</sup> Although the Revised ALL already stipulates judicial review of regulatory documents, the debates are still ongoing and some controversies have not been settled. This article aims to review the history of debates on this issue, introduce the controversies that influenced the revision of the ALL, examine the relationship between judicial review of regulatory documents and other similar channels, analyze the essence and significance of new changes in the Revised ALL concerning judicial review of regulatory documents, and discuss several important issues in the implementation of new provisions of judicial review of regulatory documents.

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*Xiugai Yijiangao* (北大学者提交《行政诉讼法》修改意见稿) [Scholars from Peking University Submitted Opinions on Revision of the Administrative Litigation Law], XINJINGBAO (新京报) [THE BEIJING NEWS] (Feb. 22, 2012), <http://www.bjnews.com.cn/news/2012/02/22/183964.html> [<http://perma.cc/V7VR-RFS7>] (reporting scholars submitted opinion on the revision of administrative litigation law which touched upon the scope of judicial review).

<sup>13</sup> In China, there are four levels of courts including the Supreme People's Court, Provincial Higher People's Courts, Intermediate People's Courts, and Basic People's Courts. The Supreme People's Court is the court of last resort. *Zhonghua Renmin Gongheguo Fayuan Zuzhi Fa* (2006 Xiuzheng) (中华人民共和国人民法院组织法 (2006 修正)) [Organic Law of the People's Courts of the People's Republic of China (2006 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 2006, effective Jan. 1, 2007), art. 2 & 12.

China University of Political Science and Law, Peking University, Renmin University, and Tsinghua University invited the scholars from all over the country to make the suggestions for the revision of the ALL. The suggestions from Peking University proposed that rules and regulatory documents should fall within the review scope of administrative litigation incidentally with the specific administrative documents, and if the regulatory documents infringe upon a citizen's rights and benefits, the citizen can bring the lawsuit directly. PEKING U. RES. CTR. for CONST. L. and ADMIN. L. (北京大学宪法与行政法研究中心), *Xingzheng Susong Fa Xiugai Jianyigao Beidaban Zhengshi Fabu* (《行政诉讼法》修改建议稿北大版正式发布) [Official Publication of the Amendment to Administrative Litigation Law proposed by Peking University scholars], [http://epaper.bjnews.com.cn/html/2012-02/22/content\\_319118.htm?div=-1](http://epaper.bjnews.com.cn/html/2012-02/22/content_319118.htm?div=-1) [<https://perma.cc/8XJU-9RQG>] (last visited Apr. 10, 2021).

## I. DEBATES ON JUDICIAL REVIEW OF ABSTRACT ADMINISTRATIVE ACTIONS

Despite absorbing and learning about many legal notions and theories from common law systems, the whole administrative law framework in China represents the heritage of civil law systems. In China, government departments govern society through administrative actions. Academically, all the administrative actions can be classified into two groups: (1) “specific” or “concrete” (*juti*) administrative action, which was covered by the ALL for the first time since 1989 and became a legal term in codified laws instead of a merely an academic term in textbooks;<sup>14</sup> and (2) “abstract” (*chouxiang*) administrative action, which is merely an academic term that is not used in any official law or legal document.<sup>15</sup> “Specific administrative action” refers to the action that is applied to concrete persons and situations, such as administrative penalty, administrative license, and administrative compulsion and requisition. “Abstract administrative action” refers to the action that can be applied generally and in the future.<sup>16</sup> The classification approximately equates to rulemaking and adjudication in the U. S.<sup>17</sup>

Although it is difficult to figure out precisely the distinction between specific administrative action and abstract administrative

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<sup>14</sup> *Juti Xingzheng Xingwei* (具体行政行为) [Specific Administrative Action] was substituted by *Xingzheng Xingwei* (行政行为) [Administrative Action] when the Original ALL was revised in 2014. See Revised ALL (promulgated by the Standing Comm. Nat’l People’s Cong., Nov. 1, 2014, effective May 1, 2015) STANDING COMM. NAT’L PEOPLE’S CONG. GAZ., art. 13.

<sup>15</sup> See Yang Haikun (杨海坤), *Dishierzhang Xingzheng Xingwei* (第十二章 行政行为) [Chapter 12 Administrative Actions], in *DANGDAI ZHONGGUO XINGZHENGFA* (当代中国行政法) [Contemporary Administrative Law in China] (Ying Songnian (应松年) ed., 2018) 783; *XINGZHENGFA XUE* (行政法学) [SCIENCE ON ADMINISTRATIVE LAW] 124 (Hu Jianmiao (胡建淼) ed., 2015).

<sup>16</sup> *Id.*

<sup>17</sup> Adjudication in the US includes the administrative reconsideration and the administrative adjudication in China, so it is broader than specific administrative actions in China. Roughly speaking, we can regard specific administrative actions as adjudication. See Wang Jing (王静), *Meiguo Xingzhengfa Faguan Zhidu Yanjiu* (美国行政法官制度研究) [Research on the ALJs in the U.S.], *GUOJIA XINGZHENG XUEYUAN CHUBANSHE* (国家行政学院出版社) [CHINESE ACADEMY OF GOVERNANCE PUBLISHER] 1, 23–24 (2019).

action—and occasionally people have different opinions on the nature of certain action<sup>18</sup>—this classification remains the most important way to understand debates in administrative litigation in China. Article 12 in the Original ALL clearly provides that courts only have jurisdiction over specific administrative actions.<sup>19</sup> That means other actions, including abstract administrative actions, cannot be subjects of administrative litigation in the past.<sup>20</sup> Courts cannot declare that an abstract administrative action is illegal and repeal or annul its effect. Professor Zhang Qianfan believed that “this is one of its few peculiar ‘Chinese characteristics.’”<sup>21</sup> However, in practice,

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<sup>18</sup> An example of one on the border is a notice made by the former Ministry of Railways, which was dissolved and transferred duties to the Ministry of Transport, State Railways Administration, and China Railway Corporation last year. It announced that the train ticket prices during Chinese Lunar New Year Festival would be raised. Concerning the nature of this notice, the first instance court, the court of appeals, the plaintiff, the defendant, and the legal experts all had different opinions. See Tang Yingying (唐莹莹) & Chen Xingyan (陈星言), *Chouxiang Xingzheng Xingwei Kesuxing Tanxi: Cong Qiao Zhanxiang Su Tiedaobu Chunyun Piaoji Shangfuan Tanqi* (抽象行政行为可诉性探析: 从乔占祥诉铁道部春运票价上浮案谈起) [Analysis on Justiciability of Abstract Administrative Actions: From Qiao Zhanxiang v. Ministry of Railways], 19 FALV SHIYONG (法律适用) [LEGAL APPLICATION] 65, 65–67 (2004) (explaining the justifiability of abstract administrative actions).

<sup>19</sup> Original ALL (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 4, 1989, effective Oct. 1, 1990), STANDING COMM. NAT’L PEOPLE’S CONG. GAZ., art. 12.

<sup>20</sup> Article 13 of the Original ALL excludes four kinds of actions in administrative litigation, for example, abstract administrative actions which are expressed as “administrative regulations and rules or decisions and orders with general binding force developed and issued by administrative organs.” Three other kinds of excluded actions are “actions taken by the state in national defense and foreign affairs” ; “decisions of administrative agencies on rewards or punishments for their employees or the appointment or removal from offices of their employees” and “administrative action taken by an administrative agency as a final adjudication according to the law.” These above limitations on the scope of jurisdiction over administrative litigation cases may also be changed because the scholars strongly proposed to expand the scope of judicial review to so-called internal administrative actions, especially those important decisions rendered by the administrative organs to the civil servants about appointment, removal, and punishment. Original ALL (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 4, 1989, effective Oct. 1, 1990), STANDING COMM. NAT’L PEOPLE’S CONG. GAZ., art. 13.

<sup>21</sup> Zhang Qianfan, *From Administrative Rule of Law to Constitutionalism?*, 3 ASIA L. REV. 47, 57 (2006).

abstract administrative actions often have greater impact on people and society than specific administrative actions. That is the reason why scholars and experts have discussed the necessity and feasibility of judicial review of abstract administrative actions many times since the ALL was drafted in the 1980s.<sup>22</sup>

In 1989, in Wang Hanbin's introduction and interpretation of drafting of the ALL to the Standing Committee of the NPC, the scope of the court's jurisdiction in administrative cases was the first important issue identified that should be resolved in the ALL and should be decided according to some principles.<sup>23</sup> Wang Hanbin mentioned that the scope of review should "be enlarged appropriately" and "neither interfere in administrative actions . . . nor substitute the administration to exercise administrative power".<sup>24</sup> He also used phrases like "actual situations" and "be expanded step by step" which can be seen as the key words to confine the scope of court's jurisdiction.<sup>25</sup> The legislators believed that at the time, based on the

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<sup>22</sup> Luo Wenyan (罗文燕), *Dui Chouxixiang Xingzheng Xingwei Jinxing Sifa Shencha de Falv Sikao* (对抽象行政行为进行司法审查的法律思考) [Legal Idea of Judicial Review of Abstract Administrative Actions], 4 HANGZHOU DAXUE XUEBAO (杭州大学学报) [J. HANGZHOU UNIV.] 23, 23–29 (1996); Gao Hong (高鸿), *Chouxixiang Xingzheng Xingwei Kesuxing Yanjiu* (抽象行政行为可诉性研究) [Research on Sueability of Abstract Administrative Actions], 4 FALV KEXUE (法律科学) [SCIENCE OF LAW] 33, 33–39 (1997); Ma Huaide (马怀德), *Xi Chouxixiang Xingzheng Xingwei Naru Susong Fanwei zhi Biyaoxing* (析抽象行政行为纳入诉讼范围之必要性) [Necessity of Judicial Review of Abstract Administrative Law], 10 RENMIN JIANCHA (人民检察) [PEOPLE'S PROSECUTORIAL MONTHLY] 12, 12–15 (2001); Gan Wen (甘文), *Dui Chouxixiang Xingzheng Xingwei de Sifa Shencha* (对抽象行政行为的司法审查) [Judicial Review of Abstract Administrative Actions], 4 RENMIN SIFA (人民司法) [THE PEOPLE'S JUDICATURE] 52, 52–53 (2002); Lu Weifu (陆维福), *Dui Guifanxing Wenjian Shencha Yingdang cong Xingzheng Fuyi Yanshendao Sifa Shencha* (对规范性文件审查应当从行政复议延伸到司法审查) [Review of Regulatory Documents Shall be Conducted in Judicial Review so does in Administrative Reconsideration], 2 XUESHUJIE (学术界) [ACADEMICS IN CHINA] 233, 233–237 (2005).

<sup>23</sup> Wang Hanbin (王汉斌), *Guanyu Zhonghua Renmin Gongheguo Xingzheng Susongfa (Caoan) de Shuoming* (关于中华人民共和国行政诉讼法(草案)的说明) [Interpretation on the Draft of Administrative Litigation Law of People's Republic of China], 5 SUP. PEOPLE'S CT. GAZ. 11, 12 (1989).

<sup>24</sup>*Id.*

<sup>25</sup>*Id.*

actual circumstances, because the administrative litigation really was a new legal mechanism, administrative organs needed some time to cope with it and courts also needed to accumulate experience, courts should review administrative actions, but not all actions, especially those documents with a general binding effect. Thus, the legislature chose specific administrative actions as the subject of judicial review in the Original ALL draft.<sup>26</sup> Since promulgation of the Original ALL, the debate about whether judicial review should be expanded to abstract administrative actions has remained hot. Many scholars and officials have proposed expanding judicial review to more abstract administrative actions, whereas others have opposed doing so. For example, Professor Zou Rong insisted that abstract administrative actions cannot be challenged in administrative litigation because we cannot design a feasible system to do so.<sup>27</sup> Professor Liu Xin also opposed expanding the scope of administrative litigation to abstract administrative actions because the courts were not equipped to review them at that time.<sup>28</sup> Even though the discussion about expanding judicial review to abstract administrative actions is a broader one, it has come to focus especially on low-level regulatory documents for which review is more feasible and acceptable. Professor Ying Songnian and Professor Yang Weidong thought in 2004 that accepting the regulatory documents under rules in judicial review was

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<sup>26</sup> Zhang Weiwei (张维炜), *Yichang Dianfu Guanguiminjian de Lifa Geming: Xingzheng Susongfa Dansheng Lu* (一场颠覆“官贵民贱”的立法革命: 行政诉讼法诞生录) [A Legislative Revolution to Overturn the Relationship between the Officials and the Ordinary People: Memory of Drafting the Administrative Litigation Law], 33 ZHONGGUO RENDA ZAZHI(中国人大杂志) [THE PEOPLE'S CONG. OF CHINA] 21, 23 (2014).

