

# 政府法制论

——转轨时期中国政府法制建设研究

蔡立辉 著

中国社会科学出版社

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# 序

王惠岩

1984年，蔡立辉考入吉林大学政治学系，成为我校第二届政治学学员。当时我是系主任，担任他们一年的《政治学原理》课程教学。蔡立辉以其活跃的思想、敏捷的思维和勤奋好学，给我留下了深刻的印象。1988年，我招收他读我的硕士研究生。他在练好政治学基础理论基本功的同时，注重拓展自己的知识面，注重构造自己的知识体系结构，并锻炼和培养了自己的研究能力。1990年6月，他以优秀的学业成绩提前获得法学硕士学位。毕业后，他一边从事法律教学，一边从事律师业务，培养了自己理论联系实际的分析问题和解决问题的能力。1997年，他作为计划内统招博士研究生，再次回校学习。在他读博士学位期间，我们师生之间围绕着如何对实践问题进行理论思考等，经常进行讨论。他每周至少用半天时间与我交流思想。我从与他的交流中，从他所发表的一些专业学术论文中，发现他提高很快。他的特点主要表现为：有较深厚的理论基础，知识面广，对问题能够从多个角度进行阐述；理论联系实际的能力较强，注重问题研究的操作性、实用性，注重学术对现实的解释力；注意学习、了解和研究西方的学术成果和经验，但更注重“学术研究”的本土化。

现在，摆在大家面前的这部学术著作《政府法制论——转轨时期中国政府法制建设研究》正体现了蔡立辉博士学习的特点。本书是他主持广东省人文社科研究项目“社会主义市场经济体制与依法治省研究”所取得的综合性研究成果，是我国政府法制建设研究方面一部难得的力作。

政府法制是社会主义市场经济法制体系的重要组成部分。政府法制建设能否适应时代的发展要求，直接关系到社会主义市场经济和民主政治能否发展，关系到政府工作中的一些弊端能否克服，是涉及全局的一件大事。在本书中，作者做到了既有深刻的理论分析，又有丰富的实践实证；既注重政治学、经济学、法学和公共行政学相互之间的整合与渗透，又把问题的论述集中在政府公共管理领域，集中在如何使政府提高效率和为人民负责这方面；既注重吸收、借鉴西方国家的优秀成果，又注重与中国的实际国情相结合，注重所提出的解决方案的可操作性、现实性。本书在研究方法上的创新完全服务于本论题的研究。

本书以系统论方法为指导，在比较深入的层次上，论述了市场经济环境与政府法制建设之间的关联性；论述了政府法制建设应当符合市场经济的发展规律和要求。为此，作者对实践中出现的行政立法以“泛化”的行政法规干预市场经济的弊端进行了分析，并且切入要害，提出了解决措施。

作者以政府法制的基本内涵为思路，研究和阐述了政府管理国家与社会公共事务的法制和管理政府内部事务的法制。作者关于国家立法为政府行政组织及其活动提供基本的实体行为规范和程序规范的阐述，他所提出的优化、组合政府职能并使之以法的形式加以确认的观点，政府绩效评估及其法定化以消除制度性障碍的观点，政府责任及其法定化以塑造政府为高效率和对广大人民负责的观点，在理论上具有较大的突破，在实践中具有较强的现实指导意义。作者还提出并论证了，政府行政组织管理法治和

政府人事行政法治，是使政府行政机关工作人员由只对某个领导人负责变为对其所担任的职位负责、对法律负责、对人民负责。这是消除“长官”意志的前提。这些观点渗透了当代民主宪政的理论内容，反映了公共行政民主化的发展趋势和政府公共政策过程的新取向，从而进一步深化了本研究的主题。这些观点显示了作者较为广阔的知识背景和自己的真知灼见。这些观点对于政府法制研究、政府公共管理研究，都不乏指导意义和参考价值。

