

Research on the executive power configuration under the context of Separation of trial and enforcement

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Abstract

Theory and practice about the executive power of the nature of the dispute has not been determined, the separation of "Separation of trial and enforcement" of the concept of proposed solutions to this dispute, the chance. The executive power should be defined by the scope of the clear definition of the nature of the premise. "Separation of trial and enforcement" in the context of executive power (special enforcement) is executed in the program actually exercise the power of the actuator (generalized enforcement) deduction of additional changes to the parties concerned, exclusive a part of the execution objection review. Special enforcement of judicial power is an independent power executive power in the adjacent area of jurisdiction power and administrative power, nor jurisdiction, Traditional administrative power, new power outside the three types powers, and nor a compound right of jurisdiction power and administrative power. According to the independent nature of the executive power, power and authority in our country the system of "unified system" corresponding principle, executive power shall be exercised by the independent institutions outside of the court. This was beneficial to the improvement of the execution efficiency greatly, which will help to solve the problem of perform difficult.

Keywords

Separation of trial and enforcement, Special enforcement, Scope, Character.

1. Introduction

Towards the nature of executive power, executive power range shall be determined in the implementation practice on the basis of, and from the theory to the theory of broad generalizations; "Separation of trial and enforcement" formally put forward the concept, in order to determine the separation of Separation of trial and enforcement and the enforcement of the narrow sense in the context of the scope of the executive power, and then analyzes its properties, the chance.

2. The concept, background and parsing of the proposed "Separation of trial and enforcement"

Literally speaking, there are two kinds of "Separation of trial and enforcement" can explain: the trial institutions and actuator separation, the separation of judicial power and executive power¹. Advocates separation agency said today seems to be less, but the author thinks that there is also a reason, just be based on the separation of powers. Scholars are the main power separation, it is generally believed that the separation of Separation of trial and enforcement is on the fourth plenum of the communist party of China 18 on comprehensively advancing the rule of law in the country a number of major issues resolution "promote implementation of judicial power and the implementation of separate system reform pilot project" in the "judicial power and executive separate". However, initially put forward of

the concept of separation of "Separation of trial and enforcement" did not begin with this, had already had this idea, but has been lack of correct understanding of the separation of Separation of trial and enforcement. Go back, "can't hold on" is actually the formulation contains the same meaning.

The proposed background of "Separation of trial and enforcement", is actually for actuators to perform work always use jurisdiction over the case. Because of actuators in the work from time to time exercise the judicial power, executive power and jurisdiction regardless of the situation, in fact, lead to logic contradiction and the practice of confusion, so is the separation of "Separation of trial and enforcement" demand is put forward. The "Separation of trial and enforcement" is for "Separation of trial and enforcement both" correction.

Starting from the running status of execution work to observe in common theory, the "executive power includes the execution implementation power and implementation decisions"². The supreme people's court also hold this view, the supreme people's court for enforcement reasonable configuration and scientific operation of several opinions "(hereinafter referred to as" the Supreme Court opinions ") that "the executive power is the people's court in accordance with the law to take all kinds of implementation measures as well as to the execution objection, reconsideration, appeal to review issues such as power, including the rights to perform implementation and execution review". The author thinks that, whether it's academic ideas, or the court's point of view. Both said, and new, should be to rethink the execution practice, do not agree or deny.

From the perspective of semantics, the phrase "Separation of trial and enforcement separation" since was established, then the separation of "Separation of trial and enforcement" in the context of judicial power and executive power is necessarily distinct, must also be quite binary, not dispute contain each other. States, the separation of "Separation of trial and enforcement" in the context of "of" the "executive power" is necessarily narrow executive power, executive power is the power of can't contain nature of judicial power. So, here again there is a problem: the "do not include the power of jurisdiction properties of executive power", is equivalent to perform implementation right? This problem is equivalent to another problem, that is, the right to review and trial in the court opinions are the same, they are what relation? Moreover, "executive authority" and "execution decisions", these different expressions, whether there is a substantial difference, what's the presence of different nature, relation with judicial power? These problems must be detailed analysis as follows.

3. The approach of the separation of trial and enforcement

3.1 The purpose of the separation of trial and enforcement

Were previously mentioned, the separation of "Separation of trial and enforcement" is for "Separation of trial and enforcement both" correction, Separation of trial and enforcement both brings many problems, this will be bashing the larger community, first, that the excessive concentration of power in the execution officer, lead to "perform", and breeds corruption. Second, in execution of relevant people the right to judge and dispose of, the parties litigation right. Therefore, in order to pass claim, Separation of trial and enforcement are two: the purpose of separation overcome Separation of trial and enforcement not executed disorderly and corruption caused by branch, protect the parties litigation right. But the author believed that the above claim is not complete, ignoring the reality of the "law enforcement difficulty" .If can't solve the positive impact of the difficulties in execution, and "Separation of trial and enforcement" is easy to fall for slick cosmetic.

