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RESEARCH ON EXTRATERRITORIAL APPLICATION OF AMERICAN LAW

The extraterritorial application of U.S. laws is also known as a «long arm jurisdiction» worldwide. «Long arm jurisdiction» is a concept based on the theory of the minimum contact of the United States, is an act of the United States' rule of law against judicial sovereignty of other countries to safeguard its «world empire» status. The understanding of long arm jurisdiction can not be limited to the superficial dogmatic interoperation but should be placed in the perspective of global politics. This paper deconstructs the long arm jurisdiction from its evolution, mode and essence reveals the violent factors inside the legal basis of the long arm jurisdiction and explores the possibility of its salvation.

The article raises the problem of the extraterritorial application of American prohibitions and restrictions to non – residents of the United States. Based on the meager judicial practice of the American federal courts of recent years, the issue of the extraterritorial application of the US sanctions legislation is being considered. In the investigated what are the answers given, why it is difficult for a foreign defendant to use in his defense the argument about the illegality of extraterritorially applied US legislation. Answers are given on how not to lose your investments due to the formal requirements of the American sanction's legislation or due to the bad faith of the American partner.

Key words: long arm jurisdiction, law's empires, deconstruction, salvation, legal, power, state.

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Американдық заңнаманың аумақтан тыс қолданылуын зерттеу

АҚШ заңдарының аумақтан тыс қолданылуы бүкіл әлемде «ұзын қолды юрисдикция» деп те аталады. «Ұзын қолды юрисдикциясы» – Америка Құрама Штаттарының минималды байланыс теориясына негізделген тұжырымдама-бұл «әлемдік империя» мәртебесін сақтау мақсатында Америка Құрама Штаттарының басқа елдердің сот егемендігіне қарсы Заңының Үстемдігі. «Ұзын қолдың» юрисдикциясын түсіну тек үстірт догматикалық өзара әрекеттесумен шектелмейді, бірақ жаһандық саясат тұрғысынан қарастырылуы керек. Бұл мақалада «ұзын қолдың» юрисдикциясы оның эволюциясы, режимі және мәні тұрғысынан қарастырылады, «ұзын қолдың» юрисдикциясының құқықтық негізіндегі зорлық-зомбылық факторлары ашылады және оны құтқару мүмкіндігі зерттеледі.

Мақалада Америка Құрама Штаттарының резидент .стеріне американдық тыйымдар мен шектеулерді аумақтан тыс қолдану мәселесі көтеріледі. Соңғы жылдардағы американдық федералды соттардың аз сот практикасына сүйене отырып, АҚШ-тың санкциялық заңнамасын аумақтан тыс қолдану мәселесі қарастырылуда. Тергеу барысында шетелдік айыпталушыға АҚШ-тың аумақтан тыс қолданыстағы заңнамасының заңсыздығы туралы дәлелді қорғау үшін пайдалану неге қиын екендігі туралы жауаптар берілді. Американдық Санкциялар заңнамасының ресми талаптарына немесе американдық серіктестің адал талаптарына байланысты инвестицияларыңызды жоғалтпау туралы жауаптар берілді.

Түйін сөздер: ұзын қолды юрисдикция, заң империясы, деконструкция, құтқару, заңдылық, билік, мемлекет.

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Исследование экстерриториального применения американского законодательства

Экстерриториальное применение законов США также известно во всем мире как «юрисдикция с длинной рукой». «Юрисдикция длинной руки» – концепция, основанная на теории минимального контакта Соединенных Штатов, является актом верховенства закона Соединенных Штатов против судебного суверенитета других стран с целью сохранения своего статуса «мировой империи». Понимание юрисдикции «длинной руки» не может ограничиваться поверхностным догматическим взаимодействием, а должно рассматриваться в перспективе глобальной политики. В этой статье рассматривается юрисдикция «длинной руки» с точки зрения ее эволюции, режима и сущности, раскрываются насильственные факторы внутри правовой основы юрисдикции «длинной руки» и исследуется возможность ее спасения.

