

Analysis and Legal Improvement of Foreign-related Infringement of Personal Rights in China

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Abstract: Foreign personality rights infringement cases, especially those involving high-profile parties, always attract attention in society. The issue of private law protection of foreign personality right, especially the parties in other countries or regions as the infringer, i.e., the plaintiff filed a lawsuit, how to identify the protection of their personality right, and how to maximize the protection of their legitimate rights and interests, combined with the relevant theories of jurisprudence, and to better solve the real-life infringement disputes from multiple perspectives, has become the current private law protection of foreign personality right is worthy of attention. Through the comparison between China and foreign countries and the categorization research of the principles of legal application of foreign personality infringement, combined with the support of legal theories, we seek to solve the feasible legal path to resolve the existing conflicts in this field.

Keywords: Foreign-related personality rights; Private law protection; Conflict resolution

1. Introduction

In recent years, foreign-related personality infringement disputes, especially the personality infringement litigation cases of parties with high reputations, have often attracted people's attention. Foreign-related personality infringement cases are mostly litigations brought in China by infringed persons from other countries or regions as plaintiffs. How to solve infringement disputes in combination with the main theories of legal methodology to safeguard legitimate personal rights and interests of the parties, has become a matter of concern in the current private law protection of foreign-related personality rights. However, in real judicial practice, such foreign-related personality infringement cases, especially those involving well-known parties, have to face the problem of confusion in the application of legal provisions especially in the application of the "Catch -all Clause" and difficulty in fully protecting the legitimate rights and interests of the victims, with a high degree of concern. How to accurately apply the law to solve the problems in judicial practice requires further discussion and study.

In the China Judicial Instruments Network ^[1], by searching for keywords, Personality Rights disputes as the cause of the case and the Law on the Application of Law for Foreign-related Civil Relations of the People's Republic of China as the legal basis for the trial of the case, a total of 46 civil case judgments were found from 2013 to 2023. Among them, there were 30 cases with the right to life, right to body, and right to health as the subject of personality rights, 3 cases with the right to health alone, 1 case with the right to body, 1 case with the right to personal freedom, 7 cases with the portrait right, and 4 cases with the right to portrait combined with the right to name. Of these 46 civil judgments, all but one of the higher courts and three of the intermediate courts heard cases at the basic level, as well as all but two of the second-instance civil judgments were first-instance judgments. All the cases obtained from the search involved Beijing, Liaoning, Jilin, Shanghai, Zhejiang, Jiangxi, Shandong, Guangdong, Guizhou, Yunnan, and Xinjiang, a total of 11 provinces, of which Guangdong Province had the most 21 cases, followed by Zhejiang Province with 8 cases, and the rest of the provinces with 1-4 cases, which shows that in the past ten years, the foreign-related personality right cases have appeared frequently, and the people's awareness of the protection of their personality rights has increased. In these foreign personality rights disputes, there are some cases with different judgments, as well as the trial of personality rights infringement cases mostly around foreign public figures or parties with high popularity, and the results of the trial are mostly for damages, apologies, eliminating the impact, and so on.

From these cases, it is not difficult to see that, the trial results of these high-profile and representative foreign-related personality rights infringement disputes show great differences, the non-mainland status

of the parties has caused different judicial practice effects in the application of law. For example, Korean law applied to the Korean plaintiff, but Taiwan, China law didn't apply to the Taiwanese plaintiff; Where the plaintiff from Hong Kong and the other party expressed, the law expressed was applied. Then whether the circumstances agreed upon by both parties have priority, and whether the right of autonomy should be restricted to a certain extent; as well as the role that the court should play in the protection of foreign-related personality rights in private law, and whether the court should exhaust the responsibility of investigating non-national laws, it is very worthwhile to consider. Therefore, how to deal with the same type of cases, more clearly define the applicable law, and find the legal theoretical basis and specific path to solve the conflict of private law protection in foreign-related personality cases has become the focus.

2. Application of dispute law clauses

2.1. Legal provisions currently in dispute

Through the comprehensive analysis of these typical cases, some common provisions can be summarized. For example, the Application of Article 2, paragraph 2 in addition to Article 46 both in the Law on the Application of Law, which stipulates the "Catch all Clause" ^[2]. That is, when the Law on the Application of Law and other laws do not stipulate the application of law in a foreign-related civil relationship, the applicable law shall be determined according to the Closest Connection Principle. This article has solved the problems of the application of law in this field that have not yet been covered. At present, Chinese academic circles have confirmed the value of this "Catch-all Clause" in the application of law in foreign-related civil relations. As there is no corresponding interpretation of the clause in the judicial interpretation (I), and (II) recently issued in December 2023 of the Supreme Law on the application of the Application of Law, the analysis of the clause by the courts in China in practice is inaccurate, the interpretation is inappropriate, and there is suspicion of expanding the application, especially the adoption of the local law.

In addition to the typical cases mentioned earlier in this article, and other relevant case judgment documents on China Judgment Online found that there are significant differences in the results of the application of law in the trial of foreign-related personality rights infringement cases. Even if the legal basis is the same, the applicable legal consequences may vary among different foreign-related parties, and there are still issues that need to be further determined regarding the priority expressed and agreed upon by both parties. Such judgments can easily raise public doubts about the fairness and justice of the law, as well as the accuracy and stability of the application of the law, especially in cases involving public figures, where such issues are more likely to receive attention. How to solve the confusion in the application of legal provisions in similar cases and find feasible implementation paths for private law protection in this field is important.

2.2. Academic discussion on the existence of this controversy

Regarding Article 46, which has been repeatedly mentioned in the cases, there is still controversy and discussion in the academic community regarding whether conflict rules should be established separately for the establishment and compensation of personality rights infringement. Supporters believe that the reason for setting them up separately is that subdividing and handling widely controversial issues can achieve the pursuit of specific values ^[3]. However, opponents argue that doing so may undermine the causal relationship between the establishment of personality infringement and compensation for damages. If in such foreign-related cases, the laws applicable to the two are inconsistent, and there are significant differences in the requirements for the establishment of personality infringement and the sharing of responsibilities between different laws, it will increase the uncertainty of the parties in judging and grasping the results of legal application, and it also imposes a burden on judges to conduct judicial comparisons to determine the applicable law for the trial of cases. Scholars have compared the emergence of this situation to an impossible "Herculean Task" ^[4].

3. Principles and categorization of the legal application at home and abroad

The study of the application of the current situation of foreign cases can provide a reference for the improvement of domestic law and reference. Through the classification of foreign cases of personality right law application research, can see the current development of international legislation presents a diversified development direction ^[5]. In this field, the international community from the traditional focus

on the general application of the rules of infringement, as well as the use of the parties to the common personal law jurisdiction and its exceptions, as well as the application of the "Double Justiciability Principle" of the restrictive provisions, to the most conducive to the protection of the infringer's legal application of the rules as the most conducive to the protection of the law. To the most favorable protection of the infringer of the law applicable rules as the mainstream development trend.

3.1. Study the classification of foreign personality right infringement law application

3.1.1. The introduction of the "Limited Autonomy Principle" in European legislation

In the judicial practice of foreign-related cases of infringement of personality rights, the European Court of Justice has different solutions to the problem of the application of the law, which is difficult to unify^[6], so it adopts the "Mosaic Principle". This also shows that we need to strive to strike a balance between the protection of private law of personality rights and the maintenance of freedom of expression and to build a more diversified and flexible choice of applicable law and method of application of the law, as mentioned in this article. Generally speaking, that is, in the trial of foreign-related personality infringement cases, it is advisable to build a rule system that applies different laws to different types of cases, including but not limited to the exception rules just as abound in Macao Law. The Federal Law on Private International Law, as amended in Swiss 2017, provides for infringement of the right of personality in Article 139. The victim has the right to choose one between his habitual residence and the place of the result of the infringement, as well as the place of business or habitual residence of the infringer. Such a right only for victims better reflects the principle of protection of the weak in the protection of foreign-related personality rights. However, even such a rule has its limitations. If the victim wants to choose the most appropriate law, he must first take full account of the preconditions, which is inevitably too harsh on the victim, because it is difficult to accurately predict the place where the damage results occur in advance and do not affect the rational use of the media. To guarantee the freedom of expression of the domestic media and protect the reasonable users of the media, paragraph 2 of this article also provides for special provisions that the long-standing news media may raise defenses based on the laws of the place where the printed matter is distributed and the place where the work is broadcast, to exclude interference by the laws of other countries. Thus, Swiss legislation on conflicts of personality infringement does not blindly emphasize that the victim unilaterally chooses the applicable law to safeguard the freedom of the media and the press in the country, to better protect the balance between personality rights and the freedom of expression, which can also be understood as a statutory restriction on the autonomy of the parties, that is, "Limited Autonomy"^[7]. This mode of private law protection of foreign-related personality rights has also been recognized and implemented in many countries, such as the Republic of Montenegro, Belgium, Turkey, and Bulgaria.

