

促进型法律基本理论研究： 以法律调整经济发展为视角

刘志强 著



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内 容 简 介

近年来,我国出台了大量旨在促进改革、发展的法律法规。我们把这种法律现象称为“促进型法律”。促进型法律的功能发挥和机制运行是实现经济社会发展的重要方式和手段。本书较为系统地研究了促进型法律的基本理论的相关问题,旨在探索法律促进经济社会发展的机制并扩展法学研究的领域。

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促进型法律基本理论研究

——以法律调整经济发展为视角

A Study on the Fundamental Theory of Promotion Law

—From a Vision of the Legal Adjustment in Economic Development

刘志强 著

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前 言

随着市场经济的发展和法治国家战略的实施,通过法律促进经济社会发展的意义和功能越来越受到重视。近年来,我国出台了大量旨在促进经济社会领域改革、发展的法律法规。我们把这种法律现象或法律类型称为“促进型法律”。之所以称为促进法,主要在于法律的引导和激励功能直接体现在立法目的和法律规范的价值取向上。理论和实践表明,促进型法律的功能发挥和机制运行是实现经济社会发展的重要方式和手段。世界主要发达国家普遍采用这种发展模式,并取得了良好效果。遗憾的是,我国法学界对这种法律现象的关注和研究极少,实务界还对促进法存在诸多误解。我们认为,探讨促进型法律问题,不仅对促进法理论和相关的法学研究具有重要的理论意义,而且对我国正在推行的法治国家战略和经济社会发展 also 具有重要的现实意义。

本书结合文献研究和实践调查,较为系统地研究了促进型法律的基本理论问题。除导论和结语外,本书共分八章。

第一章,促进型法律的基本概念。本章主要阐述了促进型法律的定义、特征、相关概念的区别与联系、分类和促进法的部门属性等基本问题。在分析法的历史类型的基础上,本书将法律分为三种类型:禁止型法律、维持型法律和促进型法律,并提出促进型法律的定义。促进法的内容特征包括促进领域的发展性、促进效率的优先性、促进手段的政策性、促进行为的规制性、政府职责的综合性和社会参与的广泛性。促进法(法律促进)与“激励法”、行政指导、行政奖励、

行政救助等概念既有联系又区别。根据调整领域、法律部门、法律功能、法律内容等标准,促进法具有不同的渊源和分类。本书虽从行政法学的视角研究促进法,但提议不宜对促进法加以“部门化”的限制。

第二章,促进型法律的理论基础。本章主要阐述了促进型法律产生的经济、政治、社会和法律内部等领域的学理基础。经济学方面,主要分析了古典自由主义经济学、凯恩斯主义经济学和新自由主义经济学等经济学派理论及其对促进法的启示和影响。政治学方面,主要分析了国家经济社会职能演变和公共治理运动兴起等理论及其对促进法的启示和影响。社会学方面,主要分析了发展社会学、社会心理学和社会学法学等社会学派理论及其对促进法的启示和影响,其中,社会学法学是促进法的重要学理基础,也可理解为法理学上的基础。法理学方面,主要分析了综合法学、回应型法学等法哲学思想及其对促进法的启示和借鉴。

第三章,主要发达国家促进型法律制度及比较借鉴。本章主要阐述了美、英、法、德、日、韩等世界主要发达国家的促进型法律制度(法律促进发展机制)和促进措施。结合各国促进法制度的不同特点,重点分析了美国的宏观经济和产业经济调控、欠发达地区开发和发展以及对政府促进发展的规制等制度,英国的行政救助、促进小企业发展等方面的立法,德国的宏观经济和促进就业立法,法国的农业指导立法、促进法与法国法律体系的协调等方面,日本的宏观经济调控、循环经济发展等方面的促进型立法,韩国的产业发展促进法和科技发展促进法等。本书以历史背景和文化基础、价值取向和“权力—权利”关系、促进法自身结构和发展以及监督和救济机制等视角,分析了国外促进型法律制度对我国促进法的借鉴意义和内容。

第四章,促进型法律的价值定位和基本原则。本章在简单了解

法的价值的基础上,分析了行政法价值研究的困境及行政法特有的两个“二元结构”,提出促进法是一种社会本位的行政法;简要论述了中国行政法价值理论和行政法价值具有的多元性、冲突性和发展性特征;重点阐述了促进法的价值理论基础——和谐行政法——一种现代行政法的价值理论。从不同角度提出促进法的价值分类,并构建了促进法的价值体系和内容结构,重点介绍了促进法的效率价值、发展价值和和谐价值等价值元素;在价值分析的基础上,提出促进法特有的六个基本原则,主要包括人本主义原则、平衡协调原则、效率优先增进公平原则、促进法治化原则、政府责任原则和发展权原则。

