Annexations and Territorial Conflicts in Private International Law: Some Comments from a Perspective of Prewar Japanese Law

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Introduction

What private international law issues arise when the relationship of territorial ownership changes? First, the change in territorial ownership affects the nationality of the people of the ceded territory. Second, the change in territorial ownership may also result in the creation of a different jurisdiction within a country because of respecting some of the "old customs" (customary law) of the ceded territory.

Japan's imperialization with other ethnic domination is said to have its origins in the Treaty of Shimonoseki in 1895 (the Treaty of Peace between Japan and China), which determined Japan's possession of Formosa (Taiwan). Later, the Treaty of Portsmouth in 1905 (Russo-Japanese Peace Treaty) allowed Japan to cede southern Sakhalin. After that, Japan began to expand into the continent in earnest, forcing the annexation[1] of the Korean Peninsula in 1910 so that Korea became a colony.

With the expansion of territory through these annexations and cessions, Formosans (Taiwanese) and

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* Professor of Private International Law, Waseda University, Japan. This paper was prepared for the International Early Career Researchers' Forum "Recent Private Law Developments in Japan and Europe" held at Waseda University on June 7, 2023. I would like to thank Prof. Takao Suami (Waseda University) and Dr. Anton Zimmermann (Heidelberg University, Germany) who were in the same session. And I would also like to thank the audience for their helpful questions and comments. This work was also supported by JSPS KAKENHI Grant Numbers JP19H01416, JP22K01177.

[1] Annexation means the transfer by a state of all its territory to another state (with the result that the annexed state ceases to exist). There are two types of annexation: voluntary annexation based on an agreement (treaty) between states and forced annexation (subjugation), in which a state acquires the territory of another state by unilateral use of force. Kokusaiho Gakkai [Japanese Society of International Law] ed., *Kokusai Kankei Ho Jiten* [Encyclopedia of law with International Relations] (2nd ed., 2005), p. 770 [Mariko Shoji].

Koreans acquired Japanese nationality.[2] However, they were distinct from the mainland Japanese in their own ethnic and tribal sense. This territorial expansion and the domination of different ethnic groups created multiple legal systems within the Empire of Japan after the annexation of Korea. And there was no order between the different legal regions within the Empire. In other words, before World War II, Japan was a non-uniformed law country that governed multiple "jurisdictions" as the relationship of territorial ownership changed.

The "*Kyotsu Ho* (Common Law)" (Act No. 39 of 1918) was enacted to establish some rules of application of laws and regulations enforced in these "jurisdictions" and to unify the communication of laws and regulations between different legal regions. This paper will introduce the role played by this law in Japan during pre-World War II. The changes in territorial ownership after World War II resulting from the Treaty of San Francisco in 1951 and the Treaty of Peace between the Republic of China and Japan in 1952 and the related issue of nationality will be discussed at another time.[3]

Please note that the subject matter addressed in this paper is intended neither to glorify Japanese legislation in the past nor to justify the current change of territorial ownership by force.

I. Formation of the "Jurisdiction" in the Empire of Japan

1. Changes in Nationality as a Result of Changes in Territoriality

Article 5 of the Treaty of St. Petersburg between Russia and Japan in 1875[4] expressly provided that the inhabitants of the exchange territories would retain their traditional nationality, did not require deportation, and took the generous position of guaranteeing business, property rights, and religious freedom to those residing there. This was an acknowledgment that a change in territorial ownership did not naturally entail a change in nationality. On the other hand, for the indigenous people, the right to choose their nationality was granted. This means that the changes of territorial ownership would affect their nationality. As a result, the indigenous peoples residing in Sakhalin, mainly the Aynu, were forced to take Russian nationality as long as they did not return to Japan within three years.

The Treaty of Portsmouth in 1905 also provided that the cession of territory did not affect the change of nationality of the ceded territory's inhabitants (Russian subjects and subjects of third countries). This was the same policy adopted in the Treaty of St. Petersburg between Russia and Japan in 1875. On the other hand, Aynu and other natives living in southern Sakhalin, the ceded territory, were not included in Russian subjects who should enjoy the freedom to hold nationality. They were allowed to

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[2] Indigenous Aynu, excluding the Russians who lived in southern Sakhalin also acquired Japanese nationality.

[3] For earlier studies on this issue, see Yoshio Tameike, "Nationality of Formosans and Koreans", *Japanese Annual of International Law*, No. 2 (1958), p. 55; Hidebumi Egawa and Ryoichi Yamada, *Kokusekiho* [Nationality Act] (1973), pp. 99-127.