3.1.2. The "Double Justiciability Principle" has been retained in the United Kingdom

The "Double Justiciability Principle" requires courts to apply both the *lex fori* and the *lex fori* when adjudicating foreign tort cases, i.e. torts occurring outside the jurisdiction of the forum must meet both the *lex fori* and the *lex fori* criteria for establishing a tort and meeting the criteria for litigation. In other words, torts occurring outside the forum must meet both the law of the forum and the forum's criteria for the establishment of the tort and the criteria for reaching litigation. Britain introduced the theory of *proprio motu* law (Proper Law) originally in the field of contract, and in the field of tort law application Britain also proposed for the first time to adopt the theory of *proprio motu* law (Proper Law of Torts) put forward by H. C. Morris (Morris) in 1951 in a thesis, which also stipulates the unique British, that is, to consider the integration of the traditional but also the use of the law closest to the tort case of "the law of tort", the law of tort and the law of the court^[8]. The Closest Connection Principle, which is unique to the United Kingdom, takes into account the integration of tradition and the use of the law most closely related to tort cases. Specifically manifested in the British Private International Law (Miscellaneous Provisions) Act 1995, Article 11, in the provision of the traditional place of infringement at the same time, for different types of infringement cases also lists and specifies the determination of different places of infringement^[9]. Section 12, in turn, can override the specific legal guidelines for particular torts in section 11 in favor of the more appropriate and closest law, thereby emphasizing the Closest Connection Principle. However, to balance the conflicting values between freedom of speech and protection of the right to reputation, the traditional "Double Justiciability Principle". Although the "Double Justiciability Principle" guarantees the reasonableness of the protection of the rights and interests of the parties concerned, it inevitably leads to the duplication and waste of judicial resources, as well as increasing the burden of the parties concerned to safeguard their rights and interests and the difficulty of protecting their legitimate rights and interests reasonably to a certain extent. The difficulty of protecting the legitimate rights and interests of the parties concerned reasonably.

3.1.3. United States legislation developed the "Closest Connection Principle"

In 1971, section 145 of the Restatement (Second) of Conflict of Laws, pp. VII, IX, provided for the adoption of the law most closely related to tort. This suggests that the United States adopted the Closest Connection Principle in the application of foreign tort law at the legislative level in the field of torts much earlier than the United Kingdom did, as exemplified by the case of *Babcock v. Jackson*, 12 N. Y. 2d 473, 240 N. Y. S. 2d 743, 191 N. E. 2d 279 (1963). This personal injury case arose out of a traffic accident that occurred in 1963 in the United States Court of Appeals for the State of New York. Traditionally, the law of the Canadian province of Ontario would have been applied, and this would have directly resulted in the parties' damages not being realized. The New York State Supreme Court is the application of the principle of the closest connection with the parties to the case of the closest New York State law so that the parties to the claim can be supported so that the plaintiff's legitimate rights and interests to get due protection. Austria, Germany, and other continental European countries in private international law legislation, also adopted the "Closest Connection Principle", applicable to the field of non-contractual debt. Flexible use of the "Closest Connection Principle" to a large extent, increasing the legal rights and interests of the parties to the protection of the legal rights and interests of personality [9], and based on exhaustive possibilities, to ensure that the victim's personality rights and interests can be maximized by the protection of the law, and therefore is also the more respected rules of law. Promote the legal application of the rules.

