

21st Century Law Series

21 世纪法学文库

走向良治的 宪政建构

以宪法性国家权力运行分析为基点

The Construction of Constitutionalism
Heading for Benign Governance

—The Analysis of
Constitutional State Power Operation as
Basic Point

王三秀/著



社会科学文献出版社
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内 容 提 要

走向良好治理是人类文明成长的内在要求和重要标志。尽管从古希腊开始,许多思想家都致力于这一目标的探求,但只有通过以国家权力、社会权力整体制度安排为内容、且具有人民主权、基本人权、法治、正义等深厚价值蕴含的宪法及宪政,这一目标的实现才能得到根本性保障。而从中外相关的研究成果看,关于治理、良治问题的探讨主要集中在政治学、公共管理学领域,而在宪法学视域内,仅有国外个别学者有所触及。

本书在导论部分首先阐明了探讨治理、良治的基点,提出了良治应有的底线。在对良治与宪法、宪政关系简要考察与分析后,提出以良治为视角研究宪法、宪政问题相对于学科自身及法理学、政治学、管理学所特有的理论与实践价值。在对现有良治标准、宪政概念系统述评并提出自己相关新理念的基础上,分别从人民权力与国家权力运行关系、国家权力之间的运行关系、国家权力运行方式、运行功效、国家权力与其他权力关系、国家权力运行偏轨的宪政矫正六个方面系统论述了宪政权力构造与良治实现的内在关系。基本思路是,从非立宪到立宪权力构造是人类走向良治的根本保障,但民主立宪并不能

一劳永逸地解决良治的实现问题,而是需要根据良治实现的客观要求,不断进行宪政理论与制度的创新,促进国家不断走向真正的和更高层次的良治。

在上述分析的基础上,本书将法理、实证、规范、价值、比较等多种分析方法有机结合,客观评价并广泛吸收国内外学者在良治、宪政理论研究的新成果及西方宪政、良治的实践经验。同时,将科学发展观、党依法执政等理念融入宪法学研究,以良治为视角,对宪政权力运行及建构的理论与制度展开了极为深入、系统的创新性研究。

Abstract

Heading for benign governance is the intrinsic requirement and principal mark of human civilizations. Although many thinkers have been devoting to researching and seeking this project from Ancient Greeks, only constitution and constitutionalism which content the complete institutional arrangement of state and social powers, and a series of values as people severity, principal human right, the rule by law and justice can supply the basic guarantees for the realization of benign governance. However, from foreign and domestic relating research results, the research of governance and benign governance are mainly centralized on the field of politics and public management. In the observing field of constitutional science, just a few foreign scholars have mentioned this problem.

In the introduction of this book, the author first elucidates the basic point of discussing governance and benign governance, and puts forward the bottom line of benign governance. After inspecting the relationship between benign governance, constitution and constitutionalism briefly, the author puts forward the special values of the constitutionalism study from benign governance research observing angle compared with itself, Jurisprudence, politics and administrative science. On the basis of inspecting present standards of benign governance and the concepts of constitutionalism and putting forwards the author's re-

lating new ideas, from six aspects, including the relationship between people powers and state powers, the relationship of states, the ways of state powers operation, the constitutionalism perusing of functional effectiveness of state power operation, the relationship between the state powers and other powers, the constitutionalism rectifying of powers operation deviation, the author analyses and demonstrates the relationship between the contraction of constitutionalism powers and realization of benign governance. The Basic logical view is that the converting from unconstitutional to constitutionalism power construction is the basic guarantee. However, constitution and constitutionalism can not solve the problem of realization of benign governance for ever, it is necessary to renew the constitutionalism theories and institutes continuously according to the objective requirements of benign governance, to improve the state heading for real benign and better governance.

The Author makes use of combining methods of jurisprudence, positive analysis, norms, values, comparison, takes in the research results of benign governance, constitutions and constitutions norms and practice of benign governance, at the same time, the author merges the ideas of scientific development, party ruling country by laws in the studies of constitutionalism from the benign governances observing angle, conducts deep and systematic renewing studies in the theories of operation and construction. about constitutionalism powers and the basic point of state powers.

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导 论

一 探讨治理、良治问题的基点

人类社会正常维持及其发展离不开治理，而治理与公共权力始终有着不可分割的联系。美国著名人类学家摩尔根在《古代社会》一书中，以丰富的实际资料证明了公共权力不仅在氏族社会已经存在，如部落议事会、人民大会，而且在部落联盟中以特有的方式和目的运作，对氏族社会发挥特有的作用，如在易洛魁氏族中主要表现为调整有关氏族的事务、为本氏族成员命名、主持节日庆典，等等。^①从而有效地维护着氏族社会的正常秩序。人类进入阶级社会之后，公共权力呈现出一种新的形态，从其性质到运行目的都发生了重大转变，成为特定主体实现其某种利益的一种重要政治手段，但对社会治理作用不仅没有减弱而且发挥更加突出的作用。恩格斯揭示，作为一种新型公共权力，国家表示这个社会“就需要有一种表面上驾于社会之上的力量，这种力量应当缓和冲突，把冲突保持在‘秩序’的范围以内；这种从社会中产生但又自居于社会之上并且日益同社会脱离的力量，就是国家”^②。而缓和社会冲突、维持社会秩序是国家权力治理功能的典型表现。所以，笔者同意这样一

① [美] 摩尔根：《古代社会》，杨东莼等译，商务印书馆，1997，第75～79页。

② 《马克思恩格斯选集》第4卷，人民出版社，1972，第166页。

种看法,“从历史角度看,狭义的‘治理’定义一直存在。如何有效地运用政治权力,实现政治权力的根本服务目标是不同国家形态必然面对的任务”^①。本书所探讨的治理问题正是以国家权力的运行为基点,同时也在一定程度上涉及广义的治理问题。^②

如果说治理的核心问题是国家权力的运行问题,那么良治则无疑是指国家权力的良好运行状态。在人类政治法律思想史上,古希腊著名政治思想家亚里士多德是较早系统论述治理、良治的思想家,他提出一切社会团体形式总的目的就是为了完成某种善业。作为特殊社会团体的国家(城邦),本质上就是一种至善的团体。“凡订有良法有志于实行善政的城邦就得操心全邦人民生活的一切善德和恶行。所以,要不是徒有虚名,而真正无愧为一‘城邦’者,必须以促进善德为目的。”^③美国近代著名思想家托马斯·潘恩也明确阐明政府与良治问题,“政府——即因德行无法治理世界而变得必要的一种统治模式——出现和兴起;这里也有政府的设计和宗旨,即自由和安全”^④。同时,他还辩证地评价当时英国政治治理,相对于黑暗而奴性的时代,它很高尚。因为当世界受到暴君的蹂躏时,哪怕摆脱其一点点,也是一次光荣的拯救行为,但是,英国的政体并不完美,那里动乱频仍,无法产生它似乎承诺了的东西。林肯在论政府的本质时指出,政府是一个国家的人民为了实现某些目标,

① 杨雪冬:《要注意治理理论在发展中国家的应用问题》,载《中国行政管理》2001年第9期,第20页。

② 广义的治理概念是指,在20世纪90年代政治学、行政学领域,西方学者提出的颇受关注的治理、善治的观点,涉及政治权力与社会权力、经济权力的互动关系,下文即做述评。

③ [古希腊]亚里士多德:《政治学》,吴寿彭译,商务印书馆,1965,第138页。

④ [英]彼得·斯特克等:《政治思想导读》,舒小昀等译,江苏人民出版社,2005,第30页。