

在民主与

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佟德志 著

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及其内在矛盾

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## 序

民主与法治的关系问题是西方政治文明中的重大问题,它反映出在权力的形成与分配、权利的行使与保障等多层面上的内在矛盾。因此,它也是理论界争论不休的重大问题。认真梳理和准确认识西方这一理论与实践,并从我国实际出发借鉴与吸纳,不仅有助于我们正确处理好社会主义政治文明建设中民主和法治关系,而且对推进公民的有序政治参与、政治稳定和构建以民主、法治为基础的和谐社会都具有重要理论价值和实际意义。

佟德志同志早在学习期间就十分关注民主与法治建设问题。并且选择了西方民主与法治关系问题作为博士论文的选题。毕业执教后,他仍然没有放弃这个课题。数年来,在原有研究基础上又有新的成果问世。他不仅在国内一些重要学术刊物上发表了多篇论文,而且还编译了一些国外政治思想家的著作。如美国学者罗伯特·达尔在2001年出版的《美国宪政的民主批判》等书。

特别值得欣慰的是佟德志的毕业论文有幸被评为2005年天津市《优秀博士学位论文》,同时还获得国家《全国百篇优秀博士学位论文》提名奖。现在摆在读者面前的这部专著,就是他在原论文的基础上增删修订而成。我想其中必定渗入他多年潜心钻研的心得与成果。如果读者能从中有所获益和启迪,我将与他同贺!

徐大同

2006年4月7日

## 内 容 提 要

用马克思主义政治文明的基本理论分析西方政治文明,我们发现,正是在国家与社会、权利与权力、民主与法治等一系列两分法之间,西方政治文明通过冲突的形式达成了某种均衡。本书运用马克思主义“市民社会”的理论方法,从“国家—社会”的二元分离入手,以民主与法治的关系为主线,从政治制度、政治意识、政治行为等三个层面考察了现代西方政治文明的二元结构及其内在矛盾。本书认为,以权力的分配与制约、权利的行使与保障为内容的宪政民主制度构成了西方政治文明的核心,它是政治行为与政治意识二元化发展的产物,在制度选择上表现为民主与法治之间的冲突与均衡。

从政治行为来看,现代的到来以日新月异的变迁速度覆盖了大多数西方国家和地区,它把自己与传统社会明显地区别开来,从而在政治制度、政治观念以及政治行为等多个方面极大地推动了西方政治文明的形成。“国家—社会”的二元分离布置了政治行为的双重场景,“市民—公民”的二重化则规定了个体政治参与的双重身份,而以民主和法治为线索的政治制度与政治观念互动直接透露了政治管理的双向筹划。

国家与社会的分离布置了政治行为的双重场景。西方社会“国家—社会”二元模式形成的过程即是由中世纪“现实的二元论”向现代“抽象的二元论”转换的过程,它既是传统的部分继续,又是现代的全面展开。一方面,虽然被绝对主义的一元政治分隔,但是,基督

教的“国家—教会”二元政治还是以文化遗传的方式为现代二元政治贡献了传统资源；另一方面，现代化的展开亦从民族国家、主权、市场经济、世俗化、抽象权利等方面为二元政治的形成提供了现实基础。这些要素构成了国家与社会领域分离的现实性，描绘了西方政治文明形成的全景图式。

“市民—公民”的二重化规定了个体政治参与的双重身份。现代化进程中的领域分离不但为政治行为主体提供了二元领域，同时还赋予了政治行为主体以“市民—公民”的双重身份，替代了中世纪“一仆二主”的尴尬地位，并以人权和公民权的形式表现出来，从而在本质上完成了人的现代化。在这一过程中，不但个人的独立性增强，个体被赋予了在市民社会中行动的“私人自主”，而且，个体还通过公民权进入国家，参与到民主政治过程中，积极地行使权利，实现了“公共自主”。

以民主和法治为线索的政治制度与政治观念互动直接透露了政治管理的双向筹划。正是在民主与法治的冲突与均衡中，西方政治文明在政治制度与政治意识双向互动中不断地向前发展。从这一视角来看，法国革命选择了民主，但却没有形成民主的制度化，是一种“民主优位”的革命；美国革命选择了法治，却相对弱化了民主的要求，是一种“法治优位”的革命。两种模式在资产阶级革命以后开始向各自的反方向运动，在 19 世纪末 20 世纪初实践了“民主融合法治”和“法治融合民主”的互动演进模式。经过“对立—互动”的演进，当代西方政治文明成功地实现了在两种对立要素之间的均衡，从而走向成熟。

从政治制度来看，在领域分离的基础上，现代西方政治制度围绕着权力的分配与约束、权利的行使与保障形成了民主与法治的双玄格局。权力与权利的双重诉求使宪政民主制的理性筹划获得了内在