<sup>27</sup> Zou Rong (邹荣), *Xingzheng Guifan Sifa Shencha de Lujing* (行政规范司法审查的路径) [The Way towards Judicial Review of Administrative Regulatory Documents], 15 HUADONG ZHENGFA DAXUE XUEBAO (华东政法大学学报) [ECUPL. L. J.] 118, 119 (2012).

<sup>28</sup> Liu Xin (刘莘), *Guanyu Xingzheng Susong Falv Shiyong Zhidu Xiugai de Sikao* (关于行政诉讼法律适用制度修改的思考) [Thoughts on Revision of Legal Application in Administrative Litigation], 107 SUZHOU DAXUE XUEBAO(苏州大学学报) [SUZHOU U. J.] 67, 70 (2012).

better,<sup>29</sup> which was accepted by most people in academia and the legal practice.<sup>30</sup>

## II. REASONS OF JUDICIAL REVIEW OF REGULATORY DOCUMENTS IN CHINA

With a highly centralized system of government, hierarchical control plays a role in China. It presumes that higher authority has more power than lower authority, so legal documents stipulated by a higher authority are more authoritative than those stipulated by a lower authority.<sup>31</sup> As China develops its market economy, more and more legislations and regulations are passed, increasing the internal legal conflicts among different government departments. In 2000, the NPC passed the Legislation Law (*lifa fa*), which aimed to establish rules for various legislative activities, including legislation at the NPC and local People's Congress levels, and administrative legislation by the State Council, its ministries, and local governments.<sup>32</sup> The Legislation Law sets constraints for legislative bodies' authority as well as procedural requirements based on the ALL. The term "regulatory documents" has a special meaning in

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<sup>29</sup>Ying Songnian (应松年) & Yang Weidong (杨伟东), *Xingzheng Susong Xiuzheng Chubu Gouxiang Shang* (行政诉讼修正初步构想(上)) [Primary Idea about Revision of the ALL I], 10 *ZHONGGUO SIFA*(中国司法) [JUST. OF CHINA] 28, 31 (2004).

<sup>30</sup> Lu Weifu (陆维福), *Dui Guifanxing Wenjian Shencha Yingdang cong Xingzheng Fuyi Yanshendao Sifa Shencha* (对规范性文件审查应当从行政复议延伸到司法审查) [Regulatory Documents Shall Be Reviewed in Judicial Procedure as Does in Administrative Reconsideration], 2 *XUESHUJIE* (学术界) [ACADEMICS] 233, 233–237(2005); Wang Zhenmin(王振民), *Dui Guifanxing Wenjian Jinxing Sifa Shencha de Sange Tezheng* (对规范性文件进行司法审查的三个特征) [Three Characteristics of Judicial Review of Regulatory Documents], 10 *ZHONGGUO SHENPAN* (中国审判) [CHINA TRIAL] 14, 14–15 (2015).

<sup>31</sup> LIU XIN (刘莘), *XINGZHENG LIFA YUANLI YU SHIWU* (行政立法原理与实务) [Theory and Practice of Administrative Legislation] (*ZHONGGUO FAZHI CHUBANSHE* (中国法制出版社) [CHINA LEGAL PUBLISHING HOUSE]) 26(2014)

<sup>32</sup> *Lifa Fa* (立法法) [Law on Legislation] (promulgated by the Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000) 2000 *STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.* 31 (China).

Chinese administrative law.<sup>33</sup> Textually, abstract administrative actions include “administrative regulations” (*xingzheng fagui*), “rules” (*guizhang*), and decisions and orders with general binding force formulated and announced by the administration bodies.<sup>34</sup> Among these documents, administrative rules and regulations are stipulated in the Legislation Law and are called “administrative legislation” (*xingzheng lifa*). Other decisions and orders with general binding force are called “regulatory documents” (*guifanxing wenjian*), “other regulatory documents” (*qita guifanxing wenjian*) or “administrative regulatory documents” (*xingzeng guifanxing wenjian*).<sup>35</sup> Thus, normally in textbooks and academic articles, abstract administrative actions consist of two categories—administrative legislation and regulatory documents.<sup>36</sup> As to the relationship and differences among these terms, please refer to *the Table about Authorities of Administrative Legislation and Regulatory Documents* below.<sup>37</sup>

There is no constitutional court or constitutional review in China up to the present, so any dispute about the legal documents

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<sup>33</sup> See Dong Hao (董皞), *Dishisanzhang Xingzheng Lifa* (第十三章 行政立法) [Chapter 13 Administrative Legislation], in DANGDAI ZHONGGUO XINGZHENGFA (当代中国行政法) [Contemporary Administrative Law in China] (Ying Songnian (应松年) ed., 2018) 831.

<sup>34</sup> Lifa Fa (立法法) [Law on Legislation] (promulgated by the Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000) 2000 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 31 (China).

<sup>35</sup> Sometimes regulatory documents, in the context of the Chinese constitutional structure, refer to broader documents that are stipulated not only by the administration but also by the legislative and other entities which have the authority to establish rules, including the courts and the prosecutors. Mo Jihong (莫纪宏), *Guifanxing Wenjian Beian Shencha Zhidu de Hefaxing Yanjiu* (规范性文件备案审查制度的“合法性”研究) [Study on the Legitimacy of the Reference and the Review Systems for Regulatory Documents], 10 BEIJING LIANHE DAXUE XUEBAO (RENWEN SHEHUI KEXUE BAN) (北京联合大学学报(人文社会科学版)) [J. OF BEIJING UNION U. (HUMANITIES & SOC. SCI.)] 104, 107 (2012).

<sup>36</sup> Because regulatory documents are always published with a red title, they are also called *Hongtou Wenjian* [Red-headed Documents], meaning documents that have red titles and red stamps. “Red-headed” in the Modern Chinese Dictionary refers to documents announced and published by the Party and government institutions, often at the central level, whose names came from the red printed title of the documents. XIANDAI HANYU CIDIAN (现代汉语词典) [MODERN CHINESE DICTIONARY] (Dictionary Editing Room at the Inst. of Linguistics CASS ed., 6th ed. 2012).

<sup>37</sup> *Infra* Table.

passed by the NPC and the local People's Congresses cannot be submitted to courts. In the Chinese constitutional structure, the NPC has both the supreme status and the highest authority. Both the State Council and the Supreme People's Court are established by the NPC. Thus, it is impossible and inappropriate to supervise the NPC's legislation through judicial review. Further, since upper-level documents belong to the category of legislation and are called "administrative legislation," upper-level documents should not be challenged in courts.<sup>38</sup>

Another explanation of why the control and supervision of regulatory documents should be prioritized is the reality of these documents. In short, regulatory documents create many problems.<sup>39</sup> The reasons regulatory documents are problematic are as follows:

First, the number of regulatory documents is considerable, so problems they cause seem more obvious. According to Article 90 of the Constitution of China, upper-level governments have the authority to issue decisions and orders. "Ministries and commissions issue orders, directives and regulations within the jurisdiction of their respective departments and in accordance with statutes, administrative rules and regulations, decisions and orders issued by the State Council."<sup>40</sup> Similar provisions also appear in Article 107 of the Constitution of China, which grant power to lower level governments to issue such documents.<sup>41</sup> Therefore, not only do

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<sup>38</sup> Qin Qianhong (秦前红) & Ye Haibo (叶海波), *Xianfa Susong: Yige Pipanxing Fenxi* (宪法诉讼: 一个批判分析) [Constitutional Litigation: Critical Analysis], 2 HUADONG ZHENGFA DAXUE XUEBAO (华东政法大学学报) [ECUPL. L. J.] 12, 12–17(2003).

<sup>39</sup> Zhan Zhongle (湛中乐), Lun Xingzheng Fagui, Xingzheng Guizhang Yiwai de Qita Guifanxing Wenjian (论行政法规、行政规章以外的其他规范性文件) [Discussion on Other Regulatory Documents except Administrative Regulations and Administrative Rules], 9 ZHONGGUO FAXUE [CHINA LEGAL SCI.] 108, 112 (1992).

<sup>40</sup> The decisions and orders issued include both regulatory documents with general binding and specific actions with specific binding. XIANFA (宪法) [Constitution of the People's Republic of China] (promulgated by the Nat'l People's Cong., Dec. 4, 1982, effective Dec. 4, 1982, amended Mar. 14, 2004), art. 90 (China).

<sup>41</sup> Article 107 of the Constitution provides that people's governments of townships, nationality townships, and towns carry out the resolutions of the people's congress at the corresponding level as well as decisions and orders of the

provincial and larger city governments issue regulatory documents, but all local governments at different levels have authority to formulate various regulatory documents.<sup>42</sup> That means local governments at various levels, the central government, and its ministries and commissions all formulate regulatory documents. These governments and agencies have long counted on regulatory documents to exercise administrative power because regulatory documents always have a general application and have the force of law in practice. It is said that 85% of effective documents in the administration are regulatory documents made by governments at various levels.<sup>43</sup> Based on the estimated number of the authorities which can establish regulatory documents, as shown in the following table, it is difficult to calculate the exact number of regulatory documents formulated nationwide.<sup>44</sup> Due to the huge scale of regulatory documents, related problems, including conflicts among documents issued at different levels, are inevitable.

Documents		Authorities	Number of Authorities
<b>Administrative Legislation</b>	Administrative Regulations	State Council	1

state administrative organs at the next higher level, and conduct administrative work in their respective administrative areas. XIANFA, art. 107 (1982) (China).

<sup>42</sup> XIANFA, art. 107 (1982) (China).

<sup>43</sup> Wu Jing (吴兢), *Rang Gongzhong Youquan Zhuanggao Hongtou Wenjian* (让公众有权状告“红头文件”) [Let the Public Have the Right to Sue “Red-headed Documents”], RENMIN RIBAO (人民日报) [PEOPLE’S DAILY] (Apr. 18, 2007),

<http://kns.cnki.net/KCMS/detail/detail.aspx?dbcode=CCND&dbname=CCND2007&filename=RMRB200704180131&uid=WEEvREcwSIJHSldRa1FhdkJkcGkxUDROallOM> [<http://perma.cc/22WM-ZFBA>].

<sup>44</sup> The number of regulatory documents passed by State Council is 150. And the number of regulatory documents passed by ministries and commissions of the State Council is 92,917. See PEKING UNIVERSITY LEGAL INFORMATION NETWORK, [www.Pkulaw.cn](http://www.Pkulaw.cn) [<https://perma.cc/NR9W-GS4X>] (last visited Apr. 10, 2021). The number of regulatory documents passed by local governments and their bureaus and offices is unclear. The author conservatively estimate that it is in the millions.

	Rules	Administrative Rules <sup>45</sup>	Ministries and Commissions under State Council <sup>46</sup>	26 ministries, commissions, and other organs endowed with administrative functions directly under State Council <sup>47</sup>
		Local Rules <sup>48</sup>	Provincial and municipal governments with subordinate districts	34 provincial governments, and 284 municipal cities with subordinate districts <sup>49</sup>

<sup>45</sup> The number of rules passed by ministries and commissions of the State Council is 5,816. *See* LAWS & REGULATIONS DATABASE, <http://search.chinalaw.gov.cn/search2.html> [<https://perma.cc/Z5WQ-MGLE>].

<sup>46</sup> Article 80 of the Legislation Law provides, “[t]he ministries and commissions of the State Council, the People’s Bank of China, the State Audit Administration, and other divisions with administrative functions directly under the State Council may, in accordance with the laws and the administrative regulations, decisions, and orders of the State Council, develop rules within their respective power.” *Lifa Fa* (2015 *Xiuzheng*) (中华人民共和国立法法(2015 修正)) [The Law on Legislation of the People’s Republic of China (2015 Amendment)] (promulgated by the Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000, amended Mar. 15, 2015), art. 80, *translated in* Lawinfochina [*hereafter* Revised *Lifa Fa*].