[4] This treaty gave Russia sole control over all of Sakhalin and gave Japan the Kuril Islands. Then, the Treaty of Portsmouth in 1905 restored South Sakhalin (Sakhalin south of 50°N) to Japanese territory.

acquire Japanese nationality upon Japan's restoration of the territory and to have his/her own "*Honseki* (permanent domicile)," which means the place where his/her family register is located.[5]

Second, Article 5 of the Shimonoseki Treaty of 1895 was said to have adopted the so-called system of "option of nationality." This system gave the residents of the Liaodong Peninsula, Formosa, and the Penghu Islands the right to choose whether or not to acquire Japanese nationality in connection with the cession of these areas to Japan. The residents of the ceded territory lost their Qing nationality and acquired Japanese nationality upon the cession of territory, but if they disposed of their real estate and moved out within two years, they would reacquire their Qing nationality and their Japanese nationality would be terminated. Thus, Formosa was ceded to Japan, Formosans became Japanese, and the Japanese Nationality Law was enforced in Formosa.[6] However, under Japanese law, there was a clear distinction between the Formosans and the mainland Japanese. In other words, under Japanese law, Formosans were clearly distinguished from the Japanese in the sense of race or ethnicity, and given a special status (see Articles 1 and 2 of the *Kyotsu Ho*).[7]

Finally, Treaty between Japan and Korea in 1910 is a voluntary annexation case, which annexed Korea by treaty. Although there is no explicit provision regarding nationality in the treaty, it is generally understood that all Koreans acquired Japanese nationality, regardless of whether or not they were residing in Korea at the time of the annexation (see Articles 1 and 2 of the treaty). Japan's annexation of Korea made Korea a Japanese territory and Koreans Japanese. However, under Japanese law, there was a clear distinction between Koreans and mainland Japanese. Although Koreans were Japanese in the broad sense and have Japanese nationality, they were not Japanese in the sense of the Nationality Act. This is because the Nationality Act was not enforced in Korea.[8] Under Japanese law, Korea was a "region" (Article 1 (1) of the *Kyotsu Ho*), and Koreans were clearly distinguished from mainland Japanese and Formosans ethnically. They belonged to Korea, a region distinct from the mainland, Formosa, and others (see Article 2 (2) of the *Kyotsu Ho*). Koreans could acquire their *Honseki* as mainland Japanese and lose their *Honseki* as Koreans through marriage or adoption, and mainland Japanese could lose their *Honseki* as mainland Japanese by acquiring their *Honseki* as Koreans (Article 2 of the *Kyotsu Ho*). However, Those who were not allowed to leave their "*Ie* (homes)" by the laws of one region were not allowed to enter "*Ie*" in the other region (Articles 3 (1) and (2) of the *Kyotsu Ho*). Although Koreans were Japanese in the broad sense, and they had Japanese nationality, they were clearly distinguished from Japanese ethnically or racially and were placed in a special status.

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[5] See Egawa and Yamada, *supra* note 3, pp. 95-96.
[6] See Edict No. 289 of 1899.
[7] Egawa and Yamada, *supra* note 3, pp. 92-93.
[8] At that time, the Nationality Act (Act No. 66 of 1899) was enforced in Formosa and Sakhalin but not in Korea. The reasons for this are unclear. Therefore, the Nationality Act did not apply to Koreans directly. It was generally accepted that the acquisition of status as a Korean, and therefore the acquisition of Japanese nationality, is determined by custom and interpretation ("*jori*") by the content of the provisions of the Nationality Act.

This was true not only for Koreans residing in Korea but also for Koreans residing on the mainland.[9]

2. Three Forms of Law and the Origin of "Jurisdiction"

All of the laws or orders that were enforced in the "outlands," i.e. the territories governed by Japan other than Honshu, Shikoku, Kyushu, and Hokkaido, which constituted the imperial legal system before the defeat of Japan in World War II, can be categorized into three statutory "forms" based on differences in their formulation, application, and enforcement processes. (a) "Government ordinance" is an initiative of the governor-general and issued and promulgated by the prime minister or the competent minister. (b) The "laws of the mainland enforced by edict" are laws that have already been agreed by the Imperial Diet and enforced in the mainland. These were issued and promulgated at the initiative of the cabinet, consulting with the office of the governor-general, or sometimes the Privy Council. (c) "Laws enacted to be enforced in the outlands only or throughout the Empire" were laws issued and promulgated at the initiative and coordination of the office of the governor-general and the cabinet. The fundamental reason for the creation of three forms of law was that Formosa,[10] Korea,[11] and Sakhalin[12] were allowed to adopt forms of law that differed from those provided in the Constitution of the Empire of Japan. In addition, there was regional diversity. For example, form (c) was rarely found in Korea, while in Sakhalin it was mostly form (c) and form (a) was rare. [13]