В статье поднимается проблема экстерриториального применения американских запретов и ограничений к нерезидентам Соединенных Штатов. Исходя из скудной судебной практики американских федеральных судов последних лет, рассматривается вопрос об экстерриториальном применении санкционного законодательства США. В ходе расследования даны ответы, почему иностранному обвиняемому трудно использовать в свою защиту аргумент о незаконности экстерриториально применяемого законодательства США. Даны ответы о том, как не потерять свои инвестиции из-за формальных требований американского санкционного законодательства или из-за недобросовестности американского партнера.

Ключевые слова: юрисдикция с длинной рукой, империя права, деконструкция, спасение, законность, власть, государство.

Introduction

The origin and development of long-arm jurisdiction

The emergence of long arm jurisdiction in the United States has profound historical roots. At the beginning of the founding of the United States, it was a political entity built on the foundation of 13 independent states. Although the United States was regarded as a sovereign state in international law, there was a tension between state power and federal power in the United States. Based on historical and economic reasons, there are huge disputes on jurisdiction between States and between the Federation and states, which is the direct reason for the emergence of long-arm jurisdiction.

Methods and material

1. The origin of long-arm jurisdiction

At the time of the founding of the United States, the thirteen states were independent political entities, and their jurisdiction was limited to the citizens of the state and the cases within the territory of the state, in order to protect the Judicial Sovereignty between states from infringement, the Federal Supreme Court established the principle of judicial assistance procedure between states through the «*Pennoyer v. Neff*» case in

1877, that is, if a non-state citizen wants to appear in this state as a defendant, the court of the state where the defendant is located must perform the relevant judicial assistance procedure. Because of the high litigation cost of confrontation and the lengthy judicial assistance procedure, the US Supreme Court derived the principle of “minimum contacts” through the «*International Shoe Co. v. Washington*» case in 1955. The independent jurisdiction between states was limited, and the long arm-jurisdiction appeared.

As the principle of minimum connection is absorbed and developed by the States, the scope of long arm jurisdiction is also extended from natural person to enterprise, the scope of application is expanding, and the conditions of application are getting lower and lower. In 1963, the «Uniform Interstate and International Procedure Act» enacted by the judicial unification Commission stipulated that: «If the act or omission outside this state make inroads on this state, it also belongs to the jurisdiction of long arm» (<https://www.jstor.org/stable/838595>). Long-arm jurisdiction has gained legitimacy and justifiability in American domestic law.

2. Internationalization of long-arm jurisdiction

The internationalization of long-arm jurisdiction has experienced the long-term efforts of the United States, one of the most important is the promulgation of the «Foreign Corrupt Practices Act». In the

1970s, American media frequently exposed scandals about American companies' bribery and trading power for money abroad, such as the «banana gate» incident and the «Lockheed company's bribery of the Japanese government» incident, etc. In order to recover its moral image in the international market, the U.S. government urgently needs to curb the overseas corruption of American companies by legal means, so as to save its moral image. In order to punish overseas corruption, the United States must upgrade the «Foreign Corrupt Practices Act» to the level of international law. The United States first adopted the «Foreign Corrupt Practices Act» on General Assembly of the United Nations and the International Chamber of Commerce, trying to obtain the power of extraterritorial application of American law through its huge judiciary and judicial action capacity, but it has not been recognized. In 1997, the United States internationalized the overseas «Foreign Corrupt Practices Act» (<https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>) through the Organization for Economic Cooperation and Development, America's long-arm jurisdiction leaps out of its own territory, and extends to any country, corporation or individual associated with the United States.

3. Strong evidence acquisition capability to implement long-arm jurisdiction

“The purpose of modern criminal law is to prosecute those who are believed to have committed crimes, not to punish them, unless they are proved guilty” (<https://bja.ojp.gov/>). Therefore, the practice of long arm jurisdiction requires the prosecution organ to obtain relevant evidence as the premise.

In the Internet age, the acquisition of evidence means that law enforcement agencies must have strong information and data collection capabilities. Because in the era of data, everything, even the abstract value and character of person can be expressed in the form of data. As the number one power of the Internet, the United States is facing “two constraints” in the collection of evidence.

