

摘要

本研究透過公共選擇途徑，檢視行政機關面對主管之行政命令遭大法官會議宣告違憲後的裁量行為，藉此瞭解行政機關面對司法審查的制衡監督，將表現出哪些樣態的裁量模式；並藉由公共選擇途徑關於理性自利人的假設，以「交易」的概念連結行政與法律，以補充兩者過去缺乏交集、各說各話的現象。

本研究追蹤至民國 97 年底為止判決行政命令違憲的解釋，共 66 筆。依大法官解釋是否賦予行政機關修改命令的裁量，以及命令是否修改，將 66 筆解釋分成四大類，並統計修改所費的時間。透過統計分析以及深度訪談，本研究發現：大法官未賦予行政機關修改裁量，雖然確能提高命令修改的比例，但是對於控制行政機關在一定的年限內完成修改卻未有顯著的結果。行政機關雖然原則上會停用違憲法規，但卻不一定願意將新的作法明文化，其間的理由包括節省修正命令的成本，或是爭取更多決策商議的機會等。縱使最後依然完成修正，「依法行政」卻不是其真正的動機；減少組織成本或政策執行成本、增加組織的正當性等才是行政機關決定修改、不修改命令，或是否在期限內完成修訂的真正理由。而大法官解釋對行政機關的制衡力量，也因為大法官作成解釋之後再無有效的監督機制而打了折扣。同時，司法審查與行政之間的制衡關係必須放在整個民主授權結構中進行理解；正因兩者關係並非處於真空環境，授權結構的資訊不對稱、多重委託與多重代理的問題，同樣會發生在司法對行政的監督關係中，因此大法官在結構上就無法完整地扮演制衡、監督行政機關的角色。

基於以上發現，本研究認為司法對行政的制衡，除了司法審查制度本身以外，應當依照行政機關的偏好模式設計監督機制。包括將違憲的命令交由行政院研考會統一管考、監察院可針對行政機關延遲修正命令的行為進行糾正，並要求遭判違憲的行政命令之修正、失效與廢止皆須對外公告，避免行政機關以節省成本為由，讓法規失去扮演政府與人民之間的契約的功能。

自由的行政裁量與受限的法拘束力—大法官會議解釋的個案分析

關鍵字：大法官會議解釋、行政裁量權、公共選擇理論、代理人理論、行政命令

Abstract

This research intends to answer the question of “how Supreme Court Rulings have impacts on bureaucratic discretion?” As the superior judicial review authority, Supreme Court Rulings are usually thought as an authority which bureaucrats must obey. Is it really the case? In this research, both bureaucrats and Supreme Court are seen as rational actors who have preferences over different outcomes, as the Public Choice theorists usually depict. Author utilizes public choice theory to bridge the gap between the fields of public administration and public law on the issue..

Empirically, this study collects the administrative decrees which were announced unconstitutional by Supreme Court before the end of 2008 in Taiwan. Sixty-six Supreme Court Rulings are found and categorized into four groups by two dimensions: (1) whether the grand judges give the bureaucrats discretion and (2) whether the bureaucrats follow the grand judges' will to reform the decrees. Both secondary data analysis and in-depth interviews are used in this research to figure out bureaucrats' preference and the way they respond to the grand judges' decisions. The statistical result shows that after been announced unconstitutional by the Supreme Court, about 15% of the administrative decrees stay the same. The reasons for this “unresponsiveness” to the Supreme Court Rulings are varied case by case. Basically speaking, bureaucrats take laws as means to fulfill their tasks. They are not motivated to follow the rule of law if there is a requirement to pay an excessive costs to achieve the policy goals. It is interesting to know that judicial review is high on its moral ground but sometimes it is a mechanism without an administrative devises to enforce their rulings. Also, the problems of information asymmetry, multi-principle and multi-agent will also be found in the relationship between Supreme Court and bureaucrats.

To sum up, on the one hand, this research has shown that to follow the rule of law is not bureaucrats' priority. As a result, an administrative mechanism is needed to enforce the Supreme Court Rulings. For example, the Research, Development and Evaluation Commission (RDEC) of Executive Yuan or the Control Yuan can be assigned to do the job. However, on the other hand, the Supreme Court always stands on the side of protecting human rights against government activities, sometimes the rulings might lead to government activities unworkable as we can see from the cases of the Rulings 400 and 440. How to balance the issue of protecting citizen's rights and governability of the administrative agencies is one of the key problems needed to be solved in order to realize democratic governance in the future.

Key words: Supreme Court Rulings, administrative discretion, public choice, principle-agent theory, administrative decree