行政契约批判

XINGZHENGQIYUEPIPAN

阎磊 ◎ 著

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内容提要

真理越辩越明——来自民法学界的不同声音。本书通过对大陆法系几个主要国家或地区关于“行政契约”的含义理解、判断标准、类型划分以及司法实践中不同做法的梳理，全面介绍了“行政契约”的历史缘起和发展概况。作者依照大陆法系传统民法的基本原理，层层剥离“行政契约”的理论基础，最后指出“行政契约”是一个伪概念。本书无论对于我国法律体系的构建，还是司法实践的操作，均具有十分重大的现实意义。

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中文摘要

在大陆法系国家，关于行政契约的争议长期存在，私法学界对于行政契约普遍持否定态度，行政法学界对此则认识不一，关于行政契约的理论研究被称为法学界的“世纪难题”；同时，行政契约的出现也给司法实践带来了诸多困扰，此类契约纠纷所引起的诉讼究竟应该由普通法院管辖还是由行政法院管辖、在没有行政法院系统的国家应该由民事审判机关管辖还是由行政审判机关管辖、此类诉讼应适用民事诉讼程序还是行政诉讼程序、实体法应适用民事法律规范还是行政法律规范，实践中比较混乱。

据一些行政法学著作介绍，行政契约的概念是具有大陆法传统的国家所特有的、与私法契约相对的概念。近几十年来，尤其是“二战”以后，在大陆法系主要国家，无论是德国、法国还是日本，行政法学界都出现逐渐肯定这一概念的趋势，并希望应用于实践。在德国和受其影响的奥地利、瑞士，以及很早就发展了判例理论的法国和受其影响的葡萄牙、西班牙、意大利等国，与行政契约理论研究发展的同时，还或多或少地出现了立法化现象。

虽然我国行政法学界对于行政契约的基础理论认识不是很统一，但对于这个概念都是肯定的，有关行政契约的研究正显现出勃勃生机。目前，制定《行政程序法》已列入全国人大立法规划，几位行政法学者分别牵头起草的“行政程序法专家建议稿”中均有关于行政合同的条文规定。

从传统的大陆法系法学理论来看，契约的原始意义与公法无关。契约上的当事人地位平等、双方合意、契约自由等基本观念在行政

法领域似无生存的可能。行政主体与相对人之间的关系属权力支配关系；且依法行政是行政法的基本原则之一，行政行为强调单方性和强制性，没有对等自由合意的基础。因此，“行政契约”这个概念能否成立，遭到一些大陆法系国家学者的怀疑。

或许是出于对跨学科学术问题的谨慎态度，或许是认为此问题显而易见、无须探讨，我国大陆地区民法学者对行政契约问题鲜有涉及。比较而言，我国内地对行政契约的研究，不但远远落后于法、德、日等大陆法系国家，而且落后于我国台湾地区；不但理论研究不够深入，而且理论相对滞后于实践。

大陆法系学者在讨论行政契约时，一般将此理论问题作为先验的假设前提而不加以思考和专门的论证，或者仅通过论证行政契约与民事契约存在着原则性区别，来附带的、间接的说明行政契约概念是能够成立的。部分学者也试图从民法中有关契约的基本原理入手，来分析公法领域中存在契约关系的可能性，比如契约当事人主体地位的平等问题、不平等当事人之间达成合意的可能性问题、契约自由与依法行政的关系问题、行政契约履行过程中行政主体的特权问题，等等，认为地位不平等的当事人之间也可以达成合意，并且契约自由和依法行政是可以调和的，这是构成行政契约制度的基础理论。

契约的本质是合意，是当事人之间意思表示一致的产物。当事人必须在平等自愿的基础上进行协商，才能使其意思表示达成一致。如果不存在平等自愿，也就没有真正的合意。所谓“地位不平等的当事人之间可以达成合意”的观点是错误的，地位平等是当事人之间达成合意的前提和基础，这种前提和基础并不因“给付行政的兴起”和“民主思想的激荡”而改变。

契约是私法自治的工具，私法的任意性主要体现在私法自治原则上。私法自治是私法的基本原则，也是私法与公法相区别的主要

特征。公法领域不可能有“法律行为”，行政机关的行为是法律意志的反映而非行政主体自己的“意思”，行为的后果是法律直接加以规定的，而非因行政主体所希冀才引起，行政行为不可能是意思自治的产物。既然公法领域不可能存在“法律行为”，那么，作为“法律行为”的下位概念——契约，自然也就无法在公法领域生存。