<sup>47</sup> Wang Yong (王勇), *Guanyu Guowuyuan Jigou Gaige Fang’an de Shuoming* (关于国务院机构改革方案的说明) [The Interpretation of Reform Program of The State Council] (Mar. 14, 2018, 03:03 AM), [http://www.gov.cn/guowuyuan/2018-03/14/content\\_5273856.htm](http://www.gov.cn/guowuyuan/2018-03/14/content_5273856.htm) [<https://perma.cc/E4KZ-646J>].

<sup>48</sup> The number of rules passed by local governments is 30,750. *See* LAWS & REGULATIONS DATABASE, *supra* note 44.

<sup>49</sup> Before the Legislation Law was revised in 2015, municipal authorities with the power to enact local rules mainly referred to 49 larger cities, including 27 provincial capital cities, 18 larger cities approved by the State Council, and 4 cities where special economic regions are located. *Lifa Fa* (2000 *Xiuzheng*) (中华人民共和国立法法) [Law on Legislation of the People’s Republic of China], art. 63, 2000 *STANDING COMM. NAT’L PEOPLE’S CONG. GAZ.* 31 (China). According to the revision of the Legislation Law in 2015, all 284 cities with subordinate districts, instead of larger cities, have local legislative power, but only on managing city affairs, including urban construction, city appearance management, and environmental protection. Revised *Lifa Fa* (promulgated by the Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000, amended Mar. 15, 2015), art. 72, *translated in* Lawinfochina.

<b>Regulatory Documents</b>	<b>Superior authorities, lower governments, and related bureaus and subordinates</b>	<b>More than 43,000 authorities<sup>50</sup></b>
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*Table: Authorities of Administrative Legislation and Regulatory Documents*

Secondly, in practice, regulatory documents are always direct guidelines for civil servants to execute laws and exercise administrative power. In Chinese bureaucracy, civil servants in lower level governments and agencies are reluctant to check upper level legal documents and usually would directly apply the regulatory documents announced by themselves or superior organs. So even if there is something wrong with the regulatory documents, administrative organs still tend to comply with them in rendering administrative decisions, such as administrative penalties or orders of relocation and home demolition.<sup>51</sup>

<sup>50</sup> As of September 2016, there were 34 provincial governments and 334 prefectural level governments (*diji xingzhengqu*), including 294 prefectural cities (*dijishi*), but only 49 larger cities with the authority to formulate local rules before the revision of the Legislation Law in 2015. Now 284 cities with subordinate districts also have limited authorities to formulate local rules. Li Jianguo (李建国), *Guanyu Zhonghua Renmin Gongheguo Lifafa Xiuzheng'an Caoan de Shuoming* (关于《中华人民共和国立法法修正案(草案)》的说明) [Interpretation on the Draft of Legislation Law Amendment of People's Republic of China], ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC], [http://www.npc.gov.cn/wxzl/gongbao/2015-05/07/content\\_1939099.htm](http://www.npc.gov.cn/wxzl/gongbao/2015-05/07/content_1939099.htm). Last visited Apr 13, 2021. For the governments at the county level, there are 1,464 counties in China out of a total of 2,851. There are 40,703 governments at the village (town) level. It is impossible to calculate the number of bureaus and other subordinates local governments, which are also authorized to formulate regulatory documents. So the number of authorities must greatly exceed the county-level divisions, including autonomous counties, county-level cities, banners, autonomous banners, autonomous counties, county-level cities, banners, autonomous banners, and city districts. Peng Dongyu (彭东昱), *Fuyu Shequ de Shi Difang Lifaquan* (赋予设区的市地方立法权) [Authorization of Legislation Power to Cities with Subordinates], 19 ZHONGGUO RENDA ZAZHI (中国人大杂志) [THE PEOPLE'S CONG. OF CHINA] 25, 25–26 (2014).

<sup>51</sup> In 2009, Ms. Da Lijuan was denied from taking the entrance examination for public school teacher positions because she was 149 cm tall. According to the regulatory document stipulated by the Hunan Education Bureau, the height

Furthermore, regulatory documents lack enough supervision and procedural controls. Compared to administrative legislation, clear mandatory requirements for issuing regulatory documents are not enough. In the Regulations on Rules Legislation Procedure (*Guizhang Zhiding Chengxu Tiaoli*) promulgated by the State Council in 2001, Article 36 provides that local governments above the county level, which do not have the authority to formulate rules, shall take the procedure in that Regulation as reference to formulate and publish decisions and orders with general binding force.<sup>52</sup> More and more provinces and cities announced local rules on the procedure of the regulatory documents. On May 31, 2018, the General Office of the State Council required all governments and departments to obey the rule of law, control the number of regulatory documents, complete the process, and hear public opinions and expert suggestions.<sup>53</sup> Nevertheless, most of the procedural requirements of

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requirement for female teachers is 150 cm and 160 cm for male teachers. But in the related documents of the Education Ministry, the Health Ministry under the State Council, and the China Disabilities Association, there was no height requirement. Therefore, Ms. Da, along with three male candidates who were under 160 cm in height, sued the Education Bureau. Though they failed in the administrative litigation, Hunan Education Bureau deleted the height requirement article in its regulatory document. Shen Xinwang (申欣旺) & Bai Zukai (白祖楷), “*Xunfu Quanli*” *de Shiyan* (“驯服权力”的实验) [Experiment to Tame the Power], ZHONGGUO XINWEN ZHOUKAN (中国新闻周刊) [CHINA NEWSWEEK], May 17, 2010, at 26.

<sup>52</sup> *Guizhang Zhiding Chengxu Tiaoli* (规章制度程序条例) [Regulations on Procedures for the Formulation of Rules] (promulgated by the St. Council, Nov. 16, 2001, effective Jan. 1, 2002), 2001 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 322, [http://www.gov.cn/gongbao/content/2002/content\\_61556.htm](http://www.gov.cn/gongbao/content/2002/content_61556.htm) [<https://perma.cc/THH7-Q76T>].

<sup>53</sup> *Guowuyuan Bangongting Guanyu Jiaqiang Xingzheng Guifanxing Wenjian Zhiding he Jiandu Guanli Gongzuo de Tongzhi* (国务院办公厅关于加强行政规范性文件制定和监督管理工作的通知) [Notice to Strengthen Enactment and Supervision of Administrative Regulatory Documents] (published by the General Office of the State Council) (promulgated by the General Office of the State Council, May 31, 2018), [http://www.gov.cn/zhengce/content/2018-05/31/content\\_5295071.htm](http://www.gov.cn/zhengce/content/2018-05/31/content_5295071.htm) [<https://perma.cc/WNU2-CA2Y>]. Another important document is *Guowuyuan Bangongting Guanyu Quanmian Tuixing Xingzheng Guifanxing Wenjian Hefaxing Shenhe Jizhi de Zhidao Yijian* (关于全面推行行政规范性文件合法性审核机制的指导意见) [Guidance on Completely Pushing Forward Legal Review of Administrative Regulatory Documents] (promulgated by the General Office of the State Council, effective Dec. 20, 2018),

regulatory documents were not spelled out clearly and tended to be handled internally rather than via standardized external channels, for example, allowing public participation and ensuring transparency. According to Yang Shujun's research, 31 provincial governments and 21 provincial rules provided that only governments have the power to draft regulatory documents; although people pay more attention to the hearing and other methods of collecting public opinion, local rules do not give clear and efficient provisions about requirements for and methods of public participation.<sup>54</sup>

Regulatory documents are used to issue licenses, assess penalties, apply compulsory enforcement, acquire goods and services, and perform other actions. They are usually in the form of decisions, orders, notices, and even meeting summaries, involving salary, social benefits, endowment insurance, awards for investment promotion, and so on. Consequently, it is not very difficult to find some problematic examples. For instance, before the Administrative Licensing Law took effect in 2004, various documents established administrative licenses and permits. One local government published a regulatory document requiring all producers of steamed bread (*mantou*) to get a permit from the steam bread administration offices, which touched upon the most popular and traditional staple food in northern China. The farce finally ended after the city office battled with the district office when both of them went to investigate the same

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[http://www.gov.cn/zhengce/content/2018-12/20/content\\_5350427.htm](http://www.gov.cn/zhengce/content/2018-12/20/content_5350427.htm)  
[<https://perma.cc/WNU2-CA2Y>].

<sup>54</sup>Yang Shujun conducted research on the local rules of regulatory procedure. He found that out of 80 local governments with the authority to provide local rules, 46 of them passed local rules to regulate the procedures of regulatory documents. Notably, out of 31 provincial governments, 21 provincial governments passed local rules on the procedure of the regulatory documents and most of the local rules used the term “regulatory documents” while other rules used the term “administrative regulatory documents” and “administrative organs regulatory documents.” Yang Shujun (杨书军), *Guifanxing Wenjian Zhiding Chengxu Lifa de Xianzhuang ji Wanshan* (规范性文件制定程序立法的现状及完善) [Current Situations and Improvement of Legislation for the Procedures of Regulatory Documents], 21 *XINGZHENG FAXUE YANJIU* (行政法学研究) [ADMIN. L. REV.] 86, 86–87 (2013).

food workshop at the same time.<sup>55</sup> This type of example<sup>56</sup> is the reason why China has the Administrative Licensing Law to govern permits and licenses, and why the law provides clearly that documents at different levels can only stipulate certain types of permits and licenses, and that regulatory documents cannot establish any permit and license. However, the results of executing this law are unsatisfactory.

Overall, it is necessary to review regulatory documents in China in order to protect the rights and interests of citizens. It is especially important for courts to contribute to this goal and push forward advancement of the rule of law in China.

Additionally, judges and courts have the capacity to review abstract administrative actions. In the discussion about the possibility of reviewing abstract administrative actions, including regulatory documents, some scholars argued that courts and judges were incompetent to review abstract administrative actions.<sup>57</sup> The

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<sup>55</sup>Liu Xuezheng (刘学增), *Shenbian Linshi Bangongshi Pandian: Zhengzhou ceng Chengli Mantouban* (身边临时办公室盘点: 郑州曾成立馒头办) [Summary of Temporary Offices in Daily Life: Offices of Steamed Bread Administration once were Established in Zhengzhou], DAHAEBAO (大河报) [GREAT RIVER NEWS] (Sept. 17, 2014).

<sup>56</sup> It is not difficult to find other similar examples. In 2007, Pinghe County Government in Fujian Province published regulatory documents providing that young men without a junior high school diploma would not be eligible to obtain certificates of labor, labor permits, marriage certificates, or driver's licenses from governments at the village level or the education departments including but not limited to, education, labor, industry and commerce, public security, civil administration. Such actions were criticized and later canceled by the government. See Lin Xiaoqi (林晓琪), *Fujian Pinghe Guiding Weiqude Chuzhong Biyezhengzhe Buneng Banli Jiehunzheng* (福建平和规定未取得初中毕业证者不能办理结婚证) [Pinghe County Government in Fujian Stipulated, No Junior High School Diploma, No Marriage Certificate], DONGNAN KUAIBAO (东南快报) [SOUTHEAST EXPRESS] (Mar. 28, 2007).

See also IUD Zhongguo Zhengwu Jingqi Jiance Zhongxin (IUD 中国政务景气监测中心) [IUD Chinese Gov't Aff. Situation Monitoring Center], *2009 Nian Liuda Zuiju Zhengyixing "Hongtou Wenjian"* (2009年六大最具争议性“红头文件”) [The Six Most Controversial Red-headed Documents in 2009], 16 LINGDAO JUECE XINXI ZHOUKAN (领导决策信息周刊) [INFO. FOR DECIDERS MAG.] 16, 16–17 (2009).

<sup>57</sup> Liu Junxiang (刘俊祥), *Lun Woguo Chouxixiang Xingzheng Xingwei de Sifa Shencha* (论我国抽象行政行为的司法审查) [Judicial Review of Abstract

arguments mainly focused on the following points. First, at least according to legal provisions, abstract administrative actions made by governments are the collective product of discussions and government conferences. The head of the government cannot decide to issue it by himself without any discussion with other administrative officials, especially roughly same-level officials. Hence, theoretically, since abstract administrative actions are decided by a group of people, it is improper for one judge or several judges to reverse them, or even review them. Second, judges do not have the expertise needed to review abstract administrative actions, compared to the expertise of the officers in the governments. Third, it is not easy for courts to review specific administrative actions, so it will be even harder for them to review abstract administrative actions. This debate ended after Revised ALL was passed. But the issues remain in practice.

