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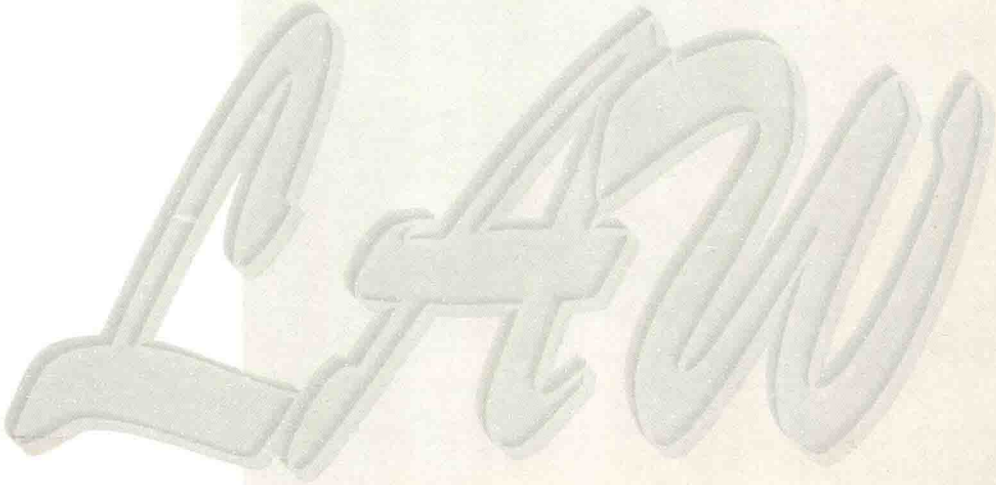
中国行政法

CHINA'S ADMINISTRATIVE LAW

阎铁毅 王馨德 谭万成 许民强 著



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China's Administrative Law
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（英文版）

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Abstract

China's Administrative Law consists of 12 chapters in 5 parts.

The first part, as an introduction to administrative law (including Chapter 1), introduces the basic concepts, general theories, principles, and knowledge of the historical development of administrative law and science of administrative law.

In the second part which named administrative subject and administrative counterpart (including Chapter 2), we explain general theories, specific theories and knowledge about duties, authorities, administrative means of administrative subjects and about the rights and obligations of counterparts.

The third part is about administrative act (including Chapter 3, Chapter 4, Chapter 5, Chapter 6, Chapter 7, Chapter 8, Chapter 9 and Chapter 10), which introduces the general theories of administrative acts and specific theories and knowledge about the nature, features, essentials and procedures of administrative acts.

The fourth part is concerning state compensation law and administrative compensation (including Chapter 11), which firstly comprehensively and generally introduces the state compensation law, and then systematically and correctly describes the specific theories and knowledge on doctrines of liability fixation, measures, procedures and criteria of administrative compensation.

The last but not the least is about administrative reconsideration and administrative litigation (including Chapter 12), which presents the scope, jurisdiction, procedures and rules of administrative reconsideration in detail, and describes the general theories and practice about administrative litigation.

This book mainly depends on administrative law practice and theories in China, and the latest achievements in Chinese legislation and judicature for reference.

前　言

随着中国经济国际化程度的日益加深，熟练利用外语从事法律业务将能更好地为国内外客户提供服务，为此，国内许多院校都开设了法律专业英语课程。为了全面提高学生运用外语从事专业服务的能力，国家教育部于2001年颁布了《关于加强高等学校本科教学工作，提高教学质量的若干意见》，其中指出，“本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%～10%。”

本书是关于中国行政法的全英文教材，采取与国际接轨的读者中心主义(reader friendly)写作风格，通过流行、标准的英语讲述中国行政法，有利于读者掌握英语表达中国行政法内容的方法。其中进行了概述与分论，有利于读者在短时间内了解中国行政法的概貌，而且内容充实，文笔轻松时尚，是国内大中院校开展法律英语教学的最佳教材。

