行政法国际化研究

——论全球治理语境下国际行政法的产生

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内容摘要

从“9·11事件”开始，到2003年SARS的爆发再到2005年禽流感的爆发引起的全球恐慌，全球化向纵深发展的世界中所体现出来的相互依存关系在最近几年已越来越明显，这种明显特征的一个最为突出表现就是各国政府无法单独处理这一系列重要问题，包括恐怖主义、贸易自由化、经济一体化、传染病以及全球环境问题如气候变化等，于是国家间的协作以及对统一国际决策应对国际公共问题的需要也随之显现，并且日益引起国内外学者们的重视。分散的国内规制和管理措施越来越难以有效应对这些全球性问题，因此，各种跨国规制体系或规制合作通过国际条约和较为非正式的政府间合作网络建立起来，使得许多规制决策从国内层面转移到国际层面。而且，此类规制的具体内容多是由那些实施管理职能但不直接受国内政府或国内法律体系控制的跨国行政机构所实施。与此同时，主权国家仍是国际关系的基本结构，很多学者对所谓全球治理的提法依然持有根深蒂固的怀疑态度，这在实践中体现为对超越国家范围决策的保守态度及怀疑态度，反全球化活动者的身影活跃在各个国际组织的会场之外，很多人认为全球化以及超越国家边界的行为损害了主权国家的民主、主权和管理的自主权。而跨国行政机构的权力行使中同样存在种种问题，如民主缺失、参与性、可问责性等。

本书正是试图通过行政法的视角审视上述种种难题。随着国内的决策者和行政法学者开始倡导制定规则和程序以加强行政机构的合法性，一种行政法的国际化趋势开始显现：即寻求行政法的首要原则以纠正跨

国层面上民主缺失、合法性以及可问责性等问题。这种国际化的趋势不但体现为为更多的超国家治理制定规范标准,还包括确保跨国规制机构必须采取基本的行政法程序以取得更好的效果,并加强公众对他们所做的选择和提出的政策的信心。

本书所称的行政法国际化,是指在全球化、全球治理的语境下,在追求和努力于国际法治的进程中,面对全球规模内相互依存已越来越多的现实并由此产生的对国际合作机制的需要以及解决跨越单一国家界限的国际性公共问题而出现的跨国规制体系,原属于国内法的行政法律制度对域外的扩张、相互联系与融合、在全球流行乃至国际行政法体系形成并双向渗透的一种法律发展趋势和过程。作为基础研究,本书围绕行政法国际化这一法律现象、法律趋势及成型中的国际行政法一系列基本问题进行展开,沿袭的是这样一种论证思路:行政法国际化从哪里来?表现如何?向何处去?围绕此命题的论述主要由绪论、结语和五章构成,绪论主要交代研究的宏观背景、基本概念界定、既有研究状况的介绍以及分析框架等基础性内容。结语部分,得出本书的研究结论及针对行政法国际化中的中国应有的主张与见解。其他五章主要内容如下:

第一章　行政法国际化的理论依据。行政法的国际化,或者和国内行政法具有相似精神和内核的任何有关"国际行政法"的提法历来都是一个备受争议的问题,因此,为其找到强化有力的理论依据是十分有必要的。本章认为作为行政法国际化的理论依据是全球治理、法律全球化和国际法治理论,这三者对行政法国际化之所以重要,是因为前者从宽泛的角度可以理解为一种超国家行政行为,而后两者则表明原属于国内语境的一些概念、术语,如法治概念,在全球化的背景已经呈现"溢出"国界的趋势,所以自然充当了行政法国际化的理论依据。本章着眼于对三者的关系详细阐释。笔者认为全球治理即新公共管理全球化的最高形式,行政法国际化则是全球治理在法律上的回应,或者说是全球治理的法治化形式。全球治理的提出是行政法这一国内公法得以跨越主权疆域的逻辑