### III. JURISDICTION OF COURTS OVER REGULATORY DOCUMENTS IN THE PAST

Whether the Revised ALL in 2014 is to expand judicial review to regulatory documents is controversial because from the perspective of some academics and judges, courts already have jurisdiction over abstract administrative actions to some extent.<sup>58</sup> In the Original ALL, Articles 52<sup>59</sup> and 53<sup>60</sup> provided that the court shall take laws, administrative regulations, and local regulations as the legal basis for specific administrative actions, which is called “taking as legal basis” (*yiju*). And the court shall take rules as reference, which is called “reference” (*canzhao*). “Taking as a legal basis” and

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Administrative Actions), XIANDAI FAXUE(现代法学) [MODERN LAW SCIENCE] 69, 69–74(1999).

<sup>58</sup> See Wang Tiancheng (王天成), *Zhirenzhe Zhiyufa—Xingzhengfa yu Renquan* (治人者治于法—行政法与人权) [Governor Who Governs People Shall be Governed by Law—Administrative Law and Human Rights], 14 ZHONGWAI FAXUE (中外法学) [PEKING U. L. J.] 29, 34 (1992).

<sup>59</sup> Original ALL, (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 4, 1989, effective Oct. 1, 1990), STANDING COMM. NAT’L PEOPLE’S CONG. GAZ., arts. 52.

<sup>60</sup> Original ALL, (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 4, 1989, effective Oct. 1, 1990), STANDING COMM. NAT’L PEOPLE’S CONG. GAZ., art. 53.

“reference” are different according to the intent of the legislators. “Taking as a legal basis” means that law, administrative regulations, and local regulations are binding and courts cannot review their legality and shall respect and obey them. But “reference” is different from “taking as a legal basis” in that a rule may or may not be binding depending on its legality. Wang Hanbin’s introduction and explanation of drafting the ALL for the Standing Committee of the NPC noted that there were varying opinions about “reference.” He explained, “if the rule is consistent with laws and administrative regulations, the court shall take it as the reference; and if the rule is inconsistent or not totally consistent with principles and spirit of laws and administrative regulations, the court may have the room to deal with regulations freely”.<sup>61</sup> In the 1990s, there were two sorts of opinions concerning whether the court can review abstract administrative actions: most did not think the court possessed the authority to review abstract administrative actions, including Professor Luo Haocai and Professor Ying Songnian, who were the deputy directors of the Administrative Legislation Team under the Standing Committee of the NPC.<sup>62</sup> Meanwhile, some scholars argued the court did, in fact, have the authority.<sup>63</sup>

In May 2004, *Guanyu Shenli Xingzheng Anjian Shiyong Falv Guifan Wenti de Zuotanhui Jiyao* [Summary of Seminar on Application of Legal Documents in the Trial of Administrative Cases] (“2004 Summary”), published by the Supreme People’s Court, which is not a formal judicial interpretation, but is always regarded as among the most important guidance for courts, stipulated that if

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<sup>61</sup> Wang Hanbin (王汉斌), *Guanyu Zhonghua Renmin Gongheguo Xingzheng Susongfa (Caoan) de Shuoming* (关于《中华人民共和国行政诉讼法(草案)》的说明) [Interpretation on the Draft of Administrative Litigation Law of People’s Republic of China], 5 ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN GONGBAO (最高人民法院公报) [SUP. PEOPLE’S CT. GAZ] 11, 12–13 (1989).

<sup>62</sup> LUO HAOCAL (罗豪才), ZHONGGUO SIFA SHENCHA ZHIDU (中国司法审查制度) [JUDICIAL REVIEW SYSTEM IN CHINA] 15–16 (Luo Haocai ed., 2003); YING SONGNIAN (应松年) XINGZHENG SUSONG FAXUE (行政诉讼法学) [SCIENCE ON ADMINISTRATIVE LITIGATION] 88 (Ying Songnian et al. eds., 1994).

<sup>63</sup> Wang Tiancheng (王天成), *Zhirenzhe Zhiyufa—Xingzhengfa yu Renquan* (治人者治于法—行政法与人权) [Governor Who Governs People Shall be Governed by Law—Administrative Law and Human Rights], 14 ZHONGWAI FAXUE (中外法学) [PEKING U. L. J.] 29, 34 (1992).

courts identify concrete applicable interpretations and other regulatory documents which are guidelines of specific administrative actions, as legal, effective, and reasonable after reviewing them, courts shall confirm the effect of the regulatory documents when confirming the legitimacy of specific administrative actions. Otherwise, courts can refuse to apply regulatory documents, which is called “non-application” (*bushiyong*).<sup>64</sup> Later, more scholars and experts expressed their ideas about it. Jiang Bixin, the former Vice President of the Supreme People’s Court, stated that the ALL authorizes courts to review regulatory documents and to confirm whether regulatory documents are legal or not.<sup>65</sup> Professor Xing Hongfei stated that the idea that abstract administrative actions cannot be judicially reviewed was a misunderstanding, and that courts can conduct judicial review of abstract administrative actions without any violation of current legal provisions.<sup>66</sup>

From the above legal provisions, some scholars and judges argue that while the defendant bears the burden of proof in challenging the legality of regulatory documents and courts shall review their legality instead of applying them directly, courts already have jurisdiction over abstract administrative documents. In fact, in early 1996, Dr. Shi Hongxin, who later became a judge in a Beijing court, argued that the difference between the supporting view and opposing opinion was how to define the judicial review.<sup>67</sup> If the non-

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<sup>64</sup> *Guanyu Shenli Xingzheng Anjian Shiyong Falv Guifan Wenti de Zuotanhui Jiyao* (关于审理行政案例适用法律规范问题的座谈会纪要) [Summary of Seminar on Application of Legal Documents in the Trial of Administrative Cases], RENMIN FAYUANBAO(最高人民法院公报) [PEOPLE’S CT. DAILY], June 1, 2004.

<sup>65</sup> Jiang Bixin (江必新), *Xingzheng Susong yu Chouxiang Xingzheng Xingwei* (《行政诉讼法》与抽象行政行为) [Administrative Litigation Law and Abstract Administrative Actions], 12 XINGZHENG FAXUE YANJIU(行政法学研究) [ADMIN. L. REV.] 13, 13–14, 23 (2009).

<sup>66</sup> Xing Hongfei (邢鸿飞), *Jinqu Haishi Wuqu? Chouxiang Xingzheng Xingwei Sifa Shencha de Xianzhuang ji Chulu* (禁区还是误区? 抽象行政行为司法审查的现状出路) [Forbidden Zone or Misunderstanding? Present Situations and Outlets for the Judicial Review of Abstract Administrative Actions], 10 HEHAI DAXUE XUEBAO (河海大学学报) [J. HOHAI U.] 43, 43–47 (2008).

<sup>67</sup> Shi Hongxin(石红心), *Lun Chouxiang Xingzheng Xingwei de Sifa Shencha* (论抽象行政行为的司法审查) [On Judicial Review of Abstract Administrative

application of regulatory documents is classified as judicial review, judges and courts already have some kind of authority to review both rules and regulatory documents.<sup>68</sup>

Nevertheless, in the author's opinion, non-application of regulatory documents in administrative litigation cannot be regarded as a formal mechanism of judicial review. Especially speaking more broadly, we cannot describe non-application as judicial review. Non-application in China is a fleeting decision about legal provisions rather than a complete and observable judicial review.<sup>69</sup> Because even if courts find problems in regulatory documents and conclude that they are illegal or inappropriate—and thus refuse to apply them—nobody can see a single word or sentence of the judge's evaluation of the regulatory documents in the judgment. Apart from the parties represented in the case and judges presiding, no one is privy to the interpretation of regulatory documents. If agencies or governments do not revise or repeal regulatory documents, those who challenge regulatory documents can bring lawsuits to new judges and courts who may issue a different judgment. The outcomes of cases will be uncertain because there is no system to coordinate opinions across judges and courts. As a result, non-application of regulatory documents only affects individual cases instead of the broad and consistent application of regulatory documents. Without supervision

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Actions], 3 YANJIUSHENG FAXUE (研究生法学) [GRADUATE L. REV.] 28, 29–33 (1996).

<sup>68</sup> *Id.*

<sup>69</sup> Chen Aihua Su Nanjingshi Jiangningqu Zhufang he Chengxiang Jiansheju Bulvxing Fangwu Dengji Fading Zhizean (陈爱华诉南京市江宁区住房和城乡建设局不履行房屋登记法定职责案) [Chen Aihua v. the Bureau of Housing and Urban-Rural Development of Jiangning District, Nanjing City], 2014 SUP. PEOPLE'S CT GAZ. 8 (Nanjing Interm. People's Ct. 2013) (Dr. Xu Xiaodong studied the Chen Aihua case published in the Gazette of the Supreme People's Court in 2014 and found the judge did not render direct judgment of the notice of two ministries, but in the Gazette the Supreme People's Court expressed clearly that the notice violated laws and statutes was not binding.). See Xu Xiaodong (徐肖东), *Xingzheng Susong Guifanxing Wenjian Fudai Shencha de Renzhi jiqi Shixian Jizhi—yi Chen Aihua An yu Huayuan Gongsi An weizhu de Fenxi* (行政诉讼规范性文件附带审查的认知及其实现机制—以陈爱华案与华源公司案为主的分析) [Recognition and Realization Mechanism of Incidental Review of regulatory documents in Administrative Litigation: Taking Chen Aihua Case and Huayuan Gongsi Case as Main Example], 19 XINGZHENG FAXUE YANJIU (行政法学研究) [ADMIN. L. REV.] 69, 69–83(2016).

or legal remedy, it is difficult to classify non-application of regulatory documents as judicial review.

On the other hand, courts and judges often execute non-application of regulatory documents differently than we may expect.<sup>70</sup> The conclusions are not taken directly from the ALL; rather, as Professor Zhu Xinli argues, they are inferred from the ALL.<sup>71</sup> Likewise, the 2004 Summary is not the law or even the formal judicial interpretation, so the conclusion that courts have jurisdiction over some abstract administrative actions is not true. The interpretation is not clear and persuasive enough for all the judges to understand and handle. As a result, how the courts deal with regulatory documents depends entirely on particular circumstances and the ability of judges. Thus, it is not surprising to learn that many courts and judges, particularly at the grassroots level, prefer to apply rules and regulatory documents as legal rules instead of judging their legitimacy before applying them. In Judge Wang Qingting's 2010 statistics and survey, he drew the conclusion that judges who seldom review regulatory documents and regulatory documents in administrative litigation play the role of "invisible law".<sup>72</sup> If the judges in Shanghai do not realize they have the power to review regulatory documents—and in practice they are reluctant to do so—then it is safe to assume that judges outside of the largest cities such

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<sup>70</sup> Yu Jun (余军) & Zhangwen (张文), *Xingzheng Guifanxing Wenjian Sifa Shenchaquan de Shixiaoxing Kaocha* (行政规范性文件司法审查权的实效性考察) [Research on Effectiveness of Judicial Review Power of Administrative Regulatory Documents], 63 FAXUE YANJIU (法学研究)[CHINESE JOURNAL OF LAW] 42, 42–61 (2016).

<sup>71</sup> Zhu Xinli (朱新力), *Lun Fayuan dui Guizhang Yixia de Xingzheng Guifanxing Wenjian de Shenchaquan* (论法院对规章以下的行政规范性文件的审查权) [On the Review Power of Regulatory Documents under Rules for the Courts], 14 FAXUE ZAZHI (法学杂志) [LEGAL SCI. MAG.] 18, 18 (1993).

