

## Original Paper

# Legal Object Control of Major Administrative Decisions

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### Abstract

*Major administrative decisions have the characteristics of wide scope of influence and long duration. Since the promulgation of the Interim Regulations on the Procedure of Major Administrative Decisions, the situation that decisions cannot be depended on has been initially solved. However, there are still certain difficulties regarding the object of the legal relationship of major administrative decisions. The scope of major administrative decisions is ambiguous, and the dynamic object is dominated by the participation of the public and experts, which cannot guarantee the scientific and democratic decision-making. Therefore, this paper proposes to limit the scope of major administrative decisions statically and strengthen the participation of experts and the public scientifically and democratically.*

### Keywords

*major administrative decision-making, decision-making scope, risk assessment, expert consultation, public participation*

### 1. Introduction

In 2019, The State Council promulgated the Interim Regulations on Major Administrative Decision-making Procedures (hereinafter referred to as the Interim Regulations), which is a milestone in the legislation of major administrative decisions and solves the situation that major administrative decisions cannot be relied upon. However, in the time after promulgation, the legalization of decision-making still faces some practical problems, such as: the loopholes of the “decision-making catalogue system” lead to the risk of the “Interim Regulations” being shelved, and the scope of “major” and “decision-making” is clarified. All these problems are important issues in the legalization of the regulation before, during and after administrative decision-making in practice. The Implementation Outline of the Rule of Law Government (2021-2025) also points out that in the future, the system construction of major administrative decisions is also one of the important indicators of the construction of the rule of law government. Although the major administrative decision-making procedure system has been established initially, the practical problems from the should to the reality

have not been properly dealt with.

Nowadays, administrative decision-making has become one of the important bases for administrative organs to make specific administrative acts, which has a close connection with the work of the public, enterprises and other organizations. Therefore, when discussing the rule of law government and administration according to law, ignoring the existence of administrative decision-making will make administrative decision-making as a front-end and basic administrative activity produce a crisis of the rule of law. As a major administrative decision which is different from the general administrative decision, its rule of law is the first problem to be solved.

## **2. The Scope of Static Object Is Fuzzy**

Administrative decision is the generalization of decision matters in the administrative field, and it is also the concretization of decision matters. However, there is some ambiguity in the qualitative of decision. To promote the legalization level of major administrative decisions, the first thing to be solved is the problem of the right and wrong of decision-making, which is also the basis of clarifying the whole scope of administrative decision-making. The explanation of decision making in Cihai is: “In the process of transforming the world, people seek and decide on a certain optimal goal and action plan”, focusing on the process of selecting the plan, which is a top-level design. After the decision is made at the upper level, the choices and decisions made by the lower level to the specific decision implementation process also belong to the management definition of decision making, which is in the large system of macro decision making. However, in government decision-making, after the higher government makes a decision, the choice of the lower government in the process of implementation is also included in the decision-making matters that need regulation, and the decision-making matters are very likely to be detailed to every choice of the grass-roots staff or institutions, and the matters that need regulation will be derived from endless possibilities. For example, some local governments do not have a good understanding of the nature of decision-making, and confuse decision-making with implementation when defining the scope of matters. In the relevant provisions of major administrative decisions formulated by Sichuan Province, major matters that implement important instructions and decisions of higher authorities, party committees and people’s congresses at the same level are also considered as major administrative decisions. Although “matters requiring decision-making” is emphasized in the latter part of the provisions, the “decision-making” here refers to the specific operational process of implementing the superior’s instructions, and the decision-making matters have been fully demonstrated and evaluated by the superior authorities, and should be implemented. Outside the scope of the decision. In addition to Sichuan, there are Qinghai, Guizhou and other provinces. At the same time, the Hubei provincial government has also incorporated the government work report into the scope of major administrative decisions. The government work report is a summary of the past period of the government’s term of office and the plan for the future period of the government’s term of office, which involves both, has been done in the past and what it plans to do in the future. The first

thing that needs to be questioned is that the past work should not belong to the scope of decision-making. Secondly, in the future work, most of the macro and abstract and principled provisions are not necessarily the same as the matters of decision-making. An important reason for this problem is that governments at all levels cannot accurately understand the connotation of the word itself and the “catalogue system” devolves power belonging to the scope of major administrative decisions to the county government.

