

The Object and Occasion of Constitutional Implementation

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ABSTRACT. *There are many different views on the object and occasion of constitutional implementation in academia. On the basis of the constitutional ontology and the theory of legal rank, this paper makes a detailed interpretation of the object and occasion of constitutional implementation. Considering that the object of constitutional implementation is limited to state organs and rights. And that a distinction should be made between the occasions of constitutional implementation: the constitution is implemented when the laws of the legislature are suspected of being unconstitutional or when the legislation is not acted upon, and is implemented when executive branch and judiciary fail to apply the law properly or when the law is unconstitutional. Finally, this paper briefly discusses the problems existing in the objects and occasions of constitutional implementation in China, and puts forward corresponding suggestions.*

KEYWORDS: *Constitutional implementation, Implementation object, Implementation occasion, Unconstitutional review*

1. The object of constitutional implementation

The object of the implementation of the constitution is to whom the Constitution should be implemented. At present, there are still different views on the object of constitution enforcement in the constitutional community of our country. I think that the discussion of the object of the constitution involves the discussion of the nature of the constitution. There have been a series of different views on the nature of the constitution. Among them, the most representative and the most antagonistic views are "the mother law of Constitution" and "the public law of Constitution", the other views can be absorbed by the two views to different degrees.

1.1 The mother law of Constitution

According to the theory of Constitutional Mother Law, "the Constitution is the mother law, and other forms of law are derived from the constitution and belong to

the sub-law of the constitution" [1], "the Constitution is the root of all legal systems of the state" [2], and the fundamental norms of the activities of all organizations and individuals, it's the general constitution of the country. The theory of the Mother Law of the Constitution once occupied the mainstream position in the research of the theory of the Constitution, which meant that no matter the state organs, the Armed Forces of the political parties, enterprises and institutions, social organizations or individual citizens, all need to be bound by the constitution. That is to say, they are all regulated and enforced by the Constitution.

1.2 The public law of Constitution

According to the theory of public law of constitution, the restriction of power and the protection of rights are the fundamental attributes of constitution. "Constitutional Law and administrative law form the basis of what civil law countries call public law," Merriman points out [3]. Austin also classified the Constitution as public law in his lectures on jurisprudence. In the view of constitutional public law, citizens can not be the subject of violation of the Constitution, so the provisions of civic obligations in the Constitution are considered redundant. That is to say, from the point of view of the target, the constitution should only be applied to state organs and state power, not to private acts.

1.3 The author's interpretation

The author thinks that the implementation object of the constitution is decided by the spirit of the Constitution and the attribute of the Constitution, and is limited to state organs and state power. The implementation object of the Constitution is the normative object of the Constitution, and the so-called normative object of the constitution is the guiding and evaluating object of the constitutional norms. Or the object of a constitutional obligation. As for the normative object of the Constitution, the author believes that we should not only start from the text and provisions of the Constitution, but also explore the fundamental spirit of the Constitution.

Constitution, as a special political and legal phenomenon since modern times, is not only special in that it is a written constitutional code superior to the laws enacted by ordinary legislatures, it also establishes the fundamental spirit of the control of power and the guarantee of human rights. This is arguably the most fundamental peculiarity of the constitution. The fundamental spirit of the Constitution, which controls power, means that the object of the constitution should be limited to state organs and state power, and not include private individuals or private organizations. The author thinks that the private or private organization is only a simple power subject in the constitution, not a duty subject. Citizens are just the subject of rights, the subject of human rights guaranteed by the Constitution. In a word, controlling power and protecting human rights are the fundamental spirit of the Constitution, public law is the essential attribute of the Constitution, and the implementation object of the Constitution is limited to state organs and state power.

2. The occasion of constitutional implementation

The occasions of constitutional implementation mean that the state organs and state powers need to be implemented by the Constitution when specific conditions are met. For the organs and powers of the state, most countries at present divide them broadly into: the legislature and the legislative power, the executive branch and the executive power, and the judiciary and the judicial power. The constitution has different conditions for the implementation of these three kinds of state organs and state power. This section will be divided into two scenarios.