的结构样式,同时亦彰显了内部各要素之间的紧张关系。

宪政民主制度的形成是权力复合制度化的要求。纯粹的民主制无法实现权力的自我安顿,容易在不断的扩张中走向自我毁灭。强调限制权力、保障权利的宪政法治体系为民主失败提供了解毒剂,保证了民主的健康发展。民主与法治的互补不但限制了民主权力的过分扩张,而且保证了法制体系的自我更新,成为两股既相冲突、又相扶助的力量,决定了宪政民主制度的内在结构。

同时,宪政民主制度的形成还是权利复合制度化的要求。当个人走出市民社会时,他们以政治权利参与到民主程序中,表现为对民主制度的要求;当个人退回市民社会时,他们就要求独立于民主制度之外的个人权利,表现为对法治保障的要求。这样,人权与公民权通过不同的方式得以制度化,形成了权利复合制度化的样式。一方面,权利的制度化体现为权利的民主化,它不但推动了自然权利向法律权利的发展,使主观权利获得了客观法的外在形式,而且从根本上更新了权利的内涵,使民主权利、经济与社会等权利获得承认。另一方面,权利的制度化表现为权利的法治化,即权利以抽象的论证方式要求超越民主,使权利不受功利的检查,并由法院以司法程序加以保护。

两种制度化的双重诉求是民主与法治内在张力形成的原因,它们不但决定了民主与法治的冲突样式,而且从整体上决定了宪政民主制度内在要素之间的竞争与紧张。美国限权宪法的形成与发展就是这种紧张关系的一个典型。自制宪会议开始直到美国的2000年大选,就司法审查、最高法院、平等代表权等诸多问题,人们围绕着民主与法治展开了一次又一次的争论,进行了一次又一次的改革。美国政治制度中民主与宪政的紧张关系规定了美国政治制度的内在结构,亦张扬了美国宪政文明的二元个性。

从政治意识来看,古代希腊的民主观念与“基督一日耳曼”的自由思想经过漫长的中世纪在现代化的进程中不期而遇,为西方政治的现代化提供了宝贵的传统资源。在反思的基础上,两种传统所内涵的民主权力与个人权利的观念得以现代化,它不但内置了国家、社会、个人等基本主体,架设了“私域自律”与“公域自主”、人权与人民主权、民主与法治等诸多二分法,搭建了西方政治文明的基本结构;而且使西方政治文明逻辑矛盾得以暴露,并以冲突与均衡的循环决定了西方政治意识的基本形态。

从权力来看,人民主权与宪政法治两大观念构成了一对矛盾。民主制替代君主制的真理在于它使法律的接受者成为法律的制定者。在这里,“服从自己本人”的卢梭命题试图消解国家与个人之间的对立,但却陷入了在民主国家实现法治的“化圆为方”困境。早期主权理论符合了民族国家成长的现实,为权力的扩张提供了辩护,在从君主主权发展到民主主权的进程中串起了一条自马基雅维里到卢梭的“理论之链”。然而,在权力与法治之间,绝对权力的倡导者在两难选择中买椽还珠,强调了权力却使法治陷入困境。就人民主权的样式来看,一元论的人民主权是失败的,它在提供权力合法性的同时却没有为政治权力设定界限,不但无法实现民主的制度化、法制化,而且容易堕落为暴政的工具。相比来看,宪政民主二元论既包容了代议制民主,又承认了权力的分立与制衡,在一定程度上纠正了民主权力的无限扩张,为宪政与民主的调和提供了成功的个案。

就权利来看,人权与公民权的两种权利在价值层次上对应了积极自由与消极自由的两大观念形态。在两种权利搭建的二元空间中,两种自由观念向两个方面拓展,从而衍生出各种各样的政治意识,为多样性的政治文明奠定了基础。就权利来看,现代政治的任务是双重的,既要推动公民权的重建,又要保障人权的安全;权利的观



念需要在国家与社会界线的伸缩之间游走,达到一种反思的均衡。就其基本经验来看,在冲突的张力之中保持平衡,接受外在变化是两种自由或两种权利健康发展之道。

**关键词:民主、法治、权力、权利、政治文明**

## Abstract

We can find that the western political civilization reaches balance through conflict from the dichotomy between state and society, power and rights, democracy and the rule of law, which is a conclusion drawn through Marxist political civilization. Starting from the separation between state and society, the dissertation explores the dualistic structure and its inner conflict of western political civilization from the aspects of political institution, political ideology and political behavior with the clue of the relationship between democracy and the rule of law. Constitutional democracy which includes the separation and constraint of power and the execution and safeguard of rights forms the core of western political civilization, which is a result of the development of political behavior and political ideology, and embodied as the conflict between democracy and the rule of law in political institution.

The coming of modern era covered many countries in the west with high speed, which speeds up the formation of western political civilization in the aspects of political institution, political ideology and political behavior and distinguish itself from the traditional politics. The separation between state and society provides two fields of political behavior, the twoness of man and citizen forms dualistic identity of the individual in political participation, and the interaction between political institution

and political ideology in democracy and the rule of law embodies two forms of the political management.