我作为蔡立辉博士的导师，为他能写出这样有见地的学术著作，感到由衷的高兴。根据作者的要求，我作此短序，聊表祝贺，也衷心地希望他今后能取得更大的学术成就。

2001 年 7 月

于吉林大学行政学院

## **Abstract**

The construction of government legal system is an important foundation and indispensable part of public administration of government. In transitional period, under the circumstances of taking market economy as orientation of social development, public administration of government is actually the government's exercising its powers in legislation, administration and judicature through administrative, political and legal theories and methods to provide management and public service for the society. Government legal system is the institutionalization and legalization of government's authority and its exercise, it includes the legal system for the government to manage public affairs of the state and the society and the legal system for the management of government internal affairs. Government legal system, as an inseparable part of the entire social legal system, is a powerful protection for the reform of economic system and political system and the construction of socialist modernization. A relatively mature market economy cannot but require a mature legal system reflecting the rule of market economy. To build a relatively mature system of socialist market economy in our country, we must strengthen the construction of government legal system. Whether the construction of government legal system can adapt to the requirement of the development of the age, we may say, is in direct connection with whether socialist market economy and demo-

cratic politics can develop and whether certain abuses of government work can be overcome, and is a matter of overall importance. Therefore, to strengthen the study on the construction of government legal system in transitional period of our country is of very important practical and theoretical significance for the effective launching of public administration of government, the promoting of the development of socialist democratic politics and the construction of socialist market economy.

In respect of contents, the article, centering on the basic connotation of government legal system, applying economic analysis to the study of government legal system and using the theories and methods of political science, the science of public administration and the science of administrative law, analyzes the operation of administrative powers and the activities of the power's holder government executive body; on the basis of the interrelation between politics and economy, it studies and analyzes to a relatively deep level the internal relations between the historical process of the development of the construction of government legal system and the elements of economic environment, probes into the changes and tendency of the construction of government legal system in transitional period, studies systematically and demonstratively the legal system for the government to manage public affairs of the state and the society and the legal system for the management of government internal affairs.

In respect of logic structure, the article is divided into three parts, eight chapters. The first part is the leading of the article, foreshadowing the next two parts' discussion. The first part, through the study and analysis of the course of the development of the construction of government legal system, reveals the changes and tendency of the relation between the elements and process, between the construction of government legal system and the development of social economy in the course of the develop-



ment of the construction of government legal system; through the analysis of the elements of economic environment of the construction of government legal system, reveals that a good legal system must be one reflecting correctly the law of development of social economy, thus lays a foundation for the demonstration of how to build government legal system under market economy. The next two parts stand side by side, dividing according to the connotation of government legal system, reflecting the contents of the construction of government legal system. In detail:

Part One: The historical process of the construction of government legal system and the analysis of the environment of market economy. This part consists of two chapters.

Chapter One: The historical process of the construction of government legal system in China. This chapter inspects and analyses the relation between the development and changes of political and economic relation and the emergence, frustration, resumption and development of government legal system in each historical period since the building of our People's Republic of China. By expounding specific facts, this essay reveals the historical process of the evolution of our country's attitude toward the construction of government legal system from ignoring it to taking it seriously, to holding in esteem rule of law; reveals the changes and tendency of the development between elements and process, between the construction of government legal system and social economy in the course of the development of socialist democratic politics; reveals the course of development from imperfection to perfection of our government legal system which is of the attribute of socialist democratic politics; demonstrates that the development of the construction of government legal system is in practice the result of system reform and social development.

Chapter Two: Socialist market economy: Analysis of the environment

and basis of the construction of government legal system in transitional period. Based on the preceding chapter's facts that the further development of economic system pushed forward the historic course of the construction of our government legal system, this chapter, through the analysis of each element of market economy and the internal connection between the construction of government legal system and the system of market economic, elaborates the ideology that the contents and structure of legal system depends on the social structure led mainly by economic relations; elaborates the idea that market economy is the external environment of the construction of government legal system and the construction of government legal system itself is part of the construction of socialist market economy; studies to a relatively deep level the relationship between market economy and the construction of government legal system; puts forward and demonstrates the guiding ideology for the construction of government legal system in transitional period. This lays the foundation for the following study on how to carry out the construction of government legal system.

Part Two: Legal system for the government to administrate public affairs of the state and the society. This part consists of four chapters.