而且我们也期望中外的行政相对人都能够了解我国的行政法，为保护中外行政相对人的合法权益，提高行政主体的执法水平，实现法治行政做出一份努力。

人民法院的工作也需要英文资料的储备，在法院各项审判工作中，行政审判与世贸组织规则的关系最为直接，自我国加入世贸组织以来，北京、上海、广东等地法院已陆续受理一些与世贸组织规则有关的国际贸易行政案件；我国的行政机关可以运用其中的英文句型、单词、条款的解释促进涉外的依法行政工作，增强政府管理的透明度；外国的相对人欲提起行政诉讼或者为了用行政法保护自己的合法权益，这又是一个获得相关知识的捷径；中国的律师经办涉外的行政诉讼案件，又可以从中发掘很多的材料，提高办案效率；国内外的公众也会通过它了解我国的行政法以及相关制度，加强我国的法治宣传工作。

本书内容分为12章，5个部分。第一部分是行政法导论(第1章)，阐述行政法的基本概念、一般原理、原则及有关行政法、行政法学发展等知识，进行理论上的铺垫工作；第二部分(第2章)是行政主体与相对人，阐述行政主体的一般理论及有关行政主体职责、职权、管理手段与相对人权利、义务等具体理论和知识；第三部分是行政行为(第3章、第4章、第5章、第6章、第7章、第8章、第9章、第10章)，介绍行政行为的一般理论及有关行政行为的性质、特征、构成要件、合法要件与各种类别行政行为运作程序等具体理论和知识；第四部分是国家赔偿法(第11章)，对国家赔偿法进行全面、概括的介绍，并且系统、准确地阐述行政赔偿的归责原则、方式、步骤、程序与标准等具体理论和知识；第五部分是行政复议和行政诉讼(第12章)，详细介绍行政复议的受案范围、管辖、程序与规则，说明行政诉讼的一般理论及有关行政诉讼法的任务、基本原则。

本书主要以我国行政法治实践和行政法学说为基本研究素材，同时也大量吸收、借鉴我国立法与司法方面的最新成果，形式简洁、内容新颖。

写作组成员是大连海事大学法学院、外语学院的骨干教师和大连市政府负责法制工作的专职人员，曾发表或出版过多篇行政法学和诉讼法学、英语专业方面的论文和专著，具有很强的科研能力和良好的团队精神，这为写作组取得写作成果奠定了良好的基础。

阎铁毅，大连海事大学法学院教师，副教授。

王馨德，大连市政府法制办副主任，毕业于南京大学，1990 年从事政府法制工作至今，已起草和审核过 300 多件政府规章，参加过 30 多件地方性法规的起草、论证工作，长期组织全市法制系统干部的培训，公开发表有关行政法方面的论文数篇，理论与实践经验丰富。

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许民强，大连海事大学副教授，法学博士，长期从事法学教学、高校科研工作，有很强的教学、科研能力，公开发表《对提单运输中当事人协议延长诉讼时效的思考》等论文数篇。

作　者

2005 年元月于海大凌秀园

CONTENTS

Chapter 1

Introduction

1.1 Basic Terms

1.1.1 Administration

Administrative law, in brief, is a law about administration. Therefore, the concept of administration shall be made clear before we know what administrative law is.

Seen from different angles, the word "administration" has different meanings. Normally it means the organizing and management of certain affairs by certain social organizations toward specific goals and objectives.

In a word, to administrate is to execute something. But that is the administration in general sense, that is, general administration.

In the light of this definition, administration lies in all social organizations. For example, enterprises, institutions, mass organizations and state organs, etc., are all involved in certain organizing and management.

But the administration in administrative law has its specific meaning. Instead of general administration, it refers to public administration, that is, the organizing and management of public affairs by state organ.

Public administration differs from general administration in that the former is a state function activity.

In "Critical Notes on the Article 'The King of Prussia and Social Reform', By a Prussian", Marx points out that "... administration is the organizing agency of the state".

The goal of public administration is to realize public interests, to maintain public order and to enhance public welfare, whereas general administration is for the interests of the organization itself. The objective of public administration is social public affairs, but that of general administration is the affairs of the organization.

