 文化多样性与地方治理丛书·总主编 戴小明

中国区域合作中 地方利益协调机制研究

——兼析武陵山片区龙凤经济示范区的利益协调

冉艳辉 郑洲蓉 著

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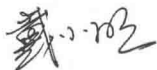
总 序

湖北民族学院地处鄂、渝、湘、黔四省（市）毗邻的武陵山片区腹地——恩施土家族苗族自治州，长期以来，学校始终牢记“面向少数民族和民族地区，为少数民族、民族地区和国家战略服务”的办学宗旨，坚持“立足湖北、面向西部、服务基层、辐射全国”的办学定位。近年来，依托民族地区、武陵山区，哲学社会科学专业建设、学科发展充分发挥省级科研平台湖北省人文社会科学重点研究基地——南方少数民族研究中心的团队凝聚和辐射功能，以“大民族学”的视域来开展科学研究、构建优势学科体系、凝练特色学科方向，保持和加强在“一州”（恩施自治州）、“一区”（武陵山片区）、“一族”（土家族）研究领域的独特优势，努力在民族文化保护与传承、生物多样性与生态安全、区域经济发展与环境保护、鄂西生态旅游圈建设，以及民族区域治理等领域产生具有重大影响的理论成果，占领学术研究的高地。

在湖北省高等学校创新能力提升计划（简称“2011 计划”）的支持下，呈现在广大读者面前的这套《文化多样性与地方治理丛书》，是一个大型的跨学科协同研究项目，涉及文化学、历史学、民族学、政治学、法学、经济学、管理学等学科领域。该项目的目的不仅在于展示湖北民族学院及“2011 计划”协同单位学者相关研究的最新成果，更在于激励具有创新精神的年轻学者脱颖而出。丛书的研究内容既有对地方治理政策框架的宏观讨论，也有对民族地方具体政策法规的微观分析，还有对社会文化变迁的细致考察，从丛书的选题和研究内容来看，它们本身就带有文化多样性的特点。丛书的作者都是接受过系统专业学习和学术训练的博士，既有在学界崭露头角的中青年专家，也有初出茅庐的青年才俊，虽然有的著作可能还略显稚嫩，但都显示出了每一位研究者良好的创新能力和较为扎实的学术功底。

一方山水养育一方人，有什么样的风土，就有什么样的人文；有什么样的文化，就有什么样的地方风貌。地方政府是国家政治制度的重要组成部分，不了解前者，就不可能了解后者。每一个国家只有一个中央政府，却有多个地方政府。地方政府与民众的日常生活更为息息相关，与多样性的地理和社会生态环境的联系更为密切。地方政府的重要性，不仅源于与它有关的政治和政治家们，源于在地方这一级所提供的服务的数量，而且还源于它在增进民主和个人自由方面所做的哲理和道德上的贡献。^① 现代治理是德治与法治的结合、道德治理与法律治理的统一，更是文化认同、文化共识之上的规则之治、宪政之治。多民族的统一中国疆域辽阔，地域差别，民族不同，文化多样，历史和现实昭示我们：政府施政不能脱离民族的文化传统，相应的人文环境，只有尊重传统性，包容多样性，关注民族性，才能因地制宜，实现有效治理，达致善治。我国正处在社会转型期，我们期待《文化多样性与地方治理丛书》的出版，能对推动地方治理，特别是民族区域治理能力和水平的提升有所裨益。

值此《文化多样性与地方治理丛书》付梓之际，我们谨向所有对组编工作给予关注、支持和帮助的相关专家，特别是中国社会科学出版社及其编辑者所付出的努力致以衷心的感谢！



2013年10月8日

^① 参见〔以〕柴姆·卡西姆《民主制中的以色列地方权力》，余斌、王荣花译，北京大学出版社2005年版，第1、3页。

摘 要

随着经济增长方式的转变和国家对区域间协调发展的重视,各类超越省、市、县等原有行政区划界线的合作区域蓬勃发展起来。在传统法治理念指导下、以行政区为基础建立起来的利益协调机制无法调整跨行政区域的利益纠纷。在依宪治国的大背景下,区域法治理论的构建、区域合作规则体系的完善、区域利益协调组织的建立等,是区域合作发展进程中需要面对的问题。本书将系统地研究区域合作过程中法律协调之理论基础、规则体系以及协作组织等问题,并以武陵山片区龙山来凤经济协作示范区为例,总结区域法治的现有经验、探寻未来的发展路径。