However, the “9.11” terrorist incident provides an opportunity for the US government to break the two restrictions. In 2001, the United States passed the «Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001». The administrative law enforcement agency of the United States not only established the information-sharing mechanism among law enforcement agencies, but also suspended «The Privacy Act» in reality: First of

all, American law enforcement agencies can use “suspected terrorism” as an excuse to legally collect information from anyone's correspondence, telephone, e-mail and other records by using the exception provisions in «The Privacy Act»; Secondly, it breaks the pattern of independence between law enforcement agencies in the past and establishes an information sharing mechanism among all law enforcement agencies, which greatly enhances the information collection ability of law enforcement agencies in the United States.

In addition, «The Clarifying Lawful Overseas Using of Data Act», which was passed in 2018, has enhanced the United States' ability to collect evidence worldwide. The «Clarifying Lawful Overseas Using of Data Act» confirms that: According to the order issued by the «Electronic Communications Privacy Act» of the United States to the technology companies under its jurisdiction, government agencies can obtain the data owned, kept or controlled by the company, no matter where the data is stored». () This means that as long as there is enough contact with the United States, whether the company is listed in the United States, or traded in US dollars, or the server is in the United States, it all falls into the jurisdiction of the United States. The information protection provided by the laws of other countries cannot be the judicial defense for refusing to provide information to the United States government. So far, the United States has built a global data Empire, which can freely access all information and data that are not conducive to the interests of the United States.

Discussion

Implementation of long-arm jurisdiction

Through a series of bills, the United States has established its jurisdiction in the world, formed a «law's Empire» in which the United States plays the role of kingdom, and established its jurisdiction over the international community on juridical logical level. The importance of proposition lies not in whether it is logically self-consistent, but in its practical effect. To understand the long-arm jurisdiction, we must go deep into the practical way of long-arm jurisdiction.

1. Internal deposition and internal investigation

The implementation of «Foreign Corrupt Practices Act» has established the jurisdiction of the United States in the international scope. Any enterprise legal person within the jurisdiction of

the long arm may enter the examination scope of the U.S. law enforcement agencies because of «corruption» and «fraud». The US Department of justice and the securities and Exchange Commission issued the «Guidelines For The Implementation of the Foreign Corrupt Practices Act», which has become a treasury of knowledge for transnational enterprises to conduct internal investigations. As the bill is a part of the legal system of the United States, it can only be understood in the context of the United States law, which means that business corporate which have contact with the United States need to hire a U.S. lawyer team to conduct compliance review and risk control. The direct consequence of the employment of the American lawyer team by the enterprise is that the American lawyer team can obtain the qualification of «internal review» of the enterprise. When the American lawyer team enters the enterprise for investigation, they can check all the information records and communications of the enterprise, as a result, the enterprise has no business secrets. The supreme status and power of the American lawyer team depends on the US control over the core technology. When corporate do not cooperate with the American lawyer team during the investigation, the US will take advantage of its own technological and economic advantages to impose sanctions on enterprises, such as «the US imposed sanctions on the «ZTE» case». If the U.S. lawyer team believes that there are violations within the transnational enterprise, then the enterprise needs to provide a clarification report to the U.S. judiciary. The U.S. lawyer team judges that, which are compliant, and which are illegal. The daily review and internal deposition are all undertaken by the U.S. lawyer team.

The position of the American lawyer team is vague. It is neither the defender of the enterprise nor the prosecutor of the American government, and his impartiality cannot be guaranteed. Because the «Revolving Door» system in American politics paves the way for lawyers to work in government. When American lawyers enter the law enforcement agencies through the «Revolving Door», they can investigate or punish the enterprise under investigation. Once American lawyers who participate in internal deposition and internal investigations enter the American political arena through the «revolving door», the business secrets they collect will be completely mastered by the administrative law enforcement agencies of the United States. In this way, the fate of transnational

enterprises will be in the hands of the United States and become puppets at the mercy of the United States.