3.2. Principles for the Application of Domestic Laws on Personality Rights Infringement in China

3.2.1. China advocates "The Vulnerable Protection Principle" in the development of legislation on human rights violations related to international affairs

In addition to the several typical foreign-related personality infringement cases mentioned above, *Hong Xinxin v. Guangzhou Yiming Cultural Communication Co., Ltd.*, according to the content of the judgment, according to the "Supreme People's Court on the Application of the Civil Code of the People's Republic of China: Several Provisions on the Effect of Time" Paragraph 3 of Article 1 of the Several Provisions of the Supreme People's Court on the Application of the Time Effect of the Civil Code of the People's Republic of China Paragraph 3 of Article 1 of the Several Provisions of the Supreme People's Court on the Application of the Time Effect of the Civil Code of the People's Republic of China stipulates that when a civil dispute occurs while the legal facts before the implementation of the Civil Code continue to be in force, the Civil Code of the PRC shall still be applied in the absence of any other laws and judicial interpretations. There is an alternation of old and new laws and regulations commonly used in Chinese mainland in foreign-related personality right infringement cases. Article 146 of the General Principles of Civil Law of the PRC, which is currently repealed, provides for the law of the place of infringement, the law of the parties' common domicile and the restrictive rule of the "Double Justiciability Principle" applies. Also repealed is article 187 of the Act, which adds that the place of infringement includes the place where the infringement was committed and the place where the result occurred. The entry into force of the Law on the Application of the Law, on the other hand, establishes the general and special rules of application of torts, and specifically refines and completes the category of moral personality rights. For example, in Article 15 and Article 46, the content of personality rights and infringement of the law after the decision according to the "law of the infringer's habitual residence", that is to say, to make the corresponding special provisions.

3.2.2. China's legislative adjustment in the Internet era involving foreign personality

The accession of Macao to the Law on the Protection of Personal Data, the distinction between public figures, the privacy of celebrities from time to time exposed by the Internet media and the different social impacts caused, as well as the problems related to the processing of personal data, such as the dire consequences caused by the blatant sale of personal information by certain entities that process personal data, which has given a large number of fraudsters a chance to take advantage of the situation nowadays. The provisions on specific personality rights in Macao, on the other hand, seem to be more definitive, have a more complete system, and have a good social effect. Can these factors give the legislator of the part of personality rights in the General Principles of the Civil Law (Draft) some reflections and lessons? Of course, only the legal provisions can't be explained more, and it is more appropriate to examine them in detail with the concrete social effect.

In addition, in the Internet era of infringement, due to the media information dissemination has long broken through geographical limitations, presenting a wide range of fast characteristics, presenting the

behavior of the place of occurrence, the results of the place of occurrence are difficult to determine or present the characteristics of diversity. The current legislator takes into account the operability and easy to determine, and the use of "Habitual residence of the infringed person" "infringed person often residence" this standard, obviously has certain the standard of "Habitual residence of the infringed person" is reasonable. Even though this provision is not perfect, and there are still controversies in the private law protection of foreign-related personality rights, this improved legislative initiative still reflects the importance and protection of the legitimate rights and interests of the infringer of foreign-related personality rights and compensation for damages, and is also in line with the current international community's demand for the protection of the right to personality, i.e., "The Vulnerable Protection Principle". Protection Principle".