It can be seen that there are certain differences in the understanding of decision-making organs. If there is no consensus on whether it is a decision or not, and if there is no sufficient distinction between decision making and implementation, the boxes of relevant regulations will only become bigger and bigger, thus tying the hands and feet of grass-roots governments, affecting the efficiency and quality of government decision-making, and going further and further away from the goal of service-oriented and streamlined government transformation.

### **3. Dynamic Object Administrative Dominant Color**

The main participants in major administrative decisions: “The government, experts and the public have a symbiotic relationship, and experts and the public are an important entry point for legal regulation of major administrative decisions”. Major administrative decisions are diversified in structure and have a certain open development direction, thus from the main body who makes decisions at the beginning to who participates in the making of administrative decisions. However, the status of the subjects involved in decision-making is not in the same dimension. In other words, not all subjects related to administrative decision-making will formally participate in administrative decision-making, and even if the subjects have participated, they do not have the same weight. The degree of influence of different subjects on the decision result is quite different.

In the government and external participants: (1) Government and experts. The independence of experts is an important guarantee for the decision-making mechanism to play the role of scientific decision-making. However, in reality, experts often have a strong “administrative color”, or are selected by the government from the expert pool, which has a certain “obedience” meaning. Secondly, the experts selected may have other capacities, either administrative or “constrained” by administrative agencies. Thirdly, in the adoption of expert opinions to adopt the “favorable listening, unfavorable avoidance” approach. For example, in 2003, experts participated in the decision making of the Nu River Dam construction project in Yunnan province. The Nujiang main stream hydropower development plan was reviewed by experts organized by the National Development and Reform Commission. According to the final plan, the project is expected to bring economic benefits of more than 30 billion yuan to the local area. However, in the process of concrete demonstration, there are two different expert opinions. The opposing side believes that the construction of Nujiang hydropower station will bring certain harm to the local ecological environment, and the specific economic benefits are also questioned. In August of the same year, the State Environmental Protection Bureau organized

two expert talks, during which the experts in the Kunming forum were divided according to the way of “household registration”, forming a “North-South separation”, the experts from Beijing were opposed, and the experts in Yunnan were supportive. But in order to get the project off the ground, the leaders of Nujiang Prefecture went to Beijing to report. At the survey a month later, not a single expert participated. Experts who were previously opposed to it have also gone silent. It treated the decision on the Nu River project as “a game of selecting experts”. Although expert consulting system is started, but the substance has changed. Dissenting opinions are suppressed, used when needed and discarded when not needed. This has undoubtedly discouraged experts from participating in decision-making. It also makes us think about the status of experts in decision-making and how the independent attribute of experts can be guaranteed. In this case, the relationship between the experts and the government becomes a “tool” for the government to achieve the purpose of decision-making. (2) Government and the public. The non-benign interaction between the government and the public is an important factor that needs to be clarified urgently. A decision ultimately benefits the target group of the decision, namely the public. Therefore, the positive interaction between decision-making power and citizenship is needed at the beginning of decision-making. In reality, decision-making power is dominant, while the public is passive. Moreover, due to the unbalanced economic and social development in China, the social public’s awareness of participating in decision-making is also unbalanced, and the resources that different regions can deploy to participate in decision-making are inconsistent. To stimulate the public’s awareness of participation, it is necessary for decision-making organs to play an active role. Whether it is the strengthening of the form of public participation in legislation, or the adoption and reasoning of public opinions, it is an important manifestation of the positive interaction between the government and the public. The relationship between the government and the public in decision-making should be like a guide, bringing the public into the operation of the decision-making system and providing various conditions for them to express their opinions. (3) Experts and the public. Experts are an important way to communicate technical rationality, while the public is an important subject of communication rationality. Only when the communicative rationality and technical rationality play a full role can the science and democracy of decision-making be adequately guaranteed. But in the absence of both, decisions fall into the trap of irrational decisions. In the real decision-making, the decision-making organs confuse the experts with the public, and the situation occurs that the experts take the place of the public or the experts are members of the public.