2.1 For legislature

As the most basic and main object of constitutional implementation, it is necessary for the legislature to have a separate discussion. The reason for this is that the legislative power of the legislature to carry out legal constraints and restrictions, is the constitution after the most fundamental substantive changes. Looking back to the history of the development of human political civilization, we can find that before the constitution came into being, there were the rule of law and democracy. The rights of the executive branch and the judiciary were governed by the law, as embodied in the administration of law and the trial of law. While the legislature and the legislative power were unlimited at that time. It was not until the constitution with the control of power as its fundamental spirit that the legislature and legislative power were restricted and restrained. In this sense, the emergence of the Constitution and the establishment of constitutional government, the most basic object is the legislature and legislative power.

As to such a basic object, the author thinks the constitution should be applied mainly in the following two situations. First, when a law is suspected to be unconstitutional, it is necessary to invoke the Constitution to review and judge whether the law is unconstitutional. If the judgment turns out to be unconstitutional, further treatment is needed, such as abolishing the law or declaring it invalid. Second, the legislative omission. It is an obligation for the legislature to enact relevant laws and establish relevant systems in accordance with the constitution. If the legislature does not take an active role and continues to procrastinate without any progress, it can be regarded as legislative inaction. At this time, the legislature constitutes the unconstitutional, through the implementation of the Constitution to investigate the legislative unconstitutional responsibility.

2.2 For executive branch and judiciary

For the executive branch and the judiciary, not only are they subject to the constitution, but laws other than the constitution are also subject to it. The question of the order in which the Constitution and laws apply to the executive branch and the judiciary is the focus of this section. To this question, the author will invoke Melk Hans Kelsen's theory of legal rank to prove it.

2.2.1 Theoretical basis

The theory of legal hierarchy was initiated by The Austrian jurist Melk. He believed that law is a normative system with hierarchical order, that is, a system composed of sexual norms and conditional norms. Conditional norms are those that contain the conditions under which other norms are created. This kind of hierarchy creation is represented by the return from the higher legal order to the lower legal order, and it is a process of concretization and individualization, which can be described as the "ladder structure" of the legal order [4]. Hans Kelsen inherited and developed Melk's theory of the legal hierarchy. In discussing the content of the "hierarchy of norms", he pointed out that as long as one legal norm determined the way in which another norm was created and, to a certain extent, the content of the latter, then, the law regulates its own creation. Since a legal norm is effective because it is created in a manner determined by another legal norm, the latter becomes the justification for the validity of the former norm. The norm that determines the creation of another norm is the higher norm, and the norm that is created as a result of this adaptation is the lower norm [5].

It can be seen that there are two main points in Melk Hans Kelsen's theory of legal rank: First, the effect is prior, when the inferior law conflicts with the superior law, superior law is superior to inferior law, superior law norm is the basis of inferior law norm, the creation of inferior law norm should accord with the creation method and content requirement of superior law norm. Second, the application is prior. In the case that the lower law accords with the upper law, the "application" of the lower law precedes that of the upper law, and the lower law is the specification and individualization of the upper law.

2.2.2 The author's interpretation

According to the theory of legal rank, the Constitution is superior law and the law is inferior law. Effectiveness priority means to give priority to the implementation of the Constitution, which directly evaluates the actions of administrative organs and judicial organs according to the Constitution; Application priority means giving priority to the enforcement of laws and judging the actions of administrative and judicial organs according to the law. This does not mean, of course, that the constitution is the only one to be applied in accordance with the primacy of force. Nor does it mean that only the law is followed and applied. It's about choosing the right one for the right situation.

The author believes that under normal circumstances, we should take the priority of application, priority in the implementation of law. Because relative to the constitution, the content of the law is more rich and specific. It could provide executive branch and judiciary with clearer guidance and greater applicability. Of course, there are two major prerequisites for the prior application of Law: one is the existence of appropriate law for application, and the other is that the applicable law is not suspected of being unconstitutional. If the law has no provision or the provision is unconstitutional, then obviously the law can not be applied, but the constitution must be used. Therefore, it can be said that the above two premises are also related to the application of the constitution in two aspects. The precondition of applying the constitution, or directly implementing the Constitution, is that there is

no applicable law or the existing law is suspected to be unconstitutional. In conclusion, for the executive branch and the judiciary, there are two occasions on which the Constitution is enforced: The absence of law or the law is unconstitutional.

