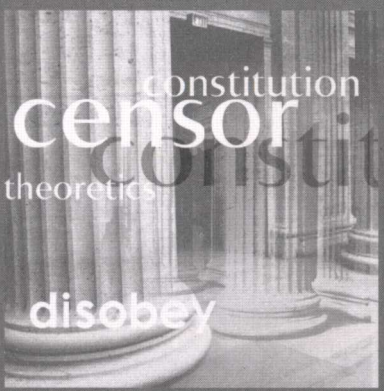
Konrad Adenauer Stiftung

德国阿登纳基金会
资助项目

违宪审查的理论与实践

THEORY AND PRACTICE OF CONSTITIONAL REVIEW



莫纪宏 主编
Mo JiHong ed.

法律出版社
LAW PRESS · CHINA

德国阿登纳基金会资助项目
Theory and Practice of Constitutional Review in China

违宪审查的理论与实践

THEORY AND PRACTICE OF CONSTITIONAL REVIEW

莫纪宏 主编
Mo JiHong ed.

法律出版社
LAW PRESS · CHINA

图书在版编目(CIP)数据

违宪审查的理论与实践/莫纪宏主编. —北京:法律出版社,2006.12

ISBN 7-5036-6848-2

Ⅰ.违… Ⅱ.莫… Ⅲ.宪法—司法监督—研究—世界 Ⅳ.D911.04

中国版本图书馆CIP数据核字(2006)第150458号

违宪审查的理论与实践	莫纪宏 主编	责任编辑 王旭坤 装帧设计 乔智炜

开本 A5　　**印张** 17　　**字数** 395千

版本 2006年12月第1版　　**印次** 2006年12月第1次印刷

出版 法律出版社　　**编辑统筹** 法学学术出版分社

总发行 中国法律图书有限公司　　**经销** 新华书店

印刷 北京北苑印刷有限责任公司　　**责任印制** 陶　松

法律出版社/北京市丰台区莲花池西里7号(100073)

电子邮件/info@lawpress.com.cn　　销售热线/010-63939792/9779

网址/www.lawpress.com.cn　　咨询电话/010-63939796

中国法律图书有限公司/北京市丰台区莲花池西里7号(100073)

全国各地中法图分、子公司电话:

第一法律书店/010-63939781/9782　　西安分公司/029-85388843

重庆公司/023-65382816/2908　　上海公司/021-62071010/1636

北京分公司/010-62534456　　深圳公司/0755-83072995

苏州公司/0512-65193110

书号:ISBN 7-5036-6848-2/D·6565　　**定价**:35.00元

违宪审查的理论与实践

主　　编：莫纪宏
参加撰写人员：刘兆兴　蒋南成　张　莉　李　岩
王祯军　王亮亮　聂秀时　莫纪宏

前　言

本书是德国阿登纳基金会资助的“法律、法规的合宪性审查”项目的最终研究成果。根据项目的基本要求，本书侧重于在三个方面进行研究，并以此实现课题立项时所要达到的立项要求。

第一，本书对违宪审查的基本理论问题进行了探讨。在这一部分，总共研究了三个问题，一是研究了违宪审查的价值功能、历史发展和基本类型。本书在介绍违宪审查的价值功能时，将违宪审查作为实施宪法的一项重要制度，并且是保障宪法的法律权威性的重要制度措施。通过违宪审查，发现和纠正各种违宪现象和问题，从而更好地保证宪法得到有效实施。此外，为了进一步明确违宪审查的制度功能，本书还通过比较违宪审查与宪法监督、宪法诉讼的价值功能的区别，进一步明确了违宪审查作为保障宪法实施的一项重要宪法制度所具有的独特的制度功能。本书还对违宪审查的起源以及历史演变作了较为详细地介绍和探讨，指出现代违宪审查制度经过了萌芽、发展和成熟三个不同的阶段。该制度最早起源于1803年美国最高法院所审理的“马伯里诉麦迪逊”案。在该案件中，美国联邦最高法院通过创造性地行使违宪审查权，宣布了违宪的法律无效这一违宪审查的重要原则，明确了宪法作为根本法所具有的法律效力。违宪审查制度在不断发展的过程中，逐渐地发展出不同的制度模式。20世纪初期，在欧洲大陆发展出以审查违宪案件为主要目标的专门的宪法法院，宪法法院制度在第二次世界大战后得到了迅猛发展，并在保障宪法的实施中起到了非常重要的作用。目前，违宪审查制度主要存在两种模式：一种是美国式的附带型违宪审查模式，即由普通法院在审理普通案件的过程中，对违宪问题进行附带审查；另一种是

