刑事法律科学文库(70)

刑法空间效力研究

Studies on the Spatial Effect of Criminal Law

■ 杨彩霞 / 著

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图书在版编目（CIP）数据

刑法空间效力研究/杨彩霞著．—北京：中国社会科学出版社，2007.8

ISBN 978-7-5004-6339-9

Ⅰ.刑… Ⅱ.杨… Ⅲ.刑法-研究 Ⅳ.D914.04

中国版本图书馆CIP数据核字（2007）第115860号

责任编辑 王半牧
责任校对 修广平
封面设计 弓禾碧
技术编辑 王炳图

出版发行 中国社会科学出版社
社 址 北京鼓楼西大街甲158号 邮 编 100720
电 话 010-84029450（邮购）
网 址 http://www.csspw.cn
经 销 新华书店
印 刷 北京奥隆印刷厂 装 订 广增装订厂
版 次 2007年8月第1版 印 次 2007年8月第1次印刷
开 本 880×1230 1/32
印 张 8.75 插 页 2
字 数 235千字
定 价 22.00元

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刑事法律科学文库

总　序

现代化的国家是法治国家。现代文明进步的社会是法治社会。中国依法治国、建设社会主义法治国家之基本治国方略的确立及其贯彻，对中国社会的发展进步至关重要。毋庸置疑，现代刑事法治在现代化法治国家中仍扮演着重要的角色，因而刑事法律学科也相应地为国家所重视，成为公认的改革开放以来我国最为繁荣的主要法学学科领域之一，并被首批纳入建设国家重点研究基地的行列。在新世纪建设社会主义法治国家的进程中，刑事法学需要进一步发展与完善，以更为充分地发挥其应有的作用。

中国人民大学刑事法律科学研究中心是专门从事刑事法研究的新型综合性学术研究机构，也是1999年12月首批建立的15个教育部普通高等学校人文社会科学重点研究基地之一。本中心依托中国人民大学雄厚的人文社会科学基础与中国人民大学法学院坚实宽广的法学学科实力，以国家级重点学科刑法学科为龙头，涵盖刑事事实体法、国际刑法、刑事程序与证据法、刑事侦查与刑事物证技术、刑事法律史等刑事法律学科群中的主要领域。按照教育部的要求，中心应当是具有明显科研优势和特色的国家级刑事法律重点研究基地，并经过努力使整体科研水平和参与重大决策的能力居于国内领先地位，在国际刑事法学界享有较高声誉。为达此目标和地位，中心要以学术研究为核心，深化科研体制改革，实行全面开放，注重高层次人才培养，加强学术交流，引导和促进刑事法律学科的发展与完善，努力建成国内一流、国际知名的刑事法律科学重点研究基地。

“刑事法律科学文库”是中国人民大学刑事法律科学研究中心

组织策划的主要系列学术丛书，计划出版国内外刑事法学（包括刑法、犯罪学、刑事执行法学、刑事诉讼法、刑事侦查、刑事物证技术、刑事法律史等）领域的有新意、有分量的著作与译作。著译者以本中心专职、兼职研究人员为主，并向国内外专家学者开放。旨在推动刑事法学领域的学术研究，积累刑事法学方面的学术成果，为繁荣和发展我国的刑事法学事业作出积极的贡献。

中国人民大学刑事法律科学研究中心

2007 年 5 月

内容摘要

刑法的空间效力同原始意义上的“国际刑法”源出一流，但近年来其相关内容却似乎成为被人们“遗忘的角落”，少有人问津。本文试图运用国际法提供的理论视角重新审视这一问题，以应对犯罪的国际化及高科技化趋势，打破国内刑法与国际刑法研究的隔膜状态。全文共分五章：

