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前 言

近年来,行政法学者已经觉察到,行政契约早已被用来作为推行行政政策的理想手段而为实践所接纳,尽管有关行政契约的理论上的论争还远远没有结束。对这个问题的理论上的兴趣也超出了国与国之间的界别。但令人遗憾的是,相较于西方而言,我国在这方面的理论研究远远滞后于实践的进程。因此,为了把握行政契约发展的理论"航向",必须对这一

课题给予足够的关注。本书可以看做是为系统研究这一问题而作出的一种努力。

从结构上看,本书大致分为两部分:第一编是有关行政 契约的基本理论建构,第二编是对两种典型的契约形态的个 案研究。

在第一编中,主要讨论有关行政契约的法学理论与观念,这当然也是行政法学研究当中必须解决的主要课题。在这里,我将尽可能地解决所有涉及政府契约权力行使的合法性与有效性问题,比如,如何在行政契约与普通契约乃至权力性行为之间划出明确的界限来?怎么调和契约的灵活性与依法行政理念的关系?为什么需要程序的规范?契约中权利义务的配置应是怎样的?如何救济?等等。

最后,我将在研究的基础上提出有关中国行政契约制度 建设的理论框架。

作为讨论问题的前提,我觉得有必要先对概念作一界定,即明确一下本书是在什么意义上来使用"行政契约"这个概念的,尽管对于这个问题不同的法学理论与传统有着不同的理解。

在这一点上,我的理解与德国行政法上的表述路数基本上是一样的。具体来说就是,强调行政契约当中必须包含着由行政法来调整的法律关系,这是行政契约区别于那些由私法规范的普通契约的重要"分水岭"。而行政契约必须在契约当事人合意的基础上才能生效的事实,又使得其有别于单方行政行为。

从历史分析的角度上看,行政契约其实是行政法制度与功能发生结构性变化的产物,又由于它有着传统规制所不曾有的优点而得到充分的发展。对其优点的表述很多,比如像尼尔豪斯(Michael Nierhaus)说的"公法契约是适合解决

非常态案件的灵活工具"^①,还比如用丹梯斯(T. Daintith)的话讲就是,行使分配利益权力,"有助于对政策选择的短期尝试和避免所必需的立法授权"^②。但与此同时,行政契约的运用也会带来一些法律问题,其中最主要的问题是如何将契约实践纳入依法行政理念的框架当中。这就必须悉心发掘两者之间可能存在的任何潜在的冲突,并找出行之有效的解决办法。

大体上讲,行政契约无非是在地位平等的行政机关之间,或者在行政机关与相对人之间签订的契约,与此相对应,行政契约也可以大致分成两类:一是"对等契约",二是"不对等契约"。近年来的实践表明,后一种情形下,由于行政机关与相对人所处的不对等地位,极容易引发一些问题,比如,对相对人的歧视或者契约过分向行政机关倾斜。因此,在行政契约制度建设上,应对这些问题予以足够的关注,并积极寻求立法上的解决。像以往那样,我们也完全可以求助于程序来保障相对人的"讨价还价"的能力,来抑制行政机关滥用特权。当然,与此同时,我们也不能忽视对"对等契约"的规范问题。

为使契约所蕴含的公共利益与行政目的能够实现,就应当赋予行政机关较大的、然而又是适度的特权,比如,对执行契约方式的指导权、对违约的制裁权、基于公共利益需要终止契约的权利。但在后一种情况下,出于平衡契约利益的需要,应当赋予受到不利益影响的相对人要求政府补偿的权

① Cf. Michael Nierhaus, "Administrative Law", Collected in Werner F. EBKE & Matthew W. Finkin (ed.), Introduction to German Law, Kluwer Law International, 1996, p. 95.

② Cited from P. P. Craig, Administrative Law, Sweet & Maxwell, 1994, p. 698.

利。又由于契约目标的实现在很大程度上取决于行政机关对 其契约责任的态度,因此,为督促行政机关履行其契约责 任,从契约的权利义务配置上,也要允许相对人在行政机关 不履行义务时可以要求赔偿或者诉诸法院。

由于行政契约是行政法上的问题,因此,由此产生的争议也应由行政复议或诉讼来解决。当然,也不排斥其他的救济方式,像协商、调解或行政仲裁。但是,现行的行政复议暨诉讼制度的结构与运作还远远谈不上能够适应解决行政契约纠纷的需要,因此,《行政复议法》(尽管刚刚通过不久)与《行政诉讼法》不可避免地要予以相应修改,引入解决行政契约纠纷的特别规则,这仅仅是时间问题。

