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THE LEX PERSONALIS IN THE CONFLICT LAW OF CHINA

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Abstract: Lex personalis is an important formula of attribution and takes on some new characteristics with the development of conflict law in this decades, this dissertation is intended to provide an overview of the history of lex personalis in Chinese laws as well as an analysis on the characteristics of lex personalis in the new act promulgated in 2010.

Keywords: Lex Personalis; China; International Private Law

1. Introduction

According to the research of some scholars, the fist foreign-related civil case in record is "Princess Liu Xijun case"[1] in West Han Dynasty(206 B.C.-A.D.24). This case was determined in accordance with an imperial edict issued by Emperor Wu-ti (141–86 BC) which provided: The validity of the marriage between Princess Liu Xijun and the king of Wusun (an ethic group in the border of Han in history) shall be applied by the customary law of Wusun. This means that the validity of marriage was applied by the customary laws of the husband's ethic group. In Chinese long feudal history, there were many imperial edicts and precedents dealing with the marriages between Chinese princesses and foreign rulers.[2]

What is noteworthy is that some scholars hold that the earliest Chinese choice-of-law rule emerged when the Tang Dynasty came into its prime and international trade was active in East Asia, especially in Chang'an, the capital of Tang Empire.[3] The first title of Tang Code is"Mingli" which provided the fundamentals of the code, Article 6 of Mingli provided: If both parties of infringement belong to the same barbarian ethic group, the customary law of their own shall apply; if the parties belong to different barbarian ethnic group, law of the Tang Empire shall apply. It is apparent that this article is a combination of lex personalis and lex loci actus. However, It is also a remarkable fact that in Chinese history, a code, if any, applied to both civil and criminal cases. [4] So the arguments of those scholars is highly arguable.

It is commonly believed that private international law sprouted out from Europe in the late of Middle Ages when four basic conditions appeared:differences of laws and the legal systems of different countries, indispensable civil relations and business transactions among the countries and granting of civil status to foreigners by the forum country and recognition of the extraterritorial effect of foreign laws in civil and commercial matters.[5] However, in all the feudal dynasties, the Chinese rulers held that they were the central empire and the emperors were the "son of heaven " who held the power to govern all the world including all the foreign ethic groups, as a result, Chinese empires and its laws was supreme over any other barbarian ethnic group and their customary laws, thus the mutual recognition of extraterritorial effect of foreign law was non-existent. This notion was reflected in the code enacted by Ming and Qing Dynasty when they adopted closed-door policy. The code of Ming provided that:any violation committed by the foreign ethic people shall be governed by law of Ming Empire. The subsidiary explanation of this code explained that"these foreign ethnic people, though not the subject of the Ming Dynasty, are regarded as so once they submit themselves to the authority of Ming Dynasty, hence laws of the Ming Dynasty shall apply". So it is concluded that there was no international private law in the ancient China, including lex personalis.

After the Mid 19th Centry, the gate of Qing Empire was opened by western countries by military force after the First Opium War (1840-1842). After was defeated in several wars thereafter, China was forced to enter into many unequal treaties with great powers including Great Britain, France, Russia, Japan and the United State etc.. As a result, the Government of Qing had been forced to recognise the extraterritorial effect of foreign law which was called "foreign consular jurisdiction". Equipped with the privileges gained in the aforementioned treaties, more and more citizens of those countries came to China for business chances. In this background, more and more foreign-related cases emerged.

Further more, there were also some equal treaties to govern the foreign-related marriages signed by Qing Government with some foreign governments. for exam-

ple, in 1888, China and Germany entered into the Rules of Applying the Law of Husband's Nationality to Marriages between Chinese and Germen, the Rules provided that: If a German man marries with a Chines woman, the German laws shall apply and he shall take the notice of the marriage to the competent local authorities of China; If a Chinese man marries with a German woman, the Chinese laws shall apply. There was also similar treaty between China and Italy.[6] In fact, those treaties confirmed a lex personalis rule that: Foreign-related marriage is governed by the law of husband's state of nat ionality. It is commonly believed that the aforementioned basic four conditions appeared and international private law of China in the modern sense was introduced from Japan in this period.

The first legislation of private international law was the Act on the Application of Law in 1918, this Act was effected deeply by some legislations of civil law countries and selected nationality as the connecting point of lex personalis. Objectively speaking, this Act was regarded as one of the most detailed and comprehensive codes available in those days, However, insofar as the unequal treaties with the foreign countries and "foreign consular jurisdiction", this Act was never in good operation..[7]

2. Lex Personalis of Chinese Conflict Law between 1949 and 2010

When the People's Republic of China was established in 1949, it abolished all previous laws, including the Act on the Application of Law in 1918. Due to the changes in the external international environment and the ultra-left trend of thought inside, China was separated from the outside world and the communications with foreign countries almost stopped. During this period, the study and legislations of international private law ceased until China decided to open its gate again several decades later. For a few foreign-related cases appeared in the period, however, because there were no legislations governing this kind of cases, all those cases were resolved in accordance with some special rules issued by competent authorities.

However, since China began its reform and opening policy in 1978, Chinese politics, economy and society gradually became back on track again, thus a lot of foreign-related civil and commercial relationship emerged. As a result, China has witnessed a historic change in private international law, including lex personalis from than on.

Before the Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China was enacted in 2010, the rules of private international law were scattered in many legislations enacted by the People's Congress and its standing committee as well as judicial interpretations issued by the Supreme People's Court. These legislations and judicial interpretations included: the chapter 8 of General Principles of Civil Law of the People's Republic of China (from article 142 to 150), Law of Succession of the People's Republic of China (article 21), Law of Adoption of the People's Republic of China (article 21), the chapter 14 of the Maritime Code of the People's Republic of China (from article 268 to 276), the chapter 5 of the Law of the People's Republic of China on Negotiable Instruments (from article 94 to 101), the Chapter 14 of Civil Aviation Law of the People's Republic of China (from article 184 to 190),[8] the Opinions of the Supreme People's Court on Certain Issues Concerning the Implementation of the "General Principles of the Civil Law of the People's Republic of China, etc.. In a word, There was no unified code of conflict law and those separate rules had caused great inconvenience and trouble in judicial practice.

Overall, for the lex personalis in this period, the primary connecting point is nationality while domicile or habitual residence only played a supplemental role. Article 182 of the Opinions of the Supreme People's Court on Certain Issues Concerning the Implementation of the "General Principles of the Civil Law of the People's Republic of China provides that: With regard to a foreigner who has dual or plural nationality, the law of the country where he/she domiciles or the country to which he/she is most closely connected shall be deemed as his/her domestic law. Article 183: Where the domicile of a party is unknown or cannot be determined, his/her habitual residence shall be his/her domicile. If a party has several domiciles, the domicile to which the civil relationship in dispute is mostly connected shall be his/her domicile. So it can be concluded that the applying order of the three connecting points is: nationality-domicile-habitual residence, except there were otherwise special provisions, for example, article 149 of General Principle of Civil Law stipulates that: In the statutory succession of an estate, movable property shall be bound by the law of the decedent's last place of residence, and immovable property shall be bound by the law of the place where the property is situated.

Mainly due to the late start and lack of judicial practice in the field of lex personalis, there were many defects in the legislations in this period. However, by and through the struggle for more than twenty years, the code of conflict law of China- The Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China was enacted in 2010 and the new legal framework of international private law with Chinese characteristics began to come into being at last.

3. Lex Personalis in Laws of the Application of Law for Foreign-related Civil Rela-

tions of the People's Republic of China in 2010

The Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China(hereafter to be referred as "The Act") was enacted by The Standing Committee of The People's Congress on October 28, 2010. The conflict law of China completed its codification and modernization by and through the promulgation of the Act. This Act introduced many advanced theories as the fundamentals, such as the theory of the most significant relationship, the doctrine of the autonomy of the parties, the principle of protecting the weak and the doctrine of favor validitatis. this was a milestone for the development of lex personalis in Chinese laws.

The scope of lex personalis in the Act is very broad and it can be found in almost all fields of foreign-related civil relations, including marriage and family, inheritance, contract, etc., except the traditional field of real right and intellectual property. From the entire content of this Act, one highlight is that habitual residence is selected as the primary connecting point while nationality was only alternate.[9] As to the characteristics of lex personalis in the Act, this article will analyze as following:

3.1. The Loopholes of Legislation in Lex Personalis was Plugged

As mentioned above, prior to the promulgation of the Act, the legislations of lex personalis is chaotic and there are full of loopholes as well. However, this situation has been greatly improved since the Act was enacted in 2010. For example, as to foreign-related parent-child relationship, there are no relative clauses in the General Principles of Civil Law of PRC enacted in 1987, however, the Act plugged this loophole by adding article 25 accordingly. As for foreign-related marriage, this act deleted the wording-"marriage engaged between Chinese and foreigners " in the relative provisions of the General Principles of Civil Law, as a result, all foreign-related marriages, including the marriages engaged by two foreigners in China are all subject to be regulated by the Act, so is it in the filed of foreign-related adoption and inheritance etc.. Thus, the Act plays a important role in settling the problem of the legislative loopholes of lex personalis completely.

3.2. Principle of Protecting the Weak in Lex Personalis

One highlight of the Act is the introduction of principle of protecting the weak that will also greatly improve the development of the lex personalis in Chinese laws. For example, Article 42 provides that: The laws at the habitual residence of consumers shall apply to consumer contracts; If a consumer chooses the applicable laws at the locality of the provision of goods or services or an operator has no relevant business operations at the habitual residence of the consumer, the laws at the locality of the provision of goods or services shall apply; Article 29 reads: The laws in favor of protecting the rights and interests of the persons being maintained in the laws at the habitual residence, of the state of nationality or at the locality of the main properties of one party shall apply to maintenance; Article 30: The laws in favor of protecting the rights and interests of the persons under guardianship in the laws at the habitual residence or of the state of nationality of one party shall apply to guardianship. It is the common sense that customers, workers and the persons under guardianship etc. are mainly the weak parties in the their particular relationships, thus substantial justice requires the legislation to weigh much on their sides, so is it in all the field of lex personalis.

3.3. The Theory of the most Significant Relationship in Lex Personalis

On the one hand, As general provision, Article 2 in Chapter 1 provides that: ……If there are no provisions in this laws or other laws on the application of any laws concerning foreign-related civil relations, the laws which have the closest relation with this foreign-related civil relation shall apply. So the Act treated the theory as one of the fundamentals to resolve all foreign-related legal matters, including in the filed of lex personalis. For example, article 23 of the Act stipulates "The laws at the mutual habitual residence shall apply to the personal relation between husband and wife; if there is no mutual habitual residence, the laws of the mutual state of nationality shall apply". this clause does not govern the situation that the couple have neither mutual nationality nor mutual habitual residence, so the question is exactly which laws shall apply in this situation? You might turn to another law to find the answer or leave it in the discretion of judges, however, if you look back to article 2, you can get the conclusion that the laws which have the closest relation with the personal relation between husband and wife shall apply.

On the other hand, the Act abandoned nationality while turned to select habitual residence as the primary connecting points in lex personalis, this approach itself reflected the theory of the most significant relationship. It is well known that nationality was criticised by scholars due to the fact that a natural person may be less relative with his/her country of nationality, the relationship between this person and his/her country of citizenship sometimes is fragile or even non-existent, thus the application of this laws is unreasonable and even leads to apply the laws of the country which he/she try to escape.[10] The place of habitual residence, however, is

the central of his/her life and sometimes is also the location of his/her property, in general, is more relative with the person than his/her country of nationality. In several cases heard in Europen courts recently, the judges try to determine the place of the parties' habitual residence by determining the center of their lives.[11] So it can be said that the approach of placing habitual residence as the primary connecting point is in line with the requirement of the theory of the most significant relationship.

3.4. The Doctrine of the Autonomy of the Parties in Lex Personalis

The doctrine of the autonomy of the parties acts as another fundamental in the Act including in the filed of lex personalis. There are many clauses in the Act grant the parties of the right to select the proper laws applicable to their legal relationship in the field of lex personalis. As general provision, Article 3 in Chapter 1 provides that: The parties may explicitly choose the laws applicable to foreign-related civil relations in accordance with the provisions of laws. There are also a large number of provisions reflecting the spirit of the autonomy of the parties in specific provisions, for example, Article 26 reads that: As for a divorce by agreement, the parties concerned may choose the applicable laws at the habitual residence or of the state of nationality of one party by agreement. If the parties do not choose, the laws at the mutual habitual residence shall apply; if there is no mutual habitual residence, the laws of the mutual state of nationality shall apply; if there is no mutual nationality, the laws at the locality of the institution handling the divorce formalities shall apply.

Further more, lex personalis alway plays a supplemental role when applying the doctrine of the autonomy of the parties. For example, article 41 of the Act provides" The parties concerned may choose the laws applicable to contracts by agreement. If the parties do not choose, the laws at the habitual residence of the party whose fulfillment of obligations can best reflect the characteristics of this contract or other laws which have the closest relation with this contract shall apply". In this clause, the laws at the habitual residence of the party whose fulfillment of obligation can best reflect the characteristics of this contract shall apply to the contract if the parties fail to choose the laws applicable to their contract. Article 42 of the Act also stipulates: The laws at the habitual residence of consumers shall apply to consumer contracts; If a consumer chooses the applicable laws at the locality of the provision of goods or services or an operator has no relevant business operations at the habitual residence of the consumer, the laws at the locality of the provision of goods or services shall apply.

The introduction of the theory of the most significant relationship and the doctrine of the autonomy of the parties in lex personalis reflect the trend that the private international laws of China will pay more attention on the substantial justice and will be more open and comprehensive. In judicial practice, the doctrine of autonomy combining with the theory of most significant relationship, greatly improves the flexibility of the application of the lex personalis in Chinese laws.

3.5. The Doctrine of Favor Validitatis in Lex Personalis

The principle of favor validitatis refers to that a proper laws tends to be the laws in favor of the effectiveness of an particular legal relationship which it is intended to apply. [12] For example, Article 22 of the Act provides that: Marriage formalities shall ba valid if they conform to the laws at the locality where the marriage is established or the laws at the habitual residence or of the state of nationality of one party; Article 32 of the Act also reads: A testament shall be confirmed as valid if its form conforms to the laws at the habitual residence, of the state of nationality or at the locality of the testamentary acts when the testament is made or at the time of death of the testator. The principle is intended to minimize the intervention in civil and commercial relationships, hereby recognizing the parties' privilege to make arrangement on their right and obligation.

4. Comment on the Lex Personalis in Existing Law of Law

To sum up, there are many highlights reflecting the nature of advance and flexibility of lex personalis in the Act described above. In spite of this, there are also some regretful defects of lex personalis in the Act which are described as follow:

4.1. The Excessive Application of Habitual Residence is not in Line with the State's Interest of China

To select a proper connecting point in lex personalis, in addition to the convenience of commercial exchange between citizens of different countries, the state's interest and policies should be also taken into consideration. For example, in the mid-19th centry when Italy was divided into many small city-states and a lot of Italians lived abroad, in order to establish the notion of unified Italian citizenship, Mancini had spared no effort to support and advocate the principle of nationality and ultimately it was written in Italian legislations. However, nowadays Italy is a unified country and has become a immigrants-flowing country, a large number immigrants come from Muslim countries which hereby leads to the frequent application of many Muslim laws which sometimes conflicts with Italian laws if Italy still insists

on the principle of nationality, therefore, the status of nationality has been greatly declined in the lex personalis in Italian laws.[13] This trend can also be found in French and Germany. In a word, all countries always try to select the most suitable connecting point in accordance with reality and make adjustment accordingly.

As to China, to begin with, China is a main migrants-exporting country in the world, a large number of citizens have been living abroad, so if the applicable scope of the laws of the place at those citizens' habitual residence is excessive expanded, the chances to apply Chinese laws will be greatly reduced, hence the state's interest of China would be damaged. Furthermore, because there are also many clauses of the doctrine of autonomy in the Act which allow parties to choose the laws to apply for their legal relationship, the foreigners settled in China may not to select Chinese laws although their habitual residence located in China. Last but not least, if you make a further research on the application of habitual residence in laws of many other countries, you can found that acting as a connecting point, habitual residence is limited in a very small scope: protection of children's right, welfare of foreign nationals and so on. Overall, we hold that the excessive application of habitual residence in the lex personalis in Chinese laws is not in line with the state's interest of China.

4.2. The Act does not Make the Definition of Habitual Residence, which will Inevitably Cause Great Inconvenience in Practice

It was proved to be regretful that the Act did not provide a precise definition on habitual residence. In fact, there is no unified standard on the identification of the place of habitual residence which is commonly accepted by all countries. EU 2201/2003 Rules(the Revised Edition of Brussels II) provides a flexible approach which refers to the so-called objective factors and the intention of settlement.[14] the Rules also stipulated that judges shall also take into account all the factors in specific case when try to find out a natural person's habitual residence in very specific cases. [15] However, because of the excessive flexibility, this approach may not be suitable for China.

At present, the determination of a natural person's habitual residence in China is in accordance with a judicial interpretation issued by the Supreme People's Court in January, 2013: The place of habitual residence of a natural person shall be the place where the person had been lived for more than one year and the centry of his/her life. However, this interpretation is also too simple to solve the increasingly complex legal matters. It can be expected that the identification of habitual residence will arouse many hotly disputes in judicial practice in future.

5. Conclusion

All in all, the development of lex personalis in the conflict law of China has been full of difficulties and challenges, in spite of this, these few decades has witnessed a remarkable improvement of the lex personalis in the Chinese conflict law since 1978 and the new legal framework of international private law with Chinese characteristics began to come into being after the Act was enacted in 2010.

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