第五章,促进型法律规范。本章首先指出关于法律规范研究方法存在的弊端,进而采取以语词和文本分析为重点的“形式分析路径”。通过对促进法条文的统计样本分析,提出以“表征性语词”代替“道义词”分析促进法规范。促进法规范可以分为权利性规范、义务性规范、职权性规范和“非具体权利义务性规范”,并分别介绍了各自的表现形式。本书指出在一般法理学意义上,建立统一的“法律规范逻辑结构”是不现实的,建议根据法律规范的不同类型,建立不同的规范结构或要素组合。政府(行政机关)是促进法最主要的规范主体,并分析了原因所在。最后,提出促进法法律关系及其公法属性,并简要分析了其具有的主要特征。

第六章,促进型法律的功能和措施。本章在法律功能的一般理解和借鉴的基础上,提出了促进型法律功能的定义。法律促进发展机制的模式可以分为政府推动型、社会推进型和政府社会互动型三种模式。在此基础上,本书提出了当前我国法律促进机制的模式选择应当是分步骤、分阶段的路径,即先以政府推动为主,而后培育社会力量参与再至双方的互动推进。促进型法律的功能具有宣示指引、利益调控、行为激励、整体发展和强制保障五个维度。常见的促

进措施主要包括财政政策、税收政策、金融政策、产业政策、政府公共服务、利用发展规划(计划)、促进工作协调机制、动员社会力量、奖励或表彰制度、针对性的监督检查制度等。

第七章,促进型法律的责任理论。本章在法律责任理论演变和学界关于促进法责任理论的分析基础上,提出法律责任和强制力随着时代发展呈减弱趋势和促进法责任所具有的特殊性。促进法责任理论基础主要包括温和中庸、理想追求的促进法特征和公共治理模式下的“软法”理论。促进型法律文本中的责任主要包括行政主体责任、其他主体责任以及援引其他法律等形式。基于法律责任的设置程度,可以对促进法进行不同类型的关注。过错责任原则是促进型法律的主要归责原则。促进法中政府责任是一种综合责任,包括法律责任、道义责任、社会责任和政治责任等其他责任。促进法责任具有两面性,即正面促进规范和反面强制规范的配合使用,是实现法律促进功能的重要途径。

第八章,促进型法律的实现。本章主要讨论促进法实现的概念、意义、模式、影响因素和完善措施等。促进型法律实现是推行法治行政的重要方式,是促进经济社会发展的重要途径;有利于逐步实现均衡发展,有利于提高社会对法律的信任度,有利于促进法体系的完善。促进法的实现可以根据不同促进法规范的实现分为三种模式。影响促进法实现的因素主要包括促进法自身的因素和促进法运行体制等方面。最后,本书提出完善促进法实现的措施:加大宣传力度、完善激励政策、加强和改善财税宏观调控、强化政府服务、完善有关促进法配套法规和规范性文件、及时修改完善部分促进型法律等。

关键词:促进型法律;概念;价值;原则;规范;功能;责任;实现

Foreword

With the development of market economy and the implementation of the national strategies under the rule of law, the meaning and function to promote economic and social development have attracted more attention. In recent years, a number of the corresponding laws and regulations which aim to promote economic and social sector reform and development have been established in our country. This legal phenomenon or type of law is called “Promotion Law”. The function of guidance and encouragement are directly reflected in the purposes and values of the Promotion Law. Both theory and practice indicate that the performing functions and operating mechanism of the promotion laws is an important way and means to achieve economic and social development. Most of western developed countries have generally adopted this mode of development and achieved good results. Unfortunately, our academia circle has paid little attention to this legal phenomenon and practical circle also has misconceptions about them. We think that the research on the Promotion Law is of great significance in theory.

Apart from the introduction and conclusion, the main text that is divided into eight parts, amounts to more than 190,000 characters.

Chapter 1 is about fundamental concept of the Promotion Law. This chapter describes the primary issues of the Promotion Law, such as the definition, attributes, the relation and difference of the relevant

concepts, classification, the legal branch of the Promotion Law and other basic problem. On the base of the types of law analysis, laws can be divided into three types: the Forbiddance Law, the Standing Law and the Promotion Law. The definition of the Promotion Law is presented in this part. The content includes the development of the fields for promotion, the priority of improvement efficiency, the policy of means, the regulation of the behavior, the comprehensiveness of government responsibility and the universality of social participation. There are some connection and difference among the Promotion Law, the Encouragement Law, administrative guidance, administrative award, administrative assistance, etc. The Promotion Law has different sources and classification.