Therefore, the author think that safeguard and promote the fully effective exercise of executive power functions, the main purpose is the separation of "Separation of trial and enforcement", it should be help to solve the problem "difficult to execute".

3.2 The starting point of logic and facts of the separation of trial and enforcement

"Separation of trial and enforcement" involves many complicated theoretical and practical problems, so you have to determine a clear approach, which is of great importance and research starting point. Many

scholars, from the theoretical analysis of nature of executive power, and then discuss the executive power configuration and Settings of the actuator. This method is good, but in my opinion as a line of policemen execute, closely integrated due to its failure to perform the practice, not from the observation of the executive running status, more in the discussion of pure reason, often irrelevant to the point. The author believes that the separation of Separation of trial and enforcement research starting point of logic and facts should be followed: work performed operation status, especially difficult problems in execution work, perform, disorderly, execution action into one of the main problems.

3.3 The research stage of the separation of trial and enforcement

Separation of trial and enforcement separation according to the present conditions of research should perform the work, should be to help to solve the above problems, it also conforms to the fundamental requirements of the judicial reform "problem oriented". In particular, should follow the following steps: first, from execution work status screen run in one of the national public power, and the separation of "Separation of trial and enforcement" in the context of execution for a contrast, filter jurisdiction, thus to determine the scope of "Separation of trial and enforcement" in the context of executive power; Second, according to the identified that the scope of the extension, the separation of "Separation of trial and enforcement" in the context, and in practice the operation of the nature of executive power, that is, defining the connotation; Third, according to its nature, according to the principle of institutions and the analysis of the setting up of the enforcement authorities exercising the power of this nature.

4. In the context of "the separation of trial and enforcement" defined the scope of executive power and nature

4.1 Execution of public power³ and "Separation of trial and enforcement" in the context of executive power

Due to the limitation of language and the cover, the same words often express the meaning is not the same, must be detailed screening, otherwise the chaos, if chaos expression to guide practice, it will be a problem, the so-called come from "name not regular bad, but it is impossible".

Often speak "executive power", refers to the executable program of actuators are exercised by all national public power, the point almost certainly righteousness. Then, the "executive power" must include executive enforcement power, coercive power, control, dispose of property rights, such as the execution objection review rights and power. This is seeking truth from facts to observe the conclusion, also accord with state power "due to set things right" principle. Has the need of management of STH, party gave rise to run a power necessary, pure to solve real problems, not necessarily to be clearly defined as theory. Therefore, often speak "executive power", is actually a kind of objective description, not a qualitative description. Often speak "executive power", refers to the executable program of actuators are exercised by all national public power, the point almost certainly righteousness. Then, the "executive power" must include executive enforcement power, coercive power, control, dispose of property rights, such as the execution objection review rights and power. This is seeking truth from facts to observe the conclusion, also accord with state power "due to set things right" principle. Has the need of management of STH, party gave rise to run a power necessary, pure to solve real problems, not necessarily to be clearly defined as theory. Therefore, often speak "executive power", is actually a kind of objective description, not a qualitative description.

Separation and the "Separation of trial and enforcement" in the context of executive power, is a qualitative description. What is nature? Answer: a power is necessarily different from jurisdiction, if the same as the jurisdiction, is both without separation, the separation of "Separation of trial and enforcement" also cannot be established.

Therefore, often speak "executive power" and "Separation of trial and enforcement" in the context of "executive power", the two broken not the same thing. Is inhibited, the former and the latter is a containment relationship and scope of the former is greater than the latter, in addition to the latter, the

former includes part of the judicial power. More qualitative terms, usually speak "executive power" is the context of "Separation of trial and enforcement both". Here "Separation of trial and enforcement both context" as "context" Separation of trial and enforcement separation contrast, is for the implementation of the status quo, it not only refers to a state of the theoretical circle, but also a practice of the status quote author thinks that, so far, our country execution context and practice is still in the "Separation of trial and enforcement both", although there has been a long time, the separation of Separation of trial and enforcement formulation but has yet to really reach the state of "Separation of trial and enforcement" ⁴otherwise, some important problems on comprehensively advancing the rule of law in the countries of the resolution will not put forward this problem again.