4. The conflict resolution of private law protection of personality rights involving foreign affairs

4.1. Overall concept of the application of laws on infringement of personality rights

In foreign-related cases, there are two principles of the "Catch-all Clause" and "Prioritization of results", which should respect the infringer's opinion and take the "Prioritization of results" as the main principle. Prioritization of results is the main principle, i.e. Limited Autonomy, but Double Justiciability will inevitably lead to the waste of judicial resources^[10]. On the premise of not violating the freedom of private law and national interests, the law that is more favorable to the victim is applied. On the one hand, it is to protect the legitimate rights and interests of the parties, and on the other hand, it also reflects the fairness and justice of the law. For example, in the 2018 case of Luca Dotti v. Suzhou Industrial Park Jin Hai Hua Catering Management Co., Ltd., as the Legal heir of Audrey Hepburn to stop using the name "Audrey Hepburn", the trial court referred to Articles 10, 11, 15, 44 and 46 of the Law on the Application of Law, as well as Articles 6, 15 and 20 of the Law of the People's Republic of China on Tort Liability and Articles 13 and 64 of the Civil Procedure Law of the People's Republic of China. Article 13 and Article 64 of the Civil Procedure Law of the People's Republic of China, as well as Article 1 and Article 10 of the Italian Civil Code, were explicitly cited in the judgment to support the Plaintiff's claim. The Court ruled that the defendant must stop using the name "Audrey Hepburn", stop infringing her rights and interests, apologize to the defendant, and compensate the defendant 200,000 yuan in damages. To maximize the protection of the rights of the weak or victims, it is necessary to adopt a pluralistic "Mosaic Principle" in the Applicable Law, that is, for different types of foreign personality rights infringement cases, applying the laws of different countries or regions or the applicable law, especially in the face of the increasing number of cases of foreign personality rights infringement, the infringement of the rights of the Internet personality rights infringement cases. Especially in the face of the increasing number of cases involving infringement of personality rights on the network, infringement and infringement of the results of the infringement often show the characteristics of multiple and wide geographic areas, the application of this diversity of the law is particularly necessary. Only based on fully investigating the facts and confirming the application, the court's decision can be more in line with the intent of the law and better protect the legitimate rights and interests of the parties.

4.2. Possible way to solve the domestic foreign personality right infringement in law application

At the level of "affiliation", although the law has set conflicting norms for a certain legal relationship, in specific cases, it is not possible to determine the guidelines of the applicable law according to these norms. Therefore, the "Catch-all Clause" is usually used in the following two situations: firstly, when the law of China does not stipulate the scope of application of the law for a certain foreign-related civil relationship, and secondly, when there is a legal gap in the relevant foreign-related civil relationship.

To "Personal Information Protection Law of the People's Republic of China" Article 3, paragraph 2 of the extraterritorial application of the effectiveness of a specific list of application methods^[11]. If the provision does not exclude the application of mandatory or special provisions of other laws but is a kind of extraterritorial effect of the provisions of the unilateral conflict of norms in the sense of public law protection and private law, there may be a potential conflict of norms with the law applicable to the law and other conflicts of norms. The Judicial Interpretation will determine the court of jurisdiction for such disputes concerning the protection of personal information in foreign countries, from "Place of infringement to Habitual residence of the infringed person or Place closely linked to personal information. The Judicial Interpretation has changed the term "Place of infringement" to "Habitual residence of the infringed person" or "Place closely linked to personal information", thus defining the court of jurisdiction for personal information infringement disputes as the place of residence of the defendant or the place of

infringement. The place of infringement here follows the previously mentioned Article 187 of the repealed General Principles of Civil Law, including the place where the infringement is committed and the place where the infringement result occurs. In the case of online personal information infringement, the jurisdiction of domestic courts is a separate and exceptional issue, and the place of commission of the online personal information infringement applicable to such cases is not limited to the location of the computer equipment being sued, while the place where the result occurs is not limited to the place of habitual residence of the infringer, the place of infringement of personal information, or any other place that is closely related to personal information.

Therefore, while applying the "place of habitual residence of the infringed person" stipulated in Article 46 of the Law Application Law, the place of habitual residence of the infringer, the place where the infringing act is committed, and the place where the result of the infringement occurs may be appropriately added as the options for the parties to exercise their autonomy, to safeguard Limited Autonomy at the same time, add the Closest Connection Principle in favor of the victim, to maximize the protection of the legitimate rights and interests of the rights and interests of the personality rights and interests of the person in the field of private law through the special provisions and exceptions to the rule of the way, that is, the "Mosaic Principle". The "Mosaic Principle" is implemented in practice. Article 46 of the Law on the Application of the Law defines "by other means" as including, but not limited to, the Internet, television, mobile platforms such as WeChat and TikTok, and new online media, as well as other public information dissemination media. Adjustment of specific personality right categories to the spiritual personality right categories under the civil law to make them consistent. In cross-border personality right infringement legal relations on the Internet, the scope of application of the general conflict of laws on torts can be excluded under Article 44 of the Law on the Application of Laws.

