

The Law Priority Doctrine and China's Food Safety Legislation

LES PRINCIPES PRIORITAIRES JURIDIQUES ET L'ETABLISSEMENT DE LA LOIS DE SECURITE ALIMENTAIRE CHINOISE

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Abstract

As one of the important doctrines in administration law, the law priority doctrine is an embodiment of the rule of administration law principle. Building up the system of the food safety legislation and the exertion of legislative power should follow the requirements of the law priority doctrine so that rights of food consumers could be protected and the administration organs could use their power according to laws.

Key words: The Law Priority Doctrine; Food Safety Legislation; Food safety laws

Résumé

Les principes de la priorité juridique sont des principe de droit administratif de la légalité, et manifestant l'importance du principe de droit administratif. Les Principes juridiques donnent la priorité législation sur la sécurité alimentaire et les exigences de la construction du système, l'exercice du pouvoir législatif devrait être compatible avec cette exigence qui permettra à l'administration exécutive conformément à la loi de protéger les droits des consommateurs d'aliments.

Mots clés: Principe prioritaires juridiques; Législation sur la sécurité alimentaire; Loi de la sécurité alimentaire

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The principle of food safety legislation is the embodiment of the basic spirit of food safety legislation. It not only carries out in the whole procedure of food safety

legislation, but also has directive and leading impact on many conducts made by the administrative departments when supervising food safety. The importance of basic principles in food safety legislation also expressed in the following aspects: 1. It unifies rules in the food safety legislation; 2. Although there are many administration legislation in food safety, they can hardly cover all the fields of this area. Thus, administration departments could use principle as law in some blind spots of certain field. As a part of the administration laws, doctrines of food safety legislation should also meet the requirements of the legality doctrine of administration law.

The legality doctrine is the prime doctrine of administration law. The basic meaning of this doctrine is that the administrative act must be made according to laws. The simplest explanation of the legality doctrine is article 4 of the "Administrative Procedure Law" in Taiwan. It says: "Administrative acts should be restricted by laws and basic principles of laws." There are many discussions among administration scholars in China around the legality doctrine and most of them recognize that it contains two sub-doctrines which are the law priority doctrine and the legal reservation doctrine. Owing to the limit of words, this paper only analyses the law priority doctrine.

1. THE CONTENT OF THE LAW PRIORITY DOCTRINE

German administration law scholar Otto Mayer first raises "the law priority doctrine". He thought that law is the strongest expression of the will of a state. "The will of a state expressed by laws superior to other wills; laws could be abandoned by legal procedure and laws could abolish all other conflicted expressions or stop them making sense. This is the so called the law priority doctrine." (Otto Mayer, 2002)

Generally speaking, the law priority doctrine requires

that all the conducts of administration departments cannot go against laws which is also called "passive administration by law." Because the procedure of food safety legislation is not only carried out by the legislature, as a matter of fact, even in country like the U. S. A. legislature cannot cover all aspects of the legislation; Legislature only conduct among certain field, thus, we have to discuss the law priority doctrine in food safety legislation. Western scholar Kelsen thinks, "In the politic reality, it never happens that the rules and laws in a state must be created by a special department. According to legal orders of any country, no courts and administration departments are excluded by laws....."(Hans Kelsen, 1996). The law priority principle aims at protecting laws created by the administration departments conflicting with laws. Thus, we have to admit the deference in different law levels.

Laws give first rank to the legality of connotation. Laws of lower levels must be in accordance with higher level laws.⁴ In a whole, this actually sets up a scope of administration legislation in order to prevent unlawful administration rules made by administrative department unauthorized. To achieve the law priority principle, the key is to make sure that the administrative department which created laws unauthorized take the responsibility for doing so. "The law priority principle gives duties to the administrative department to make legal conduct instead of setting up rules directly when they go against these duties. However, if the principle does not be obeyed, no matter how, they have to be give relevant treatment: the rules against laws are invalid."(Otto Mayer, 2002, p. 103-104)

Traditional administration law theory recognizes that administrative organs do not have the power to create laws. Government can only set up rules or purely exercises laws that in accordance with laws for the protection of law enforcement. Legislative power must be held by the parliament which is elected by people. The doctrine and system that allows parliament have the legislation power was strongly supported by enlightened thinkers. Locke said: "but freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it. A liberty to follow my own will in all things where that rule prescribes not, not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man, as freedom of nature is to be under no other restraint but the law of Nature"(John Locke, 1964, p. 15), "Nor can any edict of anybody else, in what form so ever conceived, or by what power so ever backed, have the force and obligation of a law which has not its sanction from that legislative which the public has chosen and appointed; for without this the law could not have that which is absolutely necessary to its being a law, the consent of the society, over whom nobody can have a power to make laws but by their own consent and by authority

