

Analysis on the Justiciability of Macro-control Behavior

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Abstract—The state carries out macro-control for the stability of national economy and the healthy development of economic construction. Although the justiciability of macro-control behavior has long been in dispute, in fact there are differences and connections between macro-control behavior and state act and decision-making behavior, and macro-control behavior also conforms to the constitutive elements of lawsuit. The justiciability of macro-control has certain theoretical basis and practical requirements and it is necessary to strengthen the justiciability of macro-control.

Keywords—macro-control behavior; justiciability; basis of justiciability

I. INTRODUCTION

To explore whether there is justiciability in macro-control behavior, one should first have a clear definition of the meaning and nature of the macro-control behavior and related concepts.

A. Definition of Macro-control Behavior

Macro-control and market economy are important components in the field of economic law. In the process of economic operation, the government uses its visible hand to intervene or manage the invisible hand of the market, and regulates market failure and other phenomena to promote the steady development of national economy and create a good environment for the operation of market economy.

Macro-control behavior refers to the behavior that the state introduces laws or policies so that government can adjust and manage the operation of market economy. From this perspective, macro-control behavior is not only an economic concept, but also a political concept. To be specific, "macro-control behavior" can be divided into two types according to different ways of regulation. One is the implementation behavior of macro-control, and the other is the decision-making behavior of macro-control. The implementation behavior of macro-control refers to the behavior of state macro-control organs to wield specific means of macro-control to manage, coordinate and supervise the operation of macro-economy in the process of macro-control. And the decision-making behavior of macro-control refers to the behavior of state macro-control organs to make choices and decisions on the country's future economic

development goals and principles, measures, steps and policies to achieve the goals.¹

However, scholar Xing Huiqiang has a different point of view. He believes that macro-control behavior only refers to decision-making behavior, not including implementing behavior, because the implementation of macro-control may be an administrative act, a civil act or a factual act.² The author thinks this kind of viewpoint is worth discussing. Since macro-control behavior is a means for the state to adjust market failure, the decision-making behavior and execution behavior contained in it are integral and cannot be separated easily. Moreover, relevant theories or policies should also be applied in practice or implementation to achieve their due legal and social effects.

B. Macro-control Behavior and State Act

Some scholars hold that the reason why there is not justiciability in macro-regulation behavior is that macro-control behavior is a state act. Generally speaking, it is generally believed that the state acts refer to the political acts involving the maintenance of the fundamental system of the state and the application of state sovereignty, the legal consequences of which are borne by the state. They mainly refer to those acts that are excluded from the legal and constitutional review of the court because of their high political nature and their relevance to the national survival of the state.

However, the macro-control behavior discussed here is quite different from the theoretical interpretation of state act. The macro-control behavior is far from the "state acts" mentioned above. Obviously it is neither the acts relating to national defense and foreign affairs carried out by the state council, the central military commission, the ministry of defense or the ministry of foreign affairs in the name of the state, nor the acts of state organs to declare a state of emergency, impose martial law or general mobilization, etc. Therefore it is not a legal "act of state", but at best an act of

¹ Liu Ying. A study on the justiciability of macro-control decision-making behavior [J]. *Entrepreneur World*, 2007(6): 16.

² Xing Huiqiang. Analysis on the Non-justiciability of Macro-control Behavior [J]. *Studies in Law and Business*, 2002(5): 64-66.

government, or, to be precise, an economic act of government.³

Therefore, the author thinks that there are some differences between the macro-control behavior and the traditional state act. Although there exist some overlaps between them, the macro-control behavior cannot be simply defined as the state behavior from the perspective of the consistency of the subject. The concept of state act tends to be political and policy-related, while macro-control behavior tends to be economic. With its economic nature being paramount, macro-control behavior is the application of the economic function of state in economic life.⁴ It is a means by which the state adjusts its market economy in economic operation process.

II. ANALYSIS OF THE JUSTICIABILITY OF MACRO-CONTROL BEHAVIOR

The issue of the justiciability of macro-control behavior was first proposed in 2002 by Xing Huiqiang, who denied the justiciability of macro-control behavior. In the following ten years, many scholars have further analyzed the issue of whether there is justiciability in macro-control behavior, and formed two camps of negation and affirmation.

