



中南财经政法大学学术文库

权力制约机制及其法制化研究

THE MECHANISM OF POWER CONTROLLED AND ITS LIGALIZATION

方世荣 戚建刚 著

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序

一个没有思想活动和缺乏学术氛围的大学校园，哪怕它在物质上再美丽、再现代，在精神上也是荒凉、冷清和贫瘠的。欧洲历史上最早的大学就是源于学术。大学与学术的关联不仅体现在字面上，更重要的是，思想与学术，可谓大学的生命力与活力之源。

我校是一所学术气氛浓郁的财经政法高等学府。范文澜、嵇文甫、潘梓年、马哲民等一代学术宗师播撒的学术火种，五十多年来一代代薪火相传。因此，在世纪之交，在合并组建新校而揭开学校发展新历史篇章的时候，学校确立“学术兴校，科研强校”的发展战略。这不仅是对学校五十多年学术文化与学术传统的历史性传承，而且将成为谱写新世纪学校发展新篇章的战略性的手笔。

“学术兴校，科研强校”的“兴”与“强”，是奋斗目标，更是奋斗过程。我们是目的论与过程论的统一论者。我们将对宏伟目标的追求过程寓于脚踏实地的奋斗过程之中。由学校斥资资助出版《中南财经政法大学学术文库》，就是学校采取的具体举措之一。

本文库的指导思想或学术旨趣,首先在于推出学术精品。通过资助出版学术精品,形成精品学术成果的园地,培育精品意识和精品氛围,提高学术成果的质量和水平,为繁荣国家财经、政法、管理以及人文科学研究,解决党和国家面临的重大经济、社会问题,作出我校应有的贡献。其次,培养学术队伍,特别是通过对一批处在“成长期”的中青年学术骨干的成果予以资助推出,促进学术梯队的建设,提高学术队伍的实力与水平。第三,培育学术特色。通过资助在学术思想、学术方法以及学术见解等方面有独到和创新之处的成果,培育科研特色,力争通过努力,形成有我校特色的学术流派与学术思想体系。因此,本文库重点面向中青年,重点面向精品,重点面向原创性学术专著。

春华秋实。让我们共同来精心耕种文库这块学术园地,让学术果实挂满枝头,让思想之花满园飘香。



2001年11月28日

The Mechanism of Power Controlled and Its Legalization

Abstract

Undoubtedly, the question of the check on the power is the object that many social science such as Political Science , Constitutional and Administrative Science are having been studied. Thus ,people have got plenty of theories. However, the question of the check on the power is such a great issue that there are still many important links that have not been settled. In this book , we try raising and proofing one theory -- the Mechanism of the Check on the Power Elements. The main contents are as following :

In the biography, we look back the key famous theories of controlling the power. Such as the theory of separation of powers into legislative, executive and judicial divisions; the theory of social right controlling power, etc. Ours opinions are that these theories have defects. For example, they are incline to check on the power not from the internal cause but from the outer cause. In the end of this chapter ,we consider in order to avoid the defects ,we should study the inter rule of power controlling.

In the first chapter, we discuss the internal cause of the power controlled . This comprises five points: what is the power; the theory of the system; the elements consisting of the power; the elements of the power -- the internal cause of the power controlled and the significance. We hold that from the sight of the system ,power is a kind of organization and function state that is formed by every element`mutual action. The

key elements are origination element, the subject element, the object element, the operation element, the safe-guard element. If we can control those elements, we will control the power effectively by and large. To study the controlling mechanism from the structural element, its significances lay in that it not only develops and improves the theory system of power controlling, but also controls the power abused more effectively.

In chapter two, we discuss the issue of the controlling from the origination element of the power: This question is consisted of three points: some ways of the coming of the administrative power; the controlling mode of the disposing of the administrative power and the main problems of the disposing of the administrative power. We hold that there are four ways that the administrative power comes from: the regulation of legislative apartment, the empower of the legislative apartment and the administrative apartment, the allotment of the administrative apartment and the entrust of administrative apartment. We can adopt of the mode of legislation or judicial to control these ways. The main problems of the disposing of the administrative power are that the right and duty of the administrative body are unbalance during the regulation of legislative apartment, the administrative body has too much discretion in the empower of the legislative apartment and the administrative apartment, etc.

In chapter three, we discuss the question of the controlling of the subject element of the administrative power. This question is consisted of five points: the formal subject and the factual subject of the power; the controlling mechanism of the formal subject; the controlling mechanism of the factual subject; the defects and improvements of the controlling of

the subject element of the administrative ; WTO and the judicial review of the administrative act. We hold that the main way to control the formal subject is to control the scale and to control the allotment. In the end of this chapter, we analyze the new developments of the judicial review of the administrative act when China joins WTO. It indicates that the subject element of the administrative power will be controlled more severely.

In chapter four, we study the controlling of the material – safeguard of the power. This chapter concludes four divisions: the material – safeguard – a key element consisting of the power; the function of the material – safeguard element of the administrative power; the defects of the material – safeguard element in China and the analyses of the causes of the operation of material – safeguard element of the administrative power. The means of the material – safeguard element is varied resources which can be controlled by the subjects who exercise the administrative power and which are objective and manifest some material such as funds and equipment and its purpose is to guarantee the effective of the administrative power. The functions of the material – safeguard element are the object standard measuring intensity or weakness of the administrative power; a way to check the administrative power; goodness to the authority and unison, etc. The defects of the operation of the material – safeguard element are: the payment of the capital of the administrative management expands on the basis of the finance deficit; the benefit of the payment of the material – safeguard element is quite low, the payment of the administrative is not well and there is a lot of waste; The material – safeguard element is not integrate and the funds beyond budget expands as well as the dark income does. The causes are the un-

certainty of the property right and the non - specification.

In chapter five ,we discuss the issue of the controlling of the operation of the power. This chapter includes five divisions: the possibility of the controlling of the operation of the power; the function of controlling the operation procedure; the basic controlling modes of the operation of the power ;the defects of the controlling of the operation of the power and the impacts of WTO on making the PRC of China. We hold that the basic controlling modes of the operation of the power are the procedure controlling mode ,the judicial controlling mode; the main defects of the controlling of the operation of the power are lacking of the unison PRC , shorting of the consciousness of esteeming the procedure ,lacking of the basic procedure institutions , etc. In the end of this chapter , we discuss the impacts of WTO on making the PRC of China. That includes changing the purpose of the PRC , increasing the basic principles and improving the key institutions.

In chapter six , we discuss the issue of the function of the object of the power. This chapter includes six divisions: the private party is an important strength to the administer by law; the private party is a cooperation strength to the administer by law; the necessity and certainty of the object to control the power; the operation mechanism of the object to the power ; the effect of the controlling of the private party and the defects of the object controlling in China.

In chapter seven , we analyze the temptation element of the power abused. This chapter comprises three divisions: the question of the temptation; the classifications of the temptation element of the power abused and the defects of the controlling of the temptation in China. We hold that the controlling mechanisms to the temptation element are that resis-

ting the temptation element, carrying out the institution of challenge, opening up the standard of the procedure and punishing the temptation action.

In chapter eight, we summary up the system of the elements controlling. It concludes six points: the improvement of the legislation and institution of the disposing controlling of the administrative power; the improvement of the legislation and institution of the subject controlling of the administrative power; the improvement of the legislation and institution of the object controlling of the administrative power; the improvement of the legislation and institution of the procedure controlling of the administrative power; the improvement of the legislation and institution of the material – – safeguade of the administrstive power and the improvement of the legislation and institution of the temptation controlling of the administrstive power.

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