2. «Rubber stamp» judge: *administrative law enforcement agencies lead the settlement agreement*

Another way to implement the long-arm jurisdiction is the application of «pre-trial reconciliation procedure» and «plea bargaining». Both of the two ways greatly reduce the pressure of the court and shorten the litigation process. However, both of them are based on the premise that both parties reach an agreement, otherwise they will enter into the formal proceedings. According to statistics, about 95% of the federal cases in the United States are settled through pre-trial conciliation proceedings, such as «Siemens case», «Alstom case» and «BNPP case».

American jurist Dworkin pointed out that: «the court is the capital of the law's Empire, and the judge is the prince of the Empire» (Dworkin 1996) in the American judicial system. He just emphasized the supremacy of the Supreme Court in the establishment of legal rules in a metaphorical sense, however, in the global «law's Empire» constructed by the United States, the real princes are not judges, but administrative law enforcement agencies and prosecutors. According to the practical experience, a large number of enterprises have been directly punished before they enter the trial procedure, and a few of them are often solved by the pre-trial conciliation proceeding dominated by prosecutors. After the enterprise submits the clarification report, the U.S. administrative law enforcement agency will use the «Philip factor» standard to review the quality of the report. According to the quality of the report, the U.S. administrative law enforcement agencies will reach «no prosecution agreement», «deferred prosecution agreement» and «guilty plea agreement» with enterprises respectively. These agreements are completely dominated by the administrative law enforcement agencies of the United States, and are often made directly on the basis of investigation without being reviewed by judges. When the enterprise does not agree to the composition deed, institutes legal proceeding, and enters the judicial process, the high litigation costs and lengthy trial procedures, coupled with the unequal status of the enterprise legal person in the face of the U.S. administrative law enforcement agencies, undoubtedly make the uncertainty of the judgment result greatly enhanced. The long-term litigation drag not only affects the business

efficiency of enterprises, but also reduces the image and reputation capital of enterprises. In this case, enterprises are often forced to take the plea bargaining procedure and take the initiative to plead guilty. The system of pre-trial conciliation and plea bargaining emphasizes the leading role of the parties. The judge often intervenes after the agreement is reached. The judge does not need to know the facts of the case, or don't review the fairness of the agreement in substance. He can only make a conciliation judgment and stamp on the conciliation agreement. The pre-trial conciliation procedure is completely reduced to a drama dominated by prosecutors and administrative law enforcement departments. The role of judges who review the conciliation agreement is weakened. The enterprises restricted by the U.S. government are completely in a weak position and can only be forced to accept the extremely unfair conciliation agreement. The fairness and legitimacy of the judgment are seriously lacking.

Jurisprudential reflection on long arm jurisdiction the key reason why the sovereign states in the international community can not do anything about the long-arm jurisdiction of the United States is that the United States controls the global economic system. In other words, long arm jurisdiction is the rule of law skill of the United States to maintain its «world empire» status. However, this formal «rule of law» contains the core of «illegality» and «violence». «German jurist Menke pointed out that law contains two kinds of distinctions in form: one is the distinction between law and illegality, which is used to define the legal nature of specific acts; the other is the distinction between law and no law, which is used to explain the identification of law to itself» (Menke 2015). Aristotle pointed out in «Politics»: «we have to distinguish two senses of the rule of law—one which means obedience to such laws as have enacted, and another which means that the laws obeyed have also been well enacted» (Zhou Aimin 20199). Aristotle's «good law» is not a pure technical and instrumental law which separates «fact» from «value» in our modern sense, but a kind of ability of «moral education», as Menke said: “law is the organ of ethical education» (Aristotle 1965). With the modern «empirical law» recognizing human's «natural desire» as the «subject right» and the basis of law, thus abandoning the moral basis of law, the rule of law has become essentially the «rule of no law». The «Foreign Corrupt Practices Act» and «The Clarifying Lawful Overseas Using

of Data Act» clearly stipulate that: “timely access to electronic data held by communication service providers is the core measure of the government to protect public security and combat serious crimes.” By legalizing the substantive interests (natural desire) of the United States, the process of “self-reflection” of law is rejected. The United States ensures the realization of long-arm jurisdiction with its own economic, technological and financial hegemony, which not only makes the long-arm jurisdiction «illegal», but also induces violence within the law, and even triggers what Benjamin calls «sacred violence» (Benjamin 1977). The consequences of conflicts, chaos, massacres, riots, separatist regimes, wars and revolutions brought about by the United States' implementation of its concept of rule of law and democratic system in the third world countries” (Benjamin 1977) fully prove the inherent violence and injustice of the laws on which the long-arm jurisdiction of the United States is based.