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起点和理论根基。

第二章　行政法国际化的现实动因。本章所要重点阐述的是最为直接驱动行政法国际化的内在和外在原因。从现实看，全球公共问题的凸显、公民社会兴起对善治的渴求以及非政府组织的发展等是行政法国际化的驱动因素。全球性公共问题使得世界各国均不可能置身事外，因此需要各国加强沟通与合作，通过全球治理的途径共同参与应对。全球公民社会的出现，产生了全球公民社会团体参与到国际行政监管和行政服务的公共需求，这有力地改造了国际性公共监管和全球性公共服务的主体结构、运行结构以及监督问责结构。国际非政府组织在当今国际社会中发挥着极其重要的作用，其职能的扩张所在往往正是一国政府、正式的政府间国际组织所无法触及之处，国际非政府组织的发展对行政法国际化的驱动，主要在于全球治理中国际非政府组织为国际行政法提供参与的主体支持。

第三章　行政法国际化当下表现形态。在传统行政法语境中，行政主体、行政行为、行政相对人以及行政救济等问题，是行政法最基本的范畴，这些基本范畴构成了行政法理论大厦的主体结构和核心内容。本章所要阐述的是行政主体、行政行为、行政相对人和行政救济等领域如何实现“国际化”以及其表现形式的。

行政主体的国际化体现为在一定程度和范围上产生了带有明显跨国特征的“国际规制主体”。从表现形态上看，国际规制主体在大多情况下表现为正式的政府间国际组织的形态，少数情况下非政府组织和一个国家的国内机构也可充当国际行政主体的角色。行政行为的国际化主要包括两方面的内容：一是国内行政行为由于所处理的事务具有涉外性，即国内行政行为的国际化；二是国际行政主体针对国际性公共事务所作出的行政行为，即国际规制行为。行政行为国际化主要有几种表现形态：行政行为域外效力（从国内到国际）、国际规制行为的涌现、行政行为丰富化（从公法行为到公、私法行为）等。行政相对人国际化的表现形态为原属

国内的行政相对人身份的国际性转化，以及国家、正式的政府间国际组织、国际非政府组织的行政相对人身份。行政救济国际化的基本理据是基本人权理念之确立与发展，国际规制主体发生侵害事实之可能。从本质上来讲，行政救济国际化的核心问题就是对拥有国际性公共管制权力的行政主体进行问责，即国际规制主体是否应当负责、要对全球治理中哪个利害关系人群体负责以及问责的标准和尺度是什么。国际行政问责的内容是也一个十分复杂的问题，包括：权力来源问责、权力行使过程问责以及权力行使结果问责等。

第四章　全球秩序下国际行政及其类型界分。国际行政法概念的前提是所谓“国际行政”的存在。本书把超越国家的行政规制划分为六种主要形态，分别为：国际组织的内部行政；正式的政府间国际组织的行政（以联合国难民事务高级专员公署为例）；私人机制国际组织的行政（以世界反兴奋剂机构为例）；公私混合型国际组织的行政（以国际食品法典委员会为例）；基于国内官员之间合作安排的跨国网络实施的行政（以巴塞尔银行监管委员会和证券委员会国际组织为例）；一国国内当局实施的涉外行政（以“印度、马来西亚、巴基斯坦和泰国诉美国关于虾及虾制品禁止进口案”为例）。事实上每一种形态都包含众多的跨国规制机构，本书主要选取最为典型的跨国规制机构重点进行阐述。笔者所要重点强调的还有：这种界分是一种为便于研究的相对理想化的做法，在实践中，许多形态的规制机构界限并不是非常清晰，有时甚至是相互重合的。

第五章　国际行政法的产生及其基本问题。本章是对国际行政法产生的必然性，以及其作为一全新法律体系带来的一系列基本问题的阐述。行政法国际化是一种趋势，一种动态的过程，其发展的结果就是一个相对独立意义上的“国际行政法”体系的产生。行政法国际化的视域中，全球治理行为可以理解为一种超国家行政行为，在此基础上，国际规制行为、国际规制主体（权力行使者）、国际行政相对人等概念在行政法国际化的不断推进中已经有一定相对清晰的雏形和基础。一个规范等级逐渐明朗