第一章概述刑法空间效力的基本问题。刑法空间效力是包容在更为广泛的刑法效力乃至法律效力的概念之中的，而法理学上普遍认为，一部法律能否适用取决于时、地、事、人四因素。由于这四因素之间是一种密不可分、相互从属的关系，而刑法所要解决的核心问题就是对人的行为——包含了人和事两个因素——的定罪量刑问题，因此在作为前提的刑法效力维度设定问题上，以二维度说较为可取，即应以时空范畴为基本坐标，将对属事和属人因素的研究从属进去。理论上亦有将刑法空间效力的规定称为“国际刑法”的习俗，而后者在含义范围上历经了由狭义到广义的演变过程，故当前一般采刑法空间效力的称谓，具体是指刑法对一定地域范围内的人们的犯罪行为能够予以适用的效力。这一概念通常同刑法的地域效力、刑事管辖权、刑罚权、刑事诉讼管辖权等概念存在混淆。而事实上它们之间是有差别的，但也有着千丝万缕的联系。理论上之所以将刑法空间效力等同于刑事管辖权，主要是因为公法具有严格属地性，适用他国刑法的情况极为罕见，致使刑法空间效力在法律适用层面的含义往往被忽略。关于刑法空间效力的法律性质，德日大致有诉讼条件说、构成要件说及处罚条件说。处罚条件说有一定道理，而如果放开视野，直观地将其作为指引准据法的冲突规范理解更具实践意义。

第二章探讨确立刑法空间效力范围的各原则，由其起源入手，重点论述了各原则的理论依据，以为各国管辖权的并行不悖提供充分的支持。就对国内犯适用的属地原则而言，犯罪地是其核心问题，因而以通行的遍在说为基础，就单独犯罪（包括未遂犯、预备犯、不作为犯、牵连犯、连续犯、继续犯等各种形态）与共犯的犯罪地如何认定作了详细探讨。在属地原则的适用领域问题上，则批判了将船舶、航空器、驻外使领馆视为我国领域延伸的做法。对国外犯适用的一般包括三项原则：一是属人原则。它分为三种类型，各国对属人原则均从一定角度、方式加以限制，比较可见，我国现行刑法采取的概括式立法和从法定刑上限制有其合理性，但取消双重犯罪原则值得推敲。二是保护原则。由于双重犯罪的限制机制同保护的宗旨存在理论上的悖反，因此建议参考国外的两分法，肯定对于侵犯国家根本利益的犯罪，无须在行为地也认为是犯罪。三是普遍原则。基于它是国际法上普遍原则的重申，因而在将其本土化为国内立法时，如果我国缔结或参加的国际条约所规定的罪行与刑法分则罪名体系不相协调时，可以采取新设罪名、完善现有罪名或通过罪数理论解决。理论上刑法空间效力的规定还应及于单位，但以现行刑法关于自然人的效力规定来解决这一问题存在极大的不协调，这是今后立法完善的方向。

第三章介绍了在国际社会空间格局演变之下，因国家主观观念在地理空间与网络空间分别呈现出自我抑制与极度膨胀两种截然不同的态势，从而导致的刑法在空间适用范围上各自不同的动向。众所周知，刑法空间效力的原则是国家主权观念于刑法理论中最集中、最鲜明的体现，但近年来这种观念却随着全球化、区域化的浪潮高涨而逐步由绝对走向相对。由于意识到强化国家间连带性的必要，欧洲各国率先行动，以道路交通犯罪为突破，根据预先设定的刑法共通适用，肯定了罪犯所在国的代理处罚权。它与引渡制度逆向而行，有助于填补各国刑法效力范围之间的空白，并反映了全球化背景下加强国际协作的精神，因此应当将其作为有益的国际实践

经验充实到国内刑法中去。网络空间的诞生，则对刑法效力问题形成了又一冲击。在尚无公认法律规制的国际网络空间，当前各国基于传统的主权观念，总是极力主张本国刑法的适用。虽然网络空间的特性决定其不应成为刑法效力的例外场所，但各国刑法效力极度扩张立法与司法现状是值得深思的。应当尝试通过对属地原则和保护原则的适当限缩理解，即引入针对性标准来限制刑法在网络空间的效力范围，以期在对安全、自由与技术的价值追求中求得平衡。

