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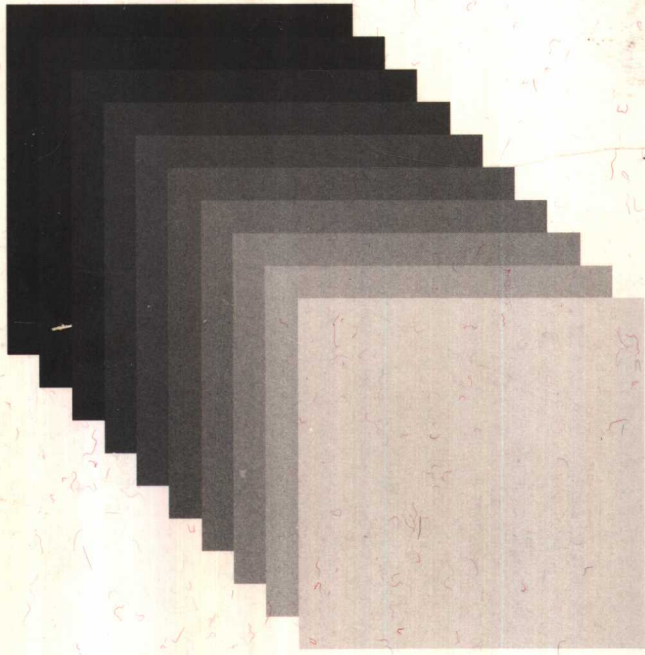
司法部部级科研项目



## 通向宪政之路

——宪法监督的理论和实践研究

王广辉/主编



法律出版社

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主 编 王广辉

撰稿人 王广辉 胡弘弘  
张 震 王建国

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## ■ 前 言

宪法学的研究在我国改革开放以来,随着法律制度的完善和法治观念的树立呈现出日益兴盛之势。研究的领域不断扩大,对有关问题研究的深度不断加深。在宪法学研究的诸多问题中,宪法监督问题无疑是一个重要的、实践性很强的问题。因而,对宪法监督制度有关问题的研究理所当然地成为许多宪法学研究者关注的重点。

对宪法监督问题研究的重视,本人认为有两个方面的原因:一是由于改革开放政策的实行,我们国家结束了长期以来政治发展上的不稳定和政策多变的局面,民主、法治的建设和加强有了空前的良好时机。在这个背景之下,我们在大力加强民主、法治制度建设的同时,又进行了有目的、有步骤的全民普法教育的活动,人们的民主、法治意识逐渐开始树立,整个社会的民主、法治意识因此而有了总体的提高,宪法在人们心目中的重要地位日益凸显出来,在国家的民主、法治制度建设和完善中的作用也越发显得重要。人们开始逐渐地认识到,宪法的实现和宪法权威的树立,无疑地会成为我国民主、法治建设成败的关键。这为我们研究宪法监督制度的完善问题提供了深厚的社会基础,也为我们在理论上研究宪法监督制度的完善和实践上采取完善宪法监督制度的措施创造了一个宽松的环境,并有可能引起社会的共鸣和响应,从而使我们的研究具有实际的意义。二是新中