德国式的宪法法院模式，即普通法院不能审查违宪问题，必须由宪法法院来处理违宪问题。此外，还有法国宪法委员会式的违宪审查制度。就目前的违宪审查机制来说，主要是针对立法机关制定的法律进行的违宪审查。而这种对法律的违宪审查通常分为事前审查（如法国宪法委员会在法律正式生效之前进行的审查）和事后审查（包括美国的普通法院和德国的宪法法院都是基于具体的案件来进行审查）。许多国家正在将事前审查与事后审查两种制度结合起来使用，并以此来作为保障宪法实施的重要机制。

在违宪审查的基本理论部分，本书还对违宪主体和违宪审查的对象这两个问题作了详尽地研究。针对以往违宪审查理论没有明确地区分违宪主体与违宪审查对象在违宪审查理论中所具有的不同的价值，本书对这两个概念进行了严格地区分。首先，违宪主体是违宪行为的实施者，建立违宪审查机制，对违宪现象进行必要的监控，归根结底还是取决于对实施了违宪行为的主体进行有效地监控。只有违宪主体自身的行为得到了宪法上的必要的监控，各种违宪行为或者是违宪现象才能得到有效避免。从违宪主体的认定标准来看，违宪主体必须是宪法上赋予了宪法职权的宪法关系主体，那些不是依据宪法的规定而行为的主体，如普通公民的日常行为、企业法人的生产经营行为，都不能视为违宪主体的行为。一般来说，违宪主体包括国家立法机关、国家行政机关、国家司法机关、依据宪法授权的社会组织和公民个人等。其次，违宪主体的行为比较复杂，并不是违宪主体的所有行为都属于违宪审查的对象。违宪审查的对象在性质上是与受宪法约束的对象在内涵上是等同的。所以，只有依据宪法的规定产生的国家机关行使宪法职权的行为、国家立法机关依据宪法赋予的立法权制定的法律规范以及公民个人依据宪法行使基本权利的行为才受宪法的约束，因此，也才能成为违宪审查的对象。最后，违宪主体与违宪审查的对象在整体上是以违宪审查的客体的性质与行使违宪审查权的违宪审查机构相对应的。在现代法治国家中，由于国家机关的一切权力都是基于宪法的规定而产生的，因此，在制度上

明确违宪主体与违宪审查的对象的概念以及两者之间的价值区分，有助于突出在法治社会中合宪性概念的至高无上的价值地位，有利于全面实现宪政的价值理想。

第二，本书的第二部分，全面和系统地介绍了6个国家的违宪审查制度的理论和实践问题，其中，作为违宪审查制度最具代表性的美国普通法院式的违宪审查机制、德国专门的宪法法院式的违宪审查机制以及法国的宪法委员会式的违宪审查机制，在该部分都作了历史和现状的全面地考察和分析，基本上概括了这三种具有代表性的违宪审查制度的基本内容和主要特征。此外，本部分还重点介绍了亚洲目前三个实行了违宪审查制度的国家中的违宪审查机制，其中包括借鉴了美国附带型违宪审查模式的日本的违宪审查机制，借鉴了德国宪法法院模式的韩国的违宪审查机制以及综合地借鉴了国外违宪审查制度的经验而产生的泰国的违宪审查机制。应当说，通过对上述6个国家的违宪审查制度的介绍，对于了解违宪审查制度的发展历史以及国外目前存在的违宪审查制度的总体状况，在学术研究的层面上是很有帮助的，也弥补了目前国内宪法学界对国外违宪审查制度介绍不够系统、全面的不足。

第三，本书的第三部分是关于中国的违宪审查的理论和实践问题的。在本部分中，主要探讨了中国的违宪审查制度的产生和发展的历史、目前的现状、存在的问题以及从总体上推进中国的违宪审查制度建设的对策；与此同时，本书还就“孙志刚案件”引发的“法律、法规的合宪性审查”问题进行了学理分析，指出了目前我国违宪审查的理论和实践中存在的理论认识误区和实践中的认识盲点。此外，本书还就宪法在中国的司法审判中的适用性问题，结合最高人民法院和地方各级人民法院所作出的司法判决，进行了比较实证的分析，指出了目前宪法在司法审判中被适用的状况以及存在的理论和实际问题，提出了如何进一步强化宪法在司法审判中的适用性，健全和完善有中国特色的违宪审查制度的学术建议。

