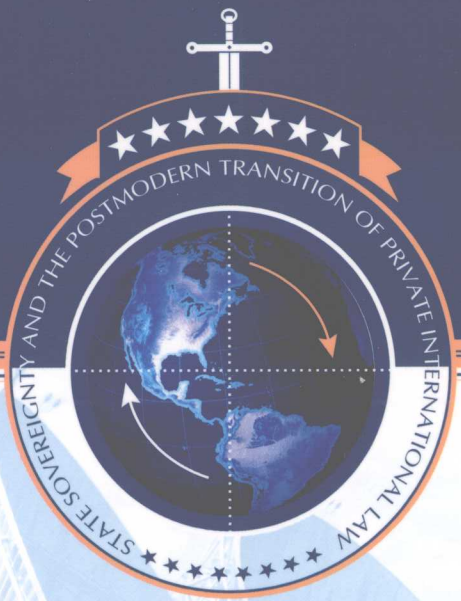
STATE SOVEREIGNTY

AND THE POSTMODERN TRANSITION OF PRIVATE INTERNATIONAL LAW



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后现代转型

耿勇 著

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中文摘要

国家主权一直是国际私法学说和国际私法立法与司法的基础，但自20世纪中期以后，这个基础在西方国际私法学界遭受了广泛的批判。本书通过对国际私法发展历史的考察，将国际私法的发展划分为四个历史阶段：万民法时期（公元前3世纪到公元12世纪）、法则区别说时期（13世纪到19世纪中期）、现代时期（19世纪中期到20时期中期）和后现代时期（20世纪中期至今），并着重通过对后现代国际私法与现代国际私法发展的不同特征的比较，揭示出后现代国际私法的重要的转型规律，结果发现国家主权对于后现代国际私法而言，并不像一些西方学者所论证的那样，导致了国际私法的混乱局面或引起了国际私法的危机，而是恰恰相反，国家主权在事实上仍然是国际私法的不可替代的基础，并且国家主权的概念在国际私法的理论、立法和司法中不仅不能抛弃，而且需要进一步重塑和强化，以适应当代国际私法发展的要求。

本书要解决的基本问题有三个：一是后现代国际私法从现代国际私法转型后的主要特征是什么？二是国际私法的后现代转型的内部动因是什么？三是如何重塑国家主权的概念才能适应当代国际私法的发展趋势？本书共分五章，在第一章中考察了国家主权和国际私法的概念及其相互关系，并把国际私法的发展区分为三次重要的转型。然后在后四章中阐述了后现代国际私法转型中的四对矛盾以及它们在当代国际私法中对立与统一的发展趋势，进而揭示了这些对立的内在的实质原因，即国际私法中客观存在的国家主权权力基础与公民权

利之间的对立与统一，并从国际私法的后现代发展趋势中探讨了国家主权概念如何在学理上进一步重塑以解决这些矛盾从而促进后现代国际私法的发展。

第一章论述了国家主权与国际私法的一般关系，认为国家主权是国际私法发展的内部动因之一，而且与其他动因有着一定的包容关系。本章共分两节，第一节简要论述了国家主权与国际私法的一般关系，提出了国家主权是国际私法不可替代之基础的论点。第二节简要论述了国际私法发展历史上的三次重要转型。第一节首先考证了国家主权概念的演变，揭示其实质内涵，认为国家主权从来就不是绝对的权力，而是与公民权利和社会自治紧密相连的；然后对本书要研究的国际私法进行了概念上的界定，认为国际私法是调整国际民商事关系过程中专门为解决国际民商事法律冲突问题而产生的冲突法、实体法和程序法规范的总称，并论述了国际私法中的法律冲突的内涵和实质，旨在从功能、规范体系的构成、调整对象、目的和价值追求五个方面把握国家主权在国际私法中的基础地位。第二节考察了国际私法发展历史上的三次重要转型，认为在国际私法的第一次转型中，即从万民法向法则区别说的转型，不仅是国际私法调整方法的地域化，而且是国际私法调整方法的权力化的加强。而在第二次转型中，不管是在斯托雷“国际礼让说”影响下的美国国际私法，还是在萨维尼“法律关系本座说”影响下的欧洲大陆国家的国际私法，都朝着以绝对的国家主权权力为中心的方向发展，公民权利和社会自治被搁置一边，结果导致了所谓的欧洲和美国的国际私法革命，开始了国际私法发展史上的第三次重要转型，即后现代转型。