A. Reasons for Academic Circles to Deny the Justiciability in Macro-control Behavior

As for the view that there is no justiciability in macro-control behavior, scholars mainly hold the following reasons. First, macro-control behavior is a state act with a strong political nature, so it is excluded from judicial review. The scholar Xing Huiqiang believed that state behavior has two key components, which is not only strong political nature, but also relevance to significant national interests. The political nature of macro-control behavior is stronger than the legal nature.⁵ Second, the macro-control behavior is a decision-making behavior that doesn't include the implementation behavior. This view mainly regards macro-control behavior as political behavior, separates the decision-making and implementation of macro-control behavior, regards decision-making as the main function of macro-control behavior, and classifies the implementation behavior into the scope of administrative law. Third, they explain that there is no justiciability in macro-control behavior from the perspective that the macro-control behavior doesn't possess a series of elements of lawsuit. It is mainly believe that the macro-regulation behavior cannot be prosecuted in that it does not meet the requirement of "eligible plaintiff" in the constitutive elements of the lawsuit, because the macro-control behavior involves the interests of the non-specific majority. Even in the occasion of "public welfare lawsuit" in which the requirement of "eligible plaintiff" has been met,

that is, anyone can be allowed to prosecute against the act detrimental to the public interest, but there is no justiciability in macro-control behavior. This is because when the interests of the non-specific majority are harmed, people are equal in front of the damage and no one is suffering more damage than others, so no lawsuit can be filed against it.⁶ In addition, although the requirement of "eligible plaintiff" has been met in "public welfare lawsuit", it cannot be taken for granted that public welfare lawsuit can solve all the problems, and the public interest litigation system in China is not mature. Fourth, the people's courts are not capable to review macro-control behavior. This is because the macro-control behavior is actually more complex, involving economic, administrative, legal and other aspects of the major issues, which requires the judge to have a very high quality. And it may be very costly and risky for the judicial authorities to actually close the proceedings.

B. Reasons for the Academic Circles to Support the Justiciability of Macro-control Behavior

Scholars for the view that macro-control is justiciable mainly hold the following reasons. First, from the perspective of the modern spirit of rule of law and the function of litigation, the essence in the spirit of modern rule of law is to control the use of public power. It is obviously against the spirit of modern rule of law to define macro-control behavior as non-justiciable, and no system can better protect the interests of victims than the judicial system."⁷ Therefore, some scholars believe that the most effective supervision and restriction mechanism for any abuse of power is litigation. Second, from the perspective of the responsibility nature of illegal macro-control behavior, although those illegal macro-control behaviors need to bear political responsibility, it cannot be said that the responsibility nature of illegal macro-control behavior is only political responsibility. The responsibility of illegal macro-control behavior cannot be generally attributed to political responsibility, which is not conducive to making the macro-control subject's legal responsibility clear. This requires us to legalize political responsibility, because satisfactory results might not be got only by restriction of the relevant supervision mechanism or blind pursuit of political responsibility,⁸ therefore, it is necessary to strengthen the justiciability of macro-control behavior. Third, the idea from the perspective of the court's review ability, that the people's courts are not capable to review macro-control behavior so there is no justiciability in macro-control, is a misunderstanding of the content of judicial review in the justiciability of macro-control. In fact, when the court examines the macro-control behavior, it mainly examines whether the macro-control decision is in conflict with the law or the superior law, and whether it violates the relevant

³ Yan Yunqiu, Li Dawei. Analysis on the Justiciability of Macro-control Behavior [J]. Journal of Graduate School of Chinese Academy of Social Sciences, 2005(1): 48-49.

⁴ Hu Guangzhi. On the Justiciability of Macro-control Behavior [J]. Modern Law Science, 2008, 30(2): 63.

⁵ Xing Huiqiang. Analysis on the Non-justiciability of Macro-control Behavior [J]. Studies in Law and Business, 2002(5): 64-69.

