

Research on China's Constitutional Review Mechanism

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Abstract: The 2018 Constitution changed the name of the "Law Committee" to the "Constitution and Law Committee", which is of great significance and is a further step forward in China's constitutional review. The functional orientation of the constitutional review is that the power organ reviews the constitutionality of the normative documents. Centering on this functional orientation, it is necessary to clarify the exercise of the constitutional review power and the scope of the constitutional review power. The power boundary of the constitutional review body should be clarified in order to form an effective connection with it, and ensure the effective operation of the constitutional review through its power allocation and system guarantee.

Keywords: Constitutional review mechanism; Constitution and Law Committee; Functional orientation; Constitutional review body; Law committee

1. Introduction

The report of the 19th National Congress of the Communist Party of China put forward the concept of "constitutional review" for the first time, which plays an important role in strengthening the implementation and supervision of the Constitution and safeguarding the authority of the Constitution. In March 2018, the constitutional amendment changed the name of the "Law Committee" to the "Constitution and Law Committee", and pointed out that the Constitution and Law Committee, on the basis of continuing to undertake the unified review of the draft law and other work, increased its responsibilities of promoting the implementation of the Constitution, carrying out the interpretation of the Constitution, promoting the constitutional review, strengthening the supervision of the Constitution, and cooperating with the publicity of the Constitution. This article will study China's constitutional review mechanism.

2. The Boundary between Constitutional Review and Related Concepts

Article 27 of the 1954 Constitution stipulates that "the National People's Congress has the right to supervise the implementation of the Constitution". As for the relationship between constitutional supervision and constitutional review, the academic community has the following views. For example, constitutional review is divided into pre-review and post-review, and post-review is equivalent to constitutional supervision[1]. Commonly constitutional review is a function of constitutional supervision, which is generally broader than constitutional review. Constitutional review is equivalent to constitutional supervision, which is only a kind of language conversion[2].

The unconstitutional review refers to the system that specific state organs review and deal with whether the constitutional act violates the Constitution according to legal procedures and methods. Constitutional review and unconstitutional review are one and two sides[3]. To distinguish between constitutional review and unconstitutional review, we must first distinguish the two propositions of "unconstitutional or not" and "constitutional or not" in methodology. Different choices will lead to different results in the same case.

Judicial review refers to the review of public power through justice. From the perspective of the object of review, judicial review includes both the judicial review of administrative acts in the sense of administrative law and the judicial review of legislative acts in the sense of constitution. "Qi Yuling case" and "Luoyang Seed case" were once regarded as constitutional judicialization in the sense of judicial

review in China.

The filing review can be regarded as a "pathfinder" act of constitutional review. China's filing review system began in the Organic Law of 1979. By the end of the Supervision Law of 2006, China has formed a normative document filing review system with the division of responsibilities between the People's Congress and the government, and it is connected with each other. The review can be divided into constitutional review, legitimacy review and appropriateness review. In China, only the Standing Committee of the National People's Congress can conduct constitutional review. There are four main ways to start the constitutional review, namely, filing for approval, filing for review, review upon request, and review upon recommendation. Filing for review is only a way of constitutional review.

3. Constitutional Review Body

The establishment of a constitutional review body is a crucial link in promoting the constitutional review. The academic community has the following views. Firstly, the establishment of a constitutional committee within the National People's Congress as the "organ to review major unconstitutional issues" of the NPC. Secondly, the Supreme People's Procuratorate supervises the Constitution. Thirdly, establish a German-style constitutional court or a French-style constitutional committee. The 1982 Constitution of China did not adopt the above plan. The National People's Congress supervised the implementation of the Constitution. The Standing Committee of the National People's Congress exercised the power of "interpreting the Constitution and supervising the implementation of the Constitution". The 2018 Constitution changed the name of the "Law Committee" to the "Constitution and Law Committee", and became a constitutional review body to exercise the constitutional review power. As for the first plan, a constitution-maker once pointed out that the Constitutional Commission meant a potential impact and challenge to the standing committee. The second and third plans are not in line with China's national conditions. Our Constitution emphasizes the fundamental nature of the People's Congress. The exercise of the supervisory power by the procuratorate is in essence the restriction and supervision of China's authority, and this reverse restriction is not encouraged. Besides, all authorities of our country are created by and responsible for the National People's Congress, and the Constitutional Court is not compatible with the system of the People's Congress of our country. The Constitutional Commission is an abstract review with substantive binding force in the process of legislation, that is, the prior review before the law comes into force, which is not consistent with the concept of the establishment of constitutional review in China.