第四章基于冲突的普遍性，提出了刑法空间效力冲突的概念，驳斥了国际私法学者认为刑法无域外效力、不存在刑事法律冲突的见解，论证了刑法空间效力冲突的实在性，并就刑法空间效力冲突的产生原因及种类作了探讨。从含义上看，刑法空间效力冲突是不同法域的刑法竞相要求适用于某一涉外犯罪案件而其规定上又存在差异，或均不适用某一涉外犯罪案件，从而导致的适用上的冲突。事实上，刑法学者所主张的“域外效力”仅仅是一种“虚拟”的或者说自设的域外效力，主要不是在适用法律的选择层面而言的，因此，这种冲突是实际存在的。这种冲突进一步还可分为积极冲突、消极冲突与国际冲突、区际冲突。由于积极冲突的问题较为突出，而这种冲突根源于立法，永远不可能消除，故以下的探讨主要围绕如何协调而不是解决积极冲突，并区分国际、区际而展开。

第五章在分析协调刑法空间效力国际冲突的传统主张之不足的基础上，作了崭新的探索，提出了一系列协调的有益途径。以往就协调的具体办法，主要有确立优先管辖原则、确立国际刑事法院的强制优先管辖权以及实现刑法的趋同等主张。但这些都将协调问题上升到了国际层面的高度，在实现上遥遥无期。如果从国内司法及立法层面上考虑，则可供选择的途径至少还包括以下三条：一是可在利益衡量基本思想的指导下，借鉴国际私法中的最密切联系原则，确立最为适当的管辖归属；二是可将国际私法中的“直接适用法”的理论运用到刑法中，突破不适用外国刑法的传统，重叠适用外国刑法。而为了给国家保留回旋的余地，可在立法技术上参

考瑞士等国的轻法原则；三是应当对外国刑事判决实行积极承认。由一事不再理原则的价值蕴涵出发，比较各国对外国刑事判决效力所持的立场，进而检讨我国刑法第10条规定可以发现，我国对外国判决采取消极承认的态度有诸多弊端。为了更好地缓和各国刑法空间效力的冲突，务必实行积极承认，同时附加一定的承认条件。当然，这些途径的实现都要求国家主权观念的更新，实践起来各有不足，因而协调各国刑法空间效力冲突的方法应是多元化的体系，应时而用。

第六章特别结合我国多法域的典型现实，探讨了如何协调刑法空间效力区际冲突的问题。因区际冲突属于一国之内的冲突，因而不能完全照搬国际冲突的协调方式，而应注意其一国的特征；同时我国这种区际冲突的产生有其特定的历史原因，相对于其他多法域国家是一种深层次、多方位且伴随着制度、法律体系、价值文化观念差异的冲突，因此在处理我国区际刑法空间效力问题时，还必须立足我国国情。不过有关国家处理区际刑法空间效力问题的经验仍可以给我们以启迪：这主要包括有关国家在区际问题上采取的制定统一的区际刑事冲突规范的冲突法模式，美国刑事法规法典化运动所采取的示范法模式以及二战后分裂中的德国发展出的务实的区际刑法理论。在借鉴有关经验的基础上，对于我国区际间刑法空间效力问题的协调，可以考虑区分国内犯、国外犯与区内犯、区外犯，并对作为国内犯的区外犯适当放宽双重犯罪原则的限制；此外，应否定刑事诉讼法成为内地管辖的法律依据，并主要遵循属地原则优先、同为犯罪地时先理一方优先等具体规则通过协议分别情况确立管辖归属；最后，因宪法已赋予了特区司法权和终审权，即主动排除了内地刑法的适用，则在一个中国的原则之下，各法域应互认彼此的刑事判决。