3. Problems and suggestions on the constitutional implementation in China

3.1 Problems of the object of constitutional implementation

As to the object of the constitution, our Constitution is the parent law actually. The second chapter of our constitution embodies the whole society and all - encompassing nature of the object of implementation in the theory of the mother law of the Constitution. This chapter not only provides for the basic rights of citizens, but also provides for the basic obligations of citizens. Since the Constitution for citizens to set obligations, citizens also need to comply with, to fulfill the constitutional obligations. So to a certain extent, the private also became the object of the constitution. In recent years, with the popularity of the concept of power restriction and rights protection, the theory of constitutional public law has been accepted by more and more scholars in our country.

3.2 Problems of the occasion of constitutional implementation

As for the problems existing in the implementation occasions, the author thinks that they mainly focus on the application sequence of administrative organs and judicial organs. The most typical case is that of Sun Zhigang in 2003. At that time, the controversial topic involved was that such an administrative compulsory measure restricting personal freedom by the State Council was suspected to be unconstitutional, and the administrative regulations needed to be examined unconstitutional through the implementation of the Constitution. Here comes the question of the order of application. As mentioned above, there are two premises for the application of the Constitution: The law does not exist or the law is unconstitutional. In this case, actually has the related law to be possible to rely on. This regulation of the State Council directly violates the legislative law. The legislation clearly stipulates that the administrative penalty of restricting personal freedom should be set by law, and the administrative regulations certainly have no power to set it. Therefore, the case should be given priority to the application of the law rather than the constitution, and should be illegal review rather than unconstitutional review.

3.3 The author's suggestion

3.3.1 Remove the civic duty clause from the constitution

Just as the author holds the view that the object of enforcement is limited to state power and state organs, accordingly, the author thinks that the civil obligation clause in the constitution is superfluous. "The clause of constitutional obligation, which

aims at declaring citizen burden, not only does not need to exist, but also should not exist. The theory behind it not only obstructs the correct understanding of modern constitutionalism, but also is the cognitive reason of hindering the realization of fundamental rights in our country [6].” The purpose of the constitution is to restrict the power of the government and to protect the rights of citizens, not to impose obligations on them. It is the task of the law to lay down the duties of the citizen, and the task of the Constitution to prevent the excessive infringement of the fundamental rights of the citizen by these laws [7]. Therefore, the citizen duty clause in the current constitution should be deleted.

3.3.2 Distinguish between unconstitutional review and illegal review

To discuss the occasions when the Constitution is applied to the executive and judicial organs is essentially to discuss the sequence of applying the Constitution and laws. That is to say, it is necessary to make a clear distinction between unconstitutional review and illegal review. There are some differences between the review of violation of law and the review of violation of constitution in the object of review, the subject of review, the level of review, the procedure of review and the way of review [8]. The question of where to apply the constitution will be resolved when we have pinpointed exactly what kind of censorship is involved. Of course, the legislature has its particularity, its application occasions as mentioned above: Law unconstitutional and legislative omission. Does not involve illegal review, here should make a distinction.

4. Conclusion

As to our constitutional scholars’ argument on the object and occasion of the implementation of the Constitution, this paper combining with the theory of constitutional public law, argues that the object of the implementation should be limited to the state organs and state power, and combining with the theory of legal rank, probes into the occasion respectively. After analyzing the existing problems in our country, this paper puts forward some corresponding suggestions to better apply the constitution and the law, and to achieve better implementation effect.

(1) As far as the object of enforcement, it is considered that China should delete the clause of civil obligation in the constitution.

(2) As far as the occasion of enforcement, it is considered that China should distinguish between unconstitutional review and illegal review in judicial practice.

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