To sum up, the clear and reasonable connection between the government, the executive and the upper and lower levels of the decision-making organs and the external network of decision-making among the government, experts and the public is an important guarantee for scientific and democratic decision-making. Only in the clear determination of the internal relationship and the accurate positioning of the respective functions of the government and the external, can a decision return to the essence and achieve the goal of the decision efficiently.

#### 4. The Legal Object Control of Major Administrative Decisions

The object of administrative legal relations is “the object and object that administrative legal relations point to, and the carrier that embodies certain interests, which mainly includes things, behaviors and people”. Under this theoretical framework, the legal object of major administrative decision is a compound object, including the concept of major administrative decision itself and the participation behavior of the government, experts and the public. The government’s participation behavior runs through the whole process of decision-making, and control from the perspective of experts and the public can indirectly achieve the purpose of controlling government behavior. Therefore, as far as experts and the public are concerned, risk assessment, expert consultation and public participation are the key objects. In the high risk, systematic and complex decision-making environment, both the practical and theoretical circles generally agree on the need to play the role of experts. For major administrative decisions with extremely high complexity, the opinions of professionals in the field are more needed. In order to satisfy scientific decision making and rational decision making, risk assessment and expert consultation system is an important legal system of decision making technology rationalization. In view of democracy, it is necessary to establish communication rationality effectively in the way of public participation. The static object and dynamic object blend with each other, can not constitute the legal relation object of major administrative decision alone.

##### *4.1 Conceptual Limitation: Redefinition of Major and Decision Making*

##### *4.1.1 The Right and Wrong of Administrative Decision-Making*

To determine the scope of administrative decision-making, two conditions need to be met. The first is that it belongs to the scope of administrative authority, and the second is that it belongs to the scope of decision-making. The former requires the decision-making subject not to cross the boundary, not to be authorized by the law, neither to do things that have no power to manage, nor to do things that are not within their jurisdiction. The latter requires that the relevant matters cannot be equated with other administrative acts, such as administrative licensing, administrative penalties, etc., and cannot involve existing legal provisions. However, some local governments fail to understand the essence of decision-making in the concrete decision-making process, resulting in a chaotic situation. Some governments have even incorporated the revision of local regulatory documents into the scope of adjustment of major administrative decisions. If “Revision of Implementation Measures for Reporting Environmental Violations with Awards in Enshi Prefecture (Trial)”, and “Overall Management Measures for Tourism Resources in Enshi Prefecture” are included in the catalogue of major administrative decisions in 2023 formulated by the People’s Government of Enshi Prefecture in Hubei Province, the first question is whether the “revision” is within the scope of decision-making. Secondly, according to the Interim Regulations and the relevant procedures and regulations for major administrative decisions of Enshi Prefecture, “formulation” is stipulated, and “revision” cannot be equated with “formulation” here. Therefore, it is not difficult to find that there are certain differences between the provisions of local governments on decision-making and the original intention of

legislation, and local governments regard decision-making as “pocket behavior” without fully understanding the nature of decision-making matters. According to the legal definition of administrative decision-making explored in Chapter 1, there are certain legal rights and obligations when administrative decision-making is made. At the same time, administrative decision-making should also be distinguished from the existing administrative acts, legislative power, personnel power, etc. that have been regulated by law, and cannot involve the scope of adjustment by other department laws. In addition, emergency matters should also be excluded from the scope of regulation, because emergency matters often need to make quick decisions and should be restricted by the process as little as possible, so as to cope with emergencies. For example, the Wuhan epidemic in 2020 was forced to take the decision to close the city, which would pose a great threat to the life safety of the people if the decision was subject to the strict regulation of the process and the procedure was too cumbersome.

