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博 士 学 位 论 文

从自发到自觉: 国家主权的祛魅与重构

From Spontaneity to Self-Consciousness:
Disenchantment & Reconstruction of State Sovereignty

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内容摘要

法学研究者应当区分“理科思维”和“工科思维”、“理论研究”与“规则研究”。与自然科学和社会科学中若干公认“硬科学”所遵循的“解释+预测”的理论研究路径不同，“理解+指引”应是法学理论研究的更优选择。对于特定的理论命题，前一路径要求所建立的理论能够以一定的精确程度对自然规律或社会规律提出“解释”，并且能够根据对系统的给定条件（输入值）推导后续变化和最终结果（输出值），从而实现一定程度的“预测”之功效。而在后一种理论路径中，“理解”的实现，需要研究者深度发掘历史，对理论命题宏大叙事的现状层层祛魅，尽量还原其真实意涵，从而使得对其进行与时俱进的更新成为可能；“指引”则要求研究者树立价值立场，对理论命题的未来发展方向加以形塑和引导。

国家主权是当代国际政治经济秩序领域中进行各种复杂博弈和高维建构的基础概念，也是国际法（主要指国际公法和国际经济法）学科的重要逻辑起点和奠基石。然而，迄今为止，国际法语境下的“国家主权”仍然主要表现为意识形态化和符号化的宏大叙事，这导致其理论主张与现实情势之间张力不断——一方面在理论上主张主权不容侵犯，另一方面，人权诉求、打击暴恐等事由，却一再成为强权国家用于肆意刺破弱小国家主权防护罩的表面借口；一方面在理论上主张主权平等，另一方面，在若干国际组织当中又常常按照国家的经济体量或军事实力等因素对成员国的投票表决权进行加权配置；一方面在理论上主张主权者对其国内经济事务和自然资源拥有绝对权利，另一方面，通过各种国际经济条约的安排，在许多情况下，一国国内的经济事务已经事实上拥有多个利益攸关者，其相关最终决策，可能已经超出该国国界之外；一方面在理论上主张主权对内享有最高地位，另一方面，在国际投资法和国际人权法等领域中，个人已经能够成为在国际裁判庭直接挑战主权国家的适格主体。因之，虽然几乎所有现代人对主权概念都耳熟能详，并且在有需要的场合下也能够信手拈来加以使用，但是，一旦被细加追问，又似乎鲜少有人能够真正理解这一概念。

这表明，亟需对主权概念进行澄清和祛魅。本文认为：由于各项相关历史条件的具备，近现代意义上的国家主权概念首先得以在西欧“自生自发”的涌现，

并在该地区造就了一批“先发”的主权国家，形成了一个区域范围内的主权国家体系。其后，若干“先发”主权国家因国内工业革命带来生产力的巨大发展，在资本自身所内含的扩张本性的驱动下向全球扩张；随之，这种原本局限在西欧的地方性秩序体系及其配套制度设定，也逐渐向全球其它地域辐射。但是，这种扩散首先形塑的，并不是当代意义上全球范围内的主权国家体系，而是全球的殖民体系以及不平等贸易体系。此种情形一直持续到二战后，众多原殖民地相继获得独立地位并形成了一批“后发”的主权国家。这些“后发”者大多被动继承了西欧的国家主权理念，并将此用作维护其政治经济独立的理论基础及其进行国际交往的前提条件。

对于这些“先发”或“后发”的主权国家，由于当事者自身均未认识和掌握主权命题的相关规律性，反映到其实践活动过程中，往往表现为主体被客观过程所支配，无法对现实做出及时且完备的理论回应，更无法进行创造性的引导活动。从这个意义上而言，此前“先发”国家和“后发”国家有关主权的理论和实践，仍仅属于初级的“自发”阶段，都缺乏因“自觉”而带来的主观能动效果。

这表明，亟需构建一个理论框架以理解主权命题的历史生成和现实问题，并指引其后续演化。本文另一个层次的主要贡献即在于此。为此，本文尝试：（1）重构一种“自觉”的理解进路，通过框架搭建以阐明国家主权和主权国家体系的过去和现在，同时实现对主权问题进行更有效的分析和对话；（2）寻求一种“自觉”的改造途径，从西方传统主权话语体系之外寻求其它知识资源以对这种话语体系进行补充和改进。

在充分“理解”国家主权以及主权国家体系“自发”形成和演化过程的基础上，本文提出以下见解，以期实现对国家主权的“自觉”重塑，进而一定程度上提出对人类社会可能前进方向的“指引”。

首先，在任何时期，对任何有关主权的话题，一个较为完备的理解框架将包含主权身份、主权权能和主权责任这三个层次，但是，在不同时期、针对不同话题，各个层次的重要性存在差异。例如，在早期西欧地方性秩序的确立进程中，为了划清世俗与宗教、王权与神权以及各个民族国家之间的权力边界，主权身份是首要问题；在经济全球化时代，为了能够在国家间实现跨界贸易和投资的协作，需要明确的一个重要问题是主权权能的具体设计和平衡妥协；在人类命运紧密连

接的当代，主权责任成为新的关键议题，并成为一种考虑全球治理和国际法治的新视角。

其次，以分别来自中国和美国的两位国际经济法领域代表性学者的主权观为例，通过对其各自学说进行系统梳理和考察，作为适用主权理论框架的实证尝试。本文总结这两种代表性主权观分歧的实质在于，一方主要关注和强调主权身份层面，而另一方主要关注和强调主权利能层面。如同许多围绕主权议题产生的其它争论一样，这种“断层式”的对话，只有当双方都意识到并且能清晰辨明对方所立基的具体理论层面，才可能真正变得能够沟通以及富于建设性。

最后，通过从中国历史和当代的经验汲取养分，探讨一种超越“原子式”主权国家秩序观的替代方案。中式“天下主义”中所蕴含的制度设定、人文情怀和历史使命感，启发了一种突破主权法理责任体系的伦理责任体系，有可能因此激发主权者的义务意识，以对主张极端权利本位的现状进行纠偏。在伦理责任体系中，主权者的身份定位将更为丰富并且更符合实际情况，从而缓解前述传统主权话语与现实情势之间的张力。

本文创新之处包括：第一，对法学理论研究进行了基础性探讨，通过比较，明确提出在“价值偏好”下旨在追求“理解+指引”的理论研究进路（绪论部分）；第二，通过考察长期尺度的历史，对国家主权概念进行“知识考古”，梳理主权国家体系制度的生成史，从而完成对国家主权概念当代宏大叙事的“祛魅”（本文第二章）；第三，总结提出三个考察主权的视角，对国家主权概念进行重塑，使其不仅能够更好地契合其过往历史，同时也有助于精确理解和分析主权面临的当代困境（本文第三章）；第四，通过选取中美两位代表性国际经济法学家的当代主权观进行考察，实现了对本文重塑并提倡的主权理解框架的一次实证适用（本文第四章）；第五，通过回归中国的传统历史经验和知识资源，为主权的未来发展贡献新元素、新价值和新视角，以期塑造一种更为饱满、更契合现实的主权观（本文第五章）。以上所列第二点到第五点，构成了本文所意图达成的完整意义上的“自觉”理论活动。

关键词：国家主权；主权国家体系；主权者身份；主权利能；主权责任；陈安；杰克逊；封贡体系；天下主义

ABSTRACT

Legal researchers should be able to distinguish “Scientific Thinking” from “Engineering Thinking”, and “Research of Theory” from “Research of Rules”. Different from the theoretical research approach of “explanation+prediction” commonly adopted by natural science and some “hard scientific disciplines” in social science, “comprehension+guidance” would probably be a better choice for carrying out theoretical research in the domain of law. As to a specific theoretical proposition, the former approach demands for a theory, once it is established, to be able to offer “explanation” towards natural rule or social rule, with a satisfactory degree of precision. Such theory is also required to be able to derive output result from a series of input parameters, acting thus as some “prediction”. While on the other hand, as for the latter approach, the realisation of “comprehension” requires researchers to dig deep into the history, so as to disenchant grandnarratives of the theoretical proposition, and to reveal its original meanings and functions, making the effort of updating such proposition according to times possible. “Guidance” requires researchers to establish a stance of value system, so as to shape the possible evolving direction of such theoretical proposition in the future.