⁶ Xing Huiqiang. Analysis on the Non-justiciability of Macro-control Behavior [J]. Studies in Law and Business, 2002(5): 64-69.

⁷ Xing Huiqiang. Analysis on the Non-justiciability of Macro-control Behavior [J]. Studies in Law and Business, 2002(5): 64-69.

⁸ Yan Yunqiu, Li Dawei. Analysis on the Justiciability of Macro-control Behavior [J]. Journal of Graduate School of Chinese Academy of Social Sciences, 2005(1): 50-51.

procedural norms. "This is just a process to judge the right-and-wrong matter of macro-control, not how well the work is done." ⁹ What the court needs to review are the constitutionality, legality and procedural nature, which are only related to the court's legal judgment and litigation capacity.

C. Basis for the Justiciability of Macro-control Behavior

First, analysis is made from the perspective of "lawsuit", which constitutes a factor in the concept of justiciability. The constitutive elements of litigation in China's procedural law mainly include four items: qualified plaintiff; an explicit defendant; specific claims and factual grounds; falling within the jurisdiction of the court. A plaintiff in of lawsuit is supposed to be a citizen, legal person or other organization that has a stake in the lawsuit. Generally speaking the subject and damage should be specific, but there is also an exception of public welfare lawsuit.

The author thinks that the macro-control behavior conforms to the four constitutive elements of the lawsuit. Those denying the justiciability of macro-control behavior hold that the plaintiff of macro-control behavior is not specific, so it is ineligible and therefore does not conform to the constitutive elements of lawsuit. However, the author believes that the premise of this view is to define the macro-control behavior as a simple decision-making behavior in advance which only involves the non-specific majority or public interests. In fact, the idea of separating decision-making from implementing is not scientific. Because only when the macro-control behavior is positioned as an organic system composed of a series of behaviors can it become a real "behavior" and play its role. Therefore, one of the preconditions for the justiciability of macro-control behaviors is that macro-control behaviors should not be regarded as decision-making behaviors only; instead, it should also include implementing behaviors. On this basis, the justiciability of macro-control has its theoretical ground.

Second, the theoretical basis of the justiciability of macro-control behavior also lies in its relationship with state act. Most scholars have noted that the relationship between the nature of macro-control behavior and its justiciability mainly relates to the relationship between macro-control behavior and state act, that is, whether macro-control behavior is a "state act" not subject to jurisdiction or not. The author thinks, macro-control behavior differs from national act. Although the macro-control behavior contains the two aspects of political and economic meanings, it is above all economic, which is the application of national economic functions in economic life. Although economic issues have the potential to become political issues, more often the boundaries between them are clear.

Finally, the exercise of public power must be closely monitored. "Macro-control must be monitored, not only internally, but also externally, that is, through judicial review.

In other words, there is justiciability in macro-control." ¹⁰ In addition, as for the relationship between administrative power and judicial power, administrative organs cannot act as judges in their own cases, because administrative power may be affected by various factors and has certain inclination when making decisions, while judicial power is neutral. If the normative documents formulated by administrative organs violate the law, the court can only change the specific administrative act derived from them, but cannot make a review conclusion on the abstract administrative act that violate the law. An abstract administrative act with low quality has far greater negative impact than its specific administrative acts.

III. OBSTACLES TO JUSTICIABILITY OF MACRO-CONTROL BEHAVIOR IN CHINA AND THE WAYS OUT

From the perspective of the overall development of China's macro-control behavior, with no complete set of legislative system for the macro-control behavior yet, there are relevant laws and regulations to regulate the specific behavior. Although there are obstacles to the justiciability of macro-control behavior, to realize the justiciability of macro-control behavior and promote the process of China's rule of law, it is necessary to realize it. The main factors hindering the justiciability of macro-control behavior are as follows.

A. No Provisions in Chinese Laws

There is no uniform macro-control law in China, and it is not common for the government to regulate the macro-control behavior. What's more, attention has rarely been paid to the justiciability of macro-control behavior. Generally speaking, the macro-control behavior is classified in the scope of administrative procedure law and identified as abstract administrative behavior. According to the administrative procedure law of our country, abstract administrative act is not justiciable, so it is also true of macro-control behavior. This further limits the realization of the justiciability of macro-control behavior in terms of legislation.