第二章研究了国际私法的多边主义法律适用方法和单边主义法律适用方法的发展历程，揭示了二者在后现代国际私法中的对立与统一和相互竞存的发展趋势，并论证了国家主权在对这两种方法的取舍和融合中的地位与作用。多边主义法律适用方法为现代时期的国际私法所推崇，体现了国家主权平等原则，而单边主义法律适用方法尽

管在法则区别说时代就已经存在，但只是在后现代国际私法中才得以复兴，虽然具有一定的狭隘性，却是由于经济发展要求国家干预民商事关系而强化国家主权权力的一种在长期内无法替代的方法。在当代管辖竞争和调整竞争的国际民商事秩序中，每个国家的涉外民商事立法和司法都必须主动地采取灵活的多边主义法律适用方法和积极有效的单边主义方法，相辅相成地调整涉外民商事纠纷，才能适当地保护其本国的国家利益和当事人利益。

第三章研究了国际私法的形式主义法律适用方法和实质主义法律适用方法的发展历程，揭示了二者在后现代国际私法中的对立与统一和相互竞存的发展趋势，并论证了国家主权在对两种方法的取舍和融合中的地位与作用。第一节系统研究了在现代国际私法中居于主导地位的形式主义法律适用方法，认为这一权力本位的法律适用方法虽然有其内在的局限性，却也是法治的必然要求。要克服这种弊端，就必须辅之以实质主义法律适用方法，这也是后现代国际私法发展的一个重要趋势。第二节系统地论述了实质主义法律适用方法的发展及其本质，认为它是权利本位的法律适用方法，尽管这种方法有助于实现个案的公正，却也有其内在的弊端，甚至会损害现代法治的成就。因而要趋利避害，也必须辅之以形式主义法律适用方法。这就要求国家主权的概念不仅具有权力内涵，还必须具有权利内涵，形成权利本位的国家主权理念。第三节进一步具体地论证了国家主权在法律的确定性与公平性这两大价值追求的冲突与调和中的作用，并通过《德国民法施行法》关于侵权行为法律适用的规定说明国家主权在协调这两大价值冲突中的有效性。

第四章研究了国际私法的民族主义和国际主义的法律适用方法的发展历程，揭示了二者在后现代国际私法中的对立与统一和相互竞存的发展趋势，并论证了国家主权在对两种方法的取舍和融合中的地位与作用。第一节论述了国际私法的国际主义和民族主义的历史发展脉络、典型的国际主义与民族主义国际私法思想及其二者之间的对

立,并论述了国际私法比较法学派在二战后的兴起和它对权力本位的国家主权理念的挑战。第二节论述了现代商人法与国际私法的关系及其现状,说明权力本位的国家主权理念对法律趋同化过程中其他重要因素的忽视及其矫正。第三节对北美和欧盟的国际私法一体化路径进行了对比,说明权力推进型的国际私法一体化路径与权利导向型或自治型的国际私法一体化路径同样有效,但二者是同一个问题的两个方面,而不是绝对对立的。

第五章研究了国际私法的规范主义和实证主义的法律适用方法的发展历程,揭示了二者在后现代国际私法中的对立与统一和相互竞存的发展趋势,并论证了国家主权在对两种方法的取舍和融合中的地位与作用。本章第一节界定了国际私法的规范主义与实证主义的概念,并论述了二者在国际私法中的对立与统一。第二节研究了冲突规范的发展趋势,第三节研究了判决承认与执行规范的发展趋势,说明了法的价值对国际私法发展的意义,进而揭示了规范主义和实证主义分析方法各自的优势和劣势,认为在国际私法的后现代转型中应通过实证主义与规范主义相结合的方法来看待国际私法,避免要么陷入绝对的主权权力本位的国际私法方法的泥潭,要么沉溺于否定国家主权的空想之中。

总之,国际私法的后现代转型的特征是多边主义与单边主义的结合、形式主义与实质主义的结合、民族主义与国际主义的结合以及实证主义与规范主义的结合。现代国际私法中的多边主义、形式主义、民族主义和实证主义的内部动因是权力本位型的国家主权理念,而在国际私法的后现代转型中单边主义、实质主义、国际主义和规范主义的复兴和发展并不意味着国家主权的过时或无用。相反,从国际私法后现代转型中多边主义与单边主义的融合、形式主义与实质主义的融合、民族主义与国际主义的融合和实证主义与规范主义的融合中,我们可以清晰地看到国家主权理念需要重塑而不是废弃以适应当代国际私法的发展,而这种重塑的基础在于把国家主权