Chapter Three: The construction of government legal system: take the basic substantial norms and procedural norms as chief contents. This chapter emphasizes the chief content of the construction of government legal system: the state's power organ through legislation provides basic substantial and procedural norms for government's activities of public administration. This is the prerequisite of making the government administrate by law and have law to abide by. Basic procedural norms indicate the laws made by the state's power organ governing the government and its administrative activities, which constitute the general codified laws within government legal system. The article elaborates in particular the

provisions in basic norms on government's authority and government's performance measurements and government's liability. The procedure for public administrative activities of government means the course of conduct consisting of the elements of the ways, steps, time and sequence of public administrative conduct of government. The state's power organ, through legal provisions governing public administrative conduct of government, in other words, through making administrative procedural law, provides code of conduct for government to exercise executive power. The central content of this chapter is to elaborate how to make clear substantially as well as procedurally, by the legislation of state's power organ, the scope of administrative activities of government and the ways of exercising government's executive power under the circumstances of market economy, and the government's liability for its activities which are not in conformity with the prescribed scope and procedure.

Chapter Four: Administration by law: core principle for public administrative conduct of government. The essential content of this chapter is: to elaborate in theory the theoretical basis and connotation of democratic constitutionalism of administration by law, to elaborate in practice public administrative conduct of government under the principle of administration by law. Sticking by the economic attribute and rules of development of market economy, this chapter puts forward and proves that with the shunt and transition of economic system comes inevitably the change of the notion of legal system and the sticking by the spirit of democratic constitutionalism contained in the principle of administration by law. On the basis of a comparative analysis of the meaning of rule of law at all times and in all over the world, this chapter elaborates that the administration by law under market economy not only should be held by the government but also should be under control of the subject of market and the public.

The government should not regard law as a tool to rule the society. To the contrary, law shall be a means for the subject of market and the public to restrict the power of the government and to actualize their legitimate rights. Regarding law as a tool to rule the society is not only a deviation from the core that market economy is economy of rights and economy by rule of law, but never capable of creating efficient government conduct and a government responsible for the subject of market and the public.

Chapter Five: The construction of government legal system: the deployment and exercise of the power of executive legislation. The power of executive legislation is a power to make administrative regulations and rules by government executive body, which belongs to the scope of government executive power prescribed by laws. This chapter probes into the division and exercise of legislative power, between the state's power organ and government executive organ, between the central state power organ and local state power organ, between the state council with its branches and local people's government, between local people's governments of different level, between local state power organ and local people's government. It is mainly for the purpose of elaborating the question of the unification of state's legal system and the question of how to restrict government's executive legislation. Since the building and development of the system of socialist market economy depends on the formation and development of domestic unified market, the disunity of legal system inevitably cause the separation of market. The article also proves that the backside of legislative rules and regulations is the extension of executive power, the entry of government's executive power into the market in the form of extensive executive legislation will lead to the strengthening and enlargement of executive power by executive legislation of the government, lead to the enlargement of fields of interference by the government.

Chapter Six: The construction of government legal system; demonstrative analysis of the issue of administrative execution. In the sense of constitutionalism, as a body of execution, the government's main activity is administrative execution. The establishment and development of the system of socialist market economy not only need the making of law to reflect the requirement and rules of market economy but also need the activities of administrative execution to turn these requirement and rules into practical order. Therefore, to implement the laws and regulations for them to be fully observed and carried out is one of the most important tasks of the construction of legal system, especially the construction of government legal system. Thus, based on the detail elaboration of the characteristics of administrative execution, this chapter elaborates how to strengthen and make perfect the measures and ways of administrative execution; puts forward and proves the viewpoint that the strengthening and perfecting of administrative execution needs the strengthening of the supervision over government legal system.

Part Three: Legal system for the management of government internal affairs. This part consists of two chapters.