B. Imperfect Unconstitutional Review System

Being still in its initial stage, China's unconstitutional review system is not developing perfectly, which is also an important reason to limit the justiciability of macro-control behavior. Unconstitutional review system refers to the examination of certain judicial acts by certain state organs according to certain procedures to check whether they conform to the provisions of the constitution and regulate those violating the provisions of the constitution. China's current unconstitutional review body is the National People's Congress and its standing committee. Without a special constitutional review body, there is a lack of subjectival guarantee. In addition, the procedure of China's unconstitutional review is incomplete and of low operability.

⁹ Xu Bolan. Debate on the justiciability of macro-control [J]. Law Science, 2012(5): 69-70.

¹⁰ Lu Jia. Actionable Problem Analysis of the Behavior of Financial Micro-control [J]. Value Engineering, 2011: 323.

C. Weak Legal Awareness

People are limited by their own ideas and cultural concepts. Although China has been implementing the reform and opening up for more than 40 years, and the country has been developing towards democracy and the rule of law, sometimes people are still affected by the feudal system and ideology, and they have a fear of administrative power or a preassumption of failure in the case of "man suing government officials". In this case, the realization of the justiciability of China's macro-control will be hindered.

In fact, the factors restricting the justiciability of China's macro-control behavior are not limited to the above points. Moreover, to solve the problem of the justiciability of China's macro-control behaviors cannot only rely on the establishment of unconstitutional review system or the introduction of relevant legislation. After all, the issue of macro-control is a relatively complex one. Scholars believing that macro-control behavior is justiciable hold that a system of accountability for illegal macro-control behavior, which is mainly investigated by the court and supplemented by the organs of power and administration should be established.¹¹

To the above question, they also proposed many realization paths. On the one hand, it is necessary to establish and perfect China's unconstitutional review system, and establish the responsibility investigation mechanism of unconstitutional macro-control behavior, which centers on judicial review and is supplemented by power organ's own review.¹² On the one hand, it is also needed to establish and improve the macro-control public interest litigation system, and analyze the scope of the plaintiff, the scope of the examination object and the litigation procedure and put forward relevant measures. At the same time, it is proposed to introduce the "amicus curiae" system to provide valuable information and advice through the power of a third party other than courts and parties.

IV. CONCLUSION

In fact, the justiciability of macro-control is not a new problem, and there is no uniform standard for the final answer. In theory, scholars who hold positive and negative views on this issue also have their own reasons and grounds. However, the author thinks that the scholars who deny the justiciability of macro-control behavior define the nature of macro-control behavior subjectively as only including decision-making behavior but not including implementing behavior, so as to deny its justiciability. Objectively, they deny the justiciability of macro-control behavior given the complexity of macro-control, the review capacity of China's courts and the examination and comparison of the different institutional background and other factors of China and other countries.

But as has been analyzed specifically above, as for the definition of the nature of macro-control behavior, the decision making behavior cannot be simply separated from the implementing behavior. However, scholars who hold a negative attitude objectively are not denying the justiciability of macro-control behavior, but denying the operability and possibility of its realization. In fact, it is not that scholars who affirm that macro-control behaviors are justiciable fail to notice the current political environment and background, but that they fully understand that the relevant foreign systems may not necessarily meet the policy needs of China. Although the theoretical possibility does not mean that it can be fully verified in specific practice, theory and practice need to be connected, and the application of practice needs theoretical support. Therefore, some specific system designs are put forward based on the obstacles facing the implementation paths of the justiciability of macro-control behavior. Difficulties and obstacle as there are for the judicial control of current macro-control behavior in China, this is not a reason to deny its justiciability. And efforts should be made to strengthen the justiciability of macro-control behavior.

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¹² Lu Jia. Actionable Problem Analysis of the Behavior of Financial Micro-control [J]. *Value Engineering*, 2011: 323.