#### 4.1.2 Significant Scope Boundaries

The boundary of the scope of “significant” can be understood as the boundary between “significant” and “general”, because the word “significant” is more abstract, and with the change of time, it is easy to cause some new things that are difficult to judge or do not belong to the scope of “significant”, with the change of society, it becomes the scope of “significant”. Therefore, we can consider clarifying the scope of “general” from the opposite side so as to better solve the boundary problem between the two.

First of all, in terms of the number of decisions made, “general” refers to frequent decisions made by the government on a daily basis, which is characterized by high frequency. Secondly, from the perspective of the subject of the decision, the subject of the decision of general matters is often of a lower legal rank, and most of the matters are decided by the grass-roots government, which often can be decided immediately without the approval process. At the same time, the subject involved in decision-making and implementation is relatively simple. Thirdly, from the perspective of scope and time, the influence scope of “general matters” is mostly within the jurisdiction of grass-roots governments; Decision execution time, formulation time and influence time are all transient. Finally, from the perspective of expected results, it is precisely because the duration of general administrative decisions is short that there are fewer influencing factors leading to deviation of decision results during the period from formulation to implementation. Therefore, the result of the decision has lower uncertainty and risk, and the final result can be accurately predicted. Matters other than the general decision-making matters mentioned above may be considered for inclusion in the “significant” category.

At present, The State Council stipulates that “the policy-making organs may, in accordance with the provisions of the first paragraph of this article, determine the list of decisions and standards based on their functions and powers and local realities”. (See Article 3 of the Interim Regulations on Major Administrative Decision-making Procedures for details). The meaning of this article is to further delegate the power to determine major scope to each local decision-making organ, and to regulate the decision-making items that need to be standardized into the decision-making catalogue by the local

government. As a result, local governments will not include matters that should be regulated by regulations in the “catalogue” according to their discretion, and regulations that should effectively regulate decision-making matters will not be regulated. In the end, the procedure of decision making is virtually useless. Therefore, the power to formulate the catalogue cannot be all delegated to each level of government, but it can be placed under the overall control of the municipal government, and reviewed by the people’s Congress at the same level and its standing committee and the government at a higher level. At the same time, the formulation of the contents of the catalog should not only be open, but also include the procedure of public participation, and the public can argue and expand those that have a major impact on the public interest.

The way of reverse definition can provide certain macroscopic guidance for the forward enumeration, while the forward enumeration is the concretization under the macroscopic guidance. The existence of the two is not contradictory. Through the reverse definition and forward enumeration, the problem of “major or not major” can be avoided to a certain extent, which not only meets the local characteristics but also details the provisions of major scope, so that the decision-making can really be divided into complicated and simple, and the effect will be twice the result with half the effort.

#### *4.2 From Inside To Outside: Expert Consultation System in Major Administrative Decisions*

Once a major decision is made, it will have an all-round impact on the economy and society. For example, the construction of hydropower stations can solve the energy demand to meet the needs of economic development. However, it will have a great impact on the migration and life of aquatic animals involved in the waters and the local ecological environment. Therefore, the experts involved in a decision are all commenting on the decision from their own field. In addition, even experts in the same field may have different opinions, but the open form of consultation will make some experts afraid to speak up. At the same time, the weight and legal status of expert opinions in the decision-making process are also important factors affecting the scientificity of decision-making results.

##### *4.2.1 Differences of Opinion among Experts*

How to deal with the opinions and suggestions of experts and how to unify the different opinions of different experts are important issues about the system of expert advice. In management, there are many ways to learn from expert survey, such as the French DUP and public consultation and investigation procedures; The Delphi method in the United States. The former is a declaration in the public interest of administrative decisions and programmes in certain areas for which the Prime Minister and ministers or local administrators are responsible. The decision-making process is carried out after the declaration and on the basis of the opinion of the Advisory Committee and even the Administrative Court. The latter is a “back-to-back” way to get expert advice and make a decision. Among them, the Delphi investigation method in the United States not only satisfies the independence requirement of decision-making, but also allows experts to fully express opinions on each other’s suggestions, which is one of the ways worth learning. It originated in the 1940s and takes a

non-face-to-face approach to expert opinion gathering. It will collect opinions in an anonymous manner through surveys in the form of questionnaires. Feedback is given to the various experts, and the process continues until a consensus is reached. The main rules of the approach are as follows: the name of the expert is not disclosed, and the expert is mainly carried out by communication. Anonymous feedback contact, experts from the feedback feedback of the collective opinions and reasons and put forward their own views to form the anonymous mutual influence among experts; Do quantitative processing of the final result of the opinion Adopting this method can avoid experts' concurs because of others' opinions to a certain extent, and minimize the influence of experts' authority. Enhance the independence of experts and encourage all experts to express their views fully.