要想进一步理解与把握行政契约,采取个案分析阐述似乎是必需的。为此,我选择了两种极其重要的行政契约形态来做个案研究的素材。一个是"采购契约",是一种很典型的"混合契约";另一个是"治安承诺协议",是一种纯粹行政关系形态。对两种契约的实例研究有助于我们更好地分析行政契约问题。因此,在第二编中讨论的问题肯定有着其理论及实践上的价值。

在现代社会中,利用合同的规制,或者像丹梯斯所表述的那样,"新特权",是政府采购的一个特点。由于政府采购活动如今已非常广泛,政府就能够轻而易举地利用它所拥有的巨大的经济或"讨价还价"能力来实现其地区或全国性的社会经济政策目标。这将极可能在采购契约的内容中形成一定的行政法关系。那么,由此引申出来的是我们必须首先解决这种合同的规制在法律上是否成立,在这个问题上,英国的经验是有一定参考价值的,这也是为什么我要详细介绍与分析丹梯斯理论的价值之所在。即使采购契约没有上面提到的成分,在特定情况下,为保证行政目的的实现,也同样可

能在契约中为政府保留有主导性权利,存在着某些"公法因素"。但不论是上面提到的哪种情况,也就是说,不论是因合同规制而形成契约中的行政法关系,还是为保证契约所蕴含的行政目的的实现而在契约中规定行政机关的特权,都使我们有理由把采购契约识别为行政契约。另外,在采购程序中采购机关对所有竞标者都负有严守程序的责任,这种责任的开放性以及由此衍生出的救济的公法性,使得采购程序带有若干行政法上的特点,我们也很可能因此而将采购契约归到行政契约当中,当然,这种见解是否能成立,我不想作出过于武断的结论,而是欢迎更加理性的批判。

接下来,我将分析"治安承诺协议"。目前,这种行政契约形态受到了批评,批评的要点在于这种协议的合法性与有效性,因为在批评者看来,这些协议是在缺少法律明确授权的情况下签订的,这种做法破坏了依法行政的要求。我却更愿意从行政契约角度来解释上面的问题,把协议中最具争议的赔偿的依据解释为是行政机关与相对人合意的结果,进而用行政契约的理论来为上述协议谋取合法性与正当性地位。

以上廖廖数语, 意在勾画出本书的结构脉络, 可作本书的导读。

余凌云 于中国人民公安大学 1999 年 12 月 29 日

Foreword

In recent years administrative lawyers have come to realize that administrative contract, to the accompaniment of theoretical controversy, has been accepted as desirable administrative device to enforce public policy. Academic interests in this subject have also transcended national boundaries. To our regret, however, research in this respect lags behind the practice es-

pecially in the PRC as compared with the western countries. Considerable concern therefore should be expressed at this subject for the purpose of "steering its course". This book can be regarded as a striving for a comprehensive account of such matter.

Part I General Theory

The focus of this part falls on legal ideas and doctrines involving Administrative contract which are undoubtedly a major theme in administrative law. All aspects of legality and effectiveness of the use by government of contract powers will be tackled here, such as how to draw a hard and fast line between administrative contract and private contract or administrative act? How to reconcile its flexible feature with the rule of law? Why constrains to be imposed by procedure? What contractual arrangements in term of right and duty to be taken? and how to remedy? etc. Finally it will be concluded by proposing a theoretical framework for the construction of administrative contract system in the PRC.

Explanation is imperative, though varies according to legal approach and tradition, as to the sense in which the term "administrative or public contract" is itself to be used in this discussion. On this point my own definition is almost identical with that expressed in German administrative law. That is, administrative contract refers to legal relations governed by administrative law, in contrast to contracts governed by private law. The fact that only under agreement of all parties concerned will administrative contract take effect makes it distinct from administrative act which is issued unilaterally.

Historically seen, administrative contract was the product of changes in administrative institutes and functions. It is well — developed for its advantages over traditional regulations. For example, administrative contract, as Michael Nierhaus pointed out, "is a flexible device suitable for atypical cases". And the use of dominium power, in T. Daintith's words, "can facilitate short—term experimentation with policy choices and obviate the need for legislative authorisation". Meanwhile, legal problems can occur as a result of the use of administrative contract. The main problem we are faced with is how to bring this practice into the framework of the rule of law. Any potential conflicts between them are highlighted. And feasible means for solution of these conflicts are proposed.