国建立至今,半个世纪的时间,我们在宪法的制定方面,可以说取得了很大的成效,不仅制定了新中国的第一部正式宪法,即1954年宪法,而且还对1954年宪法进行了多次的全面修改,先后颁布了1975年宪法、1978年宪法和现行的1982年宪法,这个期间,还对宪法进行了多次的局部修改。尽管从实质上讲,经过这些多次修改的宪法,所规定的内容及其所具有的精神实质与我们作为社会主义国家应当达到的程度还存在着一定的距离,但至少是有关我国国家制度和社会制度的基本原则问题所涉及的方面及表现的形式,基本上已经确立。只要能够维护这些基本原则的实现,就足以使我们国家的性质不会发生改变。这表明,我们在利用宪法这一重要的法律形式,确认社会主义革命和建设取得的胜利成果方面的任务已经完成。立宪的任务完成以后,行宪的工作自然应当被提上议事日程,成为一项重要的工作。而行宪的关键,无疑地应是建立完善的宪法监督制度,借以对违宪进行及时有效的处理和制裁。尤其是在我国,有着文革中宪法被严重践踏,沦为一纸空文的惨痛教训,因而,有加强民主、法治建设的大背景做支撑,行宪的要求会更加迫切,重要性也会更加突出。由此而导致整个的社会容易形成强烈的宪法实现需求。宪法监督问题研究热的兴起,无疑地是这种宪法实现需求在理论界的表现。但必须看到的是,从理论上对宪法监督问题进行系统和深入的研究虽然是必要的,但理论毕竟只是一种思想观念的体系,只能是从观念上来回应社会的宪法实现需求,将社会宪法实现的需求系统化,提高其理性的程度。真正能够满足社会这种宪法实现需求的还是完善的、有效的宪法监督制度的供给。恰恰是在此方面,我们存在着严重的供给不足问题。现有的宪法监督制度由于没有很好运转起来,甚至可以说是目前的宪法监督体制存在着难以克服的体制性缺陷,根本就难以运转起来,自然也就不可能有效地满足社会强烈的宪法

实现需求。这又反过来进一步刺激了社会宪法实现需求的增长,从而使得宪法监督问题成为现行宪法颁布以来,宪法学研究领域中一个长期受到重视的问题,许多的研究者都对此有所涉足,并力图在此问题的研究方面有所建树。因而出现了各种各样的主张,提出了许多的建议和方案。

更为关键的是,在改革开放取得巨大成就的基础上,我们已在宪法中明确规定,实行社会主义的市场经济,实行依法治国,建立社会主义的法治国家。市场经济体制的选择和法治治国方略的采取,特别是这两方面的结合,对我们这样一个传统性还比较强烈的社会的冲击将是巨大的,由此而引起的社会转型也是不可避免的。市场经济体制的建立和有效运行,需要确立个人在国家和社会中的主体地位,由此会引发人们利益的多元化、表面化和对这种利益追求的合法化;法治治国方略的采取,要求要按照既定的法律规则来解决人们之间基于利益的差别而产生的冲突或纷争,不能再像过去那样依赖于行政的或政治的手段。宪法监督制度的建立,特别是它的有效运行,则是保证各种利益主体之间产生的权利与权利、权力与权力以及权利与权力纷争得到有效解决的重要方面,更是维系法治得以实现的基本前提。如此说来,完善我们的宪法监督制度,自然是实现依法治国目标的题中应有之意。

在许多研究我国宪法监督制度,特别是关于如何完善我国的宪法监督制度的成果中,都认识到了我国宪法监督制度所存在的一系列缺陷是一种体制性的,即行使宪法监督权力的宪法监督机关设置不当所造成,因而也就顺理成章地将如何设置宪法监督的机关作为关注的焦点。这无疑是抓住了问题的关键,找到了解决这一问题的突破口。但从另一方面来看,在这些众多的主张之中,只是提出了宪法监督机关如何设立这些非常具体的问题,缺乏的是对这些问题进行深入的理论分析和论证,对