的“国际行政法”体系正在形成。

历史上不管是国外还是国内学界，国际行政法的概念早已有之，只是被中外众多不同研究领域的学者赋予不同的含义，大部分的观点相较于当下全球化的现实均过于狭隘而明显不合时宜。也有一些早期的观点有惊人的超前性和历史前瞻性，笔者对于国际行政、国际行政法的概念重构及界定部分就是试图复兴这些早期的学术观点背后的广阔视角。国际行政法的概念是国际行政法律体系的基石，考察了历史上中外学者观点的基础上，笔者结合全球化的现实在宽泛意义上对国际行政法做一个简单的界定：国际行政法是指有关跨国或者国际性行政权力行使的法律规制，是全球治理法治化的表现。并引征哈特的实证主义“法”概念作为分析国际行政法的起点，以及对国际行政法作为一个独立的法律领域的特征、渊源、规范构成、分类以及面临的挑战及应对等进行初步的阐释。

Abstract

The 911 incidence following with the outbreak of SARS in 2003 and the outbreak of bird flu in 2005, caused worldwide panic , the interdependence that globalization played in the deepth developing world has become increasingly obvious in recent years, one of the most prominent feature is that government of each county alone can not deal with a series of big issues , including terrorism , trade liberalization, economic integration , infectious diseases , and global environmental problems such as climate change, so the need of collaboration of countries and unified international decision making to response international public issues emergences, which attracted attention of scholars home and abroad gradually .

Decentralized domestic regulation and management can barely deal with these consequences , therefore, kinds of transnational regulatory system or regulatory cooperation has be established through international treaty or informal network of inter-governmental cooperation, leading many regulatory decision transfer to global level from domestic level .Moreover , the specific content and implemention of these regulations is completed by transnational administration organization that implement management function but do not directly controlled by domestic government or legal system . Meanwhile , the sovereign state remains the basic structure of international relationship , many scholars hold deep-rooted skepticism on the formulation of so-call global governance , which

in practice reflect in conservative and skeptical attitude on decisions making beyond country territory , anti-globalization activists active outside of various international conference , many people think that globalization and the action beyond country border diminish the democracy , sovereignty and autonomy of management of sovereignty country .But there are kinds of problems exit in the exercise of transnational administration organization's power , such as the lack of democracy , participation, accoutbility and so on .The article endeavors to look through problems mentioned above in the perspective of administrative law. Just like domestic policy makers and administrative law scholars' action of establishing rules and procedure to enhance the legitimacy of administrative organizations , an international trend of administrative law begins to emergence : which is to finger out first principles of administrative law in order to correct issues of multinational level , like lack of democracy , legitimacy , and accountability .This international trend not only reflects more regulatory standard of supranational governance, but also to ensure that transnational regulatory organization must take basic administrative procedure to obtain better effect , and enhance public confidence in they choice and policies proposed .

Therefore , internalization of administrative law as quoted in this article, refers to a transnational regulatory system come to formulation because of the fact that interdependence has become commom in global scale, and the need of international cooperation and the resolution of international public issues that cross country border, it also refers to a law development trend and process originally belong to the expansion, interaction, and intergration of domestic administrative law system, being global prevalent and the mutual penetrate with international administrative law system, in the era of globalization and global management , as well as the process of pursuing and making effort to realize international rule of law. As basic research, this article focus on the legal phe-

nomenon and trend and internalization of administrative law and series of basic issues of formulating international administrative law, follows such argument : where does internalization of administrative come from? What is the effect? Where to go? The illustration about this including the introduction ,conclusion and five chapters, introduction the demonstration of the overall research background, the demonstration of fundamental concepts ,the status quo of existed research , analysis structure and other basic content. The conclusion gives the summarization of this research and author ' s own views and opinions concerning the countermeasures ofChina against the challeges of internationalization of administrative law. As for the other five chapters, the content is as follows:

