

Comparative Analysis on Constitutional Supervision Modes

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Abstract

Constitution is the fundamental law of a nation and also the general regulations on administering state affairs and ensuring national security. This is why constitutional supervision is so important for a country. However, there are still many problems existing under the supervision mechanism regarding to its operability, materiality, and rationality. This paper tries to give proper suggestions on perfecting Chinese constitutional supervision through comparative analysis and other countries' advanced experiences.

Key words: Constitutional supervision modes; Comparative study

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INTRODUCTION

Constitution is the fundamental law of a nation and also the general regulations on administering state affairs and ensuring national security. This is why constitutional supervision is so important for a country. Currently, the Constitution of the People's Republic of China, the Legislation Law of the People's Republic of China, the Organic Law of the National People's Congress of the People's Republic of China, and the Law of the People's Republic of China on the Supervision of Standing

Committees of People's Congresses at Various Levels have provided regulations on constitutional supervision related issues which has made up the current constitutional supervision system in China. However, there are still many problems existing under the supervision mechanism regarding to its operability, materiality, and rationality. Scholars have always been discussing about the constitutional supervision modes. It is an important means for Chinese to learn from other countries' advanced experience in constitutional supervision.

1. THE USA MODE: JUDICIAL ORGANS TAKE CHARGE OF CONSTITUTIONAL SUPERVISION

The basic procedure of the USA mode: when hearing specific case in a common court, the parties and court both have the right to question the constitutionality of the case relating laws, regulations, administrative orders, and other normative files. After examination by the court, if the questioned laws, regulations, administrative orders, and other normative files are recognized as violation of constitution, the court has the power to deny its application in the court decision. According to statistics, there are more than 60 countries around the world adopt the USA mode. Of course, most of them have adjusted the mode on the grounds of their own national conditions.

1.1 Unique Advantages of the USA Mode

On one hand, judicial organs take charge of constitutional supervision could guarantee the technicality and independence of the constitutional supervision subject. It has provided professional supervision organ for constitutional supervision. The *Separation of powers* system in the USA also guarantees the judicial organs' complete independence in constitutional supervision. Special and independent constitutional supervision organ makes sure the applicability of constitutional supervision

and possibility of effectiveness which is an advantage that other countries who allow legislative organs take charge of constitutional supervision do not have. On the other hand, let judicial organs carry constitutional supervision power, in some degree, can ensure the fairness of constitutional supervision consequences. Since judicial organs do not have military powers or financial powers, they do not have compelling power nor take any initiative movements by controlling public wealth. Therefore, constitutional supervision results made by judicial organs are relatively impartial.

1.2 Inevitable Disadvantages of the USA Mode

First of all, allowing judicial organs hold the constitutional supervision power means to offer the constitutional supervision power to common courts. Due to the restriction in position and nature of common courts, they can only examine laws, regulations, administrative orders, and other normative legal files through specific cases instead of from a nonobjective point of view. Meanwhile, common courts can only refuse to apply constitution violated laws, regulations, administrative orders, or other normative legal files but do not have the power to repeal them. Second, if we allow judicial organs to do constitutional supervision, then who is going to judge the constitutional supervision results? And who have the final say on the decision made by the judicial organs regarding to constitutional supervision?

Although there are some defects in the USA constitutional supervision mode, the defects cannot obscure the virtues. It has provided a reference pattern for many other countries in the world in constitutional supervision and also helps promoting development of judicial organs' constitutional supervision mode. Then, can we adopt the USA constitutional supervision mode in China? This paper thinks the answer is no. The USA has the *Separation of powers* political system in which the legislative body, judicial organs, and administrative organs are separated with different kinds of power. The reason that the Marshall case has made great contribution to the USA's constitutional supervision is mainly because the decision on the case fits the political system of the USA. Nevertheless, China adopts the people's congress political system under which the National People's Congress is the highest organ of state power and also the main body for constitutional supervision. If judicial organs own complete constitutional supervision power, then it will go against the rules of Chinese constitution and the principle of Chinese political system. Therefore, the USA constitutional supervision mode is not available in Chinese domestic environment but the advantages of it should be learnt by China.