State sovereignty is the fundamental concept, based on which complex game and high-dimensional construction are carried out in contemporary international political and economic domains. State sovereignty is also the key logical standing point and corner stone of international law (here with a key reference to public international law and international economic law). However, up till today, state sovereignty under the context of international law still mainly takes the form of an ideological and symbolical meta-narrative, which causes constant tension between itself and factual situations – on one hand, no intrusion into sovereignty is permitted in theory, on the other hand, excuses such as protection of human rights and strike on terrorism are repeatedly utilized by powerful states to pierce into weak states’ sovereign shield. On one hand, sovereign equality seems to be a sure thing in theory,

on the other hand, it has been common practice for various international organizations to allocate weighted voting powers according to the states' economic volume or military power. On one hand, it is recognized in theory as a sovereign state's sole discretion to determine its domestic economic policy, and the sovereign state's exclusive right towards its domestic natural resources, on the other hand, through the arrangement of multiple economic treaties, there might, in many circumstances, be more than a few stake-holders as to the domestic economic affairs of one state, and the relating issues might be decided outside of the state's border. On one hand, the supremacy of a sovereign state is well acknowledged in theory, on the other hand, private entities have already become legitimate party to bring a sovereign state to an international juridical forum under, for example, international human rights law and international investment regime. For this reason, everyone may feel familiar with this concept, and can even make precise reference to this concept whenever there is a need, but few of them could offer genuine comprehension over this fundamental concept once being inquired in detail.

These facts ask for a timely systematic clarification and disenchantment over the concept of sovereignty. This dissertation opines that: the concept of state sovereignty in its modern sense first spontaneously emerged from Western Europe, a region where a series of required historical conditions had been met. This brought up a batch of "first-mover" sovereign states, who then established a sovereign state system in that particular region. Later on, some of these "first-movers" had acquired a massive development of productive power because of domestic industrial revolution, and sought for global expansion under the propel of expanding nature embedded within capital. Along with this process, the regional order originally restricted within Western Europe, together with its accompanying institutional settings, gradually radiated towards other areas on earth. However, what this round of expansion shaped, is not a global sovereign state system in its modern sense, but a global colonial system and unequal trade system. Such status had continued until the end of World War II, when a number of original colonies gradually obtained their independence, and became "late-development" sovereign states. Almost all of these "late-comers" have passively

accepted the notion of state sovereignty, and have learned to use it as their theoretical weapon to preserve independent status both in political and economic terms, and as the prerequisite for international intercourse.

For sovereign states of both “first-movers” and “late-comers”, they have not recognized and grasped the regularity embedded in the sovereignty proposition. As a result, they are usually manipulated by objective process during their practices, and could not provide timely intact theoretical response against the reality, not to mention carrying out active and creative guidance as to reality. It is in this sense that the author claims that the theoretical and practical movement regarding sovereignty of both “first-movers” and “late-comers” can only be categorized as a primary stage of “spontaneity”, lacking of activeness and guidance from a subjective position as can be generated in a stage of “self-consciousness”.

This indicates the demand for a theoretical framework to comprehend the historical origin and factual problems of the sovereignty proposition, and to guide its future evolvement. Such effort constitutes another major contribution of this dissertation. For this end, the author has attempted: (1) to reconstruct an approach of comprehension with “self-consciousness”, to expound the past and future of state sovereignty and sovereign state system through a theoretical framework; (2) to put forward a way of reform with “self-consciousness”, by turning to other knowledge resources outside of the traditional Western discourse of sovereignty with a purpose to make complement and improvement as to the current narrative regime.

With a full “comprehension” over the “spontaneous” formation and evolvement of state sovereignty and sovereign state system, this dissertation offers the following insights, wishing to accomplish a “self-conscious” reconstruction over state sovereignty, which would then possibly offer some “guidance” towards the advancing direction of human society.