Chapter 1 Theoretical Basis of Internalization of Administrative Law

The proposition of internalization of administrative law, or any "international administrative law" which has the familiar spirit and core as domestic administrative law has always be controversial, therefore, it is essentially necessary to find strongly persuasive theoretical basis for it, in this chapter there is an opinion that global governance, internalization of law and international rule of law theory are the theoretical basis of internalization of administrative law. The reasons why these three theories bear significant importance to the internationalization of administrative law are as follows: firstly, the former can be considered as a supranational action from a broader perspective; secondly, the latter demonstrates that some concepts and terms such as the concept of rule of law have showed the trend of "exceeding" national boundaries in the era of globalization. Therefore, they naturally become the theoretical foundation of the internationalization of administrative law. This chapter endeavors to illustrate these three theories. This chapter contends that global governance is the highest form of internalization of new public governance, while

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internalization of administrative law is the legal respond of global governance, or legalize form of global governance. The proposition of global governance is logical starting point and theoretical foundation of why administrative law as a domestic public law can cross the boundary of sovereignty.

Chapter 2 Practical Cause of Internalization of Administrative Law

This chapter concentrates on internal and external causes which accelerates the internationalization of administrative law directly. In terms of reality, the emergence of public problems, the expansion of regulation in economic globalization, the pursuit of good governance resulted by the development of civil society, as well as the development of NGOs, all contribute to the reality motivations for internationalization of administrative law. Global public issues can not allowed any country all over the world stay out of the situation, more thorough communication and cooperation among different countries are necessary to tackle this issue via the way of global governance. The emergence of global civil society leads to the public demand of global citizens' participation in the international administrative regulation and administrative services, which have powerfully rebuilt the subject structure, the operating structure and the supervision and accountability structure of international public regulation and global public services. International NGOs are playing an extremely significant role in the contemporary society, the expansion of its function is where government and formal inter-government organization can not reach, the drive on internalization of administrative law is mainly about the participation in the global governance of international NGOs.

Chapter 3 Manifestation of Internationalization of Administration Law

In the context of traditional administrative law, subjects of administration, administrative actions, administrative counterparts and administrative remedies and other issues are the most basic concepts of

administrative law, which constitute the main structure and core content of administrative theory. This chapter is about how to achieve "internalization" in categories such as the concept of subjects of administration, administrative actions, administrative counterparts and administrative remedies etc and its manifestation.

The internalization of subjects of administration reflects to be "subjects of international administration" with significant transnational characteristics in some extent and scope. As for the manifestation of subjects of international administration, most of them are official inter-governmental international organizations, and in certain circumstances NGOs and national organizations can also act as subjects of international administration. Internalization of administrative actions include two aspects: firstly, national administrative actions are connected with foreign interests, that is, the internationalization of national administrative actions; secondly, the administrative actions were taken by subjects of international administration to deal with international public affairs, that is, the internationalregulatory actions. There are some demonstrations concerning the internationalization of administrative actions, such as the extraterritorial effect of administration (from national to international), the emergence of international regulatory actions, the diversification of administrative actions (from public actions to public and private actions), etc. The types of the status of administrative counterparts include the internationalized status of the administrative counterpart's status which was originally subject to national domain, the status of formal inter-governmental international organizations between countries, as well as the counterpart status of international NGOs. The basic foundation for internationalization of administrative remedies lies in the establishment and development of the concept of basic human rights, the possibility of the injuries suffered by the subjects of

international administration. Essentially, the key issue concerning the internationalization of administrative remedies is to ensure the accountability of administrative subjects who are entitled to the powers of international public regulation, and the criteria and standard of the accountability. The scope of accountability is an extremely complicated issue as well, which includes the accountability of sources of powers, the accountability of the procedures of enforcing the powers, and the accountability concerning the results of the enforcement of the powers, etc.

Chapter 4 International Administration and its Classification under Global Order

The premise concept of international administrative law is the exist of so-call " international administration ". This article attempts to divide supranational administrative regulation into six major forms: internal administration of international organization ; administration of formal intergovernmental organization (take the United Nations 1267 committee and Office of the United Nations High Commissioner for Refugees for example); administration of private mechanism international organization (take World Anti-Doping Organization for example) ; administration of Public-Private mixed international organization (take Codex Alimentarius Commission for example); transnational network administration implemented through cooperation of national officials (take Basel Committee on Banking Supervision and International organization of securities commission for example); foreign administration of domestic authorities (take "India, Malaysia, Pakistan and Thailand v. U.S. ban on shrimp and shrimp products imported case" as the analysis example). In fact, every form contains a large number of transnational regulatory organizations, the author just focus on the selected most typical transnational regulatory organization to elaborate. What has to be

stressed is that this classification is relatively ideal and just to facilitate the research. In practice, regulatory organizations do not have most distinct classification, or being overlapped with each other.