4. The Functional Orientation of the Constitutional Review Power

4.1 Exercise of constitutional review power

The academic community has the following three views. Firstly, the Standing Committee of the National People's Congress has the unique constitutional review power. Secondly, the Local People's Congresses and their Standing Committees have a certain degree of review power. Not recognizing the constitutional review power of the Local People's Congresses and their Standing Committees means denying the legitimacy of correcting the unconstitutional acts of local state authorities. Some scholars also believe that since the Constitution has explicitly delegated the power to supervise the implementation of the Constitution to the National People's Congress and its Standing Committee, it means excluding other authorities from exercising this power. Third, the Central Committee of the Communist Party of China was established under the CPC Central Committee. The unconstitutional subjects are extensive, involving not only legal issues but also political issues. It is difficult for the National People's Congress and its Standing Committee to do so. Only under the unified leadership of the CPC Central Supervision Committee can the task of constitutional review be effectively completed.

4.2 Scope of constitutional review

Some scholars believe that the constitutional review should not include laws, because if the NPC and its Standing Committee violate the Constitution, the whole country will have problems. Some scholars also hold a positive view that the public opinion basis, formulation subject and formulation procedure of law and constitution are different. Excluding them from the scope of the object of constitutional review will lead to confusion between law and constitution[4].

Whether the inner-party laws and regulations are the object of the constitutional review, the negative

view believes that if the people's congress is given the power to review the party's documents, it will inevitably cause the internal tension between the supervision of the state authorities and the leadership of the party[5]. Otherwise, it is affirmed by the positive view that the Constitution has expressly stipulated that all political parties must abide by the Constitution, and that intra-party laws and regulations naturally need to abide by the Constitution. The inclusion of intra-party laws and regulations in the scope of constitutional review does not harm the rule of law. The Constitution and Law Committee and the ruling party have the same goal in safeguarding the rule of law[6]. The neutrality view holds that the inner-party regulations that are transformed into national laws and regulations are the objects of constitutional supervision, and the pure inner-party regulations are not the objects of constitutional supervision at the national level.

5. The Power Boundary and Power Allocation of the Constitution and Law Commission

For the effective operation of the Constitution and Law Commission, it is necessary to clarify the following pairs of relations to establish its power status, and then effectively allocate the constitutional review power.

5.1 The Constitution and Law Commission as well as the National People's Congress and its Standing Committee

The Constitution and Law Committee is responsible for "studying, deliberating and drafting relevant bills". It does not have an independent status in the Constitution and has no right to make independent decisions with constitutional and legal effects. The final decision is vested in the National People's Congress or the Standing Committee of the National People's Congress. When carrying out the constitutional review, the Constitution and Law Commission needs to carry out preventive supervision on the constitutionality of the legislative activities of the Standing Committee from the standpoint of the National People's Congress. Therefore, the Constitution and Law Commission should have both the relationship under its leadership and the appropriate independence of the Standing Committee.

As a special authority, how to allocate the powers of the Constitution and Law Commission to assist in the constitutional review. The Constitution and Law Commission can continue to use the Special Committee or the Commission of Legislative Affairs specified in the Legislative Law and the Supervision Law to first propose the amendment and repeal opinions to the formulation organ, and if it refuses to make the amendment, it will be reported to the Standing Committee of the National People's Congress for a decision on whether to revoke it. The specific work department of constitutional interpretation set up within the Law and Law Commission is responsible for handling the tasks of constitutional interpretation assigned by the Standing Committee of the National People's Congress[6].

5.2 Constitutional and Legal Commission as well as Legal Commission

The original legal committee mainly undertook the function of deliberating the draft law, but its function was also limited. The Constitution of China stipulates that the National People's Congress has the power to supervise the implementation of the Constitution, and the Standing Committee of the National People's Congress has the power to interpret the Constitution and supervise the implementation of the Constitution. The Legal Committee can only review whether the legislative documents under the law are consistent with the Constitution, but it can't review whether the law itself is constitutional. In terms of the interpretation of the Constitution, the Legal Committee can't review and modify the draft interpretation of the Constitution[7]. The establishment of the Constitution and Law Commission is the inheritance and innovation of the Law Commission. The review of the draft law by the Constitution and Law Commission should be placed in the perspective of constitutional review, and preventive review should be carried out to reduce the risk of legal unconstitutionality.

5.3 Constitution and Law Commission as well as Commission of Legislative Affairs

Commission of Legislative Affairs is a working body of the Standing Committee of the National People's Congress and does not have an independent legal status. Commission of Legislative Affairs has the right to conduct a constitutional review of the normative documents submitted for filing and review. If the review of the Commission of Legislative Affairs conflicts with the Constitution, it has the right to make a judgment and recommend the formulation authority to correct it. Commission of Legislative Affairs and the Constitution and Law Commission overlap in the work of constitutional review and share

a set of offices. In order to ensure the specificity of the constitutional review function of the Constitution and Law Commission, it is essential to coordinate the relationship with the Commission of Legislative Affairs. The power allocation of the Constitution and Law Commission should assist Commission of Legislative Affairs provide assistance to the Constitution and Law Commission in carrying out the legality review first, and the Constitution and Law Commission conduct the exclusive constitutional review.

