



BOSHI WENKU
〔法学·宪法〕

违宪责任论

WEIXIAN ZERENLUN

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内容提要

本书秉持宪法学的思维和分析方法, 以宪法的双重属性即宪法的法律性和政治性为主线, 以违宪责任范畴自身的基本逻辑结构为出发点, 从违宪与违法的基本关系切入, 突出违宪责任的独立价值, 对违宪责任的生成基础、前提、性质、内容以及追究机制进行了系统研究, 认为违宪责任是一种独立的、兼具法律性和政治性的法律责任形式, 它以违宪为前提, 以人权保障为价值内核, 具有司法性和政治性双重追究机制。

读者对象: 宪法学专业师生以及其他相关研究人员。

违宪责任论

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序

新中国宪法学自上世纪 80 年代恢复发展以来，伴随着现行宪法的颁布和实施，学者们围绕着中国宪法文本与宪法实践问题进行了多视角的研究，积累了一定的研究成果。这些成果不仅丰富了我国的宪法学知识体系，也对我国宪法制度的完善和整个法制的发展提供了重要的理论依据。但是，较之于宪法制度的研究，有关宪法原理的研究还是比较薄弱的，系统的研究成果并不多见。比如，学界在有关宪法监督理论方面倾注了大量的心血，但勿庸讳言，迄今为止系统地研究违宪责任理论与实践问题的著作寥寥无几，在违宪的基本范畴上学界还没有形成必要的共识。作为宪法学界的年轻学者，姚国建的学术专著《违宪责任论》在这方面进行了有益的尝试，是一本值得推荐的学术著作。

人类立宪的目的在于以宪法来规范和约束国家权力，防止权力滥用并最终实现对人权的保障，但不能有效实施的宪法是无法完成保障人权的使命的。人类的宪法发展史告诉我们，宪法的生命力不仅体现在宪法体制的合理安排，更体现在宪法价值在现实生活中的具体实现。因此，宪法保障制度是保障宪法实施的根本制度。在宪政体制中，违宪审查制度无疑是最重要的宪法实施的保障制度。过去，我国学者对违宪审查制度的研究主要集中于违宪审查模式的设计和制度体系，这些成果对于完善我国的违宪审查制度无疑具有重要的指导意义。但对于违宪审查模式的研究只是违宪审查制度中的内容之一，如果不研究违宪问题，不从违宪的基本范畴进行分析，就有可能失去研究违宪审查制度的基本方法与途径。本书的基本逻辑起点是，违宪是建立违宪审查制度的基础与出发点，不同类型违宪审查制度的形成与违宪存在的形态



之间有着密切的关系。不论采用何种违宪审查体制，都需要成熟的违宪理论来指导违宪审查权力的运作。违宪主体的确定、违宪判断的标准、对违宪法律和行为的处理程序等都是违宪审查理论中的基本问题。

本书在学术命题的确立和学术论证过程中努力保持学术理性与开放性视角，把对违宪问题的分析置于国家—社会一个人的关系之中，以违宪责任的分析为中心，建构三者关系趋于平衡的基本框架，突出了作者对人权价值的关怀与对现代宪法精神的追求。作者在本书中，坚持宪法学应具有学术理性，注重分析宪法理想与社会现实的结合，并以历史和客观的态度对现实制度的缺陷与不足进行检讨和反思。对中国违宪审查制度发展过程中存在的一些问题，作者保持了客观的学术立场，没有采取简单的肯定或否定的态度，而始终以建设性的学术立场对待社会生活中的各种宪法现象。比如，在对违宪性质、违宪审查制度的实效性评价、立法机关的立法不作为行为等问题的把握上，作者既尊重由宪法文本确定的基本制度框架，同时不回避宪法文本与宪法实践之间可能出现的冲突。

针对学术界存在的有关违宪审查制度概念的混乱，作者注意区分不同概念之间的界限，努力以清晰的概念说明学术命题，保持学术逻辑的统一性。作者认为，违宪审查制度并非是保障宪法实施的唯一制度。除此之外，政治性的机关对公职人员的弹劾、罢免以及立法机关对行政机关提出不信任案等制度也都是宪法实施的保障制度。应该如何认识这些制度存在的必要性及正当性？与违宪审查制度相比，这些制度对于保障宪法实施具有哪些优点及缺点？应如何处理违宪审查制度与弹劾等制度的关系以确保它们共同服务于宪法的良好实施？对此，作者从不同的角度进行了有深度的理论分析，为学术界进一步思考这些重要问题提供了有益的思路与方法。