<sup>72</sup> Wang Qingting (王庆廷), *Yinxing de "Falü"—Xingzheng Susong zhong Qita Guifanxing Wenjian de Yihua jiqi Jiaozheng* (隐形的"法律"—行政诉讼中其他规范性文件的异化及其矫正) [Invisible "Law": The Abnormity and Correction of Other regulatory documents in Administrative Litigation], XIANDAI FAXUE PINGLU [MOD. L. SCI.] 82, 82–89 (2011) (Wang Qingting found 30 cases involving questions about regulatory documents and at the same time sent 50 surveys about this to judges—getting 40 back, which is almost one third of the whole number of administrative judges in Shanghai. The author is the judge in the district court in Shanghai.).

as Beijing and Shanghai will be extremely unlikely to do so. We also get the same impression from other instances where courts neither accept cases in which plaintiffs merely claim that regulatory documents are illegal, nor truly review regulatory documents in previously accepted cases that are clearly related to regulatory documents.<sup>73</sup>

In sum, there is no real judicial review of regulatory documents in China before the Revised ALL in 2014. The Revised ALL is the beginning of judicial review of regulatory documents, which deserves to be recorded and examined further.

#### IV. JUDICIAL REVIEW OF REGULATORY DOCUMENTS COOPERATES WITH OTHER MECHANISM

Judicial review is an essential process for correcting and supervising regulatory documents while cooperating with other formal and legal channels to scrutinize regulatory documents and resolve conflicts among them.<sup>74</sup>

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<sup>73</sup> See Wang Jing (王静), *Cong Xingsu Anjian Kan Laojiao Zhidu Biange Lujing* (从行诉案件看劳教制度变革路径) [Debate on Reform Path of Re-education through Labor: Administrative Litigation Cases Study], 3 GUOJIA XINGZHENG XUEYUAN XUEBAO (国家行政学院学报) [J. CHINESE ACAD. GOV'T.] 97, 97–102 (2012) (Similar situations happen in administrative litigation when courts have the authority to take the rules as reference. In practice, judges are reluctant to review the rules. For instance, re-education through labor had been criticized for many years before the system was abolished by the National Peoples' Congress in 2013. Concerning this system, there are two legal documents: one is the administrative regulations promulgated by the State Council in 1950s and another one is the rule promulgated by Ministry of Public Affairs in 1980s. Before 2013, in administrative litigation cases, judges seldom reviewed the legality of the rule and applied it directly. Only in several cases did the judges apply the law of the NPC and did not apply the above documents.).

<sup>74</sup> See Supreme People's Court, *Xingzheng Susong Fudai Shencha Guifanxing Wenjian Dianxing Anli Xinwen Fabuhui* (行政诉讼附带审查规范性文件典型案例新闻发布会) [News Release Conference on Typical Administrative Litigation Cases with Incidental Review of Regulatory Documents], CHINA COURT.ORG (Oct. 30, 2018, 11:10 AM), <http://www.court.gov.cn/zixun-xiangqing-125531.html> [<http://perma.cc/3KYK-VCFR>] (Huang Yongwei, the chief judge of the administrative tribunal said that judicial review of regulatory documents is helpful to push forward administration according to law and legality of regulatory documents and to safeguard consistence of legal system.).

The first channel to correct illegal or improper orders and decisions (including abstract administrative actions) is under the authority and responsibility of governments at higher levels.<sup>75</sup> The State Council reserves the ability to alter or annul inappropriate orders, directives, and regulations issued by ministries or commissions and to alter or annul inappropriate decisions and orders issued by local organs of state administration at different levels. Local governments at and above the county level have the power to alter or annul inappropriate decisions of their subordinate departments and people's governments at lower levels.<sup>76</sup>

The second channel to supervise abstract administrative actions of local government at various levels is the local people's congress at the corresponding level.<sup>77</sup> The standing committees of local people's congresses at and above the county level have power to annul inappropriate decisions and orders of government at the corresponding level.<sup>78</sup> For superior government and congress to superintend problems of abstract administrative actions, Recording and Review (*Beian Shencha*) plays a role. According to the provision of the Legislation Law and related regulations, administrative

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<sup>75</sup>XIANFA (宪法) [Constitution of the People's Republic of China] (promulgated by the Nat'l People's Cong., Dec. 4, 1982, effective Dec. 4, 1982, amended Mar. 14, 2004), arts. 89, 108 (2004).

<sup>76</sup>Difang Geji Renmin Daibiao Dahui he Difang Geji Renmin Zhengfu Zuzhifa (地方各级人民代表大会和地方各级人民政府组织法) [Organic Law of the Local People's Congress and Local People's Governments of the PRC] (promulgated by the Nat'l People's Cong., July.1, 1979, effective July.1, 1979, amended Aug. 9,2015) (China), art. 59(2004). Article 59 stipulates: A local people's government at or above the county level shall exercise the following functions and powers: (3) to alter or annul inappropriate orders and directives of its subordinate departments and inappropriate decisions and orders of the people's governments at lower levels.

<sup>77</sup>Difang Geji Renmin Daibiao Dahui he Difang Geji Renmin Zhengfu Zuzhifa (地方各级人民代表大会和地方各级人民政府组织法) [Organic Law of the Local People's Congress and Local People's Governments of the PRC] (promulgated by the Nat'l People's Cong., July.1, 1979, effective July.1, 1979, amended Aug. 9,2015)(China), art. 8(2004). Article 8 stipulates: Local people's congresses at and above the county level shall exercise the following functions and powers: (11) to annul inappropriate decisions and orders of the people's governments at the corresponding level.

<sup>78</sup>XIANFA (宪法) [Constitution of the People's Republic of China] (promulgated by the Nat'l People's Cong., Dec. 4, 1982, effective Dec. 4, 1982, amended Mar. 14, 2004), art. 104 (2004).

regulations shall be sent to be recorded and reviewed by the Standing Committee of National People's Congress, while the rules of ministries and local rules of local governments shall be sent to be recorded and reviewed by superior governments.<sup>79</sup> Regulatory documents should also be recorded and reviewed by superiors.<sup>80</sup> In the past, superior governments and congresses were reluctant to review every regulatory document carefully enough to find problems. Recently, these bodies pay more attention to the Recording and Review and are making efforts to strengthen it.<sup>81</sup>

The third method is Sorting Out (*Qingli*): when a new law or superior legal document is formulated or revised, governments and congresses at various levels need to check and revise their own legislation and regulatory documents to ensure compliance.<sup>82</sup> This method also has its own limitations because the Sorting Out process

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<sup>79</sup>Revised Lifa Fa (promulgated by the Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000, amended Mar. 15, 2015), art. 72, *translated in* LawinfoChina.

<sup>80</sup> Fagui Guizhang Beian Shencha Tiaoli (法规规章备案审查条例) [Recording and Review of Rules and Regulations] (promulgated by St. Council., Dec. 14, 2001, effective Jan. 1, 2002).

<sup>81</sup> *Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Fazhi Gongzuo Weiyuanhui Fazhi Gongzuo Weiyuanhui Guanyu 2019 nian Beian Shencha Gongzuo Qingkuang de Baogao* (全国人民代表大会常务委员会法制工作委员会关于2019年备案审查工作情况的报告) [Report on Recording and Review in 2019 by Legal Affairs Committee of the Standing Committee of the Nat'l People's Cong.], *Di Shisan Jie Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Di Shiwu Ci Huiyi* (第十三届全国人民代表大会常务委员会第十五次会议) [The 15<sup>th</sup> Meeting of the Standing Committee of the 13<sup>th</sup> Nat'l People's Cong.] (Dec. 25, 2019), <http://www.npc.gov.cn/npc/c30834/201912/24cac1938ec44552b285f0708f78c944.shtml> [<https://perma.cc/4BR4-RKSU>].

<sup>82</sup>In 2011, before *Guoyou Tudishang Fangwu Zhengshou Yu Buchang Tiaoli* (国有土地上房屋征收与补偿条例) [Regulation on the Expropriation of Buildings on State-owned Land and Compensation] (promulgated by the State Council of the People's Republic of China, January 21, 2011), the governments at various levels annulled 3,918 regulatory documents and revised 1,410 regulatory documents. See also Li Li (李立), *Quanguo Zhuanxiang Qingli Youguan Zhengdi Chaiqian Guizhang he Guifanxing Wenjian* (全国专项清理有关征地拆迁规章和规范性文件) [Reviewing Regulatory Documents on Expropriation and House Removal Nationwide], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Dec. 29, 2011), [http://xueshu.baidu.com/usercenter/paper/show?paperid=05d6836286a845b9bb568b172d4c5f25&site=xueshu\\_se](http://xueshu.baidu.com/usercenter/paper/show?paperid=05d6836286a845b9bb568b172d4c5f25&site=xueshu_se) [<https://perma.cc/BE6M-RRL2>].

always operates under tight time constraints. Most of ministries of the State Council and many local governments apply the method “Three Unification”(San Tongyi) including unified register, unified coding, and unified announcement. Three Unification first was adopted in Hunan.<sup>83</sup> That means that the authorities must register in the record at the same time they are given unified codes.<sup>84</sup> Only after the above process has occurred can regulatory documents be published on the government gazette, specified newspaper, and official website. Three Unification plays a role in the supervision of regulatory documents and become an important requirement for regulatory documents.<sup>85</sup>

It must be said, however, that the functioning of the aforementioned channels of review are not as effective as they may appear at first glance.<sup>86</sup> Whether in Recording and Review, Sorting Out, or Three Unification, there is no correspondent or applicant or any real dispute, thus each is simply a form of self-examination of agencies and congresses. After finishing the above measures, administrative organs and congresses publish a general report about the number of annulled or altered documents without providing finer details. Compared to the above channels, allowing ordinary people

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<sup>83</sup> Hunansheng Xingzheng Chengxu Guiding(湖南省行政程序规定)[Hunan Provincial Administrative Procedure Provisions] (promulgated by the Hunan Provincial People’s Government, April 9, 2008, effective Oct 1, 2008) art. 49.

<sup>84</sup>Guangxi Shixing Guifanxing Wenjian Santongyi Zhidu (广西实行规范性文件“三统一”制度) [Guangxi Adopted Three Unification of Regulatory Documents System], ZHONGGUO CAIJINGBAO (中国财经报) [CHINA FINANCIAL AND ECONOMIC NEWS] (Oct. 17, 2017), [http://www.cfen.com.cn/dzb/dzb/page\\_2/201710/t20171017\\_2722162.html](http://www.cfen.com.cn/dzb/dzb/page_2/201710/t20171017_2722162.html) [<https://perma.cc/42Z4-SE8D>].

<sup>85</sup>Guowuyuan Bangongting Guanyu Jiaqiang Xingzheng Guifanxing Wenjian Zhiding he Jiandu Guanli Gongzuo de Tongzhi (国务院办公厅关于加强行政规范性文件制定和监督管理工作的通知) [Notice to Strengthen Enactment and Supervision of Administrative Regulatory Documents] (published by the General Office of the State Council) (promulgated by the General Office of the State Council, May 31, 2018), [http://www.gov.cn/zhengce/content/2018-05/31/content\\_5295071.htm](http://www.gov.cn/zhengce/content/2018-05/31/content_5295071.htm) [<http://perma.cc/WNU2-CA2Y>].

<sup>86</sup> See Keith J. Hand, *Understanding China’s System for Addressing Legislative Conflicts: Capacity Challenges and the Search for Legislative Harmony*, COLUM. J. ASIAN L. 26, 139 (2013) (discussing local filing and review systems).

to challenge regulatory documents in court has clear advantages. Only real disputes can test the legality and reasonableness of regulatory documents accurately and quickly. A plaintiff who brings forward a concrete infringement of rights or benefits will more effectively bring attention to problems in regulatory documents. As Professor Zhan Zhongle said, “[b]y expanding the scope of administrative jurisdiction, the legitimate rights of the administrative counterpart can be protected in time”.<sup>87</sup> Using administrative litigation to correct regulatory documents is more targeted, costs less, and saves time.

Moreover, there are no conflicts between administrative litigation and other channels.<sup>88</sup> Judicial review of regulatory documents cannot substitute other channels. Rather, they will coordinate together to contribute to the development of rule of law in China.

## V. JUDICIAL REVIEW OF REGULATORY DOCUMENTS PROVIDED IN THE REVISED ALL

Most Chinese officers, judges, and legislators feel more comfortable with gradual reform in the scope of review under administrative litigation.<sup>89</sup> Extending judicial review to regulatory documents was considered preferable to no action or to expanding judicial review to cover all abstract administrative actions. At the very least it looked more feasible. Such a plan was realized in the Revised ALL passed by the NPC Standing Committee in December

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<sup>87</sup> Zhan Zhongle (湛中乐), *Lun Zhonghua Renmin Gongheguo Xingzheng Susongfa De Xiugai* (论《中华人民共和国行政诉讼法》的修改) [On the Amendment of the Administrative Procedure Law of China], 7 ZHONGGUO FAXUE QIANYAN (中国法学前沿) [FRONTIERS OF LAW IN CHINA] 211, 214 (2012).

