

Study on the Meaning of *Lex Voluntatis* the Choice of Law in International Private Law

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Abstract

As an important connecting point in international private law, the discussions on autonomy of the parties (*Lex Voluntatis*) never stop. In practice, *Lex Voluntatis* works as a connecting point or Formula of Attribution rather than a common principle. The position of *Lex Voluntatis* in international private laws all over the world can be shown via value analysis: on one hand, the well-known *Lex Voluntatis* derives from the parties' pursuit on material and spiritual requirement; on the other hand, *Lex Voluntatis* is understood differently from places to places. Countries from different legal systems usually have their own special requirements on the understanding of *Lex Voluntatis*; last, *Lex Voluntatis* focuses on the respect of the freedom of individual will.

Key words: *Lex Voluntatis*; Common principle; International private law

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INTRODUCTION

The principle of autonomy of the parties (*Lex Voluntatis*) generated from civil law area, especially in contract law

area, there are most statements describing the principle. To explain the meaning of the principle of autonomy of the parties, no doubt we can start from its literal meaning. From the point of word-formation in linguistics, the principle of autonomy of the parties is a biased-positive formation and its core vocabulary is principle. Then, what is principle? For the position of *Lex Voluntatis* in the choice of law in international private law, can we use the word "principle"?

1. DISCUSSION ON THE WORD "PRINCIPLE"

According to its Latin word "Principium", principle means "start, origin, foundation" and "theory, element" etc. (Zhang, 2001). In Modern Chinese Dictionary, the first meaning of the word principle is "rule or standard for speaking and acting", and the phrase "basic principle" is also listed as an example for understanding the meaning of the word (*Modern Chinese Dictionary*, 2002). In English, the word principle always means "behavioral standards" or "behavioral rules" when in plural form; while in singular form, it is usually recognized as "code of ethics", "a particular theory" or "philosophy".¹ Strictly from the view of legal concept, legal principle refers to the guiding ideology, fundamental or fontal, comprehensive and stable legal theories and standards in certain legal system. No matter for the legislation or the enforcement of laws, legal principle always plays a significant role. It is also very important to distinguish "legal principles" and "rules" in both statutory law countries and case law countries. On distinguishing "rules" and "principles", Ronald Dworkin thinks "rule" does not have any space for autonomy and its function covers either all or nothing. However, "principle" has meanings and different strengths. From the aspect of fuzzy logic theory, "rule" and "principle"

¹ *Oxford advanced learner's English-Chinese dictionary*. (1997, p.1172). Beijing: Commercial Press.

can be differed as uncompromising and compromising (Arthur, 2004). Accordingly, starting from the original meaning of legal principle, we will find that rules that can be lifted to the level of principles must be abstract and general and required to be extracted from certain legal statements. However, the principle of autonomy of the parties (*Lex Voluntatis*) in international private law neither applies thoroughly in international private law nor is a fundamental principle which has guided function.² Based on such point, to understand the meaning of the principle of autonomy of the parties (*Lex Voluntatis*) in international private law by using the method for understanding common legal principle may cause confusions. It is because in international private law area, especially in the choice of law cases, such principle is always mentioned during the following two circumstances.

1.1 The Principle of Autonomy of the Parties (*Lex Voluntatis*) Used as the Formula of Attribution

The formula of attribution is used to fix rules for resolving legal disputes and makes them as the basic principles which can be used widely around the world or by most countries to solve similar disputes. (Han & Xiao, 2007) Common formulas of attribution are: *lex personalis*, *lex loci rei sitae*, *lex loci actus*, *lex Voluntatis*, *lex fori*, law of the flag, and *lex locidelicatus*, etc.. Among all the above mentioned formulas of attribution, *lex voluntatis* means the parties of the dispute choose the applicable law voluntarily which shows that the law admits that the parties have decision-making power over the choice of laws. Therefore, the principle is also called the principle of autonomy of the parties. It is an extracted standard when it is thought as belonging to bilateral conflict rules and is also a subjective formula of attribution paratactic to the “most significant connection” principle. However, *lex voluntatis* have restricted the subject in its own meaning. All parties engaging in different kinds of legal activities are because of their own will but not the judges’. This point is of great importance to the analysis made in this paper to the end.

1.2 The Principle of Autonomy of the Parties (*Lex Voluntatis*) Used as the Connecting Point

When talking about the applicable laws in every aspect of international private law, *lex voluntatis* works as rules

for choosing applicable laws; it even can be thought as a connecting point directly which is a paratactic concept as nationality, residence, habitual residence, place of performance, or most close connected place, etc.. For example, in contract law area, the primary connecting point is the *lex voluntatis*. Article 41 of the Law of The People’s Republic of China on the Laws Applicable to Foreign-related Civil Relations stipulates that: “The parties may by agreement choose the law applicable to their contract...” which is the same connecting point as most countries around the world in the same area. It refers to the bridge, intermediary, medium, or link connecting contractual legal relationship with certain local legal system when defining contract related issues’ applicable laws.

From the two points above, the word “principle” is not so appropriate. Since it is a common term used by international private law area, this paper also follows such meaning, that is to say, this paper will explain the concept of *lex voluntatis* from the point of connecting points and a choice of law rule. As previously discussed, formula of attribution is extracted from bilateral conflict rules whose core is connecting point. Thus, the *lex voluntatis* discussed below basically bases on the comparison between itself as a connecting point of choice of laws and other connecting points in the area of choice of laws. Accordingly, on the ground of such meaning, whether *lex voluntatis* is an established principle all over the world? We can get an understanding from the value analysis of *lex voluntatis*.

2. VALUE ANALYSIS OF *LEX VOLUNTATIS*

2.1 Universally Accepted *Lex Voluntatis*

Ludwig Erhard once said, “independent and free will be one of humanity’s most basic motives, we need to protect it and strengthen it day after day.” (Ludwig, 1983) In private law area, in order to meet the need for communication among different countries’ people, legal system arrangement needs to consider many factors, such as fairness, justice, security, and effectiveness which are very complicated themselves. On one hand, every person can give his or her own explanation on such words; on the other hand, hardly everybody can exactly define these words, or to say, it is impossible to find out a specific answer which can be accepted universally. Seriously, beyond the area of philosophy, these words have been used easily and freely. For example, “all kinds of freedom are limited” which is an absolute truth and it is so true that it has become a classic nonsense. Among all the complicated words, even we cannot give precise definitions, we can use descriptions to express them. After careful summary, we can find that in the area of private law, we need to focus on the following aspects:

First, the parties’ choice of interests. Historical materialism thinks that interests are always becoming the

² The author thinks besides the four principles (the principle of sovereignty, the principle of equality and mutual benefit, International coordination and cooperation principle, and the principle of protection of the weak party’s legitimate rights and interests) commonly used in the area of international private law, the most essential one should be the principle of equilibrium—Using the rules of private international law to seek balance between national self-interests and maintaining normal international civil and commercial communications. To see more about international private law four basic principles, see, Li, S. Y. (2005). *International private law* (pp.21-25). Beijing: Peking University Press.

motives for every activity of human. Interests give people the power to work harder. The most reflection of such power is people can get something they want. Although there are a lot of spiritual pursuits and requirements, material requirements are always more. Retrieve the history of the choice of law in private international law, it is not difficult to find that, due to the traditional conflict norms' rigid connecting points, dealing with the problems of legal application often directly embodies the lawmakers which means it always prefers the way of legislation and makes choice of law rules for individuals from the perspective of the nation. Therefore, utilizing the method of conflict rules to determine the applicable law represents the national will in a large scale but is not necessarily the autonomic requests of the parties. This kind of conflict rules usually only reflects the sovereign will and ignore the interests of the parties' choice of interests. Such rules will obviously get in the way of smooth foreign-related civil and commercial activities and inhibit the enthusiasm of civil and commercial subjects in international civil and commercial exchanges. While use the principle of party autonomy, let the parties to decide their own things, respect the parties' choice of interest, and let each civil and commercial activities' participant plans for their own interests, will significantly promote the participation of the parties, to improve healthy development of international civil and commercial communication further.

Second, (material) consequences obtained from each choice. The behavior of the parties in the field of private law is dominated by their own will. According to the rational man hypothesis of economics, everyone will evaluate the choices they made and finally choose the one with the most beneficial results. Although both theory and reality have repeatedly shown that what kind of choice is the most beneficial to oneself is a pure subjective proposition. Especially take the utilitarianism theory of Jeremy Bentham as an example. He wrote in his book *"An Introduction to Principles of Morals and Legislation"*: He follows the trend which is bound to increase or decrease the happiness of interest related party, which is the tendency to promote or hinder this kind of happiness, to show approval or disapproval for any kind of actions. Any utility of laws should be measured by the degree of promoting goodness and happiness. Bentham's ethical value judgment is based on the utility of a kind of hedonism and whether the moral point of view can grow on practice. And his utilitarian principle is: "Good" is to increase the amount of happiness on the largest scale and at the same time causes the least pain; and "evil" is the opposite. And this kind of pleasure and pain is defined by Bentham in both physical and mental. Bentham believes that nature has made people under control by happiness and misery from which will determine what people should do or not.

Based on such principle, he thinks on the basis of the value judgment of the principle of utility that: Happiness is good and misery is evil. Because people's activities always draws on advantages and avoid disadvantages. Therefore, any correct actions and political policies must generate most happiness for the largest number of people and decrease misery to the least, even to sacrifice small part of people's interest under certain situations. This is the famous "Greatest Happiness Principle". On the judgment of happiness, Bentham proposes without hesitation that every person is his best judgement on own interest (Bentham, 1892). Thus, happiness does not depend on the evaluation from outside (no matter whether the outside power is strong as countries which can represent the will of most people or no matter whether the outside power represents authorities, customs and public opinions). Happiness only lies in the choice of people's own will and independent judgment. After predicting possible consequences, people's choice has obtained its own ground. Let aside complex theory, take only social law reality as example, parties in every law suit do not require for the judgment (except Declaratory Judgment) but for the result that judgment represented. The parties require for the realization of the judgment which is why we need to focus on the "difficulty of enforcement". If parties only want a piece of judgment paper, not many people will waste their time and effort to pursue it. What is important in a lawsuit is the result recorded by the judgment paper. Whether the result is good or bad, whether the result brings the parties happy, and whether it enhances interests are the focus of the parties.