Administrative contract can be concluded either between public authorities of equal status or rank or between public authority and individual. Correspondingly, administrative contracts can be broken into two groups: one is co-ordinate contract (koordinationsrechtlicher Vertrag), the other is subordinate contract (subordinationsrechtlicher Vertrag). Recent practice shows that the unequal footing between public authority and individual shows a tendency to raise some questions, like discrimination against individual or contractual arrangements improperly beneficial for public authority. Therefore, this

① Cf. Michael Nierhaus, "Administrative Law", Collected in Werner F. EBKE & Matthew W. Finkin (ed.) (1996), Introduction to German Law, Kluwer Law International, p. 95.

② Cited from P. P. Craig (1994), Administrative Law, Sweet & Maxwell, p. 698.

should be noted and has attracted legislative emphasis. To suggest, as is always done, that procedure is to serve, effectively and efficiently, the purpose for protecting the bargaining power of individual against abuse of privileges of public authority. But this is not to say that co-ordinate contract is less important.

For want of operation of contract for purposes of public interest and public administration, contracting authority should be granted a great, though appropriate, number of privileges. Examples are the power to give instructions as to the mode of carrying out the contract objective; power to impose sanction on those who have broken the contract; power to terminate the contract at the requirement of public interests. But in the last case, to preserve the financial balance of the contract, the interested parties are entitled to indemnity from the government. Since the achieving of contractual objective, to a large extent, depends on the attitude of contracting authority towards its contractual obligation, from the perspective of contractual arrangements, in order to enforce contracting authority to perform its obligation, individual should be granted rights to require damages or sue to court for enforcement when the contracting authority fails to do so.

Since administrative contract is subject-matter of administrative law, any disputes in this regard lie within the jurisdiction of review organs in case of administrative review or of administrative court or division in administrative litigation. Of course, access to other remedies, such as consultation, mediation or administrative arbitration, is also permitted. But it is far from saying the structure and operation of the subsisting ad-

ministrative review and litigation systems is problem-free to solve disputes involving administrative contract, the Administrative Review Law, though adopted not long before, and Administrative Litigation Law are subject to alteration by the introducing of special rules for administrative contract is just a matter of time.

Part II Empirical Studies

To further understand administrative contract, a clarification on case by case basis seems in order. I have selected for case studies two types of administrative contract of great importance in this literature. At one end of the spectrum there is procurement contract representing the mix of both administrative and civil relations (Mischvertrag). At the other end is YANG YE agreement in public order which formulates pure administrative relationship. Research in both cases could be put to good use in analysing administrative contract. Accordingly, the issues now under discussion definitely have their practical as well as their theoretical significance.

In modern society, regulations by contract, or as T. Daintith puts it, "the new prerogative" is a characteristic of public procurement. Since the government's commercial business is now so vast that government easily use its economic or bargaining power to achieve social and economic policy objectives at regional or national level. Then inevitably there will formulate some administrative relations in procurement contract. The British experience may shed some light on the debate so far involving this subject matter. This is worth

analysing with T. Daintith's theories. Even without the aforementioned element, some "public law" factor may also be found out in some procurement contracts as required by their enforcement. Either of the above facts provides a part of reason why we may regard procurement contract as administrative contract. Moreover, another part of explanation, though not too confidently, is given by the "administrative" feature of award procedure characterized by the procedural obligation of contracting authority to all bidders. Research in this respect will supplements our understanding of the regulation and controlling by procedure on administrative contract we discussed before.

Thereafter, YANG YE agreement in public order is analysed. It must be noted that this type of administrative contract has been the object of sharp criticisms. Amongst them, more seriously and importantly, is the attack on the legitimacy and legality of this agreement on the ground that since there is no legislative authorization, this practice would undermine a fundamental concept of "the rule of law". If this criticism were correct, the legitimacy and rational embodied in the theory of public choice and the practice of the Citizen's Charter in UK would be undoubtedly challenged. But I would rather take the view of administrative contract, considering the compensation by police for its non—action to be the result of consensus with individual rather than to be that of applying compensation law.

YU Lingyun

Chinese People's Public Security University
December 1999

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理论构建

一、引言:行政契约在现代 行政法中的崛起及其 引发的理论问题^①

政府可以作为私法上的当事人签

① 本部分的主要内容,曾以《论行政法领域中存在契约关系的可能性》为题,发表在《法学家》1998年第2期上。本书在此基础上作了进一步的修改。

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订私法合同的历史由来已久。

在普通法系国家,政府签订的此类合同原则上适用合同 法的一般规则,但也受一些特殊规则的支配;而在大陆法系 国家,此类合同完全受私法管辖,行政法则将其排斥在视野 范围之外。但对于行政法领域中能否存在契约关系这一问 题,在早期的以支配与服从为特征的传统行政管理模式中, 是持根本否定态度的。