4.2 The scope of "Separation of trial and enforcement" of "executive power"

In accordance with, often speak "executive power" is equal to the context of "Separation of trial and enforcement" separation "executive power" and the sum jurisdiction in the enforcement procedure, so the context of "Separation of trial and enforcement" separation "executive power" the scope is: usually speak "executive power" to remove the rest of the executive program after the trial. Therefore, if you can determine the scope of jurisdiction in the enforcement procedure, separation of "Separation of trial and enforcement" context can define the scope of the "executive power".

How to identify in the executable program in the jurisdiction? Jurisdiction over still belongs to the jurisdiction of his execution, and so can be in accordance with the standard from jurisdiction. The most obvious discrimination standard is related to people and execute on the basis of the effectiveness of his right to appeal, namely people who directly affect related litigation, involving the execution according to the effect of power, are the judicial power. In practice, it is not hard to find, change or add either as an executive party, will not be review the ownership jurisdiction objection. All the other objections including execution objection, an outsider objection, the right to review the assigned dissent, are not of the judicial power, which belong to the category of special executive power, practice so that will help to solve the problem of executable program lawsuit. With the view that all usually performs review matters are different jurisdiction. The relationship between the related concepts, expressed by the following formula:

To: ①= Separation of trial and enforcement separation and executive power in the context of = special executive power

②= usually speak executive power = current actuator actual exercise of power = generalized executive power

③= the actuators to exercise jurisdiction over = ④ additional changes to the parties to review power +

⑤ shall not perform review power

There will be : ①=②-③=②- (④+⑤)

To sum up, the context of "Separation of trial and enforcement" separation "executive power" by "the Supreme Court opinions" in the "executive rights" and "executive authority to" change or additional parties, not to perform two types of objection review right outside of the right to review the two parts.

4.3 The nature of the analysis in context of "Separation of trial and enforcement" of "executive power"

"Separation of trial and enforcement" context "executive power" the scope of the above, how is its nature? Theorists have roughly judicial power and administrative power, the fourth kind of power, the composite power four claims, but mostly with pure theoretical analysis is given priority to, not according to first determine the scope of the "executive power" train of thought, so in most cases, the discussion is not the same thing, so is the thing of opinions vary the inevitable. The author from the context of "Separation of trial and enforcement" separation "executive power", the characteristics of sequential analysis opinions are reasonable or not.

1. "Separation of trial and enforcement" of "executive power" is not the judicial power Separation of trial and enforcement " context "executive power" (hereinafter referred to as "special executive power") the jurisdiction, the grounds as above; Needless to say, the more the procuratorial authority. And, according to the common recognition of the point of view, nature of judicial power as "the fact of the party to dispute positions and legal issues in accordance with the law to judge, to maintain the value of the method of finality power" 5, the core is to "judge", the execution implementation and apparently unrelated judgment; As for the executive authority, is similar to "judge", but also the judicial power of the judge, see later in this article.

2. " Separation of trial and enforcement " of "executive power" is non-traditional executive power Special executive power contains a lot of the execution implementation power, have mandatory,6 unipolarity, imperative, etc., all in accordance with the administrative charge, there is theorists think that the executive power is the nature., as some suggest, however, in many aspects are obviously different from the traditional administrative power, executive power especially in two of the most important of the following: first, on the application and operation, enforcement is passive, administrative power is active; Second, the executive power operation is based on the effective legal documents, is the result of after explaining the applicable law, and the operation is directly based on the law of executive power. Therefore, special enforcement atypical executive power.

But had to admit that, compared with the judicial sovereignty, narrow enforcement of mandatory and unipolarity, imperative, really close to more executive power. And narrow in the executive power of execution objection review power, can be divided into two categories, category shall be final and binding authority, such as the execution behavior dissent and reconsideration; There is actionable right to review, such as an outsider objection. But they are both with executive power in administrative review right approximation. "The Supreme Court opinions" adopt "executive authority to" rather than "execution decisions", its implied meaning is, "the word" belongs to the nature of judicial power, the executive authority to nature is not judicial power, executive power is closer to the right to review.

