

Research on the Problems and Countermeasures in the Review of Constitutionality about Normative Documents in China

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Abstract: There are still some problems hindering the development of the "constitutionality review" system. First, whether the objects of the constitutionality review include laws enacted by the National People's Congress and its Standing Committee (NPCSC); Second, when reviewing normative documents, legality review is often superior to constitutionality review. Third, the single use of "Internal communication mode" to deal with the consequences of constitutional review will hinder the implementation of constitutional responsibility. In view of the above problems, the analysis and countermeasures should be suggested: first, the laws enacted by the NPCSC are not within the scope of constitutional review and must be cleared; Secondly, the establishment of the standard of "constitutionality review" is helpful to make the constitutionality review superior to the legality review in specific cases.^[1] Finally, reference constitutional cases should be developed to help review authorities strictly enforce unconstitutional responsibilities, rather than just using "internal communication models".

Keywords: Constitution; Constitutionality review; Normative document

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1. Existing problems

1.1 Whether a law can be the object of constitutional review

According to the basic theory of jurisprudence, normative documents are legal documents that can be repeatedly applied to one kind of people and one kind of things, such as constitution, laws and regulations.^[2] Since constitutional review is a powerful safeguard of constitutional authority, it is necessary to carry out constitutional review on all normative documents, including laws, in order to ensure that the Constitution is not contradicted and can override all normative documents. However, whether in theory or in practice, it is difficult to review the constitutionality of the law. Theoretically, according to the relevant provisions of the Legislation Law of the People's Republic of China, the normative documents applicable to the constitutionality review are very limited, only "administrative regulations, local regulations, autonomous regulations, special regulations and rules", without the words of law. In practice, the National People's Congress and its Standing Committee (NPCSC), which are responsible for the constitutional review, are also responsible for the legislative work, which leads to the paradox that the constitutional review of laws has become "self-review".^[3] Therefore, whether the object of constitutionality review should include law has become an urgent proposition.

1.2 "Legality review" is superior to "constitutionality review"

Whatever the normative documents, the face of constitutionality in practice review, review the main body, and the constitution and the law committee of the NPC Standing Committee, is often preferred to find the law, based on which the normative documents because the part is review of regulatory documents, such as administrative or local rules and regulations, is usually directly according to the law and not according to the constitution, the direct basis of its review will directly point to the law rather than the constitution, so the nature of its review will become legality review rather than constitutionality review. Only in the absence of laws, administrative regulations and local regulations can be directly formulated in accordance with the Constitution and may violate the constitution, thus triggering the constitutional review system. To some extent, the review of the courts in the incidental review of administrative normative documents is generally based on laws and regulations, which overlap with the constitutionality review conducted by the NPCSC, so it is difficult to play its unique function. Therefore, how to solve the problem that the legality review generally precedes the constitutionality review in practice is the key to exclude the constitutionality review system from exerting all its functions.

1.3 The handling method of "internal communication mode" in constitutionality review is relatively simple

The purpose of constitutional supervision is to correct the normative documents that conflict with the provisions, spirit and principles of the Constitution, so as to protect the authority of the Constitution. However, under the constitutionality review system, the review results tend to be single. Constitutionality review as one of the few, can be unconstitutional normative documents of the dial

back to the radiation range of feasible way in practice seem to be more towards the harmonious and gentle one side, the review results compared with the traditional unconstitutional censorship, by "cancellation, recall, change is" strict processing form to "internal communication to solve. Li Peng, the former Chairman of the NPCSC, once said that the NPCSC believes that "prior consultation is very important".^[4] This is a signal and also a Chinese tradition that "peace is most valuable". However, the Constitution is not only the fundamental law of a country, but also falls within the scope of the broad law itself, so it must contain the elements of legal sanction and liability. Only using the way of "friendly consultation" to solve the problem of the formulation of normative documents that conflict with the Constitution seems to tarry the dignity of the Constitution.

2. Solutions to the problem

2.1 Clear boundaries - Laws should not be subject to constitutional review

First, starting from existing legislation, laws enacted by the NPCSC are not within the scope of review. This is a deliberate design of the legislature and a deliberate arrangement of the highest organ of power. Second, if the laws enacted by the NPCSC are included in the scope of the object of constitutional review, it will be infinitely close to the "unconstitutional review" system commonly used in western countries. However, the constitutional review and the unconstitutional review are completely different systems, and there are obvious differences between them. Third, the review of laws enacted by the legislature is the review in the legislative process, which is a part of the legislative system. The essence of constitutionality review belongs to the supervision link or the post-legislation link, and the two are parallel rather than subordinate. If the review of law is brought into the system of constitutional review, it will cause the confusion of supervision and legislation, which will not only disturb the legislative order, but also reduce the value of the existence of constitutional review. Therefore, the review of law should never be the task of constitutional review.

2.2 Establish the criterion of priority of "constitutionality review"

Constitutionality review and legality review are two main mechanisms to establish the supremacy of constitution and law, to realize good law and good governance and to realize the unity of legal system.^[5] However, in practice, the legality review often takes precedence over the constitutionality review, which makes it difficult for the constitutionality review to play a wide role. First of all, it must be confirmed that legitimacy review and constitutionality review must exist at the same time, in the case of no need of constitutionality review, legitimacy review plays a crucial role, the most ideal design is "God to God, Caesar to Caesar" type of each role. In order to ensure that the review of constitutionality can work in its proper place, this paper suggests that the NPCSC, which has the power to interpret the Constitution, should set a standard for the scope of the review of constitutionality through the method of constitutional interpretation. Relevant normative documents within this standard must be reviewed for their constitutionality first, not their legality. Normative documents beyond this standard are not subject to the limitation of priority, and according to the usual practice, only in the absence of relevant legal provisions for constitutional review.

2.3 Form constitutional interpretation based on cases or events, and promote the application of other review methods

Most of the results of the constitutionality review mentioned above are handled by "internal communication", which is in line with the traditional cultural background and current situation formed in Chinese society for a long time. Moreover, the constitutional review itself has the political function of "dialogue and consultation".^[6] Facts have proved that the mode of "internal communication" is not only effective, but also will become the main way of constitutional review for a long time in the future. Is the use of a single "internal communication" way of dealing with the unconstitutional normative documents, can make the system of review of constitutionality is too thin and constitutional responsibility to reflect, therefore, this article suggested, should is reference significance to the existing, to "undo" "abolished" and dealing with the "internal communication model", the constitution of constitutionality review case event or constitutional case as the guidance, appropriating for the constitutionality review body to release its political pressure.

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