宪法监督所涉及到的基础性的问题缺乏系统的研究,从而使得众多的建议和主张都没有理论的支撑。如关于宪法监督权的性质问题,也就是在所有的国家权力中,宪法监督权是一种什么性质的权力,这一问题的解决,直接关系到宪法监督机关的设立和采用什么样的宪法监督体制问题,但在所有的关于宪法监督问题的研究成果中,均未涉及。另外,在众多的完善我国宪法监督制度的主张中,许多研究者都将立法机关的监督体制作为最理想的模式和不证自明的前提,在此基础上主张在全国人大或全国人大常委会之下设立一个宪法监督委员会,来行使宪法监督的权力,似乎只要设立了宪法监督委员会这样一个机关,所有的问题都可以迎刃而解。实质上就是将我国宪法监督制度中存在的一系列问题仅仅看做是宪法监督机关的设立问题,对于这样一个机关设立起来以后,能否从根本上改变长期以来我国宪法监督制度不能很好地运转的问题,如何处理其与全国人大或全国人大常委会的关系,能否监督全国人大及其常委会,如何来监督全国人大及其常委会等问题,均未给予系统的论证和合理的说明。而这些问题正是造成我国宪法监督制度不能有效运转的原因或根源,如果不能给予合理的说明和充分的论证,即便是在全国人大或全国人大常委会之下设立一个宪法监督委员会,也不能从根本上解决问题。还有,当今世界的宪法监督存在着多种的体制,各种体制形成的原因、活动的程序和原则等都存在着较大的差别,为什么会出现这种现象;宪法监督尽管有不同的体制,但所遵循的原理原则是什么,追求的目标是什么等,这些基本的理论问题,也缺乏系统的研究成果;再者,我国宪法监督制度的完善还与我国社会的转型和政治体制的改革有密切的关系,不将这些因素考虑进去,纯粹地来研究宪法监督制度的完善问题,也是难以取得实际的效果的。

基于上述的理由,我们结合自己的教学和科研的体会,选择

了宪法监督这样一个看似陈旧的题目进行研究,并在主观上力图对上述我们认为的宪法监督问题研究中存在的不足加以克服或避免,尽量地将我们在这一问题上所进行的思考和认识表达出来。但这并不意味着我们就认为这些认识和思考就是完全正确的,甚至是不容置疑的。本人始终坚信,通向真理之路遥远且坎坷,每一个人都有平等的去发现和追求自己所认为的真理的权利,没有一个人可以垄断,事实上也不可能垄断发现真理、追求真理的道路,使追求真理的行为变成一种特权。为此,我们将这些思考表达出来的惟一动机,就是希望借此能与众多的关心和关注我国宪法监督制度完善的人们获得进行交流的机会,并希望通过这种广泛的交流,借众人之智慧,补我们之愚钝,以便共同地推动我国宪法监督问题的研究深入进行下去。

王广辉

2001 年秋于武昌南湖之滨



## Preface

With the performance of the reform and open door policy, perfection of the legal system and erection of the sense of rule of law in China, researches on the science of constitution have become prosperous. The field of research is growing, and research on relevant problems has probed more deeply. Among these problems, constitutional supervision undoubtedly is a very important and practicable one. Therefore, the researches related to the system of constitutional supervision naturally become the focus.

As to the emphasis on constitutional supervision, the author thinks that there are two reasons. One is because of the reform and open door policy, China has put an end and to the long period instability of political developments and policies. And there is a good chance to construct and strengthen the democracy and legal system. With this background, China has been disseminating the laws throughout the whole country. This helps the people even the whole society develop a sense of democracy and legality gradually. The constitution shows its importance and plays a more and more important role in the construction and perfection of the national democracy and legality. It tells the people that it is the key point to perform the constitution and erect the constitutional authority. It provides us stable social foundation to study on perfect-

ing constitutional supervision and to take proper measures. In other words, it provides us a free environment for both perfecting the constitutional supervision theoretically and taking proper measures practically. And it makes it possible for us to study and solve this problem. Perhaps, this may cause other researchers' response. That is the practical meaning of our study. The other reason is that we have achieved much in formulating constitution since the foundation of the People's Republic of China. We made the first formal constitution in 1954, and modified it completely several times in the following years, in 1975, 1978 and 1982. And we also modified the constitution partly many times. But the contents and spirits of the constitution still can't reach the requirements of our socialist country. At least, however, the basic principles and their forms relative to our national and social system have almost been established. If we can carry out these principles, we can surely maintain our nation's nature. So, with the constitution, an important law, we have accomplished the task of confirming the achievements gained through socialist revolution and constitution. After formulating the constitution, how to perform the constitution has been put to the agenda and becomes an important work. The key point is to establish a perfect constitutional supervision system. Thus, we can handle and sanction the unconstitutional cases. In China, the constitution had been treaded on seriously and became a useless piece of paper. Thus, with the background of strengthening the constitution of democracy and rule of law, the requirement for performing constitution is more urgent and important. This surely causes the same requirement in the whole society. In the theoretical area, this requirement shows