3. " Separation of trial and enforcement " of "executive power" is not independent nature of public power outside " tripartite political system" As above analysis, the special enforcement of judicial power, executive power is also non-traditional, more than the legislative power, shall be deemed to be outside the separation appears to be an independent power. But this argument too bold, and too difficult to demonstrate. If it is indeed a separation of the fourth, so how the fourth power qualitative? On the basis of what? Scholars hold that notion, failed to answer. Therefore, this statement cannot be established. In fact, the traditional theory of separation of powers, legislative power and judicial power, executive power boundaries clear division between never implemented, so may exist between the three independent power and space, this kind of independent power than traditional typical separation, should have independent status. And, in the three major power of the "middle power" has always been there, along with the social development trend of a growing American administrative law judge, French administrative agencies within the administrative court is, for example, doesn't follow that that exercise by the administrative court of France, the United States administrative law judge is independent from the separation of a new kind of power. Should be considered between the executive power and judicial power, on the other hand, a new type of independent power. With this truth, executive power is the executive power and judicial power between new types of independent power.7

4."Separation of trial and enforcement" of "executive power" is not the two composite power Also realize the generalized some scholars "executive power" is neither judicial power, and non-traditional or independent of the separation of new power, executive power and generalized "executive power" for the jurisdiction and the combination of traditional administrative power, so do not have independent property and status. The proposition and idea in this paper, there are two reasons: First, different contexts. This article is discussed in the context of "Separation of trial and enforcement" of the scope of the executive power and the nature of such claim is to speak normally executive power are analyzed. Second, the essence is the same old; lack of profound insight into the nature of the executive power in. According to the idea, any kind of power can be broken down into any combination of legislative power,

executive power and judicial power, and the loss of Separation of trial and enforcement. Such as the operation of the police power, involving the implementation of rights and the right of objection review, therefore, can be decomposed into executive power and judicial power, so that the loss of Separation of trial and enforcement, however, this argument error is obvious. Procuratorial authority also is such, can be decomposed into (such as: the investigation) executive power and judicial power (such as the right to arrest), and therefore has no independent status, goes to Ming.⁸In fact, think the executive power is the combination of executive power and judicial power two kinds of power point, because the understanding of "the special enforcement" is not enough profound, failed to fully recognize the recognized "special executive power" as a necessity and rationality of independent power, this is also the executive power is the inevitable result of historical development stage limit. Only at the concept of "separation of Separation of trial and enforcement" was formally put forward, marked the history of the development of the executive power to a new stage, truly make the independent status of the "special executive power" to confirm.⁸ in the case of the platypus, still cannot have egg-laying animals and at the same time, with its characteristics of mammals, and recognize it as a combination of two animals or animal, because of its obviously is a kind of animal, it is a fact of the change, not because of the theory of reverse.

5."Separation of trial and enforcement" of "executive power" is the independent power in the adjacent area of jurisdiction power and administrative power Above all, the special enforcement of judicial power, unconventional, the legislative power, executive power are not exclusively in separation of powers or combinations of two kinds of power independently, so it is a kind of independent status of the new power. Therefore, understanding of its nature, should grasp the following three points: first, special executive power is a kind of independent power; Second, special executive power is a kind of in the adjacent area of jurisdiction power and administrative power independent power; Second, special executive power is a kind of nature closer to the executive power of independent power.

5. Analysis of the context of "Separation of trial and enforcement" executive power configuration

5.1 The corresponding principles between the special executive power and organization

Special configuration of executive power, or the corresponding relationship with the authorities, should follow the following principles: First, we should conform to the corresponding relations between public power and authority in our country, the general rule, is not to be divorced from the law too far. Because our country has always been implementing the public power to exercise the principle of "one yuan" (for example, the police power exercised by the public security organs shall be responsible for the independent, unified independent court shall exercise judicial powers with respect to), so the configuration of special executive power also should follow the principle of "one yuan"; Second, should comply with the special characteristics of executive power; Third, the effective operation of special executive power should be guaranteed, the power to perform difficult to solve.

5.2 Special vision of special executive power by independent organization

According to the principles of a system, and the narrow sense as closer to the nature of the Separation of trial and enforcement of executive power, executive power actuators are removed from the court, shall be exercised in narrow sense specially set up an independent agency executive power. And, due to the special executive power has a strong mandatory, should consult administrative agencies, especially the police authority management of actuators.