契约自由与依法行政没有什么关系，两个原则在各自的领域里发挥不同的作用，也无从调和。即使根据行政私法或私经济行政理论，行政主体可以以私法手段去实现行政目的，从这个角度说，契约自由和依法行政有那么一点交接关系，但相互之间也不会发生冲突。如果说很多实在法都规定了政府在公法领域缔结契约的权力，那么，只要行政主体依照法律这么做了，依法行政原则就已经得到了体现，契约自由的空间完全在私法自治的范围内。

“行政契约”是一个伪概念，其本身就是自相矛盾的。法、德等国的本意，不是要造出一个“公法上的契约”，而是要对采用契约行政模式的行政机关采取制衡措施。基于我国和法、德等国家司法体系的不同，我们不能照搬其做法而将此类合同的订立、履行规定在《行政程序法》中，并由行政法院管辖。此类合同的基础理论应当是行政私法理论或私经济行政论。我们也许可以借鉴英美法系国家的做法，将行政主体为一方当事人的合同称为“政府合同”，并基于其民事属性，在《合同法》中增加“政府合同”一章，对其订立、履行等方面的特殊性加以明确规定。这种做法是否合适还需要探讨，本文姑且将此建议作为一种备选方案提出来，期待专家学者们的进一步研究论证。

契约行政在我国方兴未艾。随着改革开放的不断深入，柔性化的行政方式在构建和谐社会中发挥着越来越重要的作用。政府转变职能、合理民主行政是各国行政的发展趋势。契约行政作为现代行政中的一种重要手段，越来越受到关注。法学界诸多学者对契约行

政问题作了大量的研究，然而，众说纷纭、各行其是容易造成司法实践当中的混乱，浪费社会成本；若立法再摇摆不定，不考虑国情而照搬法、德等国的做法，则为雪上加霜。建议立法者对此问题加以重视，尽快完善我国立法，以疏通壅塞、结束混乱。

关键词：行政契约；合意；依法行政；法律行为

Abstract

In civil law countries, there has long been argument about administrative contract. private law circles unanimously hold a negative attitude towards administrative contract, while administrative law circles split on this issue, and therefore, the research on the theory of administrative contract is called "a puzzle of the last century"; at the mean time, the emergence of administrative contract became a problem to judicial practice, such as whether common court or administrative court has the jurisdiction over the litigation of this kind, whether civil judicial organ or administrative judicial organ does in a country without administrative court system, whether civil procedure or administrative procedure should apply and whether civil law or administrative law should be applicable, all of which is confusing in practice.

According to some introduction of books on administrative law, the conception of administrative contract is opposite to that in civil law countries and private contract. In recent decades, especially after world—war two, whether in Germany, France and Japan, administrative law circles in these civil law countries gradually confirm the trend of this conception, and hope to put it in practice. In Germany, Austria and Swiss (which were under its influence), France (which developed case law theory long ago) and Portugal, Spain and Italy (which were under its influence), saw somewhat the phenomena of legalization, along with the development of research on administrative contract theory.

Although administrative circles in China split on the basic theory of administrative contract, this conception exists, and the research on it is thriving. At present, the establishment of administrative procedure is listed in National People's Congress legislative plan, with several scholars on administrative law leading the drafting of expert's proposal manuscript of administrative procedure respectively, which contains provisions about administrative contract.

From the perspective of traditional civil law theory, the original meaning of contract has nothing to do with public law, because it is impossible for basic concepts like equal status of parties, consensus of both parties and freedom of contract to appear in the domain of administrative law. Relationship between administrative subject and administrative counterpart is about dominance of power; administration according to law is one of the basic principles for administrative law, and administrative act emphasizes on its unilateral nature and coerciveness, without foundation of equality, freedom and consensus. Thus, whether the conception of "administrative contract" can be established is doubtful among some scholars in civil law countries.

Perhaps due to the cautiousness about the interdisciplinary problem or belief that the answer to this question is obvious and needs no exploration, scholars on civil law in Chinese mainland seldom touched upon this problem. Comparatively, the research in mainland not only lags far behind civil law countries like France, Germany and Japan etc, but behind Taiwan as well; not only the theory is not in-depth enough, but also lags behind practice.

When discussing administrative contract, mainland scholars usually consider this theoretical problem as a priori assumptions that need not deliberating and specific reasoning, or only demonstrate that

administrative contract is of fundamental difference from civil contract in order to prove incidentally and indirectly that the conception of administrative can be established. Some scholars tried to start from basic theory of civil law about contract, and then analyzed the possibility that contract exists in the domain of public law, for example, the equality between the status of two parties, the possibility for unequal parties to reach consensus, the relationship between freedom of contract and administration according to law, and the privilege of administrative subject to perform the administrative contract, etc, and argued that unequal parties can reach consensus, and freedom of contract and administration according to law is compatible, which constitutes the fundamental theory of administrative contract system.