Chapter Seven: The legalization and institutionalization of the system of government administrative organization. The legalization and institutionalization of the system of government administrative organization is to legalize and institutionalize the setup of the institutions in government administrative organ, the relations between the central and the local, between the superior and the inferior, between government administrative organs of the same level, and the management of the structure, levels and extension of government administrative organ and the scope of its responsibility and staff establishment. To strengthen the construction of legal system for management of government internal affairs and legalize the system

of government administrative organization is for the purpose of building a system of management that works efficiently, operates harmoniously and conducts lawfully, and gradually building a system of government public management which is in line with the system of socialist market economy and is of Chinese characteristics. Therefore, this chapter elaborates in detail the principles of management of government administrative organization, the legal basis for the establishment of administrative organization and its activities, and the measures restricting the self - enlargement of government department. This article, by analyzing the basic situation of the development of our administrative organization law, probes into the ways to perfect the government administrative organization law, to restrict the self - enlargement of government department through the using of organization law and law on staff establishment ensuring the government's simplification of administration, efficiency and probity.

Chapter Eight: Legalization and institutionalization of personnel administration of government. Legalization and institutionalization of personnel administration of government is to legalize and institutionalize the management of government staff's training, appointment, assessment, rewards and punishment, promotion, retirement, auditing, supervision and surveillance of their execution of law etc. Under the circumstances of socialist market economy, the legalization and institutionalization of personnel administration of government is aiming to define by law the relations between government and civil servants, between government, civil servants and the public, between civil servants themselves, so to make scientific and legalize the management of the administrative staff of government ensuring the optimization and probity of the administrative staff of government and forming highly efficient government working system. In the sense of the science of public administration, this chapter elaborates

systematically the system of duties and liabilities and the system of rights and protection as the core content of personnel administration of government. This article, through the analysis of the malpractice existed in our present system of personnel administration, puts forward and proves that the reform of the system of personnel administration of government, the perfection of the system of civil servants and the promulgation of the law of state civil servants is the objective requirement of the development of market economy and also the general development tendency of modern world; analyzes and discusses the basic principle framework: the principle of management according to categories, the principle of democracy, the principle of administration by law and the principle of competition and choosing the best, which shall include in the law of state civil servants.

This dissertation makes the following progresses:

Firstly, the strengthening of the construction of government legal system is important content of and route to strengthen the construction of government executive power. The legal system reflecting the requirement of socialist market is a system of democracy and the institutionalization and legalization of democracy. Thus, the activities of public administration of government must conform to the basic interest and will of the people and follow the constitutional principle that all power of the state belongs to the people. From this point, this book applies economics analysis to the study of government, uses the theories and methods of political science, the science of public administration and the science of administrative law to study and discuss from multi-dimensional angles and different profiles the change and trend of the development of the relations between elements and course, between construction of government legal system and socialist economy in the course of the construction and development of government legal system, is of obvious comprehensiveness and practicali-

ty. This study is a remedy to the lacuna of previous studies, which were only single - dimensional or without the combination of the construction of government legal system with the development of socialist democratic politics, the development of market economy and the social environment in transitional period. It is of initiative and guiding importance to the development of our democratic politics and the reform and perfection of our government public administration.

Secondly, in the systematic study of the construction of our government legal system in transitional period, this book pay attention to the combination, intersection and pervasion of the knowledge of political science, the science of public administration, the science of law and economic science etc. The study to a relative deep level of the interrelation between market economy and the construction of government legal system help to enhance in practice the self - consciousness and foresightedness and strengthen the pressure of the construction of government legal system, help to the initiative adaptation of the reform of the system of public administration of government and the construction of government executive power to the reality and trend of social economic development. This study reflects the characteristics of modern theoretical study—intercross study of multi - subjects and trans - subjects. Combining the review of the operation of government executive power with legal system extends the field of study of public administration of government, enriches and develops the theoretical content of public administration of government.

Thirdly, centering on the unification of legal system and government executive power entering the market not in the form of extensive administrative legislation, this book makes a deepened and systematic elaboration of the deployment and exercise of the power of government executive legislation. The suggestion of this book for measures to improve executive leg-



islation is of relative strong consultation to the practice of public administration of government; in particular, the study and elaboration in respect of the function of public administration of government, government liability, government performance measurements and the principle of rule of law further deepen the theme of the reform and perfection of the system of public administration of government in the course of the development of market economy and socialist democratic politics.