5.3 The necessity analysis of special executive power by independent organization

In the history of our country, the executive power by judicial organ to exercise. The feudal era, government is the administrative organ and judicial organ and executive organ. During the period of the republic of China, the court is in charge of the trial and execution. After the founding of new China, the executive power has been configured in the people's court. In 1991 the civil procedure law in the form

of department law regulations, the exercise of executive power of the people's court. The people's courts shall exercise the trial and execution of two major functions, judicial organ and executive organ. Civil execution system in our country has experienced several changes. In the 1950 s after short-term "Separation of trial and enforcement of powers" stage, has been more than 20 years by the judicial officers of both case execution mode of the unity of Separation of trial and enforcement, since the late 80 s to is now in the reform of court set up executive agencies responsible for enforcing the Separation of trial and enforcement of internal division of execution mode. Independent exercise of executive power by the independent institutions, with reference to the police authority management, is the guarantee special executive power necessary for effective operation. In accordance with the special enforcement is closer to the independent nature of executive power, if inside the court to exercise, and the court runs counter to the functions of exclusive jurisdiction; if exercised by several departments at the same time, it can lead to fragmentation executive power running. Independent exercise of executive power by the independent institutions, with reference to the police authority management, conforms to the requirement of solve the difficulty to perform, helps to perform the difficult to solve. Mainly because of the "law enforcement difficulty" is "difficult execution property, the person subjected to execution is difficult to find, to assist the person subjected to execution is hard to find, difficult to dispose of property", independent enforcement authorities have more than the court after the person subjected to execution information and property information, there are more technical measures and means. In addition, there's probably is, out of inertia for court work of neutrality and passivity, assist executive departments to perform mandatory understanding does not reach the designated position, cooperate closely enough, is also an important cause of the executive power. Set up independent of the court of enforcement agencies can effectively solve the problem.

6. Summary

First, the nature of the executive power, executive power range shall be determined in the executive practice on the basis of, and from the theory to the theory of broad generalizations; "Separation of trial and enforcement" formally put forward the concept, in order to determine the separation of Separation of trial and enforcement and the enforcement of the narrow sense in the context of the scope of the executive power, and then analyzes its properties, the chance. Second, the context of Separation of trial and enforcement separation of executive power, and often speak "executive power" is not the same concept, and on the scope, the former is a part of the latter, the former include actuator actual exercise of judicial power. Third, the special enforcement of judicial power, executive power, the submission in separation of non-traditional new power, the compound right nor judicial power and administrative power, but in the adjacent area of jurisdiction power and administrative power independent power. Fourth, according to the independent nature of the executive power, power and authority in our country, the system of "unified system" corresponding principle, solve in execution, the purpose of executive power shall be exercised by the independent institutions outside of the court. Therefore, the context of Separation of trial and enforcement separation of executive power is a special executive power, including the scope of the implementation of rights and additional changes to the parties and shall not be executed outside of the right to review; its nature is a more close to the independent power of executive power. According to the nature and "one yuan" in our country the corresponding mechanism of power and authority, in line with security special executive power effective operation, help solve difficult execution, sets up the principle of judicial authority, should be special exercise of executive power to the independent authority. Moreover, according to the enforcement of mandatory, new execution organs shall attend the police management organization of the Text.

This article discusses the enforcement of civil enforcement only.

About the constitution of the executive power, after also have "tripartite system " and " fourth-partite system," are not dominant. " tripartite system " main executive power includes: the implementation of power, the imperium, jurisdiction;" Fourth-partite system said" the executive power includes: the implementation of power, the imperium, jurisdiction and supervision.

This article, the public power "in the" execution, "generalized executive power", and "is usually the executive power" is the same thing, just as the context expression is convenient, depending on the need to replace use, does not mean different things.

Here "independence both context" as "context" independence separation contrast, is for the implementation of the status quo, it not only refers to a state of the theoretical circle, but also a practice of the status quo. The author think that, so far, our country execution context and practice is still in the "independence both", although there has been a long time, the separation of independence formulation but has yet to really reach the state of the separation of "independence" otherwise, some important problems on comprehensively advancing the rule of law in the countries of the resolution will not put forward this problem again.

Sun Wansheng, the dimension of the judicial power of the law, page 4, law press, 2001.

The Supreme Court to execute a program "a" sex two qualitative, one of the "a" is mandatory.

Completely discrete classification between things, only human knowledge of objective things of a kind of "rational fiction", the objective facts are often not as clear-cut. Classification of biology, for example, is human to all species of drafting the "rational", but not all creatures will no doubt delimit the category, the platypus is the most confusing to biologists, the platypus is the only mammal "spawn", but if according to the traditional classification, both "eggs", it will not mammals; Both "mammals", should not be "eggs". But the truth is, the platypus is "eggs", and "mammals". Not because of it is not in conformity with the traditional classification standard, and deny it as a kind of biological existence of independence.

In the case of the platypus, still cannot have egg-laying animals and at the same time, with its characteristics of mammals, and recognize it as a combination of two animals or animal, because of its obviously is a kind of animal, it is a fact of the change, not because of the theory of reverse.

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