Since public administration takes public interests as its goal, the state administrative organization enjoys certain privileges and can adopt the measures that are exclusive to common organizing and managing practice.

For example, it can order an enterprise to perform certain duty and can give punishment to those who violates the order. Therefore those two kinds of administration have different legal meaning and shall apply different laws since there exists great differences in their nature, goals, objects and means.

The administration in administrative law is also related to constitutionalism.

Constitutionalism means that the state organs, on the basis of the division of functions, legally execute their functions and powers.

The division of functions in state organs makes state organs differ from each other and thus public administration, as a practice undertaken by administrative organs, is separated from functions of state organs. The public administration after the division of function has the feature of subordination.

Constitutionalism also means that the state organs which is organized by popularly elected representatives is the supreme organ of state power, that the will of the public is embodied through the laying down of the law and that the law is the guideline of all social communities and individual.

In democratic and constitutional politics, the public administration separated from national function is subordinate, that is to say, administrative organs are subordinate to organs of state power and all administrative practice is subject to the law.

The subordination of public administration provides foundation for the arising of administrative law. That's because before the division of national function there's no law that can restrict the king, the emperor, and all the subordinate state organs, which makes peremptoriness and willfulness inevitable, and the history is the best witness to them.

Therefore, democratic politics came into being only when there appeared division of function and the function of democratic politics lies in that the law has realized the standardization of national activities, especially the normalization of public administration, which makes it work in a legal scope.

1.1.2 Executive Power

1.1.2.1 Definition of executive power

Executive power is the rights possessed by state administrative organs to execute legal norm and administrative practice. Executive power is an important part of state power.

The process in which state administrative organ executes national and public affairs is also the process in which it exercises executive power. In modern society, executive power has quite broad content, including administrative legislation, administrative enforcement of law, administrative judicature, etc..

Compared with other state power, executive power has the characteristics of initiative, universality and discretion.

Compared with the rights of individuals and other organizations, it is compulsory, unilateral and privileged.

Executive power, compared with other rights, is distinctive for being compulsory, unilateral and superior.

The functions of executive power are of duality. On the one hand, executive power plays a positive role in the maintenance of social order, the promotion of public interests and the protection of the legitimate interests of citizens, legal persons or other organizations.

Without that positive role, societies would be out of order, chaotic and even may perish together in their antagonism. Individuals and organizations shall be autonomous, but the autonomy without public constraint is not sufficient to maintain public order and to promote public interests.

China is now at the stage of transformation, so it is necessary to exert the positive role of executive power.

On the other hand, due to both the complexity of the subjective and object situations of the people in power and that executive power is a dominant power, which needs not be considered whether the counterpart is willing to obey, executive power would play a negative or even destructive role without certain restrictions based on principles and procedures.

The power free of restriction and control certainly will lead to corruption, which is a truth that has been repeatedly attested by history and the practice. Administrative infraction and violation of citizens' interests must be investigated according to the law, which is a basic requirement of a legal society.

1.1.2.2 Executive power and other concepts

1. Executive power and political power

Executive power is different from political power. Political power refers to the rulership of a state, and the independence and integrity of political power represent the sovereignty of a state.

2. Executive power and functions and powers

Executive power is different from functions and powers. The former is a capacious, abstract and complex concept. This "executive power" cannot be endowed to an administrative subject to execute.

Functions and powers is embodiment of executive power, and it is the functions and powers that executive power is assigned to a specific administrative subject in accordance

with the nature, the function and the task of that subject.

3. Executive power and civil rights

Civil rights (here generally refers to the rights of citizens, legal persons and other organizations) are citizens' autonomy, interests, freedom and capacity. Civil rights, which is usually divided into substantive right and procedural right, has extensive content, including political rights and freedom, religious freedom, personal freedom, social and economical rights, the right of education, the right of accusation, and the right of suit, etc..

The enforcement of civil rights, instead of being unconditioned, shall be restricted by the law and shall not do harm to public and other people's interests. Rights and obligations are unified and indivisible.