Firstly, at any time, for any sovereignty-related subject matters, a relatively complete framework of comprehension comprises of three levels of sovereign identity, sovereign competence and sovereign responsibility, whose importance is, however, different as in different cases or different historical times. For example, at the early

stage when the regional order of Western Europe was being established, sovereign identity is the primary question in order to determine the boundaries as-between the secular world and spiritual world, the worldly authority and divine authority, as well as among different nation-states. In the era of economic globalisation, sovereign competence should be carefully designed and balanced in each specific case in order that states could carry out crossborder cooperation in trade and investment. At modern times when human destiny is closely interwoven together, sovereign responsibility has become a key issue, as a new perspective to think about global governance and international rule of law.

Secondly, by taking the perception on sovereignty from two leading scholars in the field of international economic law from China and the U.S. respectively as an example, an empirical application of the framework of comprehension of sovereignty is attempted through systematic combing and observation of these two scholars' viewpoints. This dissertation concludes that the fundamental divergence between these two scholars lies on the fact that while one of them emphasizes sovereign identity, the other keeps on discussing sovereign competence. Similar to a lot of sovereignty-related debate, this sort of conversation as if taking place from two sides of a fault, would become communicable and constructive only when both sides had realised and a clear knowledge over the opposing party's standing point.

Lastly, by drawing nutrients from historical and contemporary experience of China, an alternative scheme of world order that transcends the atomic sovereign state scheme has been discussed. The humane feelings and the sense of mission embedded in the traditional Chinese "All-under-Heaven" scheme has inspired a system of moral responsibilities over that of jurisprudential responsibilities. Following such logic, the sense of duty of sovereign might be motivated as a redressing power against the somewhat extreme right-oriented *status quo*. Also, the sovereign identity would be more abundant and thus more suitable to actual circumstances under a system of moral responsibilities, thus alleviating the afore-mentioned tension between traditional sovereignty discourse and actualities.

Innovations of this dissertation include: (1) Basic discussion has been performed

as to the methodology in the theoretical research of law. Through comparison, the author reaches to and clearly puts forward his preference of research approach as pursuit of “comprehension+guidance” (Introduction). (2) By carrying out the archeology of knowledge as to the concept of sovereignty, a relatively long term of history has been reviewed, with the purpose of accomplish the disenchantment of the grandnarrative of this concept (Chapter II). (3) Three perspectives for the assessment of sovereignty problems have been proposed. Such framework of comprehension forms a reconstruction of the sovereignty concept, through with the past could be better corresponded to, and the contemporary dilemmas could be more precisely comprehended (Chapter III). (4) The review of two representative scholars of international economic law from China and the U.S. has realised an empirical application of the proposed framework of comprehending sovereignty concept (Chapter IV). (5) By turning back to Chinese traditional experience and cultural resources, new elements, new values and new perspectives have been contributed for shaping a sovereignty framework more diversified and more suitable to actualities (Chapter V). The above-listed points (2) to (5) together have formed a “self-conscious” theoretical endeavour that this dissertation intends to accomplish in its intact sense.

Key words: State Sovereignty; Sovereign State System; Sovereign Identity; Sovereign Competence; Sovereign Responsibility; An CHEN; John Jackson; Conferring & Tributary System; All-under-Heaven

缩略语表

BIT	Bilateral Investment Treaty (双边投资保护协定)
ECHR	European Convention on Human Rights (欧洲人权公约)
ECtHR	European Court of Human Rights (欧洲人权法院)
EU	European Union (欧盟)
ICJ	International Court of Justice (国际法院)
ICISS	International Commission on Intervention and Sovereignty of State (干预与国家主权国际委员会)
IIA	International Investment Agreement (国际投资协定)
ILC	International Law Commission (国际法委员会)
ISDS	Investor-State Dispute Settlement (投资者-东道国争端解决)
R2P	Responsibility to Protect (保护的责任)
SSS	Sovereign State System (主权国家体系)
UN	United Nations (联合国)
WTO	World Trade Organization (世界贸易组织)

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