关注中国现实、突出本土的价值、以中国社会为背景进行学



术讨论是本书的另一个特点。在实践中，随着依法治国目标的提出和入宪，宪法在国家法治建设中的重要地位逐渐受到人们的肯定；而“国家尊重和保障人权”的规范入宪，更使宪法在人权保障中的功能为人们所认知。本书作者认为，我国宪法在依法治国和人权保障上的作用并没有充分地发挥出来，这与实践中一些违宪行为及违宪现象得不到及时的纠正、违宪主体不能及时被追究相应责任具有一定的关系。对违宪责任的漠视造成的结果是，虽然宪法的重要性被提高到了相当高的层次（宪法是国家的根本大法，违宪被视为“最大的违法”），但违宪行为总是被“重重提起，轻轻放下”，“违法、犯罪可怕，违宪不可怕”的现象的存在是比较严重的。这在事实上已经严重影响了我国宪法的贯彻实施，也有损于宪法的权威和尊严。但是，在另一方面，“违宪”或“违宪审查”又成为当下中国学术甚至大众话语中的公共语汇，动辄认为某种行为构成了违宪，一些本应是仅涉及合法性判断的问题被提升到合宪性层次，一旦公民的某项权利受到侵犯而又难以寻求明确的普通法律救济时即诉诸于宪法。这些情况使人们对违宪问题的认识和研究容易陷入误区，造成了理论上的混乱，对严格的宪法学研究规范的形成也会产生消极影响。作者认为，违宪与违法是两个不同的概念，违宪责任与宪法责任亦有区别，这有助于厘清学术研究中在这些问题上的混乱。此外，本书中对违宪责任成立基础的研究、对违宪构成要素的具体分析以及对违宪责任性质的研究等内容都表明了作者在这些问题的系统的理论思考，其研究具有一定的原创性。

本书逻辑清晰，结构完整。作者坚持宪法学基本的分析与论证方法，以“违宪责任”为核心范畴，以宪法的双重属性即宪法的法律性与政治性为主线，从违宪与违法的基本关系入手，突出违宪责任的独立价值，较为系统地研究了违宪责任的生成基础、违宪构成、违宪判断的依据与基准、违宪责任的性质与内容以及违宪责任的追究机制等重要内容，从而架构了较为完整的违



宪责任的一般理论体系。

违宪责任是一种综合性的研究课题，存在着一定的理论难度。作者虽系统地探讨了违宪责任的范畴与体系问题，但对有些问题的探讨还缺乏理论深度。比如，违宪主体的多样性问题、违宪责任与政治责任之间的界限、违宪的多样性与违宪审查制度不同成因之间的内在联系、违宪审查标准与社会变迁之间的关系等问题都是需要作者继续研究的重要课题。另外，在研究方法上，作者虽注意采用综合化的研究方法，但对有些学术命题的论证，缺乏第一手的实证资料，造成这些学术命题与现实生活之间的脱节。在宪法判例的分析和资料的选择上，作者若对来自于非西方的经验给予关注的话，有可能丰富本书的学术论证。

国建随我读书若干年来，努力克服年轻人的浮躁心态，真正潜心于学术研究，对宪法学的一些基本原理能够进行较为深入和系统的思考。特别是，作为在职攻读博士学位的老师，在完成繁重的教学任务的同时，要写出 30 余万字的博士论文是不容易的。其博士论文《违宪责任论》受到了论文评委和答辩委员会委员的普遍好评。论文答辩结束后，作者根据评委和答辩委员提出的一些建议，对论文的内容进行了修改和补充，完成了这本有一定分量的学术著作。

现在他的著作付梓，作为指导老师，我感到由衷的高兴，也期待他在以后的学术研究中能够取得更大的成绩，为中国宪法学的发展贡献自己的智慧和力量。

韩大元

2006 年 6 月 16 日



内容摘要

宪法的生命在于实施。违宪责任制度是通过追究违宪主体的责任以保证宪法实施的制度。违宪责任理论是构建违宪责任制度的基础性理论，是违宪审查机关及其他机关判断违宪以及追究违宪主体责任的理论依据。完善的违宪责任理论有助于科学地界定违宪主体、判断相关主体的行为是否违宪以及如何承担违宪责任，对保障宪法的实施具有重要意义。