此外，本书还附录了两篇探讨我国违宪审查理论与实践的英文

论文，其中的主要观点在本书第三部分研究成果中有所体现，但也有一定发展，这些英文论文是主编参加国际研讨会时提交大会的发言稿，反映了课题的一部分研究成果。

很高兴，本书能够在预期的时间内按时付梓，在这里要特别地感谢著名的德国法专家刘兆兴先生以及巴黎第一大学的公法学博士张莉女士，由于有他们的加盟，才使得本书最终能够保质保量地完成任务。

莫纪宏

二〇〇六年十月于北京万寿路

Introduction

The present research on "The Theory and Practice of Constitutional Review" has been financed by the Konrad-Adenauer-Stiftung in 2005. According to the original plan, the scope of this research programme was restricted to the subject of constitutional review of laws and regulations. In consideration of the importance of constitutional review in other countries than China, the researching group decided to expand the dimensions of the research by analysing the theory of constitutional review in foreign countries as well. Therefore, the final results of the research study consist of three parts: Part one concerning the basic theory of constitutional review, part two regarding the theory and practice of constitutional review in a sample of foreign countries and part three relating to the theory and practice of constitutional review in China.

In part one, the authors discuss three issues: First, the historical evolution, function and characteristics of constitutional review, second, the subjects, which commit unconstitutional behaviour and third, the objects, which are in contradiction with constitutional laws.

According to the authors, the development of constitutional law can be divided into three stages, i. e. the birth stage, the developing stage and the stable stage. In the initial stage, one particular law case had a great influence on the mechanism of constitutional review in the United States. The *Marbury v. Madison* case was adjudicated by the Supreme Court of the United States of America in 1803. With this case, the Supreme Court of the USA created a new system empowering courts to re-

view the constitutionality of laws made by the legislature and setting up a principle to regard laws that contradict the constitution as null and void. However, during most of the 19th century, constitutional review didn't develop as quickly as it could have.

At the beginning of the 20th century, special government bodies had been constructed in some European countries, which took charge of constitutional review. Such constitutional courts could, for example, be found in Austria and in Spain. After the Second World War, a similar system of constitutional review developed in many other countries. Some countries imitated the American model, while others learned from experiences in Germany, where special constitutional courts had been set up. In France, *Le Conseil Constitutionnel* was established based on the French Constitution of 1958 with the purpose of reviewing statutes before adoption. The system of constitutional review finally entered a stable stage after the political transitions took place in the 1990s in the states of the former Soviet Union, as well as in Middle and East European countries. The system of constitutional review in those countries has been stable and effective in guaranteeing implementation of constitutional law since.

The authors believe that constitutional review should depend on constitutional supervision and constitutional litigation in order to find and correct unconstitutionality of laws and behaviors. The purpose of constitutional supervision is to monitor actions enforcing constitutional powers based on the theory of people's sovereignty. Thus, the quality of constitutional supervision has to be procedural and successive. Any unconstitutional act or behaviour that is found by the supervisory agency during the procedure of constitutional supervision needs to be reviewed. Constitutional litigation aims at resolving constitutional disputes between different government bodies, which have a certain amount of constitutional

power, or between government bodies and individual citizens. If any act or behaviour is considered to be unconstitutional, a constitutional review should be initiated to resolve the dispute. This unique goal for reviewing unconstitutionality of government bodies or ordinary acts passed by the congress before approval can, for example, be found in the mechanism of *Le Conseil Constitutionnel.* In a more general sense, constitutional review can be regarded as an independent constitutional system in a bid to safeguarding the implementation of constitutional law.

Basic questions of the theory of constitutional review are 'who should be supervised?' and 'what kinds of law or behaviour should be reviewed?' and 'what should be answered through constitutional reviews'. Subjects, who commit unconstitutional behaviors, are supervised and must be reported to the mechanisms of constitutional review in some countries. There are many explicit provisions on subjects committing unconstitutional acts or behaviour. However, in other cases, objects, which act in contradiction to constitutional law, have been underlined by most of constitutional contexts. Based on political consideration this means that subjects, who commit unconstitutional acts or behaviour, have to be omitted in order to make relations among the different government bodies balanced and coordinated. Therefore, the subjects committing unconstitutional acts or behaviour on one side and the objects in nonconformity with constitutional law on the other side become two core contradicting concepts in the theory of constitutional review.