关键词：刑法空间效力　原则　冲突　协调

Abstract

The spatial effect of criminal law shares a same origin with the "international criminal law". Nevertheless in recent years, its relevant content has seemed to be "the forgotten corner" since little attention has been paid to it. This dissertation aims at re-examining this issue with a theoretical perspective of the international law, in response to the internationalized and high-tech tendency of crime so as to break the ice between the research of the internal criminal law and the international criminal law. The dissertation is divided into 5 chapters:

Chapter I generalizes the fundamental issues of the spatial effect of criminal law. The spatial effect of criminal law is contained in the more extensive concept of criminal law effect and even the legal effect, however it's widely accepted in jurisprudence that whether a law is applicable or not depends on four factors, namely time, place, event, person, which are indispensable and co-subordinated to each other. That the criminal law has to solve is the conviction and punishment of man's behavior which contains the two factors of person and event, so concerning the setting of the criminal law effect dimension as a premise, these two factors should better be placed in the research of the factors of time and place. There's also a convention to identify the spatial effect of criminal law with the "international law" and the latter has undergone a transformation from a narrow sense to a general sense in the scope of its implication, so currently, we tends to adopt the name of "spatial effect of criminal law". It refers to the effect of the criminal law that can be exerted to people's crime in a certain geographical scope. This concept is commonly

confused with power of territorial effect of criminal law, criminal jurisdiction, power of punishment, jurisdiction of criminal proceedings. But in fact they are different, yet sharing countless ties with each other. Why to identify the spatial effect of criminal law with criminal jurisdiction is mainly owing to the fact that public law has a strict territoriality and it rare for us to find a criminal law that can be applied in another state. It results in the ignorance of its implication about application of criminal law. Concerning the legal nature of the spatial effect of criminal law, there are theories of contentious conditions, of constitutive requirements and of punishment conditions. Theory of punishment conditions is meaningful to a certain degree, but if we broaden our field of vision, it can also be served directly as conflict rule.

Chapter II concentrates on the principles to determine the scope of the spatial effect of criminal law, beginning with its origin, stressing the interpretation of the theoretical basis for those principles to provide a sufficient support for their inclusiveness. Concerning the territorial principle of the domestic offense, the locality of a crime is its key issue, so with the basis of universal theory, it provides a detail interpretation on how to identify the locality of individual offense and complicity. As for its applicable scope, it criticizes the act to treat ships, aircrafts and embassies and consulates abroad as the extended territory of our country. The principles applied to external offense generally include: 1. Principle of nationality. It has 3 types, all states defined it in a certain way, in comparison, the current provisions adopted by our country are justifiable, but to cancel the dual criminality principle deserves some consideration. 2. Protective principle. Since its purpose contradicts confining system of dual criminality, it should be referred to the foreign states, affirming the crime that infringes essential interests of the country is unnecessary to be regarded as crime in place of the act. 3. Universal principle. As it's a

restatement of universal principle in international law, when we introduce it to internal legislation, if the crimes regulated in the international treaties, which our country conclude or participate don't harmonize with accusation system of subprovisions, we can solve the question by add new charges, perfecting the current charges or through quantity of crime. Relevant provisions should also be applied to units, while the current criminal law only applies to natural person. This gives us direction to improve the legislation.

Chapter III introduces different tendencies of scope of application of criminal law caused by the two sharply different tendencies of self-restraint and excessive expansion respectively in the geographical space and the cyber space of states' sovereign idea under the change of the world. As we all know, the principles discussed above are the most centralized and distinctive reflection of the sovereignty, but this idea has gradually been relative with the raging waves of globalization and regionalization. With the awareness of the necessity to strengthen the ties between countries, and with the road traffic crime as a breakthrough, the European countries have taken the initial move to confirm the delegated power of penalty of the country where the offender is, based on the legal community set before hand. It is helpful to fill the effect scope blank, goes in contrary with the extradition system and goes with the tide of international co-operation, so it should be reinforced into internal criminal law. Another impact is brought by the Internet. All countries tend to apply their criminal law to the cyber space where there is still not regulated by law. Although owing to the feature of the cyber space, it should not become an exception for penalty, the current legal and judicial situation deserves deep reflection. We may try to interpret the territorial principle and protective principle in a condensed way, that is to, set relevant standard to get a balance in the pursuit of value of security, freedom and

technology.

Chapter IV puts forward the concept of conflict of the spatial effect of criminal law, criticizes the opinion that criminal law has no extraterritorial effect and there's no criminal legal conflict, demonstrates the existence of the conflict, and discusses its occurrence causes and types. This conflict refers to the applicable conflict when different scopes of law apply their criminal law to the same foreign-related case, but their provisions are different or none of them can be applicable. In fact, extraterritorial effect is only a fictitious effect in criminal law scholars' opinion and it is not understood on the level of choice of law, so it actually exists. This conflict can further be divided into active conflict, negative conflict and international conflict, interregional conflict. Since active conflict is prominent and originated from legislation, which can never be diminished, all studies below shall center on how to coordinate rather than solve the active conflict on the basis of telling international conflict from interregional conflict.

Chapter V makes a new exploration on the way of coordinating the international conflicts of the spatial effect of criminal law based on the analysis of the defects of traditional proposition. Those traditional methods include confirming prior jurisdiction rule, endowing international criminal court compulsory prior jurisdiction and unifying criminal law of each country, etc. All these methods put up the problem to an international level, so it seems difficult to realize. Considered from the perspective of domestic justice and legislation, three other methods can be chosen: The first is to draw on the experience of principle of proximate connection in private international law under the guidance of the idea of benefit balance to find the most appropriate country to rule; The second is to apply the theory of law of direct application in private international law to criminal law to breakthrough the tradition of not using foreign criminal law in

order to leave a room for freedom of action, we can refer to the principle of lighter law in criminal law of Swiss. The third is to recognize foreign penal sentences actively. Starting from the principle of non bis in idem, and then comparing the attitude of each country to foreign penal sentences, consequently examining Article 10 in China's Penal Code, we can find the disadvantages of the passively recognizing attitude toward the foreign penal sentences. In order to alleviate this conflict better, we have to recognize it positively and attach some terms at the same time. Surely all these need a change in attitude in sovereign idea, and there will be various inadequacy in practice, so the methods to coordinate the conflicts between countries should be multi-dimensional and should be changed with situations.

Chapter VI focuses on how to coordinate the interregional conflicts of the spatial effect of criminal law, especially combining with the typical reality of multiple regions of law in China. Since it is a kind of internal conflict, we can't copy the methods of coordinating international conflicts completely instead attention should be paid to the feature of one country. In view of the apical historical reasons for the occurrence of this conflict in our country and considering it's a kind of multi-level and multi-dimensional conflict associated with differences in institution, legal system, value and culture, we should base on our own national conditions in dealing with it. But some experience in other countries of multiple regions of law can also endow us enlightening, which includes patterns of conflict law adopted by some countries when they make a universal interregional criminal conflict rule, pattern of model law adopted by the USA in its codification movement and the pragmatic theory of interregional criminal law developed by the disintegrated Germany after World War II. Using them for reference, for the coordination of our interregional conflict, we should make a difference between domestic offense, external of-

fense and offense within the region, offense beyond the region, and relax restriction of dual criminality to offense beyond the region belonging to domestic offense. We should also deny the criminal procedure law as the jurisdiction basis, and advise to determine jurisdiction by agreement according to separate situations and mainly follow the detailed regulations of the order of priority of territorial principle and that court that first accepts the case of complaint shall have jurisdiction. Finally, since the constitution has endowed the SAR the judicial power and final adjudication, that is to abandon the application of mainland criminal law, each scope of law should recognize the penal sentences of others under the principle of one China.

Key words: the spatial effect of criminal law principle conflict coordinate

目　录