On Criminal Investigation Power Governed by Law —Analysis of Deficiency and Perfection of Criminal Investigation Power Governed by Law in China

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Abstract. The core of the rule of law is that the executive power must be efficiently controlled by law. As one of the specific executive powers, the criminal investigation power may infringe upon human rights when it is exercised. And China makes no exception, particularly during the stage of the criminal investigation. So this article will probe into the common regular patterns of governing the criminal investigation power by law in the modern law-based countries, uncover the problems and establish the conception of the criminal investigation power governed by law in China.

1. Introduction

The rule of law, whose essential function is to adopt an attitude of negating the despotic power and maintaining the democratic politics, the fundamental value orientation is to seek justice and to protect the human right, which means a political proposition, an institutional system and an operational condition. The highest requirement for the rule of law is the state must also obey the law. That is to say, all the state powers must be governed by the law. Among the system of the state powers, the executive power is the one which is the most active, most desiring the space of freedom but expand most easily, and most needing to be controlled. Therefore, the core of the rule of law is that the executive power must be efficiently controlled by law. As one of the specific executive powers, the criminal investigation power may infringe upon human rights when it is exercised. And nowadays, China also experiences such headaches, especially during criminal investigation. Why this kind of phenomenon appear, how the modern law-based countries regulate and govern their criminal investigation powers through law and how to establish the conception of the criminal investigation power governed by law in China are the content discussed in this article.

2. General Rule of Governing Criminal Investigation Power by Law

In view of governing the criminal investigation power through law from source, the general rule is by means of legislation in the modern law-based countries. Through the constitution, the criminal investigation power were legislatively conferred on the criminal investigation organs and regulated and governed simultaneously. On the other hand, some essential principles hiding in the spirit of the constitutionalism also regulates the criminal investigation power and makes it act orderly on the trail of respecting and protecting the citizens’ basic rights. The principles include the stipulation in Constitution, Vorbehalt des Gesetzes and Der Grundsatz der Verh ßm ßigkeit.

2.1 Stipulation in Constitution

In modern society, one of the basic functions of the law is to regulate and restrict the power, no matter which is the individual’s rights or the powers of the state. In the sphere ruled by law, the free exercise of authority is hampered by the rules, which constraint to the ruler’s certain behavior. Based on this
concept, for the purpose of guaranteeing the citizens basic rights, the modern constitutionalism emphasizes from the very beginning to guard against the abuse of criminal investigation power by using rigorous scientific rules of procedure.

For instance, France Universal Declaration of Human Rights solemnly declared that anyone can not be accused, arrested or detained unless under the condition of the law and on the basis of the procedure stipulated by law. Another example is that as one of the British constitutional documents, Habeas Corpus Act provides that anyone may not be arrested by any state organs without a reasonable arrest warrant signed and issued by the court. The arrestees must be submitted to the court within 20 days or set free without any loss of time if the submission denied. The examples shows that the criminal investigation power authorized and stipulated in Constitution has already become a universal law in the world.

2.2 Vorbehalt des Gesetzes

Vorbehalt des Gesetzes\[3\] requires that the criminal investigation organs exercised and the mandatory measures adopted by the criminal investigation organs must on the basis of the authorization of the law and obey the conditions prescribed in advance by the law. Otherwise it means the illegal violations of the basic civil rights. The criminal investigation power must be set or awarded in accordance with the law or the power of the criminal investigation organs will be in want of law basis. This is the requirement of Vorbehalt des Gesetzes for the criminal investigation power on the source. Besides, Vorbehalt des Gesetzes requires the criminal investigation organs must abide certain mandatory regulations by the law when they exercise their powers, such as the provisions of the subject and the object, the procedure and the behavior of investigation, the mandatory measure and so on. These mandatory regulations form a threshold of the exercise of the criminal investigation power and a protective screen for the citizens’ basic rights.

In modern legal states, the constitution and the criminal procedural law stipulate illustrate the substantive essentials and the procedural essentials in details. In Germany, the mandatory measures stipulated in criminal procedure law are considered infringement of the citizens' basic rights when they are exercised in practice. Such as the criminal summon by force, arrest, detainment, personal search and photograph are considered infringement of the right to human dignity; the blood test and brain wave detection are considered infringement of the right of person; domiciliary search is considered infringement of the house right, etc. The criminal investigation organs intervene the citizens' basic rights stipulated in the constitution must be reasonably explained by ample and rational articles of law. The restriction on the citizens' basic rights must not be stipulated by customary law or by administrative decree. Without ample legal basis, the criminal investigation organs must not take certain mandatory investigation measures in a certain case. The subjects are entitled to intervene the citizens' personal rights are the judge, the public procurator and his auxiliary organs and the judicial police.