4.3. Judicial Paths to Solving Domestic Infringements of Personality Rights Involving Foreigners

There are some problems with the system of law application of Chinese mainland when it comes to infringement of personality rights involving foreigners, with the local laws of the court usually taking the lead in the decision. There is a classic case about Pan Xing Zimin suing Google, which started from the fact that Pan's Google mailbox was stolen and used, resulting in damage to her reputation. However, the judgment of this case showed that the evidence obtained through VPN would not be admissible, thus Pan lost the case. However, it was difficult to obtain evidence to support the claim without using a VPN, which led to the case being stuck in a situation where it was impossible to resolve the legal issues and obtain legal support. In foreign-related cases, the way of applying the law and the choice of applicable national and regional laws become the focus of the dispute and the key to resolving the dispute in the case.

The Hague Convention on the Taking of Evidence recognizes the development of network technology, in which the provision of video transmission for the taking of evidence has been added to allow the use of video transmission methods when participating in evidence-taking activities. Although Fujian courts are also attempting to use information systems for mutual assistance in inter-district investigations and depositions, the system currently still requires the mailing of paper documents for inter-district investigations and depositions and has not been fully upgraded to a network. The existing traditional inter-district mutual legal assistance in conducting electronic data forensics cannot meet the tight time requirements for cross-border e-discovery, which has its unique characteristics. For solving cross-border e-data forensics problems, China should strengthen specific e-data forensics mutual assistance provisions based on existing traditional Hong Kong, Macao, and Taiwan investigation and forensics cooperation. Attempts can be made to construct a direct forensics model, with direct cooperation between judicial authorities to address the procedural inefficiencies brought about by traditional mutual legal assistance. This model can be directly cooperated by the judicial organs of different jurisdictions in China to improve efficiency. Relevant experts can be invited to argue and release information, which is an authoritative method of sourcing information. On an informal platform, legal investigations can be conducted by hiring experts who must provide cross-examined extraterritorial legal information.

5. Conclusion

The "Mosaic Principle" seems to offer a way out of this problem. The "Mosaic Principle", based on the famous Sheville case (Fiona Sheville v. Presse Alliance SA) and established by the European Court of Justice (ECJ), applies the law of different countries depending on the location of the damage suffered by the victim. This is an important legal principle that is now closely related to the application of cross-

border personality rights infringement law. This principle is an important starting point for improving the application of private law protection of personality rights in foreign countries, and leading the transformation of the relevant legal application from singularity to diversity is also the core point of this paper.

To effectively promote the implementation of the system, typical cases applying extraterritorial norms can be published promptly to serve as a guide for adjudication. The period of this paper's completion coincided with the latest release of the Supreme People's Court's Judicial Interpretation of the Law on the Application of Laws (II), which was issued on December 1, 2023, and which will come into effect on January 1, 2024, thus further standardizing the thinking and reasoning process of conflict of laws adjudication, and the specifics in the judicial field can also be referred to this interpretation to improve implementation. This Interpretation can also be used as a reference for the improvement of the implementation methods in the judicial field. The proposal and implementation of Judicial Interpretation II, although the court in the judicial field gives a lot of specific details of the guidance and enhancement, the substantive law protection has not been able to give more explanations and improvements in the field of foreign-related personality rights, such as the simultaneous application of the law of multiple countries, the parties to the choice of the applicable law of the protection and restriction of the application of the law, as well as this article repeatedly referred to in the application of the principle of mosaic in the field of this area, is still the field of the urgent need to solve the current legal issues.

With the help in multiple ways, including but not limited to legislative improvement, foreign-related personality infringement case trial, and legal application, to solve the current problem of confusing application of laws and regulations in foreign-related personality rights infringement cases. Through the guidance of legal theories and comparative analysis of domestic and foreign-related fields, we can obtain the best diversified rather than single legal rights and interests protection plan for foreign parties in the judicial practice of personality rights, and seek practical solutions in the field of private law to avoid future legal conflicts in the field of personality rights protection involving foreign parties.

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