2. THE FRENCH MODE: THE CONSTITUTIONAL COUNCIL

The formally set up of constitutional council in November 7, 1958 in France represents the buildup of a constitutional council represented constitutional supervision mode after which France became the first country of this mode. The constitutional council is a judicial organ serving as constitution court and also an advisory political organ working as president's legal consultant. Article 56 of the current French constitution fully expresses that the constitutional council is a political and congruous organ in nature. Article 61 of the 1958 French constitution stipulates clearly that constitutional council should follow two steps during constitutional supervision in procedure: first, before each organic law releases and parliament regulations carry out, the drafts should be handed to the constitutional council who will give decision on whether these drafts go against the constitution; second, before the release of every law, the President of the Republic, prime minister, national parliament speaker, President of the Senate, 60 National Assembly members or 60 senators can submit it to the constitution council.

2.1 Advantages of the Constitutional Council Mode

First, the foundation of the constitutional council has made France a special organ for constitutional supervision which reflects the inclination and requirement of professional constitutional supervision organs. Second, the main obligation that the constitutional council has is political duty which shows the politics and judiciary combined feature of it. Definitely, it is very good for guarantee politic stability and avoid politic crisis. It is also a feature that the USA mode does not contain.

2.2 Disadvantages of the Constitutional Council Mode

Firstly, from the structure of the constitutional council it could be found that most members have political nature while the constitutional council itself is not a complete legal organ. Nevertheless, in practice, the conducts of the constitutional council is private. When there are constitutional cases, the constitutional council holds private meeting among its members. The council will only inform publicly the result of their discussion but keep the content, procedure of the meeting and the reasons for getting the results secretly. Constitution is the fundamental law of a nation which ensures the achievement of its county's people and also the fundamental rights of its people. As a part of the Constitution system, the constitutional supervision should be held open and

transparent to the public and people must have supervision right on it. Thus, private judgment on constitutional cases may be difficult for people to believe. This is totally different from the USA mode of constitutional supervision. In the USA, the judicial organs examine the case publicly as they do in other legal cases. They allow the parties and their lawyers appear in court to put the proof, complain their reasons, debates on the court, and at last, the court announces the decision and court verdict. Secondly, it can be seen from Article 61 of the 1958 French Constitution that the supervision provided by the constitutional committee is merely a beforehand supervision. Once the law issued, it cannot supervise on it even if the law violates the Constitution. Therefore, the constitutional council mode has some limitation on time. Last, the constitutional council of France basically provides political supervision on constitution. Although it holds the decision power on whether certain issue belongs to legislative or order catalogue, it does not have the right to announce constitution violated rules or orders invalid. Practically, government's regulations and orders are likely to violate the provisions of the Constitution and may do harm to citizens' rights and freedom, but the constitutional council cannot play its role under this circumstance. Therefore, the constitutional council has its limitation in the supervision scope.

3. THE BRITISH AND FORMER SOVIET UNION CONSTITUTIONAL SUPERVISION MODE: LEGISLATIVE ORGAN OWNS THE POWER OF CONSTITUTIONAL SUPERVISION

Under this mode, the nation allocates the constitutional supervision power to the national legislative body or authority organ and allows them to guarantee the normal implementation of the Constitution. This system follows the principle of "Parliamentary supremacy" and "All state power belongs to the people". Accordingly, the parliament is set up by election of the people which represents the benefit of the people. It is the highest organ of state power and the legislative body which does not has the legislative power but also is in charge of the implementation of laws. In China, the situation is almost the same, administrative organs and judicial organs are all set up by the authority organ and are responsible for it.

3.1 Advantages of Legislative Body Owning the Power of Constitutional Supervision

The advantages of this mode are mainly reflected in the following three aspects: a. as long as this supervision mode carried out and applied in countries of combination of legislative and executive powers, the legislative organ is the organ of supreme power and legislative body

which has made this mode obtain absolute authority of supervision that other countries do not have; b. legislative body taking charge of constitutional supervision is helpful in guarantee the high effectiveness of constitutional supervision work. A country's laws are made by the legislative organ, thus, regarding the degree of familiarity and understanding of law, no matter what departments or organs cannot compare with the legislative organ. Consequently, this helps guarantee the internal harmony of legislative organ when supervising constitution; c. to allow the legislative organ supervise constitution is conducive to unify the people's willingness, gather different thoughts from the public, listen to advices and suggestions from the public and therefore to make sure the constitutional supervision work's fairness and accuracy.