<sup>88</sup> See Ye Bifeng (叶必丰), *Dishisizhang Xingzheng Guifan* (第十四章 行政规范) [Chapter 14 Administrative Norms], in DANGDAI ZHONGGUO XINGZHENGFA (当代中国行政法) [Contemporary Administrative Law in China] (Ying Songnian (应松年) ed., 2018) 968–973.

<sup>89</sup> See Ying Songnian (应松年) & Yang Weidong (杨伟东), *Woguo Xingzheng Susongfa Xiuzheng Chubu Shexiang Shang* (我国《行政诉讼法》修正初步设想(上)) [Tentative Ideas on Amending the Administrative Procedure Law of China I], 10 ZHONGGUO SIFA (中国司法) [JUST. OF CHINA] 28, 28–31 (2004).

2014.<sup>90</sup> It provided the formal judicial review of regulatory documents in Article 53 and Article 64. These two articles should be regarded as the foremost innovation of the administrative litigation system and a milestone for supervision of administrative organs.<sup>91</sup> Those who have not been involved in the long history of debate about and legislation of the ALL cannot imagine how difficult it is to stipulate these two articles in the Revised ALL.

Article 53 of the Revised ALL provides:

Where a citizen, a legal person, or any other organization deems that a regulatory document developed by a department of the State Council or by a local people's government or a department thereof, based on which the alleged administrative action was taken, is illegal, the citizen, legal person, or other organization may concurrently file a request for review of the regulatory document when filing a complaint against the administrative action. The term "regulatory document" as mentioned in the preceding paragraph does not include administrative rules.<sup>92</sup>

Article 64 of the Revised ALL provides:

Where, in trying an administrative case, a people's court deems that any regulatory document as mentioned in Article 53 of this Law under its review is illegal, such a document shall not be used to determine the legality of the alleged administrative action, and the people's court shall provide the

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<sup>90</sup> Revised ALL (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 1, 2014, effective May 1, 2015) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.

<sup>91</sup> Revised ALL (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 1, 2014, effective May 1, 2015) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.

<sup>92</sup> Revised ALL (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 1, 2014, effective May 1, 2015) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., art. 53.

authority developing the document with disposition recommendations.<sup>93</sup>

Articles 53<sup>94</sup> and Article 64<sup>95</sup> include the following important points: First, courts are granted the authority to review the abstract administrative actions formally and openly. Second, courts can only review regulatory documents under rules instead of all abstract administrative actions. Third, courts can only review regulatory documents together with specific administrative actions, instead of accepting separate requests to review the regulatory documents independently. The plaintiff is allowed to sue a regulatory document because the sued specific action is caused by the regulatory document. In order to reduce illegal specific actions, the court need to review regulatory documents.<sup>96</sup> Thus, the judicial review of regulatory documents is an incidental review. Fourth, if a court finds that one regulatory document is illegal, its only recourse is to refuse to apply the regulatory document. The court may not render a judgment announcing whether a regulatory document is legal or illegal in the Revised ALL. Last, the court must submit the recommendation to the administrative organs which stipulate the regulatory document.

It was a big step for the Revised ALL to expand the scope of judicial review to regulatory documents.<sup>97</sup> Xin Chunying, the vice

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<sup>93</sup> Revised ALL (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 1, 2014, effective May 1, 2015) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., art. 64.

<sup>94</sup> Revised ALL (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 1, 2014, effective May 1, 2015) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.

<sup>95</sup> Revised ALL (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 1, 2014, effective May 1, 2015) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.

<sup>96</sup> Xin Chunying(信春鹰), *Guanyu Zhonghua Renmin Gongheguo Xingzheng Susongfa Xiuzheng'an Caoan de Shuoming* (关于《中华人民共和国行政诉讼法修正案(草案)》的说明) [Interpretation on the Draft of Administrative Litigation Law Amendment of People's Republic of China], ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC], [http://www.npc.gov.cn/wxzl/gongbao/2014-12/23/content\\_1892443.htm](http://www.npc.gov.cn/wxzl/gongbao/2014-12/23/content_1892443.htm) [<https://perma.cc/N9UA-KKJW>].

<sup>97</sup> Yang Weihai (杨维汉), *Fayuan Kedui Guizhang Yixia Zhengfu "Hongtou Wenjian" Fudai Shencha* (法院可对规章以下政府“红头文件”附带审查) [The Court Will Have the Authority to Review the Red-headed Documents below the Level of Regulations Incidentally], RENMIN WANG (人民网)[PEOPLE'S DAILY

director of the Legal Affairs Commission of the NPC at the time, praised that allowing the court to conduct review for regulatory documents was a symbol of societal progress.<sup>98</sup> Judicial review will no longer be toothless when courts have the power to review regulatory documents. The author believes that provisions in Article 53 and Article 64 themselves are two significant achievements,<sup>99</sup> not only because courts have the power to supervise more administrative actions and better protect citizens' rights and interests, but also because this change will play an increasing role in strengthening and improving governance of governments in China.

Meanwhile, due to the uncertain outcome of regulatory documents regarded as illegal by courts, the Revised ALL is far from scholarly expectation and aspiration. Perhaps it cannot be regarded as a complete realization of its ideal design. Rather, it was a compromise that grew out of different opinions on how to respond to the need to develop administrative litigation and to the thirst to settle disputes between citizens and governments in China. In the six years since the implementation of the Revised ALL, the two articles have paved the way for strengthening the authority of the courts and changing the relationship between the courts and the administrative organs. Hence, having courts review regulatory documents mingles hope and fear.

## VI. PENDING ISSUES ON JUDICIAL REVIEW OF REGULATORY DOCUMENTS

The Judicial Interpretation of the Revised ALL in 2015, the Judicial Interpretation of the Revised ALL in 2018, and the first

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ONLINE] (Dec. 24, 2013, 10:08 AM),  
<http://npc.people.com.cn/n/2013/1224/c14576-23930829.html>  
[<http://perma.cc/7VQH-4E9S>].

<sup>98</sup> ZHONGHUA RENMIN GONGHEGUO XINGZHENG SUSONGFA SHIYI (中华人民共和国行政诉讼法释义) [Interpretation of the Administrative Litigation Law of the People's Republic of China] 139 (Xin Chunying ed., 2014).

<sup>99</sup> Another important change in the Revised ALL is to change the expression of specific administrative actions to administrative actions in Article 12 concerning the scope of judicial review because administrative contracts can be sued according to the Revised ALL. Revised ALL (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 1, 2014, effective May 1, 2015) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., art. 12.

typical cases of incidental review of the regulatory documents published by the Supreme People's Court all have contributed to the development of the new mechanism, since the implementation of the Revised ALL. But there still are many pending issues regarding the judicial review of regulatory documents.

*i. The Judicial Interpretation of the Revised ALL in 2015 and the First Case of Incidental Review of Regulatory Documents*

After the promulgation of the Revised ALL, the Supreme People's Court published the Judicial Interpretation to give more details for those new changes including judicial review of regulatory documents. The Interpretation of the Supreme People's Court on Several Issues of the Implementation of the Administrative Litigation Law of the People's Republic of China [*Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa Ruogan Wenti de Jieshi*] (hereinafter *2015 Judicial Interpretation*), which passed on April 20, 2015 and took effect on May 1, 2015, stipulated two articles about judicial review of regulatory documents.<sup>100</sup> It solved some basic questions including when a plaintiff files a request for review of a regulatory document.<sup>101</sup> According to the 2015 Judicial Interpretation, if a plaintiff concurrently files a request for review of a regulatory document while filing a complaint against the administrative action according to Article 53 of the Revised ALL, the plaintiff shall file the request before the trial of the first instance; but with a good reason, may file during the investigative stage of the court session.<sup>102</sup> If a regulatory document is deemed illegal and unfit to determine the legality of the administrative action, the people's court shall explain in a statement of reasons. The people's court shall provide the authority developing

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<sup>100</sup> SUPREME PEOPLE'S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa Ruogan Wenti de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》若干问题的解释) [The Interpretation of the Supreme People's Court on Several Issues of the Implementation of the Administrative Litigation Law of People's Republic of China] (Apr. 27, 2015, 11:11), <http://www.court.gov.cn/zixun-xiangqing-14294.html> [<https://perma.cc/QA2H-ELGT>] [hereinafter *2015 Judicial Interpretation*].

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at art. 20.

the regulatory document with disposition recommendations and it may send a copy to the government at the corresponding level of the authority developing the regulatory document or the next higher administrative organ.<sup>103</sup>

After implementation of the Revised ALL, courts at different levels accepted some cases involving regulatory documents. At the end of 2015, the first administrative litigation involving legality review of regulatory documents of ministries under the State Council was reported by the media.<sup>104</sup> The plaintiff, a medicine company, applied for a trademark from the Trademark Bureau of the former State Administration for Industry and Commerce.<sup>105</sup> In the same month, two other companies also applied for a trademark on the same name. The Trademark Bureau grouped the applications from the three companies into one day based on a regulatory document published by the Trademark Bureau. The document stated that one month should be classified as one day. The plaintiff filed the request to review the document concurrently while suing the Trademark Bureau. The court of first instance made the judgment that the provision of the explanation of “one day” in the document conflicted with common sense as well as the related provisions in General Principles of The Civil Law of the People’s Republic of China [*Zhonghua Renmin Gongheguo Minfa Zongze*]<sup>106</sup> and violated the

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<sup>103</sup> *Id.* at art. 21.

<sup>104</sup> *Anhui Huayuan Su Shangbiaoju An Zuo Kaiting*(安徽华源诉商标局案昨开庭)[Anhui Huayua v. Trademark Office Case Was in Session Yesterday], *JIANCHA RIBAO*(检察日报)[THE PROCURATORATE DAILY] (Sept. 18, 2015).

<sup>105</sup> *Anhui Huayuan Yiyao Gongsi, Guojia Gongshang Zongju Shangbiaoju* (安徽华源医药公司,国家工商总局商标局) [Huayuan Medicine Co., Ltd. v. Trademark Office of the State Administration of Industry and Commerce], *ZHONGGUO XIANZHENGWANG* (中国宪政网) [CALAW. CN] (Beijing IP Ct. Dec. 8, 2015), <http://www.calaw.cn/article/default.asp?id=11976> [<http://perma.cc/6WMA-LRC2>].

<sup>106</sup> It was substituted by Original *Minfa Zongze* (民法总则) [General Provisions of the Civil Law of the People’s Republic of China] (promulgated by the 5th Session of the 12th Nat’l People’s Cong., Mar. 15, 2017, effective Oct. 1, 2017), [http://www.npc.gov.cn/npc/xinwen/2017-03/15/content\\_2018907.htm](http://www.npc.gov.cn/npc/xinwen/2017-03/15/content_2018907.htm) [<http://perma.cc/YW8B-J25K>]. Now the General Provisions of Civil Law have been absorbed in Civil Law Code. *See Minfadian* (民法典) [Civil Law Code of the People’s Republic of China] (promulgated by the 3th Session of the 13th Nat’l People’s Cong., May. 28, 2020, effective Jan. 1, 2021),

Trademark Law of the People's Republic of China [*Zhonghua Renmin Gongheguo Shangbiaofa*].<sup>107</sup> So the court rendered the judgment to revoke the alleged administrative action in 2015.<sup>108</sup> The scholars discussed the case carefully and believed that judicial review of regulatory documents can be shaped in individual cases.<sup>109</sup> Then judges and scholars conducted further research on contents under and intensity of review, recommendation, and other related issues.<sup>110</sup> Later, the court of second instance reviewed the case and rendered the judgement that the original judgement is clear in fact-finding but improper in application of laws on July 19, 2018.<sup>111</sup> The judgement

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<http://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml> [<https://perma.cc/XJD9-XFMF>].