Chapter 5 the Emergence of International Administrative Law and the Basic Issue of International Administrative law

This chapter endeavors to analyze the inevitability of the emergence of international administrative law, and, on this basis, to illustrate a set of fundamental issues concerned with international administrative law which is considered as a brand new legal system. Internationalization is a trend as well as a dynamic process, and the result of its development is the emergence of an "international administrative law" system which bears relatively independent significance. In perspective of the internationalization of administrative law, global governance can be considered as a kind of supranational administrative action, and it is on this basis that conceptions such as international administrative actions, international administrative subjects (executors of power), and international administrative counterparts have come into being and established their relatively distinct foundation in the process of internationalization of administrative law, and an "international administrative law" system is emerging whose hierarchy of rules is becoming increasingly evident.

The concept of international administrative law has already showed its existence in the history, whether it is in the domestic or international academic circle. However, it is interpreted by various scholars at home or abroad with different implications, most of which are of limited value and inappropriate in the reality of globalization. On the other hand, there are some initial opinions which are pioneering and have a historical insight, and the author tries to revive the broad implications of those opinions in the reconstruction and determination of the concept of international administrative law. Based on a thorough

study on the opinions of past scholars at home or abroad, the author attempts to point out a simple definition for international administrative law in a broader sense by adapting to the reality of globalization: international administrative law refers to the legal regulation concerned with the enforcement of transnational or international administrative powers, which is a demonstration of the rule of law of global governance. The concept of "law" proposed by Hartian positivism is applied to commence the analysis on international administrative law, and a preliminary illustration of the characteristics, sources, elements of regulations, and categorization of international administrative law as an independent field of law is also provided. The concept of international administrative law is the foundation of international administrative legal system, and the reconstruction of the concept may hopefully facilitate a systematic and further study of the brand new legal system, which can help build a more refined international administrative legal system and promote more effective countermeasures against various tough issues encountered in international administrative relationships.

序

穿越时空，环顾全球，当今世界呈现为一个多元文化、多元结构、多元价值碰撞、交错的综合体，国际社会各主体不同利益之诉求，不同价值观之取向，业已成为国际社会诸多冲突和矛盾的主要缘由。然而，在全球化语境下，各国寻求共识，共同治理普适性“全球问题”却得到国际社会的广泛认同和普遍接受。无论从国内层面抑或国际层面维度审视，环境保护、金融监管、社会正义与公平、跨境行政活动等诸多问题伴随全球化进程，呼唤和期待国际社会各主体摒弃分歧对上述问题实施“全球治理”。从这个角度讲，探究行政法规则的国际化趋势，并逐步构建国际行政法的理论体系平台，无疑具有十分重要的学术研究价值和现实意义。

本书著者林泰博士，是我指导的博士研究生，现耕耘于高等法学教育园地，对行政法规则国际化趋势的关注和研究应溯及五年前的博士研究生期间，他阅览了大量行政学、法学、社会学等国内外著作，梳理筛选了相关的文献资料，走访了相关行政主管部门，集聚了丰富的研究素材，公开发表了数十篇相关学术论文，从而为本专著夯实了宽厚的理论根基。

思维的洗练，勤奋的笔耕，跨学科、多视角、深层次地发掘国际行政法的理论精髓，努力拓展我国法学界的处女地——国际行政法，力求构建国际行政法的理论体系平台，从而使我国的国际行政法理论日臻完备，这是著者研究行政法国际化趋势的初衷及归宿。本书的付印出版，是其研究成果的真实体现，也充分印证了著者研究的初衷及学术理论价值，

回望改革开放三十年来的中国法学研究，学术研究成果颇丰，学界同

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