

Study on the Basic Characteristics of Constitutional Case

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Abstract: Scholars have not yet reached a consensus whether there's a constitutional lawsuit case in China. Most scholars advocate that China has no constitutional lawsuit. According to this view, "China's current constitution does not require the judicial organs of constitution, so there is no real constitutional litigation" [1]; there are also some scholars advocate that China has a constitution litigation case. This view insists that there's essential constitution litigation, attached constitutional lawsuit, indirect violation of the constitution though there's no formal sense constitution litigation, independent constitutional litigation, constitutional litigation in direct violation of the constitution. [2] This problem need to clarify what is the constitution and the basic characteristics of the constitutional case, this article discusses the two problems.

Keywords: Basic characteristics; Constitutional case; current constitution

1. Introduction

What is the constitutional case? Whether the court cited the provisions of the constitution to hear a case will inevitably produce constitutional cases. The essence of foreign constitutional case is to correct the unconstitutional common law, or to create new constitutional norms by hearing the constitutional cases. Therefore, the result of constitutional cases should be either maintain constitutional behavior or correct unconstitutional behavior, or may lead to amend or supplement the constitution.

If the case heard by the ordinary court according to the constitution is regarded as a constitutional case, and that is a kind of constitutional application effectively, then it may result in such an outcome: people are satisfied with citing constitution in common legal cases, and consider it is the judicialization of constitution, which will result ignoring the construction of constitutional process to deal with real constitution cases. If the cases heard by the ordinary court according to the constitution are regarded as constitutional cases, China's constitutional cases will emerge in endlessly. As the constitution is so widely and frequently used, it seems it is a symbol of a country under the rule of law, in fact it is not so. Because constitutional cases are just a few in countries with a higher degree of rule of law. In foreign countries, there is no unified standard of constitutional case. the concept of the constitutional lawsuit is very clear in countries with a system of the constitutional court, it is the lawsuits hearing by the constitutional court. The standard of the constitutional lawsuit is the case must connect with the constitution in countries hear the constitution litigation by the ordinary court, that is to say the court must do unconstitutional check and make constitutional judgment.

The definition of constitutional litigation should be in accordance with the nature of "action", because "the constitutional litigation" is a litigation after all. "Basically, in the modern sense litigation is a kind of ternary structure system." [3] A typical "three yuan structure" pattern is: the plaintiff and the defendant is equal in the law, and the judge in the meantime as the authoritative arbiter between the plaintiff and the defendant to solve the disputes and conflicts. According to the characteristics of litigation, constitutional litigation can only be held by the judicial organs. There's no doubt that it is only applicable to judicial procedure of constitutional litigation, since the constitutional litigation jurisdiction only by judicial organs.

2. The Basic Characteristics of Constitutional Case

2.1. The general characteristics of constitutional case

First, the basis of judgment is the constitution. In constitutional litigation, it may be both parties to a case claim its rights based on the constitution, the court thinks the parties are reasonable after examination according to the constitution, and ultimately affirms its basis was established, the court judge by this; it may also be the parties did not claim according to the constitution, but the judge found only in accordance with the constitution, the disputes can be resolved in the process of the trial, so ruling directly according to the constitution. "With the constitution as the basis of judgment", the "constitution" mainly refers to the provisions in the constitution or constitutional norms, including constitutional principles. [5] Second, it is the authority of the constitution litigation. This is reflected in: first, the exclusiveness of the constitution, the meaning is: (1) in the process of applica-

tion of the constitution, it can't apply other norms inconsistent or in conflict with constitution. (2) no other legal norms could be applied. Second, the final of the constitution, its meaning is: (1) in the process of litigation, there's no higher standard for trial; (2) other laws and regulations are not applicable to the case.

Third, the political nature of constitutional litigation. Constitutional litigation is bound with a strong political color. This is reflected in: (1) the constitutional litigation is an important way to solve the political disputes. (2) the political nature of constitution judicial organizations. The constitutional court and the constitutional committee are important political authorities. (3) the judge's political orientation cannot be ruled out. The judge also has its own freedom of religion including political philosophy. The judges have their own interests of the parties, it is impossible for them to surpass.

Fourth, the ultimate nature of constitutional litigation. It refers the constitutional lawsuit play a role as a last resort. The so-called "last resort", from the individual point of view, it refers to the constitutional litigation provides a final or final judicial remedy for citizens. Citizens must have exhausted all other means of judicial relief before using this means.

2.2. The Chinese characteristics of constitutional case

First, it is judged by the ordinary court. The present constitutional litigation can only be tried by the ordinary courts. At present, the constitutional cases emerge only in some places and the occasional individual courts, constitutional litigation is not a system of judicial function. Although our country has appeared a few cases related to the constitution, but it has not reached the degree that influence court internal judicial institutions. Therefore, our country has no an agency specializing in constitutional trial. [6]

Second, there is no independent form of constitutional lawsuit. So far, it exists four forms of litigation including civil litigation, criminal litigation, administrative litigation and constitutional lawsuit in the world. Constitutional lawsuit has independent system form in the constitutional court system and the system of constitutional council countries. In the mode of ordinary court constitutional lawsuit, there is no such system form. In our country, the cases can be called constitutional litigation cases are housed in other forms of action: one situation is to take the form of civil litigation, Qi Yuling case like this; Another situation is to take the form of administrative litigation, such as Jiang Tao case, Zhang Xianzhu discrimination case etc. It has not been taken the form of criminal litigation so far. The court in our country, especially the Supreme Court has not consider the problems of the constitutional lawsuit systematically in addition to

the individual court occasionally accept the constitutional case tentatively.

Third, there is no constitutionality. From the constitutional lawsuit has already happened, basically all is the court sees no ordinary legal basis in the process of trial, just directly quoted the constitution, with the constitution as the basis of decision. Qi Yuling case is formed under this background. The judge pointed out that most of the basic rights of citizens guaranteed by constitution has not been specific in the common laws. when this part of the civil rights are violated, the court often can not protect the rights of citizens because there is no specific legal norms can be quoted. In our traditional judicial practice, the lawsuits taken by citizens because of violation of the rights often were refused to accept because there is "no legal basis". But in fact they have not only the basis, and have a higher basis - constitutional basis. Constitutional litigation cases in China at present are all due to there is no specific provision in the common law and turn to the constitution. Therefore, our constitutional litigation is used to solve the problem of the basis of the judge rather than judicial review.

Fourth, the claim object is constitutional rights. Constitutional litigation cases in China were filed in violation of the constitutional rights of citizens. The main reason is: first, the citizen's independent consciousness, rights consciousness gradually enhanced. The citizens tend to seek relief through litigation after the violation of the right. The citizens naturally look for basis from the constitution when some of the basic rights in the constitution have not been specific in common legal regulations. Second, the right disputes between our country constitution and other constitutional disputes are resolved through political means. This is still a very effective way. In fact, there is no judicial channel to solve the authority disputes. Therefore, this kind of constitutional case may not appear in the constitutional litigation.

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