首先,本书对“区域”以及地方利益冲突的类型进行了探讨。经济区与行政区的冲突是区域之间开展合作的前提,区域发展目标主要包括两个方面:一是区域经济的协作发展,自由大市场形成,资源配置实现最优化;二是区域内公共事务的协作治理,提高公共事务的解决效率。地方利益是一个群体性概念,实践中通常由地方政府作为地方利益的代言人。从地方利益冲突的成因上看,可以分为主观和客观两方面因素。区域内合作各方无法摆脱传统的行政区域治理模式的影响,是导致地方利益冲突的主观因素。区域内合作各方经济发展水平、历史文化传统、自然地理环境等因素,是导致地方利益冲突的客观因素。区域行政规划、区域行政指导、区域行政协议、区域协作立法等构成区域合作中地方利益协调的主要规则体系。实践中某些合作区域的组织机构一体化存在对现有法律框架突破的情形,还需要进一步寻求合宪性、合法性依据。

其次,本书讨论了区域合作中地方利益协调机制的理论基础。我国经济一体化区域的法治建设与其他区域的法治建设有着共同的前提,都要在现行宪法所确立的国家结构形式、中央与地方关系的框架之下构建区域合作秩序。当然,由于区域发展目标、功能、性质不同,经济一体化区域与

其他区域法治建设也存在差异。人民主权原则决定了区域合作各方的人民代表大会应当成为区域合作过程中的利益协商之所、区域合作过程的监督者。权力分工与制约原则在区域合作过程中体现于两个方面：区域合作过程中的权力的横向划分问题——政府与人大的权力划分；区域合作过程中权力的纵向划分问题——中央与地方的权力划分。基本人权原则在区域合作过程中涉及资源的稀缺性与人权保护的限度、所有权产生或变化与私有财产权的保护、自由大市场的形成与人权保护、区域公共政策制定与公民的参与权等问题。在法治原则中，宪法为区域合作规则体系是否良法的根本判断标准。具体说来，区域法治不能仅仅依靠国家法和国家强制力建构合作秩序，还应当重视民间的自生秩序和实践中能够有效规范人们行为但是又没有国家强制力的规则，创建各具特色又适用于本地方的区域合作模式。区域合作过程中地方利益协调的原则包括两个层面：一是规范地方政府治理行为的原则，即合理划定政府权力与自由市场的界限原则与合理运用政府权力实现公共事务的有效治理原则；二是规范地方政府之间合作的原则，即区域平等原则、自愿协商原则和权责一致原则。

再次，本书探讨了我国区域合作中地方利益协调的规则体系。第一，区域规划。在制定依据上，区域行政规划在法律保留上应适用较为宽松的保留密度，其编制和制定并不必然需要行为法上的依据。因此，即使没有行为法上的依据，也不能简单地认定为违法。在行为属性上，区域规划属于抽象行政行为，至于属于内部行政行为还是外部行政行为，需要具体情况具体分析。作为内部行政行为，区域规划在行政系统内部发挥重要作用。它们依靠行政机关上下级之间的关系，得以层层落实；作为外部行政行为，在区域合作法治化的背景下，区域规划的制定过程要遵循法律保留原则，实施过程服从依法行政原则。第二，区域行政协议。区域行政协议可以从公法契约的角度进行阐释，也可以从行政规范性文件的角度进行阐释，不过作为公法契约和行政规范性文件的行政协议在法律依据、效力、救济机制等方面存在很大差别。为更好地解决区域行政协议履行过程中出现的纠纷，在订立行政协议的过程中尽可能写明争议解决方式，便于合作各方政府按照公法契约的方式，协商解决问题，实在达不成共识，再参照规范性文件的批准程序，向共同的上级人民政府申请裁决。第三，区域协作立法。区域内地方立法合作包括地方政府之间合作制定行政规章、地方人民代表大会及其常务委员会之间合作制定地方性法规以及不同民族自治

地方人大及其常委会之间合作制定单行条例。当前我国区域合作实践中的立法合作属于协作立法和同步立法。从立法主体上说,是由合作各方人民政府或者人民代表大会及常委会进行立法;从立法的表现形式上说,制定的是地方政府规章或地方性法规(民族自治地方可以协作制定单行条例);从立法的程序上说,由合作各方之间建立起立法联席会议协商,然后按照地方政府规章和地方性法规的制定程序进行立法;从立法的适用范围上说,合作各方分别通过的地方政府规章或者地方性法规也只适用于本行政区域内。并没有突破现有的立法体系。