违宪是违宪责任理论中的基础概念，它与违法是两个不同的范畴，两者在主体、法律依据、责任内容和追究机制等方面存在着区别。同时，违宪责任与宪法责任也是两个不同的范畴，宪法责任是国家机关实施宪法的积极责任，违宪责任是国家机关等违反宪法所应承担的消极责任。违宪与违宪责任之间具有严密的逻辑联系，在结构和价值上具有同一性，违宪是违宪责任的前提，承担违宪责任是违宪的必然结果。

违宪责任的正当性不仅在于宪法作为实定法的规定，更重要的是其具有坚实的理论基础。其理论基础包括五个方面：（1）先定约束和民主政治的悖论与破解，这是违宪责任成立的哲学前提。先定约束是前人通过宪法为后人施加的约束，对宪法的遵从表示对先定约束理念的接受，其根据是民主的缺陷，违宪责任制度是保障先定约束理念实现的制度。（2）宪法的法律性。宪法是法而不是政治纲领或政治宣言。法律性是宪法的主要特性，通过宪法对国家权力的直接强制性以及被适用等方面表现出来。宪法的法律性是违宪责任作为法律概念成立的法理前提，使违宪责任具有法律意义上的确定性。（3）宪法的至上性。宪法在法律体系中具有最高位阶，高度概括了法律体系中的价值内



涵，直接约束国家立法。宪法的至上性使得违宪责任获得价值上的独立性，而成为违宪责任成立的制定法基础。（4）宪法的成文化。成文宪法取代不成文宪法是世界宪法发展的基本趋势，它明确了宪法的渊源，使得宪法至上性的实现成为可能，是违宪责任区别于民事责任、刑事责任、行政责任等概念得以成立的形式根据。（5）宪法成为人权的第一保障法。早期宪法仅具有宣示性意义，不能直接为公民权利提供保障，公民权利由普通法律予以保障。二战后，宪法取代法律成为人权的第一保障法，这是违宪责任概念成立的实质根据，它使违宪责任获得了人权保障的价值内核。

违宪是违宪责任的逻辑前提，因为只有某种行为被确定为违宪后才有可能及必要追究相关主体的违宪责任。违宪构成理论是确认违宪是否成立的理论。违宪构成包括违宪主体、违宪客体、违宪客观方面和因果关系等要件。违宪主体包括立法机关、行政机关、司法机关以及政党，公民和一般社会组织不能构成违宪主体；违宪客体是指宪法所保障而为违宪行为所侵害的宪政秩序和公民的基本权利；违宪客观方面是指违宪主体作出的违反宪法的行为。立法机关的立法行为以及一定条件下的立法不作为可以构成违宪，行政机关的执法行为、立法行为以及一定条件下的行政不作为可以构成违宪，司法机关的违宪判决以及政党的行为也可以构成违宪。违宪构成中的因果关系具有复杂性和不确定性等特点。

违宪审查机关在进行违宪判断时，可直接根据宪法规范作出违宪判断。在缺乏宪法规范时，宪法原则或宪法精神也可以成为违宪判断的依据。宪法序言能否成为违宪判断的依据依各国宪法序言本身的内容而定，一般情况下宪法序言不能单独成为违宪判断的依据，但可以作为解释宪法条文的参考。宪法性法律不可以作为违宪判断的依据。宪法惯例可以作为违宪判断的依据，但运用时必须十分谨慎。宪法判例可以作为违宪判断的依据，但在必

要时可以被推翻。

违宪审查基准是违宪审查机关判断立法或政府行为合宪性的标准。合理而科学的违宪审查基准是各国独特宪政价值的反映,可以增强违宪判断的可信度和可接受性。美国式的双重基准和德国式的比例原则是两种有代表性的违宪审查基准。双重基准由美国联邦最高法院大法官斯通提出,强调根据立法性质的不同适用不同的基准对其进行合宪性审查,从而对不同的权利施以不同程度的保护,具体分为合理性基准、严格合理性基准以及严格审查基准三种。除美国外,双重基准还被日本、韩国等国的违宪审查机关所采用。德国式的比例原则强调通过对立法目的与手段之间的关系进行考量以确定立法的合宪性,它要求立法限制公民权利时必须基于合法的目的、采用恰当的手段以及在目的与手段之间具有合理的联系。