权力的行使与社会自治和公民权利在实质上结合起来，形成权利本位的国家主权理念。

关键词：国际私法　后现代　主权　权力　权利　自治　价值

Abstract

Sate Sovereignty had been the theoretical, legislative and judicial basis of Private International Law in modern times. However, criticism of private international law theories with this basis have been popular in the academic circles of the West since the middle of last century. Through a historical survey of Private International Law, this dissertation attempts to classify the historical development into four periods, namely the Classical Period (From Ius Gentium of Early Medieval Italy to the Statutists' Theory of Medieval Italy)、Statutists Period (From the Statutists' Theory of Medieval Italy to the Middle of the 19th Century)、Modern Period (From the Middle of the 19th Century to the Middle of the 20th Century) and the Postmodern Period (From the middle of the 20th century to the present). Through a comparative analysis of the different features of the different periods, several features of transition are conveyed, especially of the postmodern transition of Private International Law. The result shows that state sovereignty has not been the cause of the disorder and crisis of the subject as some western scholars have insisted. On the contrary, sate sovereignty is still the solid but not sound foundation of Private International Law that cannot be cast off or substituted. Furthermore, the concept of Sate Sovereignty should be reconstructed and strengthened in

the theories, legislature and judicature of Private International Law instead of being cast off so as to meet the demands of the development of contemporary Private International Law.

This dissertation attempts to study three related issues. The first is the main features of the postmodern transition of Private International Law since the Modern Times. The second is the internal motives of this transition. And the third is how to reconstruct the concept of sate sovereignty so as to meet the needs of the development of contemporary private international law.

This dissertation is divided into five chapters. The concepts of state sovereignty and private international law as well as their interrelationship are conveyed in the first chapter. Three patterns of transition of private international law are analysized in the final part of the first chapter. In the following four chapters, four pairs of seemingly contradictory but in fact harmonious tendencies are analyzed so as to find the nature of their contradictions and their agreements. The result is that state sovereignty is both the cause and the cure of them. So there remains one important task, namely, how to reconstruct the concept of state sovereignty theoretically.

Chapter One discusses the general relationship of sate sovereignty and private international law and put forward the idea that sate sovereignty is one of the inner motives of the development of private international law and that it is interrelated with other inner motives. There are two sub-chapters or parts in this chapter. The general relationship of private international law is briefly discussed in this part, and the three important transitions in the history of private international law are also briefly introduced. The evolution and nature of sate sovereignty is analyzed in part one, and concludes that sate sovereignty has never been an absolute power and in fact it is limited and closely connected with rights and autonomy. Private

International Law is also defined in this part and concludes that it is the collection of all the norms of conflict of laws, substantive rules and procedural rules which aims at solving the problem of conflict of laws in private disputes. The nature of the conflict of laws in private disputes is also discussed. In this way, private international law is defined in respects of its function, its norms, its object, its aims and its values so as to show the fundamental position of state sovereignty in this subject. The three important transitions in the history of private international law are also analyzed in this part. The first transition is from is gentian to the strategists theory. It is not only the localization of the regulating methods of conflict of laws, but also the strengthening of the power in regulating civil disputes. In the second transition, namely from the statutists theories to the theory of Savigny and Story in Europe and America respectively, private international law both in Europe and America developed to a power-oriented direction while leaving aside the rights of citizens and social autonomy. And this is the why the so called revolutions of private international law happed simultaneously in the two wide apart continents and so led to the third transition, namely the postmodern transition of private international law.

Chapter two studies the development of unilateralism and multilateralism in private international law. These two methods or inclination in solving conflict of laws had their ancient origins. Multilateralism was favored in modern times and unilateralism revived during the third transition after the middles of 20th century. The former embodies the idea of the equality of sovereignty and interdependence of states, while the latter disregards the equality of sovereignty and stresses the independence of sates. In spite of its parochialism and ingressiveness, unilateralism is also a choice for solving conflict of laws, since economic

and legal environment sometimes need this intervention of sate power. So the two methods have to be both utilized in order to safeguard the benefits of either the citizens or the states.