3.2 Disadvantages of Legislative Body Owning the Power of Constitutional Supervision

First of all, laws are made by the legislative organ. If they are allowed to supervise the implementation of the Constitution which is made by it, it is very difficult to resolve tough problems such as "one cannot be his own judge" and it is also inevitable for people to get the logical conclusion: legislative organ makes laws based on the premise that the laws made by it is coincide with the Constitution or they will not be passed by the legislative organ; once a law is passed, the legislative organ cannot doubt about the constitutionality of it for if they do so, the constitutional supervision result is hard to believe. Second, as an authority organ, the legislative organ has many other affairs besides constitutional supervision. Normally, they do not have too much time for tasks as constitutional supervision. Third, the results made by the legislative organ from constitutional supervision are after all the results that do not have judicial compelling force and the effect of it is limited. Last, as ad hoc organization, the legislative organ does not hold meetings at regular bases. Even there are some meetings, most of them are short, and they cannot guarantee the continuity of constitutional supervision. The fact of legislative organ supervising constitution has also shown that most of them have become formalistic and the real effect is not as large as it seems.

CONCLUSION

The four above mentioned constitutional supervision modes are the main modes existing in current world. From both theoretical and practical points of view, we can see that the four modes all have their pros and cons. After comprehensive analysis on Chinese political system, economic system, culture system, historical traditions, and current constitutional supervision practice, the authors think that it will be a good choice for China to build up a double-track approach in constitutional supervision system. The so called double-track system refers to set

up constitutional supervision council under the National People's Congress and allow the council and people's court both take part in constitutional supervision. The authors have made the following analysis on the supervision subject, procedure, and content of the double-track system: (1) the origin of the constitutional supervision council. Constitutional supervision is a continuous and professional work. Combined with successful modes of typical countries in the world, for example, the French constitutional supervision council and the German constitution court, constitutional supervision must be taken in charge of certain special organ which does not have any other responsibilities. However, Para. 1 and 2 of Article 62 of Chinese current Constitution stipulate that the National People's Congress has the responsibility of amending constitution and supervising the implementation of the Constitution. Para. 1 of Article 67 also provides that the National People's Congress has the power of explaining the Constitution and power of supervising the implementation of the Constitution which has made clear the constitutional supervision subject in China is the National People's Congress and its standing committee. However, the way that the National People's Congress and its standing committee holding conferences has decided that they cannot meet the requirement of the continuity and specialty of constitutional supervision, meanwhile, if we set up an independent and special constitutional court as the Germany does to guarantee the implementation of the Constitution, then our action may be considered violating the constitution which is illegal. Consequently, the authors of this paper suggest set up a constitutional supervision council under the National People's Congress. The legal basis for setting up constitutional supervision council under the National People's Congress is sufficient. Article 70 of the current Chinese Constitution and Article 35 of the Organic Law of the National People's Congress of the PRC both provide that the National People's Congress has the power to set up special council. Thus, to set up a special council – the constitutional supervision council under the National People's Congress's standing committee both conforms with the stipulations of the Constitution and the requirements of the Constitution's implementation and perfection of the constitutional supervision mode. (2) The manning of the constitutional supervision council. The authors think that regarding the members of the constitutional supervision council, we can borrow the structure from the Austrian constitutional court. The National People's Congress should be in charge of the appointment of membership for the constitutional supervision council, in detail, the process must be completed by the people appointed by the National People's Congress, the people nominated

by the National People's Congress's standing committee, and legal specialists, at the same time, there must be some alternates besides officially nominated people. The aims for designing such a structure are: firstly, secure the supreme position of the National People's Congress and its committee, make sure constitutional supervision committee is under the supervision and leadership by the National People's Congress and its committee and therefore to keep the legality of the constitutional supervision council; secondly, to guarantee the overall quality of constitutional supervision council members professional. The 2003 SUN Zhigang case is well-known to Chinese. Every reason that caused the case, every stage after the case, and every influences brought by the case is worth our remembrance and considerations. In addition, we should all remember the blasting fuse of the SUN Zhigang case that can keep a record in Chinese constitutional supervision history – a proposal about the “urban vagrants and beggars Custody and repatriation measures” was handed in to the National People's Congress's committee. The proposal was presented by three doctors of laws in Peking University YU Jiang, TENG Biao, and XU Zhiyong. They proposed to the National People's Congress's committee to examine related regulations and laws applied in SUN Zhigang's case according to Article 90 of the legislative law which offers that citizens have the right to propose constitutional supervision suggestions. Since then, people have been thinking about the loopholes and disadvantages of Chinese current constitutional supervision work. It serves to show that only professional knowledge can provide clear understanding on professional content and can generate motive for changing the unsatisfied situations. Only if the members of the constitutional supervision council fully grasp political and legal professional knowledge, they can make sure that the constitutional supervision work's normalization, standards, and professions, and guarantee the supervision results more fair, justice and scientific.

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