#### 4.2.2 External Acceptance of Expert Advice

As one of the subsystems in the whole decision-making system, expert consultation argumentation should be recognized as its position and function in it. Good communication between the expert and the administration is of particular value and significance for the scope of the expert's opinion. However, most of the experts are intensive research talents in a certain field, and the scientific nature of the decision is only a standard for the judgment of facts, and the choice of value needs to be judged by the decision-making organs themselves. Just as the government decides to build an urban park, construction experts are concerned about the construction standards, but the government needs to consider various aspects such as budget, residents' sense of gain, and environmental impact. In addition, experts in different fields, even experts in the same field, will have different opinions and disagreements. At this point, how decision-makers choose between them is a question for each individual. At present, it is generally believed that experts play a positive role in strengthening the rationality of administrative decision-making. The author believes that dichotomies should be adopted in the process of expert consultation, positioning experts as the subject of fact judgment. It is forbidden to adopt the views of experts on the value judgment of decision-making matters, just as it is to treat the testimony of witnesses and the attitude of expert assistants in court proceedings. At the same time, in order to encourage experts to speak and participate, on the one hand, the experts are given material rewards and spiritual awards to ensure their enthusiasm to participate in decision-making. On the other hand, when the experts express their opinions, they should not only strictly maintain the confidentiality of the problems and suggestions told by the experts, but also not pursue their responsibilities because the experts express any opinions, and they should be absolutely strict in immunity and confidentiality.

#### 4.3 *From One-Way Dominance to Two-Way Interaction: Public Participation Mechanism in Major Administrative Decisions*

Public participation in decision-making is considered to be a kind of broad and direct participation. The administrative practice circles generally reflect that public participation is the most important and difficult part of decision-making procedure. The main reasons are: "The function of public participation is unclear"; "There are problems with the idea of operating public participation". At the same time, in practice, public opinions are often unilaterally listened to in a mode dominated by administrative



organs, while there are few public inquiries and debates between the two sides.

#### 4.3.1 How Public Representation Is Produced

The universality of representatives has an important impact on the democracy of the hearing system. After the hearing system was first introduced to listen to public opinions, problems such as the lack of universality of representatives, unreasonable way of representation and lack of representative ability were exposed until now, it has not been well solved.

At present, there are three main types of public representation: (1) administration-oriented government selection mode, (2) random selection mode under moderate administrative control, and (3) application of low administrative control-representative mode. The first is the early mode in which the government selects and determines the representatives participating in decision-making, which reflects strong government control. For example, Article 4 of the Interim Provisions on the Hearing of Qingdao Price Decision stipulates that “the hearing shall be organized by the municipal price control department. The Planning Commission, the Economic Commission, the Construction Commission, the Finance Bureau, the Statistics Bureau, the Civil Affairs Bureau, the Federation of Trade Unions and other departments and units are the members of the conference; At the same time, the municipal People’s Congress, the CPPCC, the democratic parties, the relevant business departments, enterprises and news units of the relevant experts, consumer representatives to participate”. Under this model, the decision-making organs will enjoy the initiative of participating representatives, and the public will only have the right to be chosen. In this way, the decision-making department of the government can grasp the direction of decision-making and produce the results that the decision-making department wants to happen. So it gives the public a feeling of going through the motions. The second is for the public to sign up voluntarily, and then for the decision-making organ to choose among the registered public. Although this system has strengthened the enthusiasm of the public to participate, the final participants are still the result of the selection of decision-making departments. Such selection is nominally random, but in fact it is the space for decision-making departments to operate in private. The government has free rein in how it randomizes. The third option is for the public to elect their own representatives, and when the public cannot elect their own representatives, the government will intervene. The third is to fully mobilize the enthusiasm and initiative of the public, which is a more reasonable model than the first two. But there are also differences in the selection of representatives by the public, the qualification of the selection, illegal operations, the selection system guarantee, the funding guarantee. Therefore, it is necessary to institutionalize the third mode through separate legislation to strengthen the satisfaction of the public as the decision-making subject. After the public representative is elected, the next step is how to implement the public’s rights in the hearing system.