Chapter three studies formalism and substativism in private international law and their interrelationship as well as their relationship with sate sovereignty. New concept of sate sovereignty has to be formulated so as to harmonize the two necessary but often contradictory methods in regulating private disputes. Part one discusses formalism which was once an overwhelming method in Modern times and concludes that though it is power-oriented it has been the heart of rule of law, especially in countries with a written law tradition. So formalism has to be revised with the help of substantivism. This trend of harmonization is also the demands of the development of contemporary private international law. Part two systematically analyzes subtantivism and its nature, and concludes that it is a right-oriented method which is very effective in realizing material justice in individual cases, but at the same time it has its own faults and can even damage the achievements of modern rule of law. So in order to revise the faults of substantivism it is also urgent to formulate a new concept of sate sovereignty so as to include the idea of right and autonomy into it. Part three aims at proving that state sovereignty can be very useful in balancing the two contradictory values of certainty and justice in law by using the example of the related stipulations in German Private International Law.

Chapter four studies the development of nationalism and internationalism in private international law, reveals the tendency of their coexistence in postmodern times and demonstrates the role of sate sovereignty in the choice and revision of the two. Part one introduces the historical development of the two ideas and their opposing sight of private

international law. And then this part also introduces the rise and grow of the comparative school of private international law since the middle of last century and this also symbolizes the challenge of rights-based thought of private international law to the power-oriented concept of state sovereignty. Part two discusses the position of modern merchant law and its relation with private international law in order to reveal the reason why modern merchant law is in a neglected situation in private international law and how can it be revised through the reconstruction of the concept of sate sovereignty. Part three compares the seeming different routes of harmonization of private international law in North America and Europe and concludes that the two are mutually beneficial if a new concept of state sovereignty can be formulated.

Chapter five distinguishes the two inclinations in viewing private international law, namely normativism and positivism, and further explores the usefulness and shortcomings of the two. Part two uses the the ideal of equality as a value while conducting a normative and positive analysis of conflict of law norms in private international law and concludes that adhering solely to one inclination would be dangerous. Part two uses the ideal of order as a value of law while conducting a normative and positive analysis of the development of the rules and systems in the area of recognition and enforcement of foreign judgments and concludes that a new concept of state sovereignty may avoid the two extremes of both normativism and positivism.

To sum up, the postmodern transition of private international law is the harmony of unilateralism with multilateralism, the harmony of formalism with substantivism, the harmony of nationalism with universalism and the harmony of positivism with normativism. Formalism, nationalism, multilaterlism and positivism in the private international law of Modern

Times are surely based on a power-oriented concept of satesovereignty, however, unilateralism, substantivism, nationalism and normativism in the postmodern transition of private international law do not necessarily symbolize the outdatedness and use futility of state sovereignty in private international law. On the contrary, a new concept of state sovereignty assimilated from the concept of right and autonomy is urgently needed to meet the demands of the postmodern transition of private international law.

Key Words: Private International Law, Postmodern, Sovereignty, Power, Right, Autonomy, Value

前言

本书的写作缘起于作者2001年参加博士研究生入学考试的时候。中国政法大学的国际私法试卷有两个题目:一是试论国际私法在21世纪的发展趋势;二是国家的司法管辖权在国际私法中的地位。考完之后感觉回答得不理想。不是因为所回答的内容与当时的教材或论著中的相关内容有多大的出入,而是感觉自己也无法说服自己回答的或相关论著中的内容是有说服力的。几乎是在疲惫不堪的状态下勉强参加了2个月之后的复试,打开国际私法试卷,不是惊喜,而是彷徨,因为国际私法试题与初试时几乎是一样的,但我在思考和重新阅读有关论著2个月之后仍然没有能够得到令人满意的答案。尽管最后的结果不是太差,但国际私法在21世纪的发展趋势这个问题却深深地印入了我的脑海。

怀着惴惴不安的心情回到了阔别四年的母校,导师要求我利用语言优势多读一些国际私法和法哲学方面的原著。因为在硕士研究生阶段,该学的国际私法知识都已经学过了,要学会分析和解决问题的能力,就必须能够用一种思想把支离破碎的国际私法现象贯穿起来,就像不管是盖一栋大楼还是一座小房屋,不是钢筋水泥或砖瓦石料,而是思路,把这些材料构建在一起才有了成品。再说,国际私法问题,从一定意义上讲,就是法学理论问题。材料当然重要,在思路一定的情况下,材料的质量和数量决定成品的质量,但如果没有思路,再好再