On the basis of general statistics on different constitutional systems, subjects committing unconstitutional acts or behaviour include the following bodies and/or persons: the supreme legislature, the President, the Supreme Court and other government bodies, which have been authorized by the constitutional law. Objects in nonconformity with constitutional law generally refer to the law (in different forms), the state ac-

tions (legislative, administrative and judicial actions) and actions enforcing basic rights provided by constitutional law. The legislature and its laws commit most of the unconstitutional acts or behaviour and are most significant in nonconformity with constitutional law. The main task for constitutional review therefore has to be to review unconstitutionality of laws made by the legislature, especially by the supreme legislature in different countries.

In the second part of the study, the authors go into further detail on the concrete mechanisms of constitutional review in different countries.

In Chapter IV, the authors introduce the historical evolution of constitutional review in the USA, pointing out the main developing stages of American constitutional review. The authors analyze the judicial review of laws before the birth of the "Declaration of Independence" and points out that the established system of judicial review in each of the British colonies provided the basis for constitutional review of the US-Federation. The case of *Marbury v. Madison* became the starting point for constitutional review through judicial procedure and from then on the conception of constitutionality of laws and state actions has concerned both theory and practice. The significance of the precedence created in the case of *Marbury v. Madison* lies in different aspects, such as in intensifying the uniformity of the states in the federal domain, in consolidating the unity of legality amongst different states and in erecting an authority of constitutional priority over all ordinary laws made by the Congress. In the development phase of constitutional review in the USA, the Supreme Court played a very important role in constructing the modern constitutionalism. The authors illustrate the clues by exemplifying the legal changes regarding the rights of black people in the United States by introducing several cases of that time, such as *Dread Scott v. Sandford*, *Plessy v. Ferguson*, *Brown et al. v. Board of Education of Topeka* and

others. In above cases, the Supreme Court created a number of judicial principles, which demonstrated the differences in jurisprudence and sustained judicial justice through constitutional interpretation. It should be pointed out that the contradictory attitude can be found in different judgments made at different times, particularly in regard to protecting equal rights in education. In some regard, judicial justice shown in judgments made by the Supreme Court of the USA may be seen as visible and obvious justice. The American constitutional review model is a so-called affiliated review, which had great influence on many other countries, like Japan, Australia, Canada and others.

In Chapter V, the authors concentrate on the characteristics of the German constitutional court, the *Bundesverfassungsgericht*. The *Bundesverfassungsgericht* was established based on the German Basic Law/Constitution of 1949, the so-called *Grundgesetz*. Its main task is to act as a defender of constitutional law and resolve all kinds of constitutional disputes among different government bodies and between federal and state bodies. Furthermore, it reviews the possible unconstitutionality of laws made by the federal and the state legislature, handles individual claims regarding the violation of basic rights and interprets the Basic Law. In this chapter, the authors concentrate on the importance of the German constitutional court in protecting human rights through adjudicating individual claims, which have exhausted the legal process. Moreover, the *Bundesverfassungsgericht* has the power to abstract constitutional review and objective litigation, for example, launched by public groups in the area of environmental law and actions. In contrast to the American model, which functions as a constitutional defender, the judgments made by the German constitutional court have direct legal force and all state organs, social organizations and individuals are bound to their decisions. This model of constitutional courts applies to both the federal and the

state level in Germany.

In Chapter VI, the authors discuss the characteristics of *Le Conseil Constitutionnel* in France. As a special model of constitutional review, *Le Conseil Constitutionnel* has the power to review constitutionality of any law before implementation. *Le Conseil Constitutionnel* is different from the German constitutional court and the Supreme Court of the USA. It is a political agency consisting of members from different areas. It takes strict political liability to supervise the actions of the legislature. It deals with cases concerning electoral disputes and presidents' election. As an independent model, its priority in the aspect of constitutional review lies in supervising the constitutionality of international treaties, which need to pass legislature in order to avoid any legal contradiction between domestic and international law. *Le Conseil Constitutionnel* doesn't have the power to handle individual claims regarding basic rights until today though.

In Chapter VII, the authors illustrate the historical evolution of constitutional review in Japan and the characteristics of affiliated review, which takes place in ordinary courts according to Article 81 of the Constitution of 1946. In this chapter, the authors focus on the birth and development stage of the constitutional review system in Japan. The authors refer to the Ming Ji Constitution of 1889 and elaborate on its impact on the construction of the modern constitution. Moreover, the authors analyze the process of drafting and discussing the Japanese Constitution of 1947 and exhibit some characteristics of constitutional review as stipulated by the Constitution. The authors show how the constitutional review system in Japan stipulated in Article 81 of the Constitution has been created in accordance to the American model, brought forward by the occupied forces after the Second World War, and how it doesn't conform to Japanese legal traditions influenced by the Civil Law. Thus, the consti-

tutional review system in Japan has—to some degree—been established under the pressure of democratic and legal reform after the Second World War rather than following its own traditional development. One of the important progresses after the Second World War in Japan can be found in the area of the protection of human rights according to the spirit of peace prescribed in the Constitution of Japan in 1947. The authors systematically introduce the development process of constitutional review in the judicial system, in particular, in the Supreme Court of Japan.