The scope of application of the "laws" was usually limited to the mainland. Government ordinances in Formosa and Korea ((a)) were limited in their scope of application to their respective regions. As such, they did not extend their effect to other regions.[14] The origin of the term "jurisdiction" is because, as the basis for form (b), an article stating that 'those laws which require enforcement in whole or in part in ____ shall be determined by edict' was brought into the laws on which each regional legal system is based. In other words, this article created regions where laws agreed by the Imperial Diet

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[9] Egawa and Yamada, *supra* note 3, pp. 97-98.
[10] Act No. 63 of 1896.
[11] Act No. 30 of 1911.
[12] Act No. 25 of 1907.
[13] In Sakhalin, the laws of mainland Japan were enforced by edict according to Act No. 25 of 1907, and the system of delegated legislation was not allowed. This differs from Formosa and Korea. However, special rules were allowed by edict for inconveniences that did not conform to the actual situation in Sakhalin. These rules have alleviated this inconvenience. In addition, Edict No. 94 of 1907 enforced the mainland's Court Organization Law, Civil Code, and Commercial Code in Sakhalin. Thus, the legal system in Sakhalin became identical to that of the mainland.

Under the above circumstances, there is no need for a connection between the mainland and Sakhalin as anticipated by the connection rules of the *Kyotsu Ho.* Therefore, the provision of Article 1(2) of the *Kyotsu Ho*, which states that Sakhalin is included in the mainland, is justified as far as the application of the connection rules is concerned. However, since not all of the private laws of the mainland are enforced in Sakhalin, and there are special rules regarding the laws in force (Edict No. 124 of 1920), it is still considered to constitute a different jurisdiction from the standpoint of the application rules. See Masao Sanekata, *Kyotsu Ho* [Common Law] (1940), pp. 17, 25.
[14] *Ibid.*, p. 15.

could not be automatically enforced without the intervention of an edict ('jurisdictions' as regions that have different forms of law). In addition, the delegated legislative systems in these regions enacted form (a), and special conditions were added to form (b). These became mixed and formed separate legal systems ("jurisdictions" as distinct regions with different substantive content). Each legal system was then linked to the particular administrative and judicial systems actually existing in that territory (only the judicial system of Sakhalin was integrated with that of the mainland). In this way, the "jurisdictions" operated.

II. Enactment of "*Kyotsu Ho* (Common Law)"

1. What is "*Kyotsu Ho*"?

After the cession of Formosa, the number of jurisdictions further increased in the Empire of Japan. This necessitated a general rule for the uniform application of the law between these jurisdictions. Therefore, the *Kyotsu Ho* was enacted in 1918 with the aim of establishing the scope of the application of laws and the relationship between them, as well as to connect between these jurisdictions.[15]

Although the *Kyotsu Ho* contains both civil and criminal provisions, this paper limits its scope to civil law only.

2. Rules for the Application of Laws, and Rules for the Connection between Laws

Civil provisions in the *Kyotsu Ho* include two types of provisions: those establishing general rules for the application of law ("application rules") and those providing the connection between laws ("connection rules"). Both provisions are often contrasted with the relationship between private international law and alien law.[16]

First, the application rules resolve conflicts of law between different legal regions. For example, a marriage between a mainland Japanese and a Korean relates to two jurisdictions (the mainland and Korea), and a contract concluded in Formosa and performed in the mainland relates to two jurisdictions (the mainland and Formosa). This legal relationship raises the question of which law should be applied in resolving the case. Articles 2, 7 (2), and 8 (1) of the *Kyotsu Ho* are the application rules which resolve such conflicts of law.[17]

Second, the connection rules are Articles 3 to 7 (1), 9 to 12 of the *Kyotsu Ho*. Some problems such as concerning family register between mainland Japanese and Koreans,[18] recognition of corporations

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[15] The *Kyotsu Ho* is a law that establishes the scope of application between the laws of different jurisdictions and also aims at connection between them. Therefore, the *Kyotsu Ho* is a law that is enforced throughout the Empire of Japan (form (c)).

[16] Sanekata, *supra* note 13, p. 6.

[17] *Ibid.*, p. 7.