复次,本书探讨了我国区域合作中地方利益协调的组织体系。在区域合作过程中,如果经济区域与行政区域在一定程度上重合,行政区的组织机构可以起到地方利益协调的作用。如果经济区域与行政区域并不重合,其利益协调组织体系所面临的问题就要复杂得多。从目前的区域合作实践来看,主要是地方的行政、立法、司法部门之间组成的合作组织,有管理委员会这种正式合作机构,也有联席会议这样制度化程度相对较低的合作组织。从域外的经验看,欧洲法院在冲突解决过程中的审查标准和欧盟各机构的立法协调经验可在一定程度上为我国借鉴。结合我国的实际,建立跨区域的机构目前没有宪法和法律上的依据,但是美国对于州际协定纠纷的诉讼、仲裁和调解途径可以借鉴。同为单一制国家,法国积极发挥中央在区域合作中的经验值得我国借鉴。当前我国区域合作中的行政协作、立法协作、司法协作日渐频繁起来,但是如果要走组织机构一体化的道路,在当前宪法框架下是障碍重重。在区域协作过程中,用行为机制替代组织结构的功能,才是避开组织机构一体化将会遭遇的合法性困境的可行之策。

最后,本书对武陵山龙凤经济协作示范区地方利益协调机制进行了探讨。龙凤示范区这样的少数民族经济协作区,属于国家扶贫开发协作区,市场体系极不完善,政府这只“看得见的手”在资源的配置中起到重要作用。同时,龙凤示范区又属于民族自治地方,在区域合作过程中,涉及行政区划调整、区域立法权的行使时都存在特殊性。协作双方过于“同质化”,合作动力不足,利益争夺频繁。协作措施容易触及我国的民族区域自治制度。从地方利益协调机制上看,既包括上级政府对武陵山龙凤示范区的利益协调机制,又包括龙凤示范区内部的利益协调机制;龙凤示范区内部的利益协调机制又包括县级政府、乡级政府和村与村之间的利益协

调机制。对于龙凤示范区当前存在的过分依赖行政权威推进区域合作的想法，本书认为缺乏可行性：第一，行政区划的变动在现实中比较困难。第二，实现省级直管有削弱民族自治地方自治权的嫌疑。第三，完全依靠国家支持有违区域合作的目的。第四，区域合作真正的发展动力应当来自于合作地区本身。武陵山片区龙山来凤经济协作示范区还存在县城之外的乡镇、村寨之间的非正式合作方式，这些合作方式对完善区域合作机制、探讨民间法与国家法之间的良性互动有着重要意义。要进一步完善地方利益协调机制，还需要考虑大力培育市场机制、规范地方政府行为以及合理运用民族区域自治权。《酉水河保护条例》的制定是区域立法合作的一次成功探索，同时也揭示出区域立法合作进一步发展过程中将会面临的问题。

关键词：区域；合作；规则；组织；宪法框架

Abstract

With the mode of economic growth changed and more attention paid by the government to regional cooperation, various kinds of cooperative regions are booming beyond the original administrative boundaries. The interest coordination mechanism under the traditional concept of rule of law and on the basis of administrative regions is unable to adjust the disputes arise from across-administrative regions. Under the view of governing the country by the Constitution, the problems which are faced with in the process of regional cooperation includes constructing the theoretical basis of legal system of cooperative regions, completing the rules of legal system of cooperative regions and establishing the organizations for regional interest coordination. The theoretical basis, rule systems and cooperative organizations will be discussed in this thesis. Longshan and Laifeng County in Wuling Mountain which is one of the demonstration areas of economic cooperation in China will be an example for exploring the present experience and future path of the regional cooperation.

Firstly, the mode of regions and conflicts of local interests have been discussed in the thesis. The conflicts between economic regions and administrative regions are the premise of regional cooperation. And two goals are involved in regional development. One is the development of the regional economy, establishment of free market and optimization of resource allocation. The other is cooperative governance of public affairs and solving the public affairs more efficiently. Local interest is a group concept and the local government always acts as the representative of the local interest. As to the cause of the local interest, there are both subjective and objective factors involved. The local governments of cooperative region have failed to get rid of the influence of the governance mode of

traditional administrative regions, which is the objective factor giving rise to conflicts of local interests. And the subjective factors include the level of economical development, historical and cultural tradition, physical and geographical environment etc. Regional administrative planning, regional administrative guidance, regional administrative agreement and regional cooperative legislation constitute the main rule systems of regional cooperation. The constitutionality and legality of the measures by which the organizations integrated in the process of regional cooperation should be discussed and some of them have broken through the present legal framework.

Secondly, theoretic basis of the local interests' coordination mechanism has been discussed in the thesis. The common premise of state structure and central-local relations which stipulated by the Constitution should be followed by both the integrated and other regions. Absolutely the integrated and other regions are much different according to the goals, functions and characters of them. The people's congress should be the place where interests of all parties in the integrated region are negotiated and allocated and the process of cooperation is supervised according to the principle of people's sovereignty. The principle of the division and restriction of power has been divided into two aspects. One is the horizontal division of power which is between the government and the people's congress. And the other is the vertical division of power which is between the central and local governments. The principle of basic human rights have included scarcity of sources and the limits of the protection of human rights, change of ownership and the protection of private property, establishment of free market and the protection of human rights, formulation of public policy and the participation rights of citizen etc. The principle of rule of law means that the constitution is the fundamental standard to judge whether the legal system of the cooperative region is good or not. In particular, the order of cooperation should be constructed not only by the law and force of the state but also by the self-ordered rules in the society. The principle of local interest coordination includes two aspects. One is the principle of regulating the behavior of local government's governance, which involving reasonable boundary between the power of the government and free market. The other is the principle of equality, negotiation and re-

sponsibility.

Thirdly, the system of rules for the local interests' coordination has been discussed in the thesis. First of all, the basis and character of the regional planning will be analyzed. Formulation of the regional planning is unnecessarily under the special entitlement in law according to the principle of legal reservation. As to the character of the regional planning, whether it belongs to the abstract administrative act or specific administrative act depends on concrete conditions. As an abstract administrative act, the regional planning plays an important role in the administrative system, which has been put into practice owing to the relationship among the upper and lower authorities. As a specific administrative act, the process of formulation of the regional planning should follow the principle of legal reservation and the process of implementation should abide by the principle of administration by law. Moreover, regional administration agreement can be explained not only by the character of public contract but also the character of administrative rule. But the public contract and administrative rule are much different in the legal basis, effect and remedy mechanism. Resolutions to disputes should be written clearly in the administrative agreement in order to resolve the disputes during the performance of the agreement. The verdict of the upper government could be applied if the lower governments cannot reach the consensus according to the approval procedure of normative documents. Finally, cooperative legislation includes cooperative administrative rules between local governments, local legislations between the people's congress and its executive committee and cooperative special regulations in the minority autonomous areas. Nowadays cooperative legislation in the cooperative region in China is synchronous legislation. As to the legislative subject, it has been the local government or people's congress. As to the forms of legislation, it has been the form of administrative rules or local legislations. As to the legislative procedure, it has been the legislative procedure followed by the joint conference. As to the range of application, it has been the local areas of each party in cooperative region.

Furthermore, the organizational system of regional cooperation has been discussed in the thesis. If the administrative region and the economic region overlap in some way, organization of the administrative region can deal with the

conflict of local interest. But if they do not overlap, the problem will be more complicated. The cooperative organizations are always composed by the local administrative, legislative and judicial sections. There are some formal cooperative agencies, such as the management committee. And there are some informal cooperative agencies, such as the joint conference. According to the foreign experiences, the standard of judicial review of European Court of Justice and the experience of cooperative legislation of European Union can be used as reference in China. The procedure of litigation, arbitration and mediation to the disputes of interstate compact can be used as reference in China though cross-regional institutes are beyond the Chinese constitution and other laws. As a unitary state, the central government of France plays positive role in the regional cooperation. Mechanism of behavior should take the place of the structure of organization so that the predicament of legality can be avoided in the future.

Finally, the cooperative mechanism of Longfeng demonstration area of economic cooperation in Wuling Mountain has been discussed. Longfeng demonstration area is a minority economic cooperative region and national poverty alleviation and development region. And the government plays important role in the process of allocation of resource as a visible hand because of the imperfect market system. As a minority autonomous area, both the adjustment of the administrative division and performance of the power of legislation should follow special procedures. The two parties of cooperation are so similar that they often fight for their own interests and sometime cooperative measures are even beyond the system of regional ethnic autonomy. As to the cooperative mechanism, both the mechanism of interest coordination of upper government and the mechanism of Longfeng demonstration area which includes the county, town and village are involved. This thesis suggests that Longfeng demonstration area should not depend on the administrative authority excessively and the reasons are as follows. First of all, it's very difficult to change the administrative boundary. Secondly, the right of autonomy will be weakened if Longfeng demonstration area is governed by the provincial government. Thirdly, it is contrary to the goal of regional cooperation if depend on the central government excessively. In the end, the crucial power of regional cooperation comes from the cooperative region it-

self. There are still some informal cooperative mechanism among the villages which are important for perfecting the cooperative mechanism and exploring the way of positive interaction between the folk law and the national law. Cultivating the mechanism of market, regulating the behavior of the local government and applying the right of autonomy properly would contribute to the implement of the cooperative mechanism. The process of formulating the Act of Protection of Youshui River has revealed not only successful experience for legislative cooperation but also the problems confronted in the future.

Key words: Region; Cooperation; Rules; Organizations; Constitutional Framework

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