违宪责任具有法律性和政治性双重性质,以法律性为主,这是由宪法的法律性和政治性双重性质所决定的,并通过违宪责任内容以及违宪责任的追究机制表现出来。违宪责任的内容包括法律性的违宪责任和政治性的违宪责任,法律性的违宪责任包括立法或行政行为失去效力、政党资格的终止、国家赔偿以及在一定时间内完成立法等内容,政治性的违宪责任是指国家公职人员被剥夺继续任职的资格。

违宪责任具有较强的政治性,这使得违宪责任的追究具有一定的不确定性。违宪审查机关只有在某些条件具备时才会追究违宪主体的责任,其条件是违宪责任的追究无损于违宪审查机关的宪法地位、对相关主体违宪责任的追究有必要且有充足的理由。当违宪责任追究的时机不成熟时,违宪审查机关可以采用某些变通形式而不是立即或直接追究违宪主体的责任。

违宪责任的追究机制有两种,即司法性的违宪责任追究机制和政治性的违宪责任追究机制。司法性违宪责任追究机制是通过违宪审查的方式追究违宪主体的违宪责任,具体有司法审查体



制、宪法委员会体制和宪法法院体制三种模式；政治性违宪责任追究机制主要有弹劾、不信任案和引咎辞职等具体方式。由于受政党政治以及程序不确定性的影响，政治性违宪责任追究机制的运行效果较差。为了更好地追究违宪主体的责任，一方面要扩大司法性机制的权力范围，另一方面要加强政治性违宪责任追究机制中的法律性因素。



Abstract

The vitality of constitution lies in its enforcement. The enforcement of constitution is ensured through a liability system of unconstitutionality through investigating the involved subjects' liabilities in the unconstitutionality. The theory of unconstitutionality liability is the foundation for establishing the liability system of unconstitutionality, and is also theoretical basis for the constitutionality review organs and other relevant organs in judgment of unconstitutionality and investigating the subjects' liabilities in the unconstitutionality. A sound theory of unconstitutionality conduces to defining scientifically the subjects in the unconstitutionality, and to judging whether the involved subjects' acts are unconstitutional or not and how the subjects shall bear the liability. Therefore, the sound theory of unconstitutionality plays a significant role in enforcement of constitution.

Unconstitutionality is a basic concept in the theory of unconstitutionality liability and is different from the concept of illegality. Unconstitutionality and illegality are different in terms of subjects, legal gist, content of liability and the liability investigation mechanism. Meanwhile, unconstitutionality liability is different from the concept of constitution responsibility. Constitution responsibility refers to the positive responsibility that the state organs take in enforcing constitution, while unconstitutionality liability refers to the negative responsibility that the state organs shall bear in case of unconstitutionality. Between unconstitutionality and unconstitutionality liability exists a rigorous logical connection in that they are the same in terms of constituents and val-



ue. Unconstitutionality is the premise for unconstitutionality liability, and to bear the unconstitutionality liability is the inevitable consequence.

The legitimacy of unconstitutionality liability lies not only in the provisions of constitution but also in solid theoretical foundation of constitution. Its theoretical foundations include the following five aspects. The first is the paradox and explanation of the paradox between the pre-determined restrictions and democracy, which is the philosophical premise for the justification of unconstitutionality liability. The pre-determined restrictions are the constitution adopted by the ancestors that are binding on the successors. Abiding by the constitution means the acceptance of the concept of pre-set restrictions, which intend to cure the defect of democracy. Therefore, unconstitutionality liability system ensures the actualization of the institution of pre-determined restrictions. Second, constitution is a law. Constitution is not political guidelines or political declaration. The main characteristic of constitution is that it is law, which is embodied in its direct force on state power and its implementation. Constitution being law is the jurisprudence premise for unconstitutionality liability as a legal concept, and ensures unconstitutionality liability of definiteness of legal sense. The third is the supremacy of constitution. Constitution enjoys supremacy in the legal system, and highly generalizes the value and significance of legal system and directly binds state legislation. The supremacy of constitution endows unconstitutionality liability with independent value, and lays the legal foundation for justification of unconstitutionality liability. The fourth is the written statute of constitution. The written constitution replacing the unwritten one represents the basic trend of constitution development in the world. The written statute specifies the sources of constitution and makes possible the actualization of the su-



premacv of constitution, which also makes the formal basis for justification of unconstitutionality liability that differs from civil liability, criminal liability and administration liability etc. The fifth is that constitution is the primary law that protects human rights. Constitution in its earlier stages of development had proclamatory senses and could not directly protect people's rights that were originally protected by ordinary law. After the World War II, constitution took the place of the ordinary law and became the primary law that protects human rights, which is the substantive foundation for the justification of the concept of unconstitutionality liability and thereby unconstitutionality liability gains its core value of protecting human rights.