Third, spiritual contentment. From the point of view of legal philosophy, the main body of legal relationship is not completely passive. They should have the main body consciousness and independent consciousness. Great philosopher Plato said human is two-legged glabrous animals that can walk upright. His student was very angry about his statement and found a chicken with its feather picked and threw it to Plato said "see, it's two-legged, glabrous, upright, animal." Chinese litterateur Qian Zhongshu also said like this: People, what is a bipedal glabrous animal who can walk upright. Of course, to say such statements here is not mocking at them, but because they really define a person from appearance. The reason people is different from animal is not because of the appearance but the core of our difference from other species: the consciousness of the people. Facing the survival environment, people can judge for independent thinking which is the biggest difference between human and other creatures. Such judgment is not same with the exaggerated description, such as "man can conquer nature", of voluntarism. It is a common statement generated from the reality that people change life through their own will. Party

autonomy principle reflects such spirit, and thus gets people's acceptance and welcome. So, to let the parties to decide their own destiny is indeed a great choice of lawmakers. In addition, even if for some reasons to give unilaterally the right of choice to one party³, it also conforms to the concept that people is social main body. Because law has the responsibility to maintain the party without fault or the legitimate rights and interests of the weak party in order to realize social justice. However, the maintenance is realized by giving the party (such as victims, the weak legal priority protection) with the preferred option.

From the point of people's nature, all people around the world, regardless of race, nationality, age, gender, religion, occupation, status, rich or poor, as long as he or she is live on this planet, will accept the principle of party autonomy. Sartre said in his drama "Huis clos" and in the book "L'Être et le Néant" that: hell is other people. People can prove their own existence only by self-choice, and only through self-selection can get free. Even if we were abandoned in the hellish environment, we should also have the freedom to break the hell. If we give up self-choice, depend too much on other people's standard and recognize other people's standard as judging and understanding the world's only standard, then we will fall into the difficult situation as in the drama and finally become living dead.

In private international law practice, we can also find that "although private international law in Anglo-American law system and continental law system countries are differences in thought and structure, *lex voluntatis* is universally accepted by all of them." (Chen, 2010)

2.2 Locally Concerned *Lex Voluntatis*

The concept of law and law itself is both not abstract materials from hyperspace. Legal culture researchers emphasize law as a "local knowledge" fact. Clifford Geertz once said:

... the world is a place which has different characteristics. Jurists and anthropologists have different characteristics, Muslims and Hindus have different characteristics, small and big traditions have different characteristics, the past colonies and the current national states have different characteristic, and so on; by using scientific methods and other ways and by facing such grand actuality instead of hoping that kind of difference disappear automatically in a useless universality and fake comfort, we will obtain more achievements.(1994)

Although *lex voluntatis* has universally accepted utility, in the field of private international law's application, as a connecting point, after the parties choose their own

³ For example, the recent "result oriented rules" in international private law area, and Article 29 of China's "The law of the application of law for foreign-related civil relations of the People's Republic of China" states: "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".

will, it can reflect more of the laws' regional differences. Because, everybody wants to choose the rules that work the best for themselves after self-evaluation. When this kind of unilateral thought faces both sides' negotiation, compromise is inevitable. In this case, if the parties want to reach an agreement, they must be clear about their intentions, and also hold clearly about the other side's bottom line. Then the result get from such operation is naturally based on fully understand of each other's choice of law. Even if the two parties fail to reach a balance, they can also choose an acceptable third party's law for both parties. If the third party's law wants to stand out, it has to show its advantages in overcoming other laws which also required to be understood and be familiar by the parties. This is the best platform for laws to show their local characteristics. During the process of *lex voluntatis*, let the parties understand their "carry-on laws" (naturally attached to the party and understood by the party as its own abiding law) and "the applicable law" (laws that applied to the party due to the change of time and space, or to say "do in Rome as Rome does). This is also the requirement of people's growth of intelligence. Even the parties are not legal professionals, such outsiders' understanding on laws can reflect surrounded people in the form of common knowledge an even the whole world. On such point, we cannot ignore the power of individuals or individual cases, however, such a consequence does not need further explanations: In theory, even natural science which is in the name of "pure science" can use the "butterfly effect" to support it (Liu & Song, 2006); in practice, Rosa Parks case in the USA 1956 and Sun Zhigang case in China 2003 (Fang & Sun, 2010) can also provide sufficient evidence. However, all of these are merely a small part of it. History, economic base or superstructure, no matter in which level, is all made up by every normal people's common life and eventually became the grand chapter of human civilization.

CONCLUSION

No matter from the semantic analysis or historical analysis on *lex voluntatis*, we can see the influence of respecting people as the main body of the laws. In fact, any ruling order cannot exist without human. Even the "rule by law", "law should be executed by power, and by people" also admit that people should rule by obeying laws. Humanity is also an important factor in such statements (Fei, 1985). People's free will shall be respected no matter when and where.

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