

法治与和谐社会建设研究中心文丛

宪法与法律世界

石绍斌 著

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内容摘要

宪法是人在一定社会生态中的有序生活方式。该定义中的人既指类的人也指个的人；社会生态的表述则超越了人类中心主义，构成了以人为中心的生态伦理主义；生活方式是对规则本质的诠释，它以一种规范的视角切入，整合了人以及人与生态的协调；而有序则是一切价值的内核，它统率着一切价值形式，考问着既有生活方式的正当性和合法性。宪法并不必然表现为法律，它以法律、道德、宗教等形态表现出来。宪法主导形态的选择取决于既有社会生态的内容。法律世界是社会法则的一种理性表现。法律世界因其独特属性而具有自足性，法律世界又因人的共同属性以及与其他世界的相互关联而具有开放性。法律世界的自足性表现为法律生成的本土性。法律世界的开放性表现为不同地域中人生活的同一性以及法律作用须借助于其他学科的发展而得以彰显。宪法既存在于法律世界

之中,又超乎法律世界。宪法内涵既可覆盖“法”这整个“面”,也可收缩固守“法律”这个“点”。

宪法是法律世界的世界观(或本体论),它契合着宪法作为根本法的理念。西方以一种类自然的方式接纳了社会,中国则以一种内修养的方式接纳了社会,故西方宪法重法律,中国宪法重道德。生态、生活、生命(人)是宪法的内涵。社会生态由政治、经济和文化等构成。三者 in 相互作用的同时,均以各自不同的属性运行着。社会生态的多样性决定了宪法的多样性。宪法因其对社会生态的整体反映而践行着根本法的宗旨。生命(人)具有自然性、社会性和整体性。生命因其客观存在而具有自然性,生命因其相互依赖而具有社会性,生命因其自然性和社会性的统一而具有整体性。生活则表现为自由、秩序、和谐等形态。生活是生命在生态中的展现,它是生命和生态的外在表现形式。生活因生命的存在而呈现出自由,生活因生命的相互依赖而呈现出有序,有序和自由的共融使得生活呈现出和谐。

宪法是法律世界的认识论。强势西方导致了宪法科学主义的滥觞,二元认识论是其应然的结果。二元认识论下的法律世界被划分为公法和私法,宪法归入了公法。生活认识论是对二元认识论的反思。在生活认识论视野中,法律世界是由宪法、公法、私法组成。宪法既不是公法,也不是私法。宪法以法律的形态呈现在法律世界中,它和公法、私法一样具有法律的属性,同时它又在公、私法之间起着一种转呈的作用,使得公、私法有机地融合在一起。

宪法是法律世界的方法论。近代西方资产阶级革命后,宪法

由“隐性”转变为“显性”，宪法的法律形态承载着宪法在法律世界中的使命。宪法是共同体的组织者。从原始人群、氏族、部落、城邦、帝国、民族国家、政治共同体到人类共同体，宪法始终担当着组织的作用。共同体的组成是以公共权力（在民族国家阶段表现为国家权力）的运行为准，公共权力是人的类存在表征。宪法是人生命的诠释者。从成员、臣民、国民、公民到人，宪法诠释着人的生命形态。近代以来的宪法以公民基本权利的方式描述着国家状态中的个人生命，公民基本权利是人的个存在表征。宪法是社会生态的协调者。宪法是人权的保障书。人权在社会生态中表现为类属性和个体属性，它们分别以公共权力和个体权利的形式呈现出来。近代以来的宪法是以民族国家作为生态基础的，故人权以国家权力和公民权利表现出来。国家权力和公民权利之间的良性互动是社会生态有序运行的保障。

当前中国处在社会转型时期，宪法的主导形态由道德向法律转变。依法治国方略的确立使得宪法的法律形态得以彰显，宪法逐渐由客观规范取代了主观感性的指引，工具理性转换为价值理性的示范。然而宪法的法律形态彰显只是宪法主导形态的转换，并非呈现出唯法律独尊，因此，我们应极其理性地看待宪法的法律形态彰显。中国的社会转型是从经济开始的，然而将经济发展作为社会生态的单一进度，必然拆分既在的社会结构，利益成了共同体的中心，国家在社会进化论的驱使下，产生了贫富悬殊、阶层对立、人心涣散等严重社会问题。当务之急，是在发展经济的同时，着力营造政治共同体的存在。故公法建构是宪法的法律形态彰显的一个应然结果，而并不是所谓的“公法优先”。私法作为