Unconstitutionality is the premise for unconstitutionality liability. Only when certain performance is proved to be unconstitutional, can the investigation of unconstitutionality liability become possible and necessary. The constituent theory of unconstitutionality is the one that defines unconstitutionality. The constituents are subject, object, objective fact and causation in the unconstitutionality. The subjects of unconstitutionality are legislatures, administrative organs, judicial organs and political parties. Citizens and ordinary social organizations cannot become the subjects of unconstitutionality. The objects of unconstitutionality refer to constitutional order and citizens' fundamental rights infringed upon by unconstitutionality. The objective fact refers to the subject's unconstitutional performance. The performance of lawmaking and nonperformance of lawmaking under certain circumstances for the legislature can constitute unconstitutionality. The law enforcement and lawmaking and administrative nonperformance under certain circumstances for the administrative organs can also constitute unconstitutionality. The unconstitutional judgment made by the judicial organs and behaviors of political parties can also constitute uncon-



stitutionality. The causality in unconstitutionality is quite complicated and precarious.

Constitutionality review organs can make judgment of unconstitutionality according to provisions of constitution. If there is no relevant provision, the fundamentals principles and spirits of constitution can form the basis for making the judgment of unconstitutionality. Whether the preface of constitution can be the basis for judgment of unconstitutionality depends its content. Usually, the preface itself cannot form the basis for judgment of unconstitutionality, but can be referred to in interpretations of the provisions of constitution. The constitutional laws cannot become the basis for judgment of unconstitutionality. The constitutional conventions can be the basis for judgment of unconstitutionality but must be excised cautiously. The constitutional judgments can be the basis for making judgment of unconstitutionality, but can also be overruled if necessary.

The constitutionality review organs adopt the stand for constitutionality review in judging whether the performances of the legislature and government are constitutional or not. Reasonable and scientific standards for constitutionality review reflect individual country's unique value of constitutional order, and can enhance the validity and acceptability of the judgment of unconstitutionality. The American double standard and German proportion principle are the main standards for constitutionality review. The double standard put forward by Justice Stone of Federal Supreme Court of US differentiate the natures of legislation in the application of stand in constitutionality review so as to provide different degrees of protection of different rights, and can be categorized as rationality test, strict rationality test and strict scrutiny. Double standard is also adopted by constitutionality review organ in Japan, South Korea etc. The German proportion principle judges wheth-



er the legislation is constitutional or not by measuring the relation between the objectives and the instruments of legislation. The principle requires that the restriction of citizens' rights be based on the legislation objectives and be realized through proper instruments, and that there must exist causality between the objectives and instruments.

Unconstitutionality liability has the double political and legal natures with the legal nature being the primary one, which is determined by the double political and legal nature of constitution, and is embodied through the contents and investigation mechanism of unconstitutionality liability. The contents of unconstitutionality liability include the legal aspect and the political aspect. The legal aspect includes the invalidation of legislation and administrative performance, the termination of party title, state compensation and legislating within time limit etc. The political aspect of unconstitutionality liability is the deprival of title as a government public servant.

The political nature of unconstitutionality liability makes investigating the liability quite precarious. Only provided with certain conditions will the constitutionality review organs investigate the subjects' liability in the unconstitutionality. The conditions are that investigating unconstitutionality liability won't harm the constitutional status of the constitutionality review organs, and that there must be necessity and sufficient reasons for investigating the relevant subjects' liability in the unconstitutionality. When the opportunity to investigate unconstitutionality liability is not ripe, the constitutionality review organs can take a flexible way by not immediately or directly investigating the unconstitutionality liability.

There are two mechanisms for investigating unconstitutionality liability, namely the judicial one and the political one. The judicial mechanism is to investigate the subjects' liability through constitution-