但是,伴随着民主思潮的激荡,福利国家(welfare state)、给付行政等新型国家目的观的出现,行政作用不再限于 19 世纪秩序国家所确立的保护国家安全和独立、维持社会公共秩序以及确保财政收入的消极秩序行政作用,而向积极整备环境、经济、地域空间等秩序行政方面,以及社会保障、公共役务的供给、资金补助行政等给付行政方面扩展,为达到上述行政目的,就存在着使用多种多样的手段的倾向。① 在这种背景下,行政契约(administrative contract)作为一种替代以支配与服从为特征的高权行政(Hoheitliche Verwaltung)的更加柔和、富有弹性的行政手段孕育而生了。

英国政府在 1977 年至 1978 年间为抑制通货膨胀在 "白皮书" (White Paper) 中公布了工资增长率不得超过 10%的方针,但由于该政策不具有法律效力,政府就采用拒绝与拒不执行上述政策的相对人签订商事合同,或者在合同中加入要求相对人遵守上述方针的条款的方式,执行上述政策。②

① [日] 石井昇:《行政契约的理论和程序》,5页,东京,弘文堂、1988。

² Cf. David Foulkes (1982), Administrative Law, Butterworths, p. 349.

在美国,政府合同中通常要求加入不同的条款,作为推进各种已确定的政策的方法,例如,保守机密信息、反对歧视、确保公平的工资、扶持小型或少数民族所有的企业等等,在签订合同的政府机构中都有专门机构负责执行上述政策。①

法国在第二次世界大战以后将行政契约广泛地应用到经济发展和资源开发方面,以改进传统的命令式的执行计划方式,并称之为政府的合同政策②,而且在非集权化(decentralization)时代,公共团体之间,包括中央政府和地方政府之间的"合同",是政治策略(political strategy)的一个重要方面。③

德国出于行政实务上之事实需要,不顾理论上存在诸多 反对意见,在草拟符腾堡行政法典和行政手续法时,对行政 契约作了专门规定。^④

在日本,行政机关在诸如市町村间教育事务的委托等行政事务方面,作为行政活动上必要的物的手段处分、管理和取得财产方面,利用公共设施与公共企业方面,有关财政补助以及公害防止等诸多方面,都积极地借助合同方式进行处理。⑤

我国行政契约的产生,与责任制思想的出现及其向行政

① Cf. Peter L. Strauss (1989), An Introduction to Administrative Justice in the United States, Carolina Academic Press, p. 285.

② 参见王名扬:《法国行政法》,179页,北京,中国政法大学出版社,1989。

³ Cf. L. Neville Brown & John S. Bell (1993), French Administrative Law, Oxford University Press Inc., p. 193.

④ 参见翁岳生:《论西德一九六三年行政手续法草案》,见《行政法与现代法治国家》,221页,台北,台湾大学法学丛书编辑委员会,1979。

⑤ 参见[日]石井昇:《行政契约的理论和程序》,6~7页。

管理领域的渗透,以及经济体制由计划经济向市场经济转轨 而引发政府职能和管理手段变化有关。

自党的十一届三中全会以来,我国走上了经济体制改革的道路,党的十三大报告中指出:无论实行哪种经营责任制,都要运用法律手段,以契约形式确定国家与企业、企业所有者与企业经营者之间的责权利关系。这段论述为我国行政契约的研究与运用提供了基本依据。

在由计划经济体制向市场经济体制转型的过程中,政府 在社会生活中的职能与角色向着宏观管理和间接控制方向转 变,促使政府管理观念与手段发生变化。其中一个突出的表 征就是在传统上习惯使用行政方式的经济领域也开始摸索借 助合同方式强化和落实责任,调动和发挥相对人的积极性, 以改善行政管理,提高公共财产的使用效率,推进经济体制 改革。

在这方面,最早出现在农业改革当中并被人们长时期称道的土地承包(农业承包)以及受其影响而出现在工业改革中的国有企业承包都是明显的例子。这之后的例子就更多了,比如,在物资计划管理中,从 1992 年起国家陆续颁布法令试行用国家订货方式代替原来的重要物资的指令性计划管理,作为政府干预经济的调控手段①,从实施的效果看,这比指令性计划的执行情况要好;在国有资产管理中,上海市房屋土地管理局、国资办、财政局尝试与企业签订授权经

① 国家计委在1992年10月28日印发了《关于对部分生产资料实行国家订货的暂行管理办法(草案)》和《1993年对部分生产资料实行国家订货的具体实施办法》,同年12月31日印发了《关于下达1993年小轿车国家订货指标的通知》;1993年8月13日国家计委、国家经贸委、国家体改委联合颁布了《关于对部分生产资料实行国家订货的暂行管理办法》。