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国际习惯法理论问题研究

Study on the Theory of Customary International Law

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内容摘要

国际习惯法是国际法最重要的渊源之一，但在当代国际法理论体系中，国际习惯法一直处于比较尴尬的地位，理论争议也非常之多。为了能够把握国际习惯法的本质特征，本文从法哲学、国际社会和分析实证的角度对国际习惯法理论和实践进行了多维的考察，以期构筑一个比较全面、客观的国际习惯法理论体系。

全文分为前言、正文和结语三部分。正文共有五章：

第一章导论主要考察一些与国际习惯法相关的基本概念性问题，包括：第一，国际习惯法概念的形成问题。主要从国内习惯法理论的影响和国际法理论自我演变两个角度做了分析；第二，国际习惯法的定义问题。目的是给出关于国际习惯法的一般描述，并对国际习惯法与国际习惯两个概念进行必要的界分；第三，国际习惯法从传统到现代的简单发展过程问题。意在获得对国际习惯法宏观发展史的整体清晰认识；第四，国际习惯法在当代国际社会中的功能与定位问题。主旨在于指出当代国际法理论和实践忽视了国际习惯法之重要性这一点，以表明开展本文研究的必要性。

第二章从法哲学角度考察了正义与国际习惯法的关系。这是着眼于对国际习惯法进行系统研究的首要工作，即揭示正义之法哲学和国际习惯法不可分割的内在联系，以及正义对于国际习惯法的指导作用。本章首先考察了对国际习惯法进行法哲学考察之必要性问题；之后，集中讨论了正义价值的内涵问题，澄清了“正义理念”概念的独立地位，并指出了作为法哲学思想的正义理念能够适用于国家层面；最后，在前述讨论的基础上，阐述了国际正义对国际习惯法的构成作用，即国际正义能提供国际习惯法是否为“良法”的评价工具和标准，并能促进国际习惯法的发展。

第三章从国际社会的角度考察国际习惯法的形成和效力问题，试图给出一个国际习惯法形成和效力问题的社会解释。为此，本章首先介绍了法的社会学研究进路，并对国际社会的本质特征做出了考察，同时剖析了国际社会对国际习惯法的构成性关系。在此基础上，本章对国际习惯法在国际社会中如何形成问题进行了微观探析，目的在于揭开长期以来笼罩在国际习惯法形成问题上的“神秘面

纱”。最后，本章还从国际社会的角度，对国际习惯法另一最具争议的基础理论问题，即效力问题进行了社会考察。这与当代众多国际法学者在传统法学研究范围内给出的解释显有不同。

第四章则从实证的角度探讨了国际习惯法规范的构成问题。本章首先对国际习惯法规范构成的现有理论做了一个总体述评，包括对“两要素理论”、“变革理论”和“重构理论”，都进行了比较详细的论述和评论。之后，本章展开了对国际习惯法规范构成两个最基本要素，即实践和国家意识的分析。在此基础上，本章最后从实证的角度具体阐释了国际习惯规范的形成过程和机制。

第五章继续遵从分析实证研究进路，对国际习惯法规范分类、确定和演变进行了考察。本章首先讨论了国际习惯法规范分类问题，即基于效力差异做出了全球性、普遍性和特殊性三类国际习惯法规范的划分，并进一步考察了全球性规范与“强行法”、普遍性规范与“对所有国家普遍义务”规范之间的关系，澄清了长期以来对国际习惯法规范效力问题的模糊认识；之后，重点分析了在司法实践中国际法院如何确定和适用国际习惯法规范的问题；最后，本章对国际习惯法规范的演变和终止问题进行了探讨，并集中讨论了国际习惯法演变中“实践的自我偏离”与“强化拘束力”之矛盾这一核心问题，试图给出一个关于国际习惯法规范自我演变的合理解释。

结语部分是关于国际习惯法未来的简单描述。诚然，要最终准确预测国际习惯法的未来是非常困难的，但笔者还是相信，只要给予国际习惯法理论和实践以足够的重视，国际习惯法必将能够充分发挥它作为正义之国际法规范的应有作用。

关键词：国际习惯；国际社会；国际正义；规范构成

Abstract

The customary international law is one of the most important sources of international law. But in contemporary theories of international law, the status of customary international law has been awkward with a lot of theoretical disputes. In order to grasp the essential characteristic of customary international law, the author makes a multidimensional study on its theory and judicial practice from aspects of legal philosophy, international community and analytical positivism, as is expected to build a comparatively full and objective theoretical system for customary international law.