received from them; and therefore all the obedience, which by the most solemn ties any one can be obliged to pay, ultimately terminates in this supreme power, and is directed by those laws which it enacts"(John Locke, 1964, p. 83). Nevertheless, with failure of western laissez-faire capitalism and establishment of monopolization, administrative power of the state has been expanding and function of administrative management has been increasing. The public now are asking the government to bare more positive responsibility for the society and public affairs instead of being the night watchmen. In this situation, the traditional administrative theory and the base of it – the constitutional principle of legislation power that parliament has have been challenged. After deep study, repeated arguments and painful choices, many countries have given up the principle that only parliament has the legislation power. They either directive stipulate that administrative organs have legislative power under certain circumstances or allow the parliament authorize or assign certain administrative department to use the legislative power. From then on, administrative legislation has become one of the contemporary administration law themes and plays a more and more important role.

2. THE REQUIREMENT OF LAW PRIORITY PRINCIPLE TO FOOD SAFETY LEGISLATION

The law priority doctrine has the following requirements in food safety area:

First, create a uniform law for food safety and make sure this law is the fundamental law in the food safety area. Create rules for food safety quality, the department of food safety, the supervision procedure and measures taken by government. All other rules or laws about food safety against this uniform law are invalid. Also, rules and laws cannot exceed the scope and aims which were authorized by the food safety law. The Food Safety Law was issued for enforcement in 2009 in China. However, just before this law there were various administrative rules and regulations about food safety. According to statistics, regulations before the Food Safety Law that were created by the state council about food safety management are up to 14. Besides, there are two regulations about the emergency processing in food safety incident and five about food safety supervision and punishment. The earliest of them is the "Food Nutrition Fortifiers Sanitation Regulation" in 1986 and the latest is the "Announcement on the quantum limit temporary management of Melamine in milk and dairy products" in 2008. Local rules about food safety are countless in China. There are at least three problems: Firstly, because these rules and regulations are created by different departments in different fields, they are always conflict with each other; Secondly, although rules and regulations in food safety area are many, they

are created by different administrative departments separately and the result for doing so is that there is no uniformity in food safety legislation and there are still many blank area not covered by laws; Thirdly, for the late release of the Food Safety Law, there are many conflicts between rules and regulations in food safety area and this situation leads to the conflict in the food safety system in China. To solve this problem, government departments need to properly use the Food Safety Law and at the same time clear conflict rules and regulations in the system.

Second, administration rules and regulations created by administrative department must meet the requirement of its higher level laws and the constitutional law. Any parts in administrative rules and regulations of food safety are invalid. Article 5 paragraph 3 of the constitution of China stipulates that "All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law." And paragraph 4 "All acts in violation of the Constitution and the law must be investigated. No organization or individual may enjoy the privilege of being above the Constitution and the law." In addition, article 78 of the Legislation Law stipulates "The Constitution has the highest legal authority". Article 79 says: "National law has higher legal authority than administrative regulations, local decrees and administrative or local rules. Administrative regulations have higher legal authority than local decrees and administrative or local rules." Most normative documents under the level of regulations about food safety are created from the view of local government and management department but barely concerning about the benefit of the whole nation as well as the rights of consumers. What is more, those documents against higher level laws are very common. Regulations and normative documents

under them are nearest documents to administrative counterpart and they usually have the most important and directive influence in daily life. However, regulations and normative documents under them are lack of legislation planning so that they often get influenced by short-term benefit. On one hand, they may negligent of supervising to protect local food companies, on the other hand, may create supervision block which against higher level laws in the food safety supervision. These conducts could do harm to food production companies and legal rights of consumers in wide range.

REFERENCES

- Hans Kelsen (1996). *General Theory of Law and State* (Shen Zongling, Trans.) , pp.300. Beijing, Encyclopedia of China Publishing House.
- LIU Xin (2003). *Study on Administrative Legislation*. Law Press China.
- Otto Mayer (2002). *German Administrative Law* (LIU Fei, Trans.). Beijing: The Commercial Press.
- SONG Gongde (2000). *Administration Law Philosophy*. Law Press China. 2000
- SUN Xiaoxia (1999). *Laws' Control on Administration*. Shandong Ren Min Press.
- [U.S.A.] Nestle Marion. *Safe Food: Bacteria, Biotechnology, and Bioterrorism*. Social Sciences Academic Press China, 2004.
- [U.K.] John Locke (1964). *Two Treatises of Government* (Part 2). (YE Qifang & QU Junong, Trans.) . Beijing: Commercial Press.
- WU Geng (2005). *Administration Law Theory and Application*. China Ren Min University Press.
- ZHANG Wenxian (1996). *Study on 20th Century Western philosophy of Rights*. Law Press China. 1996