<sup>107</sup> *Shangbiaofa* (商标法) [Trademark Law of the People's Republic of China] (promulgated by the 24th Session of the 5th Nat'l People's Cong., Aug. 23, 1982, effective Mar. 1, 1982; revised April 23, 2019), [http://www.gov.cn/guoqing/2020-12/24/content\\_5572941.htm](http://www.gov.cn/guoqing/2020-12/24/content_5572941.htm) [<https://perma.cc/E4MH-YJXW>].

<sup>108</sup> Anhui Huayuan Yiyao Gongsi, Guojia Gongshang Zongju Shangbiaojū (安徽华源医药公司, 国家工商总局商标局) [Huayuan Medicine Co., Ltd. v. Trademark Office of the State Administration of Industry and Commerce], ZHONGGUO XIANZHENGWANG (中国宪政网) [CALAW. CN] (Beijing IP Ct. Dec. 8, 2015), <http://www.calaw.cn/article/default.asp?id=11976> [<http://perma.cc/6WMA-LRC2>].

<sup>109</sup> Xu Xiaodong (徐肖东), *Xingzheng Susong Guifanxing Wenjian Fudai Shencha de Renzhi Jiqi Shixian Jizhi—yi Chen Aihua An yu Huayuan Gongsi An Weizhu de Fenxi* (行政诉讼规范性文件附带审查的认知及其实现机制—以陈爱华案与华源公司案为主的分析) [Recognition and Realization Mechanism of Incidental Review of Regulatory Documents in Administrative Litigation: Taking Chen Aihua Case and Huayuan Gongsi Case as Main Examples], 6 XINGZHENG FAXUE YANJIU (行政法学研究) [ADMIN. L. REV.] 69, 75–78 (2016).

<sup>110</sup> Zhu Mang (朱芒), *Guifanxing Wenjian de Hefaxing Yaojian—Shouli Fudaixing Sifa Shencha Panjueshu Pingxi* (规范性文件的合法性要件—首例附带性司法审查判决书评析) [Elements of Legality of Regulatory Documents: Analysis of First Incidental Judicial Review Judgment], 11 FAXUE (法学) [LAW SCI.] 151, 152–160 (2016); Zhang Jiansheng (章剑生), *Lun Xingzheng Susong zhong Guifanxing Wenjian de Hefaxing Shencha* (论行政诉讼中规范性文件的合法性审查) [On Legality Review of Regulatory Documents in Administrative Litigation], 3 FUJIAN XINGZHENG XUEYUAN XUEBAO (福建行政学院学报) [J. FUJIAN ADMIN. INST.] 9, 9–16 (2016).

<sup>111</sup> Anhui Huayuan Yiyao Gongsi, Guojia Gongshang Zongju Shangbiaojū (安徽华源医药公司, 国家工商总局商标局) [Huayuan Medicine Co., Ltd. v. Trademark Office of the State Administration of Industry and Commerce],

pointed out that according to the second paragraph of Article 74 of the Revised ALL, an administrative action shall be revoked according to the law, but if the revocation is anticipated to cause any significant damage to national or public interest, the legality of the alleged action may be confirmed as illegal, but the action may not be revoked.<sup>112</sup> In this case, the court adopted the agency's opinion and believed that revocation of the alleged administrative action will cause damage to public interest.<sup>113</sup> Obviously the second instance court was more cautious in dealing with incidental review of the regulatory document. As the first case for this new mechanism, it represents the attitude of the courts that want to take action without pursuing greater changes, which are inherently disruptive. From a judicial perspective, the courts may be right to preserve their conservatism. However, any regulatory document is related to public interest, so it is easy for an agency to exploit damage to public interest as an excuse. It looks like the court of second instance solved the dilemma. Judicial review of regulatory documents may be toothless if few administrative actions are revoked and if confirmation of legality only means administrative compensation. Since the courts have to implement the related articles of incidental review of the regulatory documents—and plaintiffs are increasingly raising questions about the legality of regulatory documents—more and more local courts are calling for further stipulation of the new mechanism which has become one of the hottest issues in the realm of new legal judicial interpretation.

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ZHONGGUO XIANZHENGWANG (中国宪政网) [CALAW. CN] (Beijing IP Ct. Dec. 8, 2015), <http://www.calaw.cn/article/default.asp?id=11976> [<http://perma.cc/6WMA-LRC2>].

<sup>112</sup> Anhui Huayuan Yiyao Gongsi, Guojia Gongshang Zongju Shangbiaoju (安徽华源医药公司, 国家工商总局商标局) [Huayuan Medicine Co., Ltd. v. Trademark Office of the State Administration of Industry and Commerce], ZHONGGUO XIANZHENGWANG (中国宪政网) [CALAW. CN] (Beijing IP Ct. Dec. 8, 2015), <http://www.calaw.cn/article/default.asp?id=11976> [<http://perma.cc/6WMA-LRC2>].

<sup>113</sup> Anhui Huayuan Yiyao Gongsi, Guojia Gongshang Zongju Shangbiaoju (安徽华源医药公司, 国家工商总局商标局) [Huayuan Medicine Co., Ltd. v. Trademark Office of the State Administration of Industry and Commerce], ZHONGGUO XIANZHENGWANG (中国宪政网) [CALAW. CN] (Beijing IP Ct. Dec. 8, 2015), <http://www.calaw.cn/article/default.asp?id=11976> [<http://perma.cc/6WMA-LRC2>].

ii. *The Judicial Interpretation of the Revised ALL in 2018*

Interpretation of the Supreme People's Court on the Application of the Administrative Litigation Law of the People's Republic of China [*Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi*] (hereinafter *2018 Judicial Interpretation*) was adopted on November 3, 2017 and took effect on February 8, 2018; meanwhile the 2015 Judicial Interpretation mentioned above was annulled.<sup>114</sup> The 2018 Judicial Interpretation absorbed all the provisions of the 2015 Judicial Interpretation and improved related provisions concerning judicial review of regulatory documents. This new Judicial Interpretation aims to establish a comprehensive system for the review of regulatory documents with five lengthy provisions covering different kinds of issues.

First, the 2018 Judicial Interpretation establishes an independent trial process for regulatory documents with confirmation of power of the court and right of the agency. Article 147 provides that a people's court shall hear the authority developing the document when it finds that regulatory document may be illegal.<sup>115</sup> Hearings can be conducted in various ways under this context.<sup>116</sup> The

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<sup>114</sup> SUPREME PEOPLE'S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People's Court on the Application of the Administrative Litigation Law of the People's Republic of China] (Feb. 07, 2018, 11:20 AM), <http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>] [hereinafter *2018 Judicial Interpretation*].

<sup>115</sup> SUPREME PEOPLE'S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People's Court on the Application of the Administrative Litigation Law of the People's Republic of China] (Feb. 07, 2018), art. 147, <http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>].

<sup>116</sup> SUPREME PEOPLE'S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People's Court on the Application of the Administrative Litigation Law of the People's Republic of China] (Feb. 07, 2018), art. 147, <http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>].

Interpretation does not prohibit *ex parte* contacts. That means the administrative bodies shall take part in the trial process. It is not the defendant but rather a participant because this is not a formal litigation process. Though the Interpretation requires that, if the authority developing the document requests an agency state its opinion in court, the people's court must allow it.<sup>117</sup> Thus, the agency may show up in court or state its opinion through one of a handful of channels, including submitting a written opinion. This provision creates enough room for the court to collect opinions from the agency and for the agency to express its opinions. The provision also stipulates that an agency that does not state an opinion or provide related testimony may not stop the court from reviewing regulatory documents.<sup>118</sup>

From the provision itself, the trial of regulatory documents can be an independent phase in administrative litigation.<sup>119</sup> However, there are some unsolved questions, for example, how the court informs the authority developing the document especially when the court at the grassroots level accepts a case involving the legality of regulatory documents published by ministries and commissions under the State Council. The further question is whether the court

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<sup>117</sup> SUPREME PEOPLE'S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People's Court on the Application of the Administrative Litigation Law of the People's Republic of China] (Feb. 07, 2018), art. 147, <http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>].

<sup>118</sup> SUPREME PEOPLE'S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People's Court on the Application of the Administrative Litigation Law of the People's Republic of China] (Feb. 07, 2018), art. 147, <http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>].

<sup>119</sup> SUPREME PEOPLE'S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People's Court on the Application of the Administrative Litigation Law of the People's Republic of China] (Feb. 07, 2018), art. 147, <http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>].

has the obligation to collect evidence for regulatory documents if the agency does not provide any evidence or opinion without good cause. In normal administrative litigations in China, the defendant bears the burden of proof. That means if the agency does not provide evidence for the contested administrative action, it will lose the case. The outcome in the review of regulatory documents is different from normal administrative litigations. Even if the agencies do not provide evidence or opinions, the regulatory document will not be considered illegal. Thus the agency has no incentive to provide evidence or opinions. Furthermore, it is impossible for the agencies to provide opinions or evidence in every case. So it is uncertain that this provision will be implemented well.

Second, the Judicial Interpretation stipulates clear review contents and review standards. Article 148 provides that the court shall review the legality of regulatory documents but not the question of reasonableness.<sup>120</sup> The contents of review of regulatory documents include whether the agency oversteps power, violates statutory procedures, and so on. The provision defines “illegal” in regulatory documents as follows: (1) Outside the statutory remit of the developing authority, or beyond the authorization by the law, regulations, or rules; (2) Contravening the provisions of any law, regulations, rules, or any other superordinate law; (3) Without a basis in any law, regulations or rules, illegally increasing any obligation, or derogating from the lawful rights and interests, of any citizen, legal person, or any other organization; (4) Failing to comply with the statutory approval procedure or the public issuance procedure, or seriously violating the development procedure; (5) Otherwise violating the law, regulations, or rules.<sup>121</sup>

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<sup>120</sup> SUPREME PEOPLE’S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People’s Court on the Application of the Administrative Litigation Law of the People’s Republic of China] (Feb. 07, 2018), art. 148, <http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>].

<sup>121</sup> SUPREME PEOPLE’S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People’s Court on the Application of the Administrative Litigation Law of the People’s Republic of China] (Feb. 07, 2018), art. 148,

The provision stipulates the standards for reviewing original administrative litigation to some extent. Comparatively speaking, overstepping power or authority in the first standard is easier to judge and make a conclusion. The second standard about whether the regulatory document contravenes higher rank laws is not too difficult. However it is rather difficult to review the procedure requirements. Due to rough and few procedure requirements of regulatory documents, we still cannot predict how the court would review the procedure requirements. In the first case involving regulatory documents issued by ministry under the State Council in 2015, the court conducted trials for only the one article deemed controversial and alleged illegal by the plaintiff, but did not review matter of power or procedure. The 2018 Judicial Interpretation is obviously different from the review in the above case. The court shall review every aspect according to this Interpretation. Combined with Article 147, Article 148 does not list evidence as the content of legality, which also implies that the agency does not bear the burden of proof in judicial review of regulatory documents, although burden of proof is a common requirement in judicial review of concrete administrative actions. It still remains to be seen whether it will discourage agencies from taking judicial review of regulatory documents seriously.

Third, the Interpretation stipulates a multitude of details concerning disposition recommendations of the courts. Article 149 provides the time, the form, and the outcome of recommendations if the court deems the reviewed regulatory document illegal.<sup>122</sup> For example:<sup>123</sup>

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<http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>].

<sup>122</sup> SUPREME PEOPLE'S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People's Court on the Application of the Administrative Litigation Law of the People's Republic of China] (Feb. 07, 2018), art. 149, <http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>].

<sup>123</sup> SUPREME PEOPLE'S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People's Court on the Application of the Administrative Litigation Law of the People's Republic of China] (Feb. 07, 2018), art. 149,

(1) Only if a regulatory document is deemed legal can it be the basis of administrative action. If the court deems a regulatory document as illegal, the court shall explain the determination in a statement of reasons.<sup>124</sup>

(2) The court shall provide the authority developing the document with disposition recommendations. Meanwhile it may send a copy to four kinds of state organs:

- a) the government at the corresponding level of the authority developing the document;
- b) the next higher administrative organ;
- c) the supervision organ(s);
- d) the recording and review authority of regulatory documents.<sup>125</sup>

The scope of state organs to which recommendations should be sent in the 2018 Judicial Interpretation is broader than that in the 2015 Judicial Interpretation. The supervision organs here mainly refer to the supervision commissions which are also emphasized in the organ reform and revision of the Constitution in 2018, which play a role in the whole state structure and are intended to supervise regulatory documents more efficiently. Copying the recommendation to the supervision organs provides more clues to the supervision organs. The recording and review authority will also receive a copy of the recommendation, which signals cooperation between the recording and review system and the judicial review system.