Secondly, in order to reduce the resistance to the implementation of long-arm jurisdiction in the world, the United States actively promotes the concept of the rule of law that appears to be “freedom and equality”. However, the concept of “freedom” promoted by the United States itself contains a sense of war, which forms the philosophical basis of long-arm jurisdiction—“subjective philosophy”. Because in western philosophy, freedom is understood as the free action that people take under the consciousness of freedom, and they are encouraged by desire to achieve their goals by all means. Under the control of passion, this kind of action will inevitably lead to a state of war, based on this, the “master personality” with strong desire for power is different from the timid “slave personality”. From Hobbes to Montesquieu, western thinkers have always advocated freedom and equality. Whether it is Hobbes' absolute monarchy, Montesquieu's constitutional monarchy, or Rousseau's Republic, they all take independent and equal free man as the prerequisite. To obtain freedom, people need to win or be equal in the war. Those who are greedy for life and afraid of death or defeated in the war can only be “slaves” engaged in labor. The “master personality” needs to establish a country equally according to the contract to end the state of war, while the “slave personality” can be achieved just by conquest. The philosophical logic of long-arm jurisdiction is “subjective philosophy”, that is, the relationship between the “master personality” is equal and has equal international law

qualification, “slave personality” can only be the object of domination. This philosophy formed the “internal” and “external” sides of the “New Roman Empire” of the United States: internally, equal subjects or countries subject to the interests of the United States were free and equal; externally, they were sanctioned with extraterritorial legal power.

Long-arm jurisdiction is the legal expression of the “subjective philosophy” of the United States. The countries that share the common values of the United States, obey the interests of the United States, and recognize each other in the struggle are civilized countries with equal status in international law, countries that threaten the status of the United States and have different interests from the United States are the targets of sanctions under long-arm jurisdiction. The United States has built a “New Roman Empire” all over the world, in other words, the United States is the only country with a master personality, in the logic of “subjective philosophy”, the United States, relying on its huge law enforcement agencies and powerful scientific, technological and military forces, has the philosophical legitimacy to rule the whole country on the edge of the empire by means of civilized “legal technology” – long-arm jurisdiction.

Conclusion

The construction of “world empire” by the United States is internally driven by “subjective philosophy”, which does not mean that we need to compete with the United States for the status of world empire, but to rethink the overall fate of mankind

and the diversity of human political civilization. There is a long history of thinking about the overall fate of mankind. As early as Plato and Aristotle’s conception of “city state” (Huntington 2005), as well as Kant’s (Kant 2005) conception of “permanent peace” (Leviathan 1985), and Jaspers’s prospect of “socialism, world order and common belief” (Jaspers 1989), all provide rich imagination space for the development of mankind’s overall destiny. In the era of globalization, we need to learn from the skills and achievements of Western civilization in constructing world order, and to construct community with shared future for mankind with the goal of maintaining world peace and common development. The community of shared future for mankind requires every country to unswervingly follow the path of peaceful development and build a world of lasting peace, universal security, common prosperity, openness, inclusiveness, cleanness and beauty. Countries coexist peacefully and actively participate in world governance as equals, contributing wisdom to human development. The philosophical basis of the community with shared future for mankind is “human’s subjective status”, which is not “people full of power desire” in “subjective philosophy”, but a high-level life with soul, spirit and value pursuit, which can be called “the measure of all things”. Only when such citizens get together can the world be diversity and stability, and peace can last forever. Only in this way can law have the function of ethical education and not lose the foundation of morality and justice. Only in this way can the law suspend the violence and become the real rule of law.

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