This dissertation is divided into three parts including preface, text and epilogue. The text includes five chapters:

The Chapter one mainly discusses some basic concepts related with customary international law. Firstly, the author discusses the formation of the concept of customary international law from two aspects, ie., the important influence from the theories of internal customary law and the self-evolvement of the theory of international law. Secondly, the author discusses the definition of customary international law with aim to give a general description of it and makes a necessary discrimination between customary international law and international custom. Thirdly, the author describes the process of the formation of customary international law from traditional stage to modern stage. With this description, the whole developing history of customary international law will be showed clearly before further study on the entities of customary international law is made. Lastly, the author makes a study on the status and function of customary international law within contemporary international community, as is to point out that the contemporary theory of international law has neglected the importance of customary international law in the status and function, indicating the importance of this study.

In Chapter two, the author focuses on discussing the relationship between justice and customary international law. This is the first work which one has to do before making systematic study on customary international law, as to disclose the intrinsic and inseparable relationship between customary international law and legal philosophy. Firstly, the author discusses the necessity of making a study on the

customary international law with legal philosophy. Secondly, the author discusses the contents of the 'justicial value', clarifies the independent status of the 'ideal of justice' and points out that it, being the thoughts of legal philosophy, is applicable in the community composed of countries. Thirdly, based on the above studies, the author analyzes the constitutive function that the international justice holds on the customary international law, ie., international justice is the criterion of judging whether the customary international law is 'good law' or not, and can promote the development of customary international law.

In Chapter three, the author makes an exploration of the formation and force of customary international law from aspect of international community with aim to give a social interpretation on this issue. Firstly, a social academic approach is introduced in and then the intrinsic character of international community and the constitutive relationship between international community and customary international law is analyzed. Based on above discussions, the author describes the microcosmic process of the formation of customary international law within the circumstance of international community to unveil the 'mystic veil' hanging over it. Lastly, the author focuses on discussing the force of customary international law in the international community, which is one of the most disputed fundamental issues in the theory of customary international law, as is completely different from those given by a lot of contemporary scholars.

In Chapter four, the author makes a study on the constitution of international custom through a positive approach. Firstly, the author gives a general comment on the theories in this area including 'two-element theory', 'reform theory' and 'reformulation theory'. Secondly, the author discusses two most fundamental constitutive elements of international custom, ie., the 'practice' and the 'consciousness of sovereign nations'. Lastly, based on above studies, the author describes the process and the mechanism of the formation of the rules of customary international customary law through a positive approach.

In Chapter five, the author discusses the classification, determination and evolvement of the rules of customary international law. Firstly, the author discusses the classification of the rules of customary international law, which could be divided into three types based on difference in force, including universal rules, general rules and particular rules of customary international law. In addition, the author further

studies the relationships between the ‘universal rules’ and ‘jus cogens’, the ‘general rules’ and ‘obligations erga omnes’ to clarify the blurry ideas on the force of the rules of customary international law. Secondly, the author discusses the determination and application of the rules of customary international law in judicial practice, mostly in C.I.J.. Lastly, the author gives an academic analysis on the evolvement and termination of the rules of customary international law, especially on the problem of the intrinsic contradiction between the self-evolvement and the strengthening of the force of customary international law. The author is trying to give a reasonable and practical interpretation on this issue.

As the concluding part of this dissertation, the epilogue makes a simple prediction of the future of customary international law. Although it is difficult to predict accurately, the author still believes that the customary international law will definitely play its role as justicial international law rules if adequate attention is paid to its theory and judicial practice.

Key words: International Custom; International Community; International Justice; Constitution of rules

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