Executive power, origins from civil rights, is a kind of special transformation mode of civil rights. Citizens' own organ of power is created by their election and then divides executive power from uniform state power according into the principle of division of powers, then government is formed to execute this power.

1.1.3 Definition of Administrative Relation

What administrative law adjusts is administrative relation. Social relation which occurs in the course of the execution of executive power by administrative organ is called administrative relation.

Chinese administrative organs have broad scopes of functions and powers, and complicated content. Therefore the kinds and nature of administrative relations are quite different and need the mutual regulation of administrative law and other legal departments. The relations adjusted by administrative law includes:

(1) The administrative management relation between administrative organs and citizens, legal persons or other organizations in order to set up and fulfill the rights and obligations of each side.

(2) The functions and powers relation between administrative organs and the administrative post relation between administrative organs and their staff members in order to systematically and efficiently execute functions and powers.

(3) The supervisory administrative relation between administrative organs and other state organs, social organization and individuals.

The administrative relations that occur in the performance of executive power by administrative organs are not adjusted according to administrative law wholly. In other words, not all administrative relations are the objects of administrative law's regulation.

Seen from the point of view of current laws and rules, the administrative relations ad-

justed by administrative law in fact are specifically in a certain scope instead of whole administrative relations.

Some administrative relations, especially some internal administrative relations, usually are to be adjusted by the system, discipline, professional ethics and policy inside the administrative organs.

1.1.4 Definition of Administrative Law

Administrative law is a general term of the legal norms on the grant and exercise of executive power and the legal norms on the supervising of executive power and the remedy of its consequence. In general, administrative law is sum total of legal norms on the adjustment of administrative relation.

The detailed explanation of this concept is in what follows:

1. The goal of administrative law is to realize administration by law in order to validate or to found the administrative legal order that accords with the people's interests and will.

Other social activities need order, so do national administrative activities - on the one hand, executive power is easily misused by people in power; on the other hand, administrative activities are directive to the society and administrative law is needed to realize administrative order.

In administrative activities, state administrative organs shall work in accordance with the law, otherwise, there must occur peremptoriness or substitute one's words for legal provisions, which would leave citizens no way out.

Therefore, the goal of regulating administrative activities by administrative law is to stop the misuse of authority and to realize administration by law, so that the administrative legal order that is in accordance with the people's will is to be founded.

Administration by law is the basic principle of administrative law. It's the kernel of all administrative legal norms and the spirit of administrative law.

The law in feudal society also laid regulations on executive power, but those regulations only served the foundation of the order of despotism and only specified the duties of officers to the emperor or to the king, but the relation between officers and people was not laid stress on. That is not latter-day administrative law.

Latter-day administrative law is the one based on the principle of administration by law. Therefore, administration by law is the key to understand all administrative legal norms.

2. Administrative law is the law to regulate administrative organization and executive power, and it is also the law to remedy the aftermath of the exercise of executive pow-

er. The content of administrative law mainly includes the following three parts.

Firstly, executive power must have its undertaker.

Before administrative law regulates executive power, it shall first regulate the undertaker of executive power - the administrative organization.

Such questions as what is the status of administrative organs in accordance with law, which administrative organs possess the status of subject, and what qualification for administrative subject shall an administrative organ have, are the important content for administrative law to regulate, because it is impossible to exercise executive power without clarifying the authority of administrative organizations, the legal status of administrative organs and their relations.

Secondly, the exercise of executive power appears as administrative act.

Administrative act can change the legal status of a citizen, a legal person or other organizations; it can endow citizens, legal persons or other organizations with or deprive them of their rights, set or relieve them of their obligations so as to make much influence on them. Therefore, administrative act objectively follow certain rules and procedures.

Issues such as what rights shall an administrative organ take, what actions shall they take in accordance with those power and what procedures shall they follow when taking those actions need to be legally clarified. Those rules of conduct make up the main content of administrative law.