规范人个体属性的法律,传承的是一种自治的精神。宪法的法律形态彰显也预示着私法发展时代的到来,而并非是所谓的“民法帝国”。

【关键词】宪法 法律世界 世界观 认识论 方法论

Abstract

Constitution is the person has the foreword life style in the certain social ecology. In this definition, person refers to a kind of person and also refers to a person; the social ecology surmounts the human center principle, and constitutes the ecological ethical principle on taking the person as the center; the life style annotates the essence of the rule, and coordinates persons as well as person and ecology by a kind of standard view; the foreword is the essence of all values, commanding all forms of value and interrogating the legitimacy and the validity of the current life style. The constitution is between the rule and the law, and it refers to all social principles, the law only is the mankind's choice on the constitution leading attribute in the certain social ecology. The constitution is not only the performance of law but

also of the moral and the religion. The dominant shape of the constitution is decided by the contents of the social ecology. The legal world is the rational performance of the social principles. It has the self sufficiency because of its unique attribute, and has the openness because of personal common attribute as well as interdependence with other worlds. The performance on the self sufficiency of the legal world is the native legal production. The performance on the open of the legal world is the identities of the personal life as well as resorting to other disciplines. The constitution exists both in the legal world and outside the legal world. While the constitution guides the legal world as the rule, it also melts into the legal world through its legal attribute. The constitution may cover “the rule”, and also may define “the law”.

Constitution is the ontology in the legal world that agrees with the idea of the fundamental law. On the one hand, while the constitution organizes community as a kind of rule, it standards the basic shape on politics and society; On the other hand, as one of the life styles, the constitution profoundly affects the life of organization and individual (for example citizen). The society is admitted by a natural way in the west, and by a way on self discipline in China. Therefore the constitution stresses to the law in the west, but the moral in China. The ecology, the life, the live are the connotation of the constitution. The social ecology is constituted by politics, economy and culture and so on. While mutually affect, they move

by different attributes. The multiplicity of the social ecology decides the multiplicity of the constitution. The constitution fulfills the objectives on the fundamental law for reflecting the social ecology wholly. The live has naturality, sociality and integrity. The live has naturality because of its objective existence, the live has sociality because of its interdependence, the live has integrity because of its unification on the nature and the social. The life displays the freedom, the order, the harmony and so on. The life is the live's show in the ecology, while it is the external manifestation on both the live and the ecology. The life presents the freedom because of the existence on the live, and presents the order because of the interdependence on the live, and the uniting of the foreword and the freedom together presents the harmony.

Constitution is the epistemology in the legal world. The constitution moves towards maturely, not only innovate the theory and perfect discipline system but also surmount scientific principle and the method on the scientific principle machinery. The scientific principle on the constitution is popularized with the formidation of the west, so that the dual epistemology is its result. The dual epistemology is the historical result, so that it is only the stage theory in the world. Its production, development and even continues has proven its rationality, while its question and the fade-out simultaneously has also proven its limit. Under the dual epistemology, legal world is divided into the public law and the civil

law, the constitution has belonged to the public law. The life epistemology is the reconsidering on the dual epistemology. The real life world is the foundation of the constitution, so the constitution comes from the real life world. The constitution only reflection the real life world, and it can overcome the designs about the unreal idea world, thus it arouses “the intrinsic world” and realizes the final value on society. Under the life epistemology, the legal world is composed of the constitution, the public law and the civil law. The constitution is neither the public law nor the civil law. The constitution presents by the legal formation in the legal world, so that it has the legal attribute like the public law and the civil law. Simultaneously it plays a so important role between the public law and the civil law that organically unites the public law and the civil law together.

Constitution is the methodology in the legal world. After the bourgeois revolution in the modern west, the constitution transforms by “recessiveness” into “dominance”, and constitutional law bears basic mission in the legal world. In the written constitution, the constitution is displayed through the constitutional code and the constitution is further displayed through the constitution law in the correlation region or the domain; On the contrary, in the unwritten constitution, the constitution is directly displayed through the constitution law. The constitution is the organizer of the community. The constitution displays live through the constitutional

code or the constitution law, thereupon the social ecology presents by community. However, with the change of the social ecology, the community lies in the condition of evolution. From the primitive crowd, the clan, the tribe, the city-state, the empire, the nation-state, the political community to the human community, the constitution takes on the function of the organization throughout. The operation of the public authority (performance as state power in the nation-state stage) is the basic for the composition of community, so it is the attribute of mankind's existence. The constitution is the annotation on human life. Person is the lead of the social ecology. Along with the change of the social ecology, human's connotation also experience the corresponding change. The person is a common concept and he (she) is displayed in the condition. Only in the certain situation, the person is able to display their nature. Facing to the rich, the constitution throughout annotates the life by its rich. From member, subject, national, citizen to person, the constitution annotates the form on person's life. The modern constitution has been describing the individual life in the national condition by the citizen basic right, then citizen basic right is the attribute of person's existence. The constitution is the coordination of the social ecology. The constitution is the book on safeguarding the human rights. The human rights display both the kind and the individual attribute in the social ecology, and they respectively present by the public authority and the individual right. The modern constitution has taken on the

nation-state as ecology foundation, therefore the human rights have been shown by the state power and the right of citizen. The benign interaction between public authority, individual right, the state power and the right of citizen ensures the foreword moves of the social ecology.