In America, the Fourth Amendment to the Constitution said: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” \[4\] And the Section 1 of the Fourteenth Amendment said: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” \[5\] The Principled regulations, carried out through certain Specific rules in the Federal Criminal Procedure Rules in 1945 and The Federal Rules of Evidence in 1975, and certain specific demands put forward by the Supreme Court in cases, become the reliable security to guard against the states’ powers make inroads on the personal rights.
2.3 Der Grundsatz der Verhütung Bigkeit

Der Grundsatz der Verhütung Bigkeit, which means that the measures taken to interpose the citizens’ basic rights by the criminal investigation organs must proportionate the purpose of the measures, requires that the criminal investigation organs must take the various factors into account and weigh the various interests so as not to interpose the citizens’ basic rights at maximum range and the most extent when they interpose the citizens’ basic rights in accordance with law. Der Grundsatz der Verhütung Bigkeit contains Geeignetheit, Erforderlichkeit and Angemessnheit.

Geeignetheit requires that the investigation measures or mandatory measures taken by the criminal investigation organs to attain the purpose must proportionate or contribute to the purpose of the measures. For example, the power of detention exercised by the judicial police is deemed to accord with Geeignetheit if it can achieve finding out the truth.

Erforderlichkeit requires that the exercise of certain criminal investigation power or compulsory power is considered to be necessary only when other equally effective powers which limit less the citizens’ basic rights cannot choose. In other words, when the criminal investigation organs can choose multiple powers to achieve the purpose of investigation, they should choose the one which least restricts or impairs the citizens’ basic rights. For example, among summons to court, detention and arrestment, the summons to court least restricts or impairs the citizens’ basic rights. So in a case, the criminal investigation organs must choose the summons to court unless it cannot equally achieve the purpose of investigation. Only in this way, the exercise of the criminal investigation power can accord with the requirement of Erforderlichkeit.

Angemessnheit requires that the intensity of the mandatory measures taken by the criminal investigation organs must not go beyond the limits of the purpose of the measures taken by the criminal investigation organs. It also requires that the unfavourable factors caused by the mandatory measures taken by the criminal investigation organs must not surpass the favourable ones safeguarded by the criminal investigation organs. That is to say, before the criminal investigation organs exercise certain criminal investigation power, they must weigh the suspect’s injury caused by the mandatory measures and the interest obtained by the exercise of the measures. Even when the latter is superior to the former, the mandatory measures can be taken, but not vice versa. Angemessnheit is meant to forestall making a mountain out of a molehill when the mandatory measures taken by the criminal investigation organs are unfavourable to the suspect. Modern criminal procedure theory lays extraordinary stress on the exercise of the criminal investigation power must accord with Angemessnheit, which is stipulated in the German constitution. On the basis of Angemessnheit, the measures taken to deal with the crime must meet the needs of the grave consequences of the crime, the degree of the suspect being suspected and the interest safeguarded in the constitution. So the mandatory measures taken in one case are suitable, but not suitable in other cases.

In practice of Germany criminal procedure, as a common principle, Angemessnheit applied must rest content with the demand of certain case. For example, the law will regard it illegal if the mandatory measures such as arrest, detainment, personal search, photograph and blood test and so on taken by the criminal investigation organs go beyond the limit of the law.

3. Deficiency of Regulating and Governing Criminal Investigation Power by Law in China

In China, the thirteenth Amendment to the Constitution said that China governs the country according to law and makes it a socialist country under rule of law. This suggests that Rule-of-law principles have been affirmed in the Constitution and it has general applicability. The criminal investigation power regulated and governed by law is no exception. However, contrasting the general rule of regulating and governing the criminal investigation power through law, some legislative shortcomings and juridical deficiency in institution in China exist in the restriction and the regulation to the criminal investigation power.
3.1 A Low Level of Criminal Investigation Power Stipulated in Constitution

As one of the public state powers, the criminal investigation power should be regulated and confined fundamentally in the Constitution. The Constitutions in foreign countries almost regulate and confine the mandatory measures exercised by the criminal investigation organs to make them be operational. The Fourth Amendment to the Constitution and the Section 1 of the Fourteenth Amendment to the Constitution of America are good examples.

The basic rights of the citizens, such as the right of personal freedom, the right to human dignity, the right to adequate housing and the right of communication may be infringed. So in China, the articles from 37 to 40 of the Constitution provide some prohibitory regulations to restrain the criminal investigation power. But these general and abstract prohibitory regulations are lacking of maneuverability, which indicates a low level of the criminal investigation power regulated and stipulated by the Constitution.

More than that, the Article 135 of the Constitution says: “The people's courts, the people's procuratorates and the public security organs shall, in handling criminal cases, divide their functions, each taking responsibility for its own work, and they shall coordinate their efforts and check each other to ensure the correct and effective enforcement of law.” [9] According to this regulation, the disposition of the powers of this three organs presents that they are in the process of dealing with a case and the exercise of the three powers presents a mode of an assembly line method.[10] The disposition of the powers of the three organs lays stress on the interaction of the powers of the state but the citizens' personal rights are absent. What is mentioned above indicates that the exercise of the criminal investigation power is in want of effective restriction of power, which reduces the level of the criminal investigation power regulated and stipulated by the Constitution.