[18] For example, the effect on the family register when there are changes in family relationships between mainland Japanese and Koreans or between mainland Japanese and Formosans due to marriage, divorce, adoption, and acknowledgment. *Ibid.*, pp. 2-3.

established in one jurisdiction in another,[19] and recognition of the validity of bankruptcy declared in one jurisdiction in another[20] may be resolved not by the application of law, but rather by the connection that is lacking between these laws. The connection rules served this role.[21]

Thus, most of the civil law provisions of the *Kyotsu Ho* are connection rules. On the other hand, the application rules for the resolution of conflicts between substantive laws, by their nature, borrow many rules from Japanese private international law provisions ("*Horei*" [Act No. 10 of 1898]). Since interlocal conflicts of law and international conflicts of law are essentially the same, the principles of private international law are applied or interpreted by analogy subject to clear exceptions.[22]

3. Connection between "*Ie* (Homes)", and Family Register as a Regional Registration

The problem with interpreting the applicable rules by analogy with *Horei* was the nationality principle (*lex patriae*) adopted by the Act. For example, if article 14 of the *Horei*, which states that "the law of the country where the husband has his nationality shall be applied to the question of the validity of the marriage" is to be interpreted by analogy to the question of marriage between a mainland Japanese and a Korean, the connecting factor "husband's nationality" has no meaning.[23] Therefore, *Kyotsu Ho* stipulated that "the law of the country where one has his/her nationality shall be interpreted as the law of the region to which he/she belongs" (the second sentence of Article 2 (2) of the *Kyotsu Ho*).

The question is what is meant by "the region to which he/she belongs". It has been interpreted as the region to which he/she belonged in terms of his/her status, i.e. the place of *Honseki* (in this case, it means the location of his/her family register). This is due to the systems of the Japanese mainland family register, the Formosan household registration, and the Korean family register, which registered only the persons of Japanese mainland registration, persons of Formosan registration, and persons of Korean registration, respectively.[24] Mainland Japanese belonged exclusively to the mainland, while outland people belonged exclusively to their respective outlands. The transfer of family registers

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[19] Although the substance of the company laws between the mainland and Korea is the same, the forms of the law are different. Therefore, a corporation established by Korean law cannot be recognized as a legal entity (even though it is a domestic corporation) without a clear-cut provision such as Article 35 of the Japanese Civil Code on the recognition of foreign corporation, and it is impossible to merge it with a mainland Japanese corporation. For this reason, a special legal basis is required for a legal entity established in one of the different jurisdictions to be recognized as a legal entity throughout the entire territory of Japan. And this needs uniform national supervision. *Ibid.*, p. 3.

[20] For example, the question is whether property owned by the bankrupt in Formosa can be incorporated into the bankruptcy estate. *Ibid.*, p. 3.

[21] *Ibid.*, p. 8.

[22] *Ibid.*, p. 29.

[23] *Ibid.*, p. 31.

[24] See Toyomi Asano, *Teikoku Nihon no Shokuminchi Hosei* [Colonial Legal System in the Empire of Japan] (2008), pp. 328-329.

between jurisdictions is in principle not permitted. As already mentioned (Chapter **I**, section **1**), transfers such as entry into or departure from an "*Ie*" due to the effect of family relationships were permitted, but those who were not allowed to leave their "*Ie*" by the laws of one region were not allowed to enter the "*Ie*" of the other region.[25] In any event, the *Kyotsu Ho* "connected" the "*Ie*" under the laws on the family register, so that a person could move from an "*Ie*" in one region to another on the occasion of an act of status, such as adoption. However, in principle, there was no freedom of movement between the mainland and the outland[26] or between the outlands. Therefore, a mainland Japanese remained a mainland Japanese even if he/she resided permanently in an outland, and an outland person remained an outland person even if he/she had a residence in the mainland. A change of his/her residence did not result in a change of the region to which he/she belonged. The region to which he/she belongs is therefore the region in which his/her family register is located.[27] Thus, Article 2 (2) of the *Kyotsu Ho* established a system of interstate conflicts law, using the concept of "*Ie*" and the family register system.[28]

Conclusion

The conclusions of this paper are as follows: (I) The "jurisdiction" on which the *Kyotsu Ho* is premised was formed as a result of the colonial policy of the Empire of Japan. (II) The *Kyotsu Ho* contains "application rules" and "connection rules". These rules interacted through the concept of "*Ie*" and family register, giving rise to the interstate conflict of laws system in the Empire of Japan. It is clear from the above discussion that a comprehensive study including the law of status, such as nationality and family register is needed to clarify the private international law issues concerning the cession of territory.

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[25] See Egawa and Yamada, *supra* note 3, p. 98.
[26] This is different between the Japanese mainland and Sakhalin. This is because the Japanese mainland and Sakhalin were subject to the same family register system.
[27] Sanekata, *supra* note 13, pp. 31-32.
[28] Asano, *supra* note 24, pp. 336-337.