Thirdly, since the use of executive power may influence or even impair counterparts' interests, administrative law as the law to regulate executive power shall consider the consequences of the exercise of the power.

If there is power, there must be remedy, and there must be restriction as well.

If administrative activities violate or impair counterpart's legal interests, ways of remedy shall be legally offered to the counterpart to enable the counterpart to defend his/her legal interests or get their impaired interests indemnified.

Only then can executive power and legal responsibility be connected so as to make executive power in controllable responsibility condition and to make the interests of citizens, legal persons and other organizations guaranteed.

3. Administrative law requires executive power to be controlled.

State executive power is necessarily related to administrative law. The legal significance of executive power lies in that the use of it means it makes influence on the legal interests of citizens, legal persons and other organizations. Under this influence there inevitably includes damage.

In order to avoid or eliminate this damage, executive power needs to be restricted and

controlled by administrative law. Therefore, administrative law comes into being due to the power nature of public administration, which determines that administrative law is certain to control executive power.

Administrative law always takes executive power as its object of regulation. Where there is executive power, there is administrative law. When administrative law regulates executive power, many factors may be taken into consideration, but seen from the form of the norms, executive power is no doubt the object and content.

1.1.5 Classification of Administrative Law

The content of administrative law is quite extensive. For the convenience of the research and exercise of administrative law, a classification of administrative law is necessary. Administrative law can be divided into different classification by different criteria.

1.1.5.1 Classification by function of administrative law

The norms of administrative law can be divided into the following three categories:

The first is norms on administrative organizations, which can be divided into two parts: norms on the setting, organizing, authority, duty, procedure and measure of activities of concerned administrative organs, among which the scope of official authority and duties are the core of administrative organic norms; norms on the rights and obligations relations between state administrative organs and their employees about the employment, training, awards, punishment, promotion and transfer of the employees;

The second is administrative norms of conduct, in which the major are the norms on the conducts of administrative organs and individuals or organizations, and among them norms on the relations between administrative organs and individuals or organizations are the major part. Norms of this kind is also the broadest, the most numerous, and the most complicated.

The third is norms on the supervision to administration. Here supervision norms refers to those norms of the supervision subject to administration. Those norms include some norms on the principles, forms and procedures of administrative litigation, and those norms are not large in number, but are remarkably important and are taken as one of the key points in the research of science of administrative law.

We should note that the division of norms as mentioned above is relative and some of them are intersectional.

1.1.5.2 Classification by the scope of the adjusted objects of administrative law

Administrative law can be divided into general administrative law and special administrative law.

General administrative law is a general term of legal norms that adjust general admin-

istrative relations and supervisory administrative relations, such as basic principles of administrative law, administrative organic law, civil servant law, administrative procedure law, etc..

The administrative relations and supervisory administrative relations that are adjusted by general administrative law have a large scope, broad coverage and more generality. Especially the basic principle of administrative law is the foundation of administrative law and the norm it concerns is of highest generality.

Special administrative law is a general term of legal norm that adjusts special administrative relations and supervisory administrative relations, such as economic administrative law, military administrative law, administrative law of education, administrative law of public security, administrative law of civil affairs and administrative law of sanitation.

In science of administrative law, general administrative law is usually studied in the pandect of administrative law, whereas special administrative law is usually studied in the expatiation of administrative law.

1.1.5.3 Classification by the nature of norm of administrative law being the criterion

Administrative law can be divided into substantive administrative law and procedural administrative law, as is shown in the following illustration.

Substantive administrative law is a general term of administrative norms that concern the status, qualification and capacity of the concerned parties.

Procedural administrative law is a general term of procedural administrative norms on the exercise of substantive law, such as administrative procedure law and administrative litigation law.

Although in administrative norms, substantive administrative law is usually interlaced with procedural administrative law, to distinguish substantive administrative law from procedural administrative law is of theoretic value.

Moreover, with the development of science of administrative law, many procedural administrative norms such as administrative procedure law and administrative litigation law have been separated from administrative law, which shows that this division has its use value.