5.4 The Court as well as the Constitutional and Legal Commission

China's legislative law stipulates that five main bodies can put forward requirements for constitutional review to the Standing Committee of the National People's Congress. In practice, the Supreme People's Court is the most likely to put forward requirements for review. On how to give full play to the advantages and potential of the court, the transfer mechanism of the court's constitutionality issues should become the main way for the court to start the constitutional review, that is, "reform the case request system in judicial practice, transfer the issues that judges may encounter in the application of the law that may conflict with the Constitution to the Supreme People's Court, and then transfer the Supreme People's Court to the constitutional review body established by the National People's Congress and its Standing Committee for constitutional review"[8].

5.5 Members of society as well as the Constitution and Law Commission

China's legislative law stipulates that all subjects can put forward review suggestions, which does not reflect the concept of constitutional rights relief, so there is no news after some citizens start constitutional review suggestions to the Standing Committee of the National People's Congress in practice. Its reasonable approach should be establishing a filtering mechanism, that is, the parties to the case where the constitutional rights are violated can put forward suggestions for constitutional review, and it should try to use legal remedies, because the application of legal remedies by the parties is equivalent to indirect constitutional rights remedies when the constitutionality of the law is not challenged[9]. Based on this, the Constitution and Law Commission only establishes a connection relationship with the parties to the case in the main body of society and specifically exercises the constitutional review.

6. Legal Perfection of Constitutional Review

6.1 Revise the law and give the Constitution and the Law Commission the exclusive right to review the constitutionality

Although the Decision gives the Constitution and Law Commission the exclusive power to review the constitutionality, the legislative law and the organizational law have not been amended accordingly, which will lead to the lack of institutional guarantee for the functions and powers of the Constitution and Law Commission. Relevant laws should be amended. Firstly, the Constitution and Law Commission should be given the exclusive constitutional review power, and other institutions should coordinate the work of the Constitution and Law Commission. Secondly, give the Constitution and Law Commission the preventive and constitutional review power in the process of unified review of the draft law.

6.2 Make laws

When the Constitution and Law Commission conducts the constitutional review, it is bound to encounter the understanding and interpretation of the constitutional provisions. For the interpretation of the Constitution, procedural norms are required. However, the more legal documents to safeguard the authority of the Constitution are not conducive enough to constitutional governance. The more norms are, the more institutions need to be coordinated, the higher the cost of legislation will be. The system construction should not be too idealistic. Legislation should first clarify what is feasible, and then gradually improve it through experience, so as to reduce the cost of legislation and the risks of institutional reform.

7. Conclusion

The functional orientation of the constitutional review is that the power organ reviews the

constitutionality of the normative documents. The prerequisite for the Constitution and Law Committee initiating the review function is to determine its power status and clarify the boundary of its function and power with various institutions so as to form an effective connection with them. The effective operation of constitutional review can be ensured by power allocation and system guarantee.

References

- [1] Liu Songshan. (2018) *Several Important Issues to be Studied and Solved in Filing Review, Constitutional Review and Constitutional Supervision*. *China Law Review*, 4: 21-32.
- [2] Lin Laifan. (2010) *China's "Unconstitutional Review": Characteristics and Generation Status from the Perspective of Change Strategies of Three Relevant Terms*. *Zhejiang Social Sciences*, 5: 33-40, 126.
- [3] Lin Laifan. (2018) *On Constitutional Policy Theory of Constitutional Review*. *Science of Law*, 2: 37-45.
- [4] Liu Zhigang. (2018) *An Analysis of the Expansion of the Objects of Constitutional Supervision in China*. *Journal of Guizhou Provincial Party School*, 3: 114-121.
- [5] Liu Guo, Cheng Yi. (2022) *On the Normative Basis and Basic Framework of China's Constitutional Review*. *Journal of Sichuan Normal University(Natural Science)*, 4: 52-61.
- [6] Zou Pingxue. (2018) *The Goal Orientation and Mechanism Innovation of the Constitution and Law Commission*. *China Law Review*, 4: 43-50.
- [7] Yu Wenhao. (2018) *The Constitution and the Law Commission are the Key Details of the Implementation of the Constitution*. *People's Rule of Law*, Z1: 41-44.
- [8] Wang Wei. (2018) *Coordination of Objective Order and Subjective Interests ---Improvement of China's Constitutionality Mechanism*. *China Law Review*, 1: 132-142.
- [9] Hu Jinguang. (2018) *On Promoting the Systemization of Constitutional Review*. *Science of Law*, 2: 28-36.