#### 4.3.2 We Will Strengthen the Hearing System with Debate as the Core

Although the Provisional Regulations and local norms provide for various forms of public participation, the hearing, as a formal procedure for hearing opinions, has special significance in the value and function of public participation in administrative decision-making. The value of hearings is that they

are both a means of disseminating information, a channel for advocacy, a means of reconciling differences between different interest groups, and a safety valve for mitigating and eliminating interference. In practice, the current public opinion listening method in our country mostly adopts the way of “speech” to provide opinions for decision-making organs. For example, in the “Norms for Major Administrative Decision-making Procedures of the People’s Government of Enshi Prefecture”, the way of public participation is the result of the independent choice of the administrative organ. In Article 8, the way of listening to opinions and feedback can be carried out in an online way.as you can see the way does not reflect the argumentative spirit of the hearing. There are also local governments that use hearings as a form of “when necessary”. The definition of “necessary” is not explained, which gives decision-making departments space and room for independent choice. In addition, administrative regulations only stipulate that the decision-making departments can adopt the form of hearings. No matter the legislation at the central level or the local level, the form of public participation is decided by the decision-making departments and enjoys a high degree of discretion. Public participation should establish a two-way communication mechanism, and this “rational communication system is the key link of the effectiveness of the hearing”. Therefore, a “circular” debate mechanism should be established in the hearing to fully question and demonstrate. One is the choice of hearing host. It shall be composed of persons in a non-government capacity or persons from the judicial system to ensure the neutrality of the presiding officer of the hearing. The role of the moderator in the process of hearing is mainly to guide the smooth progress of the process and clarify the focus of the dispute. Second, in the process of hearing, we should refer to the process of court debate in litigation, and establish the process of communication and exchange between the two sides as an essential link. This link is also the core of the hearing. In this session, the question and answer method is adopted to solve the doubts of the public, so as to facilitate the public to raise questions and understand the demands of the public. Third, the legal effect of the hearing record. The legal effect of the hearing record should be clearly taken as one of the basis for decision-making, if the voice of doubt is too large, it is necessary to adopt multiple hearings to adjust the existing plan or directly terminate the way. For the opinions that are not adopted, it is also necessary for the decision-making organs to respond positively and explain the reasons so as to obtain the support of the public. Only when the hearing record is legally recognized and obtained binding force, can the spirit of argument be implemented. In addition, the subject of the application hearing and the application should not be limited to the decision-making organ or even the administrative system, but can be organized by a third-party social organization or other public authority independent of the administrative system, so as to ensure the “benign interaction” of the hearing.

## 5. Conclusion

Administrative decision-making has entered the law from the outside of the law, which itself is the inevitable requirement of the construction of the rule of law in China. Under the background of the construction of modern rule of law government in full swing, administrative decision-making, such a front-end and basic administrative activity, has been unable to escape the regulation of law. The tripartite decision-making chain formed by decision-making organs, experts and the public has become an important experience to improve administrative decision-making. Major administrative decisions, as the most special kind of administrative decisions, are different from general administrative decisions at the beginning, and their essential characteristics are non-frequent, extensive scope of influence, persistence of time and complexity of consideration factors. This also determines that it should be regulated with stricter norms when making decisions, whether it is in the participation behavior of the main body, the establishment of the network of participation and supervision of the main body in related decisions. In terms of static objects, strict regulations on “major” and institutional construction of public and expert participation in decision-making should avoid the failure of the rule of law.

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