多的材料，只能是一堆的混乱，博士论文的写作也是这样，要及早准备。

回宿舍的路上，导师的话萦绕在我的耳边，21 世纪国际私法的发展趋势这个问题又浮现在我的脑海。我记得当时回答这个问题的时候，回答的要点有十个：国际私法理论的多元化、国际私法立法的法典化、国际私法司法的灵活化、国际私法所调整的法律关系的多样化、国际私法的趋同化、国际私法的全球化、冲突规范连结点的软化、最密切联系原则的普遍化、意思自治原则的扩大化和弱者保护的强化。回想起来，似乎还不算混乱，但仔细一想，这些至多不过是摆放整齐的一堆砖或一堆瓦或一堆水泥之类，而不是一座房屋，更不是一栋大厦。但究竟什么思想能把它们构建在一起而成为有用的一体呢？对了，经济基础决定上层建筑，国际私法中的这些“化”肯定与经济基础有关。想当初，如果没有地中海文明中跨城邦的工商贸易的发展，巴特鲁斯就不会提出法则区别说。但面对同样的经济基础，阿尔德里克却主张用“更好的法律”解决法律冲突问题。于是，眼前又是一阵暗淡，就像皎洁的月光被乌云肢解成了斑驳的乱象。

时光如水，转眼又是阳春。捧着午餐在懒洋洋的日光下阅读最新一期的《研究生法学》，2002 年中国政法大学博士生入学考试的国际私法试卷中，国家主权在国际私法中的地位这个题目跃然纸上。这使我眼前顿时一亮，能把国际私法中的这些“化”串联起来的，难道不是国家主权吗？仔细一想，1 年前的那个月夜的乌云又降临了。在 20 世纪的国际私法中，不是同样存在国家主权吗？前些日子也曾阅读过美国学者的论著，不是有学者称国际私法的国家主权基础在世纪的转折时已摇摇欲坠了吗？带着这些疑问和第二天一整天的国际私法专题课，晚上参加了同学们组织的博士论文选题讨论会，一位民法博士嘉宾“一篇博士学位论文应解决一个问题”的论点占了上风。于是，“意大利国际私法研究”这个论题从我笔记本中划掉了，在“国家主权在国际私法中的地位”这个论题下面又画上了两道粗横线。本书最后的论

题就是在这个论题的基础上，在导师的指导下，从国家主权在国际私法中的地位，到国际私法的国家主权基础，再到国家主权与国际私法的当代发展趋势等等而不断演进而来的。

本书第一次提出了国际私法后现代转型这个提法。“转型”和“后现代”都不是什么新鲜词汇，也许在其他的很多学科中已经成了陈词滥调，但将这两个词汇与国际私法结合起来确信是本书首创。我在阅读过的国际私法文献中，没有读到过。为验证这种确信，曾上网搜索，输入“国际私法的后现代转型”或“国际私法后现代转型”或“后现代国际私法转型”或其英文的对应词汇，结果是无相关结果。当然，问题的关键并不在于其新，而在于这种结合的意义。

“转型”和“后现代”都是客观的社会现象，是很多学科都关注的焦点。国际私法是法学的一个学科，法学又是与其他学科紧密相连的。这种意义上的“共时性”研究相对于仅仅限于本学科内的研究更具有说服力。而且，“趋势”和“当代”之类的词汇含糊不清，更糟糕的是“趋势”往往夹杂着不同的主体的不同的主观臆断。“转型”比“趋势”更客观。“趋势”可以有不同层面上的，即有大的，有小的，而“转型”则是蕴含着微观的变化的宏观意义上的客观观察。比如我们说“连结点的软化”，就不能恰当地说这是冲突规范的“转型”。“后现代”也是固定的概念，特指特定的时代，同时“后现代”也是一个流动性的概念，要把握“后现代”，必须将其放置在其“现代”背景之中。“转型”的宏观和微观意蕴与“后现代”的结合凸现了时空的客观转换。正是在本书的写作过程中才惊奇地发现了国际私法从“现代”到“后现代”的转型与其他社会和人文学科的发展有着共同的发展轨迹。

本书将国际私法的后现代转型归纳为四对“主义”的对立与统一，在汉语世界中尚属首次。英语世界中虽有类似的总结，但也不尽相同。本书中的“主义”，如“形式主义”与“实质主义”，虽在英文中有对应的词汇，但与英文中的相应词汇并不完全相同，它们只是在一般意义上相通。在本书中，“主义”并不是一个褒义的词缀，像“马克思主