The authors introduce the basic characteristics of the constitutional review system in Japan, including the subjects of exercising the power to review the laws, the category of the objects which should be checked in the reviewing process, the subjects which have the right to ask for constitutional review, the basic standards for constitutional review, the method of examination and the legal force of constitutional review. The authors also illustrate the characteristics and reasons of negative judicial orientation in the process of constitutional review.

In Chapter VIII, the authors introduce the historical evolution of constitutional review in Korea after the Second World War and illustrate the characteristics of constitutional review influenced by the political transitions there. The authors analyze the reason why a constitutional court model could be established in 1988 and explain the significance of the constitutional court of Korea as the first constitutional court replicated from the German model. The authors introduce the importance of the constitutional court of Korea in supervising the actions of political parties and they then analyse the role of the constitutional court in stimulating the construction of the Korean constitutionalism and oriental democratization.

In Chapter IX, the authors have a closer look at the historical development of constitutional review in Thailand and point at the important

role played by the constitutional court in promoting democratic progress within the society of Thailand. The authors describe an interesting phenomenon in the developing process of the constitutional review system where the constitutional court helped Thailand to circumnavigate many political risks, especially by making crucial decisions on general election. It is apparent that the mechanism of constitutional review has played a very important role in constructing a stable and democratic society in Thailand, which forms a good starting point for developing countries in this region. Constitutional courts can guarantee a stable transition of political systems and mutual coordination and cooperation amongst different government bodies, social organizations and individuals. The experiences of Thailand in the field of constitutional review therefore deserve a closer research and imitation.

In the third part of the research, the authors put a stronger emphasis on the theory and practice of constitutional review in China.

In Chapter X, the authors look back at the first constitution of the "New China", and systematically introduce the development of constitutional review. The authors believe that the concept of constitutional review cannot be found in the context of the Constitution of 1954, although the spirit of respecting authorities and prioritising the Constitution were emphasized in the concrete provisions of it. The authors also note that the allegation of unconstitutionality should have been avoided in the report about the Constitution of 1954 presented by Liu Shaoqi. It should rather say that there wasn't a clear mechanism of constitutional review according to the Constitution of 1954. The Constitution of 1975/1978 doesn't have the same or similar provisions about constitutional review.

In the Constitution of 1982 (the present Constitution), the basic principle of respecting and implementing the Constitution has been stressed. In Article 5, it is mentioned that all laws, administrative regu-

lations and local regulations mustn't contravene the Constitution. Nothing has a privilege over the Constitution and laws. In the preface, all government bodies, all political parties, all social organizations, all enterprises and individuals are requested to respect the Constitution and to guarantee its implementation. Moreover, the National People's Congress (NPC) and its Standing Committee have the power and duty to supervise the enforcement of the Constitution. The Standing Committee also has the power to interpret the Constitution and laws according to Article 62 and 67 of the Constitution of 1982. According to Article 99, the people's congresses at the provincial level have the duty to guarantee the implementation of the Constitution in their local regions and according to Article 100, the People's Congresses and their Standing Committee at the provincial levels have the power to pen local regulations on the premise of maintaining their constitutionality. Thus, it may be said that the concept and system of constitutional review has been confirmed and established to some degree in the context of the Constitution of 1982, but the concrete procedures for reviewing unconstitutionality of laws and state organs' behaviour is still limited and unclear.

The breakthrough of constructing the constitutional review mechanism in China stems from the adoption of the Legislation Law passed by the NPC in 2000. According to Article 90 of the Legislation Law, if state organs, social organizations and individuals consider administrative regulations, local regulations and other legal norms that are in contradiction with the Constitution have the right to submit their claims to the Standing Committee of the NPC and to require a constitutional review. Article 90 therefore plays an important role in the establishment of the legal procedures of constitutional review. Since its implementation, many individuals have launched files to the Standing Committee of the NPC to review unconstitutionality of certain regulations based on the Legislation Law.