The essence of contract is consensus, which is the result of both parties agreeing to each other. Each party should consult with one another on the basis of equality and voluntary, reaching an agreement. If without equality and voluntary, there is no authentic consensus. The viewpoint that unequal parties can reach consensus is wrong, for the equal status is the prerequisite and bases to form an agreement, which does not change as a result of the emergence of benefits administration and the surge of democratic ideals.

Contract is the tool for private law autonomy, which reflects the arbitrariness of private law mostly. Private law autonomy is a fundamental principle of private law, and also a main characteristic to differentiate private law from public law. The domain of public law contains no juristic acts, for the acts of administrative organ is the reflection of the will of law rather than administrative subject's own "intention", and the outcome of the acts results from the direct prescription of law rather than administrative subject's pursuits. Therefore, ad-

ministrative acts cannot be the production of party autonomy. Since "juristic acts" cannot exist in public law, then, contract—as a sub—conception, cannot exist in public law without doubt.

There is no much relation between freedom of contract and administration according to law, both of which play different roles in their respective domain and thus incompatible. According to administrative private law or private economic administrative theory, though, administrative subject can achieve administrative goal by private law means. From this perspective, freedom of contracts and administration according to law have overlaps and do not contradict with each other. If many positive law have regulated the power of government making contracts in the domain of public law, then, as long as administrative subject performs according to the law, the principle of administration according to law has been reflected, and the freedom of contracts is included in private law autonomy.

"Administrative contract" is a fake conception, or a paradox. We can draw on experience from common law system that the contract with one party as an administrative subject is called "government contract". The fundamental theory of government contract should be administrative private law theory or private economic administrative theory. The original intention of France and Germany is not to create a contract in public law, but to take check and balances against administrative organ which adopted contract administrative mode. Based on the difference of judicial system between China and France and Germany, we cannot imitate the way they put government contract in administrative procedure and under jurisdiction of administrative court. We should add a chapter "government contract" in contract law considering its civil nature, and make clear regulations on the

particularity of the concluding and performing of government contract.

Government contract system in China is at its ascendant. With the increasingly in－depth opening up, flexible administrative ways play more and more important role in developing harmonious society. It is an universal trend for governments to change their functions and administrate in a rational and democratic manner. Government contract, as an important method in modern administration, increasingly gets attention. Many scholars in law circles have done extensive research on government contract; however, opinions and practices are widely divided. As a result, judicial practice is very confusing and increases social cost. If legislation continues be undecided and we imitate France and Germany without taking our national conditions into account, the situation will be worse. I propose that lawmaker should pay more attention to this issue, and complete our legislation of contract as soon as possible, so that we can bring the chaos into an end.

Key words: administrative contract; consensus; administration according to law; juristic acts

本书创新点

1. 选题：否定行政契约的论文选题，包括学术著作，在我国到目前尚未见到过。

2. 厘清了所谓的“行政契约”在大陆法系国家的产生主要是由国家私法主体身份的加强和契约行政的需要两方面共同作用的结果。之前学界关于“行政契约”的文章都只是强调契约行政的需要，而忽视了国家主体的民事身份性质。

3. 指出造成“行政契约”误区的原因：国家双重主体身份的同时存在并频繁变化、语言翻译的问题、法院体系和司法运行体制的差异。

4. 将行政私法理论与现实生活中的契约行政模式结合起来，指出此类契约的基础理论是行政私法理论，明确此类合同的性质只能是民事合同。

5. 以民法原理批驳了“行政契约”基础理论的谬误：不平等的当事人之间无法产生合意，契约自由与依法行政无从调和。

6. 指出我国行政法学界对依法行政原则的误解：法律优先原则不是指在法律适用方面法律优于其他规范，而是指行政机关的行为不得违反法律的规定，否则无效。法律保留原则不是指在立法方面有的问题只能由法律加以调整，而是指行政机关只有在法律明确授权的情况下才可以依法行政，法律没有授权的不得任意作为。

7. 明确此类合同的救济渠道：此类合同是民事合同，救济自然是民事救济。合同关系以外的行政侵权或行政违法由行政程序救济。

8. 呼吁立法者不要照搬德国模式而应将“行政合同”规定在即将出台的《行政程序法》中。

目 录

导 论

——行政契约引发的理论争议与实践混乱