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<http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>].

<sup>124</sup> SUPREME PEOPLE'S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People's Court on the Application of the Administrative Litigation Law of the People's Republic of China] (Feb. 07, 2018), art. 149, <http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>].

<sup>125</sup> SUPREME PEOPLE'S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People's Court on the Application of the Administrative Litigation Law of the People's Republic of China] (Feb. 07, 2018), art. 149, <http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>].

(3) The court shall raise suggestions to revise or annul regulatory documents to the authority developing the regulatory documents within three months of the effectiveness of the judgment. If the regulatory documents are stipulated by several departments, the court may send recommendations to the sponsoring authority or to their common administrative organ at the next higher level. This provision aims to solve the dispute over the definition of responsibility of respective governments when documents are stipulated by several departments.<sup>126</sup>

(4) The administrative organs who get recommendations shall respond in written form within 60 days. If the situation is urgent, the court may suggest the authority developing the document or the next higher government stop execution immediately. This provision is very important for the implementation of recommendations. Nevertheless, it is still unclear whether the government shall be treated as “contempt of court” as in normal administrative litigation if they refuse to implement the recommendation.<sup>127</sup>

Forth, it stipulates the supervision procedure in the court system in Article 150 and Article 151.<sup>128</sup>

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<sup>126</sup> SUPREME PEOPLE’S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People’s Court on the Application of the Administrative Litigation Law of the People’s Republic of China] (Feb. 07, 2018), art. 149, <http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>].

<sup>127</sup> SUPREME PEOPLE’S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People’s Court on the Application of the Administrative Litigation Law of the People’s Republic of China] (Feb. 07, 2018), art. 149, <http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>].

<sup>128</sup> SUPREME PEOPLE’S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People’s Court on the Application of the Administrative Litigation Law of the People’s Republic of China] (Feb. 07, 2018), art. 150, <http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>].

(1) The judgment shall be recorded to the next higher court if a regulatory document is deemed as illegal. When the document is stipulated by ministries under the State Council or by provincial governments, judicial recommendations shall also be submitted to the Supreme People's Court or the Higher People's Court to record and review. In order to prevent destroying uniformity of the legal system, lower level courts should report to higher level courts during the review process. This provision does not specify what higher level courts should do after receiving recommendations. One possible action is to collect information and publish a related judgment or recommendation to all courts. Another possible action is to inform the relevant government that has the authority over the document in question.<sup>129</sup>

(2) If the president of a people's court at any level discovers that an effective judgment or ruling of the court makes a wrong determination of legality of regulatory documents and deems a retrial necessary, the president shall submit the case to the judicial committee of the court for discussion. The provision aims to solve the problem of how to find and correct wrong judgment of regulatory documents. The person who holds the authority to raise the issue is the president, and the body that maintains the authority to retry the case is the judicial committee of the court. So the retrial process is also incorporated in the judicial review of regulatory documents.<sup>130</sup>

(3) If the Supreme People's Court, or people's court at any level, discovers that any effective judgment or ruling of the court makes a wrong determination of legality of regulatory documents,

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<sup>129</sup> SUPREME PEOPLE'S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People's Court on the Application of the Administrative Litigation Law of the People's Republic of China] (Feb. 07, 2018), art. 150, <http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>].

<sup>130</sup> SUPREME PEOPLE'S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People's Court on the Application of the Administrative Litigation Law of the People's Republic of China] (Feb. 07, 2018), art. 151, <http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>].

they reserve the power to directly retry the case or specify the people's court at a lower level to retry the case. The provision stipulates additional content for the trial supervision procedure which keeps pace with the whole supervision procedure in administrative litigation.<sup>131</sup>

*iii. The First Batch of Typical Cases of Incidental Review of the Regulatory Document*

Since the 2018 Judicial Interpretation took effect in February, more and more local courts began to implement this Interpretation to review regulatory documents. In May 2018, the Supreme People's Court promptly drafted the individual Judicial Interpretation for judicial review of regulatory documents which was ranked in the project's initial plan of the judicial interpretation by the Supreme People's Court in 2018.<sup>132</sup> The reason why the Supreme People's Court did so was that lower courts remained confused about the judicial review of regulatory documents. The Supreme People's Court wanted to provide confidence, support, and techniques to push forward judicial review of regulatory documents, though it is not easy to reach consensus on consequential issues. On October 30, 2018, the Supreme People's Court published nine typical administrative litigation cases with incidental review of the regulatory documents.<sup>133</sup>

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<sup>131</sup> SUPREME PEOPLE'S COURT, *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jieshi* (最高人民法院关于适用《中华人民共和国行政诉讼法》的解释) [Interpretation of the Supreme People's Court on the Application of the Administrative Litigation Law of the People's Republic of China] (Feb. 07, 2018), art. 151, <http://www.court.gov.cn/fabu-xiangqing-80342.html> [<http://perma.cc/8TPM-QY7W>].

<sup>132</sup> Supreme People's Court, *Zuigao Renmin Fayuan 2018 Niandu Sifa Jieshi Lixiang Jihua* (最高人民法院 2018 年度司法解释立项计划) [The Project Initial Plan of the Judicial Interpretation by the Supreme People's Court in 2018], CHINA COURT.ORG (July 17, 2018, 10:34 PM), [http://www.sohu.com/a/241822337\\_164794](http://www.sohu.com/a/241822337_164794) [<http://perma.cc/3V8Z-EHE5>].

<sup>133</sup> Supreme People's Court, *Xingzheng Susong Fudai Shencha Guifanxing Wenjian Dianxing Anli* (行政诉讼附带审查规范性文件典型案例) [Typical Administrative Litigation Cases with Incidental Review of Regulatory Documents], CHINA COURT.ORG (Oct. 30, 2018, 11:19 AM), <http://www.court.gov.cn/zixun-xiangqing-125871.html> [<http://perma.cc/GP24-3R28>].

The Administrative Tribunal of the Supreme People's Court introduced that all these typical cases were the first batch of cases since the implementation of the Revised ALL. Courts across the country already reviewed 3,880 cases incidentally in the first instance from January 2016 to October 2018.<sup>134</sup> These cases are typically about medical insurance, public security, price administration, drug administration, land approval, environment supervision, enforcement, and administrative compensation. It looks like the Supreme People's Court aims to state their opinions about the incidental review of the regulatory documents among nine typical cases.

(1) In three cases, the courts finally stated that the regulatory documents were illegal; while four regulatory documents were legal. Regardless of whether the regulatory documents were legal or illegal, the courts conducted formal review in seven cases according to the enactments of Judicial Interpretation published in the Spring of 2018, applying the review standards including whether the drafting body, drafting goal, and drafting procedure comply with legal enactments and whether there is any obvious illegal provision in the regulatory documents.<sup>135</sup>

(2) In the eighth case, the court declared that due to procedural reasons the administrative action under litigation should fall within the scope of administrative litigation and the regulatory documents should not be reviewed incidentally.<sup>136</sup> In the last case, the court

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<sup>134</sup> Supreme People's Court, *Xingzheng Susong Fudai Shencha Guifanxing Wenjian Dianxing Anli Xinwen Fabuhui* (行政诉讼附带审查规范性文件典型案例新闻发布会) [News Release Conference on Typical Administrative Litigation Cases with Incidental Review of Regulatory Documents], CHINA COURT.ORG (Oct. 30, 2018, 11:10 AM), <http://www.court.gov.cn/zixun-xiangqing-125531.html> [<http://perma.cc/3KYK-VCFR>].

<sup>135</sup> Supreme People's Court, *Xingzheng Susong Fudai Shencha Guifanxing Wenjian Dianxing Anli* (行政诉讼附带审查规范性文件典型案例) [Typical Administrative Litigation Cases with Incidental Review of Regulatory Documents], CHINA COURT.ORG (Oct. 30, 2018, 11:19 AM), <http://www.court.gov.cn/zixun-xiangqing-125871.html> [<http://perma.cc/GP24-3R28>].

<sup>136</sup> Supreme People's Court, *Mao Aimei & Zhu Hongxing Su Zhejiangsheng Jiangshanshi Hecunzhen Renmin Zhengfu Xingzheng Qiangzhi ji Xingzheng Peichang An* (毛爱梅、祝洪兴诉浙江省江山市贺村镇人民政府行政强制及行政赔偿案) [Administrative Enforcement and Administrative Compensation Case of Mao Aimei & Zhu Hongxing v. Hecun County Government of Jiangshan City in Zhejiang Province], CHINA COURT.ORG (OCT. 30, 2018, 11:28 AM),

pointed out that the regulatory documents the plaintiff requested to review were not the legal basis for administrative action under litigation, which means judicial review is only incidental review for the related provisions or the provisions that form a legal basis, rather than all provisions.<sup>137</sup>

(3) The intention of the Supreme People's Court is to reaffirm that the courts have the authority to review the regulatory documents and the details of this new mechanism are becoming clearer. For example, in the fifth case, the court believed that the typical case was helpful to acknowledge the legal rights of the female and protect them better. However, the Supreme People's Court did not provide further conclusions about how the mechanism of incidental review of regulatory documents should perform.<sup>138</sup>

The number of incidental review cases of administrative regulatory documents increased after the revised ALL became effective in 2017, reaching a peak in 2019 then subsequently decreasing in 2020.<sup>139</sup> No matter how scholars, the National People's

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<https://www.chinacourt.org/article/detail/2018/10/id/3551948.shtml>  
[<http://perma.cc/XVM7-UJHR>].

<sup>137</sup> Supreme People's Court, *Chengdu Jinpai Tianshi Yiliao Keji Youxian Zeren Gongsi Su Sichuansheng Chengdushi Kexue Jishuju Keji Xiangmu Zizhu Xingzheng Xuke An* (成都金牌天使医疗科技有限责任公司诉四川省成都市科学技术局科技项目资助行政许可案) [Administrative Licence Case of Chengdu Gold Metal Angel Medical Technology Co., Ltd v. Chengdu Science and Technology Bureau in Sichuan Province], CHINA COURT.ORG (Oct. 30, 2018, 11:25 AM), <https://www.chinacourt.org/article/detail/2018/10/id/3551944.shtml> [<http://perma.cc/TST9-9NDM>].

<sup>138</sup> Supreme People's Court, *Zheng Xiaoqin Su Zhejiangsheng Wenlingshi Renmin Zhengfu Tudi Xingzheng Pizhun An* (郑晓琴诉浙江省温岭市人民政府土地行政批准案) [Land Approval Case of Zheng Xiaoqin v. Wenling City Government in Zhejiang Province], CHINA COURT.ORG (Oct. 30, 2018, 11:25 AM), <https://www.chinacourt.org/article/detail/2018/10/id/3551934.shtml> [<http://perma.cc/4NRK-U7QG>].

<sup>139</sup> According to the statistics provided by the website of the Supreme Court, there were 15,457 cases in 2020, 20,970 cases in 2019, and 18,721 cases in 2018, which may be related to regulatory documents. Concerning formal judgments, there were 10,414 cases in 2020, 14,761 cases in 2019, and 12,968 cases in 2018. Following the News Release Conference on Typical Administrative Litigation Cases with Incidental Review of Regulatory Documents in 2018, the Supreme Court did not published any report or statistics about incidental review of administrative regulatory documents, so the number of cases is unknown. *See*

Congress, and the Supreme People's Court design the system of judicial review of regulatory documents, key problems will persist in the short term given that the practice of judicial review has not fundamentally changed and the government remains more powerful than the courts. Yet the environment is slowly changing. Lower level courts are showing greater courage and incentive to review regulatory documents published by higher level governments. The governments also are making efforts to improve regulatory documents and push forward the rule of law in government. Regardless of what comes next, the gate of judicial review of regulatory documents has been opened, and the momentum will continue forward rather than reviving the past. Questions and problems will continue to emerge and deserve thorough discussion along the way.

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ZHONGGUO CAIPAN WENSHU WANG (中国裁判文书网) [China Judgments Online], <https://wenshu.court.gov.cn/>[<https://perma.cc/Z9Q5-QD7T>].