Chapter 2 is about the theoretical basis of the Promotion Law. This chapter explains the economic, political, social and juristical support for this type of law. The thesis analyses some economic theories such as the Classic Economics, the Keynesian Economics, the Neoclassic Economics and their influence and enlightenment on the Promotion Law. In terms of political theory, the thesis introduces the evolution of the national economic and social function and the rise of public administration as well as the influence and enlightenment. In terms of social theory, the thesis discusses the influence and enlightenment from social psychology, sociology of development and sociological jurisprudence. In terms of juristical theory, the paper emphasizes the effect on the Promotion Law from the integrative jurisprudence and responsive law.

Chapter 3 is about the Comparison and Reference on the Promotion

Law System of Foreign Countries. According to the different results of the Promotion Law in different developed countries, this chapter focuses on the laws about the macro-economic control system, the development of under-developed region and the regulation of the administrative behavior in the U.S.A; the laws about administrative assistance and to promote the growth of the small corporation in the UK; the laws about macro-economic control system and to promote employment in Germany; the laws about agriculture guidance and the coordination between the Promotion Law and legal system in France; the laws about macro-economic control system and Circular Economy in Japan; the laws about the development of national industry and high-tech industries in South Korea. And then, from some different perspectives, this chapter discusses the influence and enlightenment to the Promotion Law in our country.

Chapter 4 is about the Value and Fundamental Principle of the Promotion Law. On the basis of the value of law, the paper analyses the predicament about the study on administrative law which has two “Dualistic Structure”, and puts forward that administrative law is a the law of the social standard. The basic theory of the value of administrative law has three Characteristics as follows, diversity, conflict and development. The thesis emphatically describes the Harmonious Administrative Law which is a basis of the value theory of modern administrative law. The paper constructs the value system and content structure of the Promotion Law and discusses in detail the efficiency, development and harmony value. On the he basis of the value analysis,

the thesis puts forward the fundamental principle of the Promotion Law which includes humanistic principle, balance and coordination principle, “give priority to efficiency and improve fairness” principle, “promotion on rule of law” principle, government responsibility principle and development right principle.

Chapter 5 is about the Legal Norm of the Promotion Law. The thesis firstly points out the drawback in research methods of legal norm, and then chooses a “Formal Analysis Method”, particularly with the word and text at the core. It proposes that we should analyze the legal norm by “symbolic word” instead of “moral logic word”. The legal norm of the Promotion Law can be roughly classified into four kinds, such as rights norm, obligations norm, powers and functions norm and “non-right and obligation norm”. The paper points that it is unpractical to set up an unified “logical structure of legal norm”. It suggests that we should establish different norm structure and element combination in accordance with different types of legal norm. The government is the most important body of “subject of norm”. Finally, the thesis discusses the legal relation of the Promotion Law.

Chapter 6 is about the Legal Functions and Measures of the Promotion Law. On the basis of the theory of legal function, the thesis gives a definition of legal function of the Promotion Law. The model of development mechanism by law may be classified into following categories: the push of government, the pull of market and combination with the both. It maintains that the path of the development mechanism by law in our country currently is step-by-step and carried out by phases.

The function of the Promotion Law includes declaration guidance, benefit adjustment, behavior encouragement, overall development and enforcement of security function. The common measures for promotion comprise fiscal policy, tax policy, financial policy, industrial policy, government public service, development program, coordination mechanism, social participation, incentive system, pertinent supervising and examination system, etc.

Chapter 7 is about the Responsibility Theory of the Promotion Law. On the basis of the analysis of the legal responsibility, the paper points out the legal responsibility and coercive force have abated with the development of the times and the Promotion Law has the certain particularity. Its theoretical basis mainly includes the legislative compromise, the ideal pursuit and the “soft law” theory in public governance mode. There are different kinds of responsibilities that lie with the administrative agency and the other body of law, in promotion laws or other code of laws quoted. The principle of fault liability is the mostly principle of imputation of promotion law. Government responsibilities include legal liability, moral responsibility, social responsibility and political responsibility for such other responsibilities. It is an important way to integrate the stimulating norm with the obligatory norm to achieve the legal functionality.

Chapter 8 is about the Realization of the Promotion Law. The thesis puts forward the definition of the realization of the Promotion Law, and then distinguishes the “realization” from the “enforcement” and “efficacy”. The realization of the Promotion Law is an important way to

carry out the administration of law, an important means to promote economic and social development, is beneficial to achieve balanced development gradually, is beneficial to promote accountability and trust in the government and law by the public, and is beneficial to improve the system of the Promotion Law. The Influencing factors of the realization of the Promotion Law includes the immanent factor of the Promotion Law self and operating mechanism of the Promotion Law. Finally, the thesis points out the measures to improve the realization of the Promotion Law which are to strengthen publicity work, to introduce an excitation mechanism, to improve macroeconomic regulation, to provide government service quality, to complete set law and to emend some Promotion Laws which are out of date obviously.

Key words: the Promotion Law; Concept; Value; Principle; Legal Norm; Function; Responsibility; Realization

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