China is in the period of the social reforming currently, the leading shape of the constitution transforms from the moral to the law. The strategy of ruling the country by law causes that the constitutional law which once was transplanted by the imitation, gradually transferred from the tool to the should, and now constitutional law could be obviously revealed. However the constitution law is only the transformation of leading shape on the constitution, so that we should rationally regard the constitutional law. China's social reforming starts from the economy, however regard economy as the sole progress in the social ecology, it is inevitably spilling the social structure, thus the benefit has become community's center. Under the social theory of evolution, such the serious social questions as the polarization of the rich and the poor, the opposition of the social stratum, the lax of the people's will and so on has been produced. The urgent matter is to build the political community while developing economy. As one of human rational attributes, the public law will embody "the kind" through public authority, thus the path on mankind will be outlined by the institution. Therefore the public law is the result on the constitution

law revealing ,but not so-called “the first on the public law”. The civil law is the law on the standard of individual attribute, so the inheritance is the spirit of autonomous. The constitution law also simultaneously indicates the development on the civil law, but not so-called “the empire on the civil law”.

As the fundamental law ,constitution’s authority comes from the mankind’s understanding on society. Constitution which obtains from the legal position, only has catered to the legal function of constitution, so that it has neglected the standard principle. Compared with residential society, the political country is so complex that the succinct legal function principle can not hold it. In the western nation with the deep legal foundation ,when governing of the civil law extends to of the public law ,they also feels frail on the legal function principle. Compared with the western nation ,rule of law is so barren in China that the emphasis on the legal function principle may be understood. However, the simple conjecture about the legal person only can transform the simple rationality to the plaintive perception finally. Therefore, as the ontology, the epistemology and the methodology, constitution is the historical necessity.

[Key words] constitution ; legal world ; ontology ; epistemology ; methodology

目 录

引言 001

- 一、选题意义 001
- 二、内容创新 003
- 三、论证方法 008

第一章 宪法和法律世界 009

第一节 宪法的含义 009

- 一、宪法语词考证 009
- 二、宪法概念流变 014
- 三、宪法含义新解 020

第二节 法律世界的含义 024

- 一、法律世界释义 024
- 二、法律世界的自足性 027
- 三、法律世界的开放性 032

第三节 法、宪法与法律世界 034

- 一、法与宪法 035
- 二、宪法与法律 037
- 三、宪法下的法律世界 041

第四节 宪政政治、人民民主专政与宪法秩序 042

一、宪政政治的情势性 043

二、人民民主专政的地域性 048

三、宪法秩序的抽象性 051

第二章 宪法是法律世界的世界观 054

第一节 世界观含义 054

一、世界观释义 054

二、宪法与根本法 058

第二节 宪法是社会生态表现 062

一、政治生态的表现 063

二、文化生态的表现 066

三、经济生态的表现 068

第三节 宪法是人生命形态 071

一、人生命的自然性 072

二、人生命的社会性 075

三、人生命的整体性 077

第四节 宪法是生活方式 080

一、有序的生活方式 080

二、自由的生活方式 083

三、和谐的生活方式 087

第三章 宪法是法律世界的认识论 091

第一节 认识论含义 091

- 一、认识论释义 091
- 二、宪法与科学主义 094
- 第二节 二元认识论 100
 - 一、二元认识论的生成 100
 - 二、公、私法的划分 105
- 第三节 生活认识论 113
 - 一、生活认识论的生成 114
 - 二、宪法与公、私法 118

第四章 宪法是法律世界的方法论 122

- 第一节 方法论含义 122
 - 一、方法论释义 122
 - 二、宪法典与宪法性法律 126
- 第二节 宪法是共同体的组织者 130
 - 一、共同体的含义 130
 - 二、共同体的演变 135
 - 三、公共权力是人的“类”存在表征 139
- 第三节 宪法是人生命的诠释者 142
 - 一、人的含义 143
 - 二、人的生成 145
 - 三、公民权利是人的“个”存在表征 148
- 第四节 宪法是社会生态的协调者 151
 - 一、公民权利之间的协调 153
 - 二、公共权力之间的协调 156