The separation between state and society provides two fields of political behavior. With the procedure from realistic dualism to abstract dualism, the formation of dualistic system of state-society is not only the continuation of the tradition, but also the expansion of modernity. Although separated by the monism, the Christian dualistic system affects the modern dualistic system greatly in the aspect of culture; On the other hand, the expansion of modernization provides the real foundation of it from aspects of nation-state, sovereign, market economics, seculariation, abstract rights and so on. These ingredients formed the fact of the separation between state and society, which formed an excellent image of political civilization.

There forms the dualistic identity of the individual in the aspect of political participation because of the separation of man and citizen. The separation between state and society during the process of modernization not only provides two fields for political subject, but also entitlement dualistic identity of man and citizen for the political subject, which replaces "one servant with two lords". The essence of man is specified by the human rights and civil rights, which completes the modernization of man. During the process, the political subject has not only self-determination in the private field, but also public autonomy in the public field, through which the individual can take part in the democratic process by fulfilling his rights.

The interaction between political institution and political ideology in democracy and the rule of law embodies two forms of the political man-

agement. During the process of conflict and balance between democracy and the rule of law, western political civilization evolves in the aspects of political institution and political ideology. From this point of view, the French Revolution is the model of priority of democracy, which realized the kind of democracy without institutionalization; the American Revolution is the model of the priority of rule of law, which realized the principle of the rule of law without democracy. There form the two models of political management in the revolution and interact with each other from the end of 19th century to the beginning of 20th century, and turns mature in the western contemporary society in a way of antinomy-interaction.

The dualistic structure is proved to be true from the aspect of political institution. On the foundation of the separation between fields, there formed dualistic structure of democracy and the rule of law with not only the allocation and limitation of power but also exercise and guard of rights as center. While forming inner structure of rational planning of the constitutional democracy through thinking power and rights, the dualistic system also brings it into dilemma.

The formation of constitutional democracy is the production of compound institutionalization of power. The pure democracy cannot limit itself; tend to corrupt in the expansion excessively. The rule of law provides antidote for it by restriction of power and safeguard of rights. Democracy and the rule of law formed the constitutional democracy, which provided foundation of political civilization for the west.

The constitutional democracy is also the claim of the compound institutionalization of rights. When the man in the civil society want to be out, they can take part in the process of democracy for his civil rights;

when they retreat from country, they can ask for the law to safeguard human rights independent from democracy. Then, there formed the compound institutionalization of rights because of the way of institutionalization of rights. The democratization of rights can not only promote the shift from natural right to legal right, but also entitles the subject rights with legal form. The legalization of rights asks for the supremacy to the democracy, and the safeguard by the court through the judicial process.

The two claims of the compound institutionalization is the cause of the tension of the democracy and the rule of law, which determines not only the conflicts between democracy and the rule of law, but also the competition and tension of it. The model of limited constitution in the USA gives an example. From the Convention to the 2000 president election, there caused many reforms and debates around judicial review, supreme court, equal suffrage, and so on. The tension between constitution and democracy in the political institution of USA embodied not only the inner structure of it, but also the dualistic character of the American constitution.

The democratic idea in the ancient world and the notion of liberty in the Christiano-Germanic world meet together during the process of modernization and provides abundant traditional resources for it. The notion of democratic power and individual rights containing in the two kinds of tradition turns to get their modernity by reflection, which not only formed the basic structure by dichotomy between autonomy of private field and public field, popular sovereignty and human rights, democracy and the rule of law and so on, but also embodied the logic contradiction of the

western political civilization, determines the model of political ideology in the way of conflict and balance.

Popular sovereignty and constitutionalism formed a pair of conflict from the aspects of power. The superiority of democracy to the monarchy is that the man who obey the law can take part in the making of it. Here, the theory of "obey to oneself" which is provided by Rousseau tried to clear up antinomy between state and individual, but get into the dilemma of legalization in the democratic country. The idea of sovereignty fit in with the history of nation-state, which provided the justification for the expansion of power, formed a link from Machiavelli to Rousseau in the theory of sovereign. Between the power and the rule of law, they fall into the dilemma of the rule of law by emphasizing power. The abstract sovereign is doomed to fail because of no limitation, which cannot realize the institutionalization, and tend to be degenerated to the tools of tyranny. Compared with it, the dualistic conception of constitutional democracy becomes a very important model, which can correct the error of monistic popular sovereign by accepting the representative democracy and the separation of power.

Human rights and civil rights can be fit in with the positive liberty and the negative liberty in the aspect of rights. In the fields of two kinds of rights, two kinds of liberty expands in two directions, provide foundation to political civilization. In the aspects of rights, the modern politics has two assignments of promoting the reconstruction of civil rights and safeguarding the growth of human rights. The idea of rights will change according to the development of the separation of state and society through reflective balance. As for the basic experience, the method to

resolve the conflict between two kinds of rights or liberties is to keep balance between the tensions of conflict and accept the stimulation in an open attitude.

**Key Words: Democracy; Rule of Law; Power; Rights; Political Civilization**

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