to be heated study on constitutional supervision. Meanwhile, we should know that it is necessary to study the theory systematically and deeply. However, theory is just a conception system, what can really meet the social need for performing constitution is to establish a perfect and effective constitutional supervision system. In fact, we have serious shortage in this aspect by chance. The present constitutional supervision system can't run well. In some sense, we can say that it has institutional deficiency, which can't be overcome, so, it can never run well. Of course, it can't meet the social need. On the contrary, it stimulates the raise of the need, so the problems about constitutional supervision have attracted many researchers attention for a long time. They study on these problems and put forward many kinds of claims, suggestions and plans.

The more important fact is on the basis of great achievements with the reform and open door policy, we have such regulations is our constitution: carrying out socialist market economy and rule by law, to establish a socialist rule of law country. The choice of market economy system and the rule-of-law policy, will raid our traditional society. This certainly causes the transformation of the society.

The establishment and effective work of market economy require for identifying the individual's subject in the nation and society. This cause people's interest to be and apparent, and legalizes people's chasing for such interest. The rule of law policy demands to solve conflicts and disputes caused by different, according to the established laws and rules, not depending on administrative or political methods. The establishment and effective work

of the constitutional supervision system play an important role in solving different disputes between powers and rights. Therefore, it is the basic precondition to realize the rule of law policy.

Many researches on the constitutional supervision system, especially ones on how to perfect the system, point out that the series defects are institutional. That is because the improper establishment of constitutional supervision organ. So how to set up constitutional supervision organ become the focus, and also the key to solve the problem. But on the other hand, many researchers just put forward some concrete measures and lack further theoretical analyses, demonstrations, and systematic researches on relative basic problems. This leads to many claims and suggestions without theoretical supporting. For example, the nature of the constitutional supervisory jurisdiction, has direct connection to how to set up the supervision organ and what system should be taken. In fact, we lack researches on these aspects. What's more, many researchers regard the legislative body as the perfect supervision organ, and on the basic, they claim to build up a committee of constitutional supervision, attached to the National People's Congress, to excise the supervisory jurisdiction. They think if the committee were built, all the problem may be solved easily. In fact, they just constitutional the systematic problems as establishing the constitutional supervision organ, and did not make systematical demonstrations and reasonable explanations on such important issues. For example, with this organ, whether we can make the supervision the National People's Congress and its Standing Committee. All these problems exactly are the reasons why the constitutional supervision system can't work well. Thus,

if we could not explain and demonstrate them reasonably and completely, even with such committee, we still can't solve these problems completely. Furthermore, that is the reason why these different kinds of constitutional supervision modes and many differences between their sources, procedures and principles. There is no achievement to these basic theoretical problems. Meanwhile, to perfect our constitutional supervision system has close connection with our social transformation and political reforms. So, we will not achieve practical effects if we just study on the perfection itself.

Considering all the reason above, we choose this topic and do our best to express our thoughts and comprehensions from our teaching and researching experience. Maybe, these thoughts are not exactly right. But I believe that the way to truth is far and full of hardships, each person has the equal right to discover and chase it. No one can monopolize it and make it a privilege, of court, in fact, no one can. Therefore, our intention to express these thoughts is to exchange ideas with those who pay close attention to the perfection of our constitutional supervision system, so that we can promote our researches further.

Wang Guang Hui

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