3.2 Imperfection of Vorbehalt des Gesetzes in Legislation

In criminal procedure, the crux of Vorbehalt des Gesetzes is that the permission scope, the exercised physical elements and program elements of the criminal investigation power are pre-established by law as a threshold to guarantee the citizens’ basic rights.

In China, the power authority and control are embodied by practicing criminal procedure law. But as for the permission scope, the exercised physical elements and program elements of the criminal investigation power are not perfect. Especially the regulation of the investigation measures and the mandatory measures are lacking of restriction in the criminal procedure law. Almost all the decisions of investigation measures and the mandatory measures taken by the criminal investigation organs such as interrogation, search, distraint, inquest, inspection, investigative test, summon for questioning, recognizance upon bail, residential surveillance, criminal detention and arrest are made and carried out by the criminal investigation organs themselves. The reasons and procedures of applying the investigation measures and the mandatory measures are very simple and the purpose of the regulation is to meet the demand of the investigation. For example in China, the exercise of the power of interrogation is legislatively lacking of clear and definite restriction which makes it randomly chaotic in practice. For the purpose of interrogation, the investigators can freely summon the suspect without being detained for questioning and they also choose when and where as they wish. During the whole process of interrogation, whether the legislative restriction effective or not almost depends on the personal quality of the investigators. [11]

3.3 Insufficient Implementation of Der Grundsatz der Verh Itnism ßigkeit in Practice

The implementation of Der Grundsatz der Verh Itnism ßigkeit during the exercise of the criminal investigation power means that the application of the mandatory measure must adapt to the seriousness of the crime, the adequacy of the evidence and the emergency of the case. But in China, the implementation of Der Grundsatz der Verh Itnism ßigkeit is quite insufficient in Practice. The criminal procedure law stipulates a series of mandatory measures in different intensity. But in practice, starting from their departmental selfishness, the criminal investigation organs try to arrest
the suspect without considering the seriousness of the crime, the adequacy of the evidence and the emergency of the case but emphasize the action of arrest. Other mandatory measures would not be boldly taken even if the degree of intervention in citizens’ basic rights to a lesser extent. The application for change of mandatory measures put forward by the suspect or his defender would frequently not be approved. [12]

4. Routes of Perfecting Criminal Investigation Power under Rule of Law

In the modern countries under the rule of law, the source of the criminal investigation power derived from the constitutions. The mandatory power as a specific one stipulated in the criminal procedure law is no exception. And under the modern constitutionalism system, the criminal investigation power is not an unrestricted state power any more. Modern criminal investigation system presents the situation of restricting the criminal investigation power and makes it its mission to safeguard the citizens’ basic rights not be infringed upon.

As mentioned above, the degree of controlling the criminal investigation power by law is not high and the operability is not strong enough. So the first route of perfecting the criminal investigation power under the rule of law is to improve the degree of controlling the criminal investigation power by law and strengthen its operability. The specific measure is to add certain articles of restricting the criminal investigation power especially the mandatory power so that the deliberate and scientific procedural regulations can guard against their being abused.

The second route of perfecting the criminal investigation power under the rule of law is to consolidate Vorbehalt des Gesetzes in legislation. In order to further realize the standardization and legalization of the criminal investigation power, the permission scope, the exercised physical elements and program elements must be perfected through the criminal procedure law. And the power of intervention in the citizens' basic rights can only be authorized by the criminal procedure law but not by any other statutes or rules. On the other hand, the behavior rules of the criminal investigation such as interrogation, search, distrainment, inquest, inspection, investigative test, summon for questioning, recognizance upon bail, residential Surveillance, criminal detention and arrest must be further refined to refrain the power from being abused.

The third route of perfecting the criminal investigation power under the rule of law is to carry Der Grundsatz der Verh Inism ßigkeit out in practice, whose main function is to excessively prevent the violation of human rights. [13] That is to say, when the criminal investigation organs exercise their powers to interfere with the citizens' basic rights, they must take into account various factors and make the intervention to a minimum range and in a minimum degree. Der Grundsatz der Verh Inism ßigkeit put into effect in judicial practice claims that in some smaller personal risk and minor offence cases, the criminal investigation organs must take the mandatory measures with smaller intensity such as summon for questioning, recognizance upon bail, residential surveillance, criminal detention and arrest must be further refined to refrain the power from being abused.

5. Conclusion

Among the state powers, the criminal investigation power is the one which most easily infringes the citizens’ basic rights. To guarantee the criminal investigation power exercised methodically, the essential measure taken by the modern law-based countries is to govern it by law, so as to balance the conflict between the individual right and the state power and to fully protect the citizens’ basic rights. It proved to be a successful experience. I wish China will copy the experience to improve the degree of controlling the criminal investigation power by law and strengthen its operability, consolidate Vorbehalt des Gesetzes in legislation and carry Der Grundsatz der Verh Inism ßigkeit out in practice. Only in this way, the criminal investigation power under the rule of law will be realized and the citizens’ basic rights can be practically protected during the process of the criminal procedure.
References


