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Introduction

Ken Oliphant, Zhang Pingua and Chen Lei

I. Starting points

1 Three recent decisions provide informative case studies of how Chinese courts have had to grapple with the complexities of liability for interference with personality rights in the years since the turn of the century:

Without obtaining permission, Life Style newspaper used a picture of Liu Xiang, superstar of Chinese track and field athletics who won the gold medal in the 110 metre hurdles at the 2004 Beijung Olympics, to advertise the opening of a new department store. Liu claimed RMB 1.25 million in damages, but was ultimately awarded only RMB 20,000, this amount being compensation for his mental anguish rather than disgorgement of Life Style’s unjust enrichment; the court also ordered Life Style to make a public apology.¹

A group of medical students doing internships at the defendant hospital observed a woman’s abortion surgery without her knowledge and consent. As the operation was under anaesthetic, the patient was unaware of this at the time, but she felt deeply offended when she learned of it afterwards.

¹ Liu Xiang v Life Style Newspaper [2005] Beijing No 1 Immediate Court, Civil Appeal case no 8144. See Chen Lei, Codifying Personality Rights in China: Legislative Innovation or Scaremongering?, this volume, no 30.
She sued the hospital for invasion of her right to privacy and was awarded RMB 10,000 as compensation for mental suffering.\(^2\)

The plaintiff conducted searches on Baidu, the largest Chinese search engine service provider, using the terms ‘weight loss’, ‘breast enhancement’ and ‘abortion’. When she subsequently accessed other websites, advertisements relating to the search terms popped up in her browser. She claimed that Baidu had used cookies to collect her personal information and disclosed that information to third parties for commercial advertisement. She requested an injunction and damages for mental distress. However, the court found that the information was not personal to her as cookies identify only the browser being used and not the user. Further, Baidu had placed a notice on its search page to inform users that they could opt out of the use of cookies and so, by proceeding to use the search engine without opting out, the plaintiff had impliedly agreed to accept cookies. Her claim therefore failed.\(^3\)

In fact, the recognition and protection of personality rights in China is not a creation of the 21st century but goes back at least as far as the General Principles of Civil Law (GPCL) of 1986, in which the following are specified as ‘personal rights’ (art 98 ff): life and health; personal name; portrait; reputation; honour and marriage by choice.\(^4\) The Tort Liability Law (TLL) of 2009 expressly adds to this (non-exhaustive) list the right of privacy (art 2).\(^5\) These legislative texts are reinforced by authoritative interpretations and guidance issued by the Supreme People’s Court.\(^6\) Yet the legal protection of personality rights remains a much discussed and controversial issue in China and this debate has been given renewed impetus in recent years by repeated calls to introduce new legislation. Indeed, Chen Lei states at the outset of his chapter in this collection that how to legislate personality rights has been ‘the most controversial issue in Chinese civil law’ in the last few years—in particular, whether there should be a separate book on personality rights in the future Chinese Civil Code.\(^7\)

Against that backdrop, we hope that this investigation of the legal protection of personality rights in Europe and China will both inform the Chinese debate and introduce non-Chinese readers to the arguments made and their legal context.

\(^2\) Liang v Qingdao People’s Hospital (unreported, 2003), cited by Ding Chunyan, Protection of Patient Personality Rights in China, this volume, no 22.


\(^4\) English translation available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm. As to the statutory framework, see further Chen (fn 1) no 5 ff.

\(^5\) English translation available at http://www.npc.gov.cn/englishnpc/Law/2011-02/16/content_1620761.htm. See also Chen (fn 1) no 8.

\(^6\) Ibid no 1.
II. The structure of this book

This book is divided into three parts, providing general overviews of the legal protection of personality rights in Europe (Part I) and in China (Part II), before addressing a number of specific contexts in which protecting personality rights raises important and distinctive issues (Part III).

A. The legal protection of personality rights in Europe

In her helpful remarks in Chapter 1, Barbara Steininger sets out the basic questions that should be answered in investigating the protection accorded by law to interests in personality. The three questions she highlights are the following: (1) What interests in personality does the law protect and what is the scope of such protection? (2) Which legal mechanisms are employed to provide this protection?; and (3) How are the general rules applied to specific areas such as the mass media and the internet? The ways in which European legal systems answer the first and second of these questions are then pursued in further detail in the contributions to this volume of Eva Ondreasova and Monika Hinteregger.

Looking at the interests protected, Ondreasova first provides an overview of the historical evolution of different approