经济法专题研究书系

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内容提要

本书认为在政府证券监管公权力的不断强势下，已严重削弱了证券业自律管理原有的“独立的”、“自治的”、“私权利”的本质，使其成为政府证券监管的一个“臂膀”。而生成于市民社会或政府主导不同环境背景下的证券业自律管理制度，其“公权化”的路径选择和内涵虽有所不同，但究其根源均是证券业自律管理“公权化”的症结。我国当前证券监管改革中，在证券交易所公司制改革成为必然的趋势下，树立适度的政府监管理念、确立证券业协会充分的证券业自律管理者“独立”地位，并赋予其实际的自律管理职权，应为矫正我国证券业自律管理严重“公权化”的主要路径选择。

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摘　要

随着金融危机的发生，一些受金融危机波动影响严重的国家围绕金融市场结构、金融监管理念和监管者责任等内容已着手其本国现行金融监管体制改革。其中，在理论界和政策制定者之间以及最新立法改革中引起广泛争议的焦点是在金融监管体制中，对金融业自律管理形态和角色的重大探讨存在显著缺陷。

现代金融市场的复杂性及全球化特征，使得任何政府试图全面控制和管理金融市场都将不可避免地遭遇管理套利的基本问题，只有通过获得行业的积极参与和管理才可能打破这个怪圈。因此，在讨论、争辩金融监管体制改革时，缺乏对行业自律管理的关注是一个严重的缺陷和遗漏。在整个金融市场中，证券市场无疑是其中市场结构最复杂、投资风险最大、有效监管也最困难的主要部分，现行金融市场的跨境联盟也更多地产生在资本市场领域中。并且，每一次金融风暴引发的经济动荡也基本来自资本市场的爆发原点。因此，证券市场自律管理体制的改革成为金融监管体制改革中不容忽视的重要内容。

证券业自律管理现状不尽如人意，表现为自律管理严重不力、自律管理被严重边缘化、自律管理在利益冲突面前失去信用等诸多严重问题。产生上述问题的原因是多方面的，但本书认为，究其根源是证券业自律管理“公权化”的症结，而非仅仅是自律管理某一外在表象的问题。或者说证券业自律管理不足，所有外在的表象均源自于其“公权化”根源。基于此，本书围绕证券业自律管理“公权化”的表象、产生的原因、路径演变等内容进行分析、研究，并探讨证券业自律管理“公权化”矫正的途径选择。

一、证券业自律管理本义及其“公权化”表象的分析

对事物的最高认识莫过于对本质的把握，证券业自律管理亦不例外。证券业自律管理这一古老、传统，而又常新、现代的话题历来是证券监管体制中永恒探索的内容，不同时代、不同体制的国家对证券业自律管理不断改革、完善的孜孜探究也充分说明证券业自律管理本身对于证券市场监管的重要性及其存在的困惑。而“只有正本才能清源”。

在证券业自律管理本义部分，首先，本书通过对行业自律管理中“自我”特性的分析表明，尽管从行业自律管理组织产生以来金融业自律管理中的“自我”都是以集体组织面貌而非个人形式出现的，但“自我”作为一个社团组织管理形态，其表现为独立于政府行政监管并与之并行存在的一种市场化管理组织，属于市民社会中民间协会“私主体”的身份，并具有充分的“独立性”。尽管在政府介入证券市场监管后，自律管理也并非与政府毫无关联，但行业自律管理组织的“独立性”仍是其最本质的特征。而且，契约理论以及行业自律管理中体现的有限“公共利益”特征决定了行业自律管理组织“私主体”的本质特性。其次，本书对证券业自律管理权的“私权利”本义作了分析。从证券业自律管理权行使对象为行业内部成员、行业自律管理权维护的是行业共同利益的角度以及其与政府监管关系的外部维度方面分析了行业自律管理权的“私权利”本质属性。另外，通过对证券业自律管理“自治权”的契约来源及自治权的特性分析表明，尽管证券业自律管理自治权包括带有一定强制约束力的处罚、惩罚等职权，但其本质仍应属于“私权利”的范畴，从而与国家政府实施的“公权力”相区别。

除此之外，证券业自律管理本义部分还从证券业自律管理权的合宪性、契约性角度，对证券业自律管理“自治权”及其权利体系、对证券业自律管理“自治权”行使程序的正当性要求

进行了分析，认为在法治进程中，在外部力量尊重自律管理行为之外，证券业自律管理本身也要注重正当性程序的要求。

在证券业自律管理“公权化”表象部分，本书在认定“公权化”特定含义的基础上，分别对证券交易所、证券业协会的法律属性及证券业自律管理目标三个方面进行了论证。其中，证券交易所“公权化”的表象为证券交易所“自我”身份“准行政机构化”的异化。尤其在中国，现实中的证券交易所自律管理组织已异化为“具有中国特色的公共权力机构”，不再是原本具有私人属性的团体组织。交易所会员从“自我”变身为完全的“被管理者”。证券交易所自律管理也多是以“自律”之名行“行政管理权”之实。证券业协会自律管理“公权化”的表象为证券业协会已从行业成员利益的代表者、维护者转变为仅是一个服务者，其自律监管职能主要成为“政府的桥梁和纽带”，成为政府监管的延伸工具。证券业自律管理的目标也从维护行业成员的群体利益滑向对“公共利益”的维护等“公权化”的表现。

二、证券业自律管理“公权化”国际发展趋势的考察

英美最发达的证券市场本就渊源于证券交易所自律管理的“自我”生成。这种“自发”的具有民间私人俱乐部性质的组织为证券业自律管理打下了坚实的“独立”“自治”的品质基础。在长达百余年的期间里，美国处于自由经济发展阶段，其奉行的“最少干预的政府就是最好的政府”信条，极大地促进了美国证券业自律管理的发展。然而，分散、自由所带来的美国证券市场严重的投机、虚假、欺诈等问题，导致对证券业自律管理信任的坍塌和政府的干预介入。伴随着之后每一次金融危机爆发，在责难证券业自律管理的缺陷时，政府开始不断加强其对证券市场的监管力度，并最终使证券业自律管理本身也被置于政府的监管之下，逐渐减弱证券业自律管理的独立、自治的本性，使其从被广泛质疑演变成“准政府机构”，扮演着政府监管者“臂膀”的角

色。尽管对此无论是理论界还是司法实务中都有反对的主张，但理论界的广泛质疑以及有关司法认定本身就已表明英美等西方国家传统的证券业自律管理已经发生了异化演变。

日本早期的证券业自律管理就被置于政府的监管之下，其自律管理的行政色彩同样越来越浓厚，在一定程度上也表现出证券业自律管理“公权化”的发展趋势。

三、证券业自律管理“公权化”的原因探析

造成证券业自律管理“公权化”的原因，既有其行业自律管理本身的内因，也有外因的强大影响，这种内外因的相互联动形成了证券业自律管理“公权化”的局面。

这些原因主要表现在：第一，行业自律管理限度及其利益冲突的内因。证券业自律管理的优势在不断变化的市场结构面前逐渐弱化，公司化改制后的交易所的自律管理职责与其自身利益及其他相关主体利益诉求间的冲突，导致其自律管理中出现放松、偏袒等严重自律管理不力现象。第二，政府对金融市场的直接干预政策和对公共利益的维护是造成证券业自律管理“公权化”的外部动因。第三，证券市场结构及其经济环境的变化是导致证券业自律管理“公权化”的根本因素。第四，经济学理论所主张的经济自由放任监管理念及政府全面干预监管理念的发展变化，也引导了在政府证券监管日益加强环境下的证券业自律管理“公权化”的演变。

面对中国金融市场在2007年美国金融危机中并未受到严重影响的现象，有观点赞许中国现行政府主导型证券监管体制的有效性。然而，中国金融市场未受重创的原因与美国次贷危机爆发的原因非属同一层面的原因，而主要是中国现行证券市场结构相对简单、交易领域相对封闭、缺乏竞争以及与国际证券市场相对脱离的结果。因而这种有效论值得商榷。

四、证券业自律管理“公权化”的路径依赖分析

当今中西方证券业自律管理均表现出“公权化”问题。尽管如此，生成于不同环境背景下的证券业自律管理制度，其“公权化”变迁的路径选择和内涵却有所不同。根据诺斯“制度变迁路径依赖理论”，任何制度变迁总有其自身路径依赖的规律可循；其中，文化积累和政治力量是制度变迁路径依赖中的两个重要因素。文化累积过程中形成的价值观、理念等文化存量以及政治制度、组织和利益集团力量对比等政治因素决定了不同制度的路径选择。

英美证券业自律管理是在市场经济、民主政治国家所奉行的“自由主义”精神下自发、自觉生成的，同时也是市民社会高度发展时期的产物。市民社会所特有的“独立”“自治”特性以及国家对私权利的保护等价值观使其证券业自律管理在政府监管不断加强的环境中尽管呈现出逐渐减弱并产生异化的趋势，但其“独立”“自治”的特性依然保存。或者说，这在某种意义上也可以理解为是对其证券业早期完全行业自律、自治、自由的一种约束，有其合理的一面。

我国几千年封建社会形成的集权主义、国家本位主义及官本位主义等思想、价值观是我国政府主导型证券监管制度选择的根本所在。同时，中国市民社会的缺失使行业自律固有的“独立”“自治”精神在由政府推动而成立并运行的证券业自律管理组织中根本无法真正体现，这也是我国证券业自律管理“公权化”路径选择的必然结果。

五、“公权化”下自律管理“存废论”与“有效论”之辨析

在证券业自律管理明显“公权化”的当今，在证券业自律管理中的弊端日益凸显时，关于证券业自律管理体制的废除抑或是维持、存续，不断引发争论。其中，“废除论”所持的理由主

要为网络化、全球化、电子化的证券交易市场以及另类证券交易系统使得以交易所为首的证券业自律管理体制虚拟化，故应由市场竞争规则替代行业自律管理。而另一个理由则是在政府监管日益强势的背景下，证券业自律管理已经“公权化”，因而，其自律管理已严重弱化而处于实际虚无状态。当然，还有观点认为证券业自律管理出现的种种弊端并非其被废除的理由，重要的是如何改革使其“公权化”得以矫正，从而发挥其应有的优势和作用，因而证券业自律管理制度的存续及改革是必然的。

而在中国证券业自律管理“公权化”十分凸显的情形下，面对2007年美国金融风暴中中国金融市场并未受到巨大冲击的态势，有人提出了中国现行以政府为主的金融监管体制有效的观点。这一观点的偏颇之处在于未清晰地认识到二者所产生和论及的层面是截然不同的。

六、证券业自律管理“公权化”矫正的路径探究

对证券业自律管理“公权化”这种非正常现象应予以矫正，才能发挥证券业自律管理应有的作用，有效地促进中国金融市场、证券市场的繁荣和发展。

证券业自律管理“公权化”矫正的首要路径是修正中国证券监管制度中一直奉行的政府主导干预理念，实行政府适度干预理念及规则监管与原则监管相结合的理念，以解除政府对市场过度“担忧”所造成的权力滥用与失控现象，实现政府监管权力合理让渡，给予证券业自律管理正常发展的必要空间。其次，中国证券交易所公司化改革及其自律监管的合理定位是使其“公权化”得以矫正的重要途径。证券交易所目前被认为是中国最主要的证券业自律管理组织，“公权化”问题也最严重。面对证券电子化、网络化、国际化趋势发展以及全球交易所公司化改革现状，中国证券交易所也不能“独善其身”，交易所的公司化改革是必然的趋势。对此，应合理借鉴国外交易所改制的成功经验，

准确定位其证券交易市场一线管理者角色，减少利益冲突，发挥其应有的作用。最后，重树证券业协会统一、独立、非政府行业自律监管机构的地位是矫正其“公权化”的重要保障；架构其自律规则制定权、行业管理自治权、市场主体资格准入权、违规行为处罚权、业内成员纠纷解决权等自律管理权利体系，以及完善其组织结构，是矫正中国证券业自律管理“公权化”的重要举措。

Abstract

With the occurrence of the financial crisis, nations heavily impacted start to reform their present domestic financial supervision system by means of rethinking and rebuilding their respective financial market supervision systems with a view to the financial market structure, reconfiguration of financial supervision ideals, and obligations of the supervisors. In this process, a heavily-debated focal issue is the mode and role of self-discipline management in the post-crisis financial supervision order. This issue has been widely disputed on the domestic level and international level, both in theoretical research and by policy-makers. But the debate so far has exhibited apparent flaws. In the present development of financial market, although the US financial crisis led to the collapse of financial credit, as a result of which people in general start to question the efficacy of self-discipline management system in the financial service industry, we should, however, realise that the choice of self-discipline management should no longer be a political one.

Due to the complication and globalization of financial markets, any government shall inevitably encounter the fundamental issue of management and arbitrage in its efforts to achieve overall control and management of financial markets. Only with the active participation of the industry into the management can this vicious cycle be broken. Therefore, a reformation without the involvement of the financial industry constitutes a serious defect and omission in the discussion and debate. In the overall financial market, the securities market is

obviously the most complicated, with the highest risk of investment, and meanwhile the task of effective supervision is also the hardest. Cross-border alliance in the financial market occurs most often in the capital market. What's more, every disruption of financial storm and the following economic turbulence have basically evolved in the capital market. Therefore, the self-discipline management system in the securities market should be the priority in the reformation of the financial supervision system.

The reason why the self-discipline management in the securities industry has aroused so much attention and become the focal target of the reformation to the financial supervision system lies in the fact that the status quo of the self-discipline management in the securities industry is dissatisfactory, facing problems like incompetence in the self-discipline management, or marginalization of self-discipline management, or faith breaking of self-discipline management in the face of conflicts of interest. Many factors contribute to the above problems, but the primary reason lies in the "tendency towards public right" of the self-discipline management in the securities industry. To put it in another way, all the superficial phenomena denoting incompetence of the self-discipline management in the securities industry lies in the "tendency towards public right". Based on this knowledge, this dissertation focuses on the analysis of the reasons for and evolvement path of the tendency towards public right of the self-discipline management in the securities industry and probes into the possible corrective approaches to the tendency.

Firstly, Definition of the Self-Discipline Management in the Securities Industry and Analysis of the Tendency towards Public Right

The highest level of knowledge is to grasp the essence of things. The same is true with the self-discipline management in the se-

curities industry, which has had a long tradition but meanwhile has always been a lasting topic in the reformation of securities supervision. The fact that nations of different times and political systems have strived to research on the reformation and perfection of the self-discipline management in the securities industry explains the importance of the self-discipline management to the supervision of the securities market and the perplexity in it. In order to get out of such perplexity, it is essential to clarity essential matters.

The definition part of the self-discipline management in the securities industry is divided into two sections. Section one is inspection into the private identity of the self-discipline management organizations. It begins with the analysis of "self" and "management", then the dissertation proposes that, although in the financial industry the "self" in the self-discipline management is always in the form of collective organizations, as a corporative management mode, it is independent from and coexist with the administrative management. It belongs to a nongovernmental private entity in the civil society and is meanwhile highly independent. Although after the involvement of the government into the supervision of the securities market, the self-discipline management is not totally unrelated to the government, independence is still the most essential feature of the self-discipline management. Besides, the self-discipline management as a private entity is also reflected by contract theory and the limited "public interest" in the self-discipline management. The second section is the discussion over the private right feature of the self-discipline management. It begins with the private right nature of the self-discipline management right through analysis of target of the exercise of such a right by internal members, the common interest safeguarded by the self-discipline management right and its relationship with government supervision. Besides, by analyzing the source of the

right of autonomy of the self-discipline management right and the features of the right of autonomy, the dissertation believes that the self-discipline management right still belongs in private right, in spite of the fact that the right of autonomy of the self-discipline management in the securities industry includes compelling penalties and the power to punish, thus distinct from the public power exercised by the government.

What's more, the dissertation also justifies the private right nature of the self-discipline management right and the legitimacy of its right system by means of constitutionality and contract feature of the self-discipline management right. It also discusses the legitimate procedure for the exercise of the self-discipline management right in the securities industry, and thinks that in the process to the rule of law, compliance with due procedure has become an inexorable trend and practical demand. In defining the private right nature of the self-discipline management right, the dissertation also admits that, while acts of self-discipline management should be respected by external forces, the self-discipline management itself should comply with the due procedure.

In the section of the "tendency towards public right" of the self-discipline management in the securities industry, this dissertation, after defining the "tendency towards public right", discusses the following three aspects: securities exchange, securities association and the objective of the self-discipline management in the securities industry. The "tendency towards public right" of the securities exchange exposes its quasi-administrative-agency identity. This is especially the case in China, where the self-discipline management organizations in the securities industry has turned into "public power agencies of Chinese characteristics". They are no longer corporative organizations of

private nature. Members of the securities exchange have changed from the "self" into target of administration. The so-called self-discipline management has turned into executive power in the name of self-discipline. The "tendency towards public right" of securities associations is represented by the fact that they have become representatives of the members of the industry and defenders have been reduced to service providers. Their self-disciplinary function has turned into "the bridge and link of the government" and become the extended tool of the government. The objective of the self-discipline management in the securities industry has shifted from safeguarding the interest of the members of the industry as a whole group to safeguarding the public interest, which is unreasonable and unjust.

Secondly, To Explore the Trend of Public Right in Securities Self-Regulation of Securities Industry in International Perspective

USA and UK being the most developed economy countries in the world, the emergence of their securities market just originated from the forming of the securities self-regulation organization, namely the stock exchange. The "innate" and pure nature of private club of this kind of stock exchange laid down a solid foundation for their "independence" and "autonomy". During the period of more than one hundred year, USA sticked to the theory of economic liberalism and abode by the creed of "the best government is the government with minimum intervention", which greatly promoted the liberal development of American economy and fanance and the self-regulation organization without government regulation. Nevertheless, the serious speculation, misrepresentation and fraud problem in American security market brought by dispersion and freedom caused a mistrust of self-regulation and the government intervention. Accompaning with every explosion of financial crisis, while accusing the blemish of self-regulation of

security industry, the government began to strengthen the strength of regulaion on the security market, and finally making the self-regulation of security industry being charged by government, which led to the self-regulation of security industry gradually losing its nature of independence and autonomy, and being extensively queried to turn into the role of "quasi-government organ". Regardless of the opposing augument in both academic circle and judiciary, the extensively querying of the academic circle and judicial judgment have showed that some alienation of the traditional self-regulation of security industry in west countries has already occured.

Japan has a long history for government to take charge of the self-regulation of security industry, and the administration attribute of self-regulation of security industy became stronger and stronger, which in some sense reflected the development trend of "public right" in self-regulation of security industry.

Thirdly, To Discuss and Analyse the Causes of the Tend of "Public Right" of Self-Regulation of Security Industry

The causes that brought about the trend of "public right" of self-rregualton of security industry include both its innate reasons of self-regulatin of security industry and reasons in the security market environment. These inherent and extrinate reasons interacted and resulted in the outcome of the trend of "public right" of self-rregualton of security industry.

These reasons are mainly expressed as followings: first, the limitation and conflict of interests of self-regulation of security industry is just the internal factors of the alienation of "self-regulation". Facing with the changing market, the advantages of self-regulation of security industry become weaking gradually. After being restructed into company, the security exchange has confronted some problems such as its

own self-regulation duty being conflicted with its own interests and other stakeholder's interests, which would lead to some inadequate self-regulation such as loosening and partiality in self-regulation of security industry. Second, the intervention policy of the government to the financial market and the maintenance target of public interests is for government to directly interfere with security regulation, which is the external reason that leads to the trend of "public right" of self-regulation of security industry. Third, the changes in both the security market structure and it's economy environment is the fundamental factors that cause the alienation of self-regulation of security industry. These developments and changes directly the changing role of government intervention in fanacial market and security market from a loosening regulation to stregthening regulation. It can be followed that the development trajectorie in self-regulation of security industry just coinide with the development trajectories of government regulation theories.

Confronted with the alienation phenomenon of self-regulation of security industry and the phenominon of China's immunity from the American financial crisis in 2007, some approve the effectiveness of Chinese current security system, the reasons for supporting the current system are based upon the relevant simple security market structure, self-enclosed trading field, less competetion and being greatly deviated from international security market. These factors mentioned above will in no doubt affect the correct path of Chinese financial regulation reform.

Fourthly, To Analyse the Path Dependence of the Alienation of Self-regulation of Securities Industry

Although all the self-regulation of security industry in every country presents the development trend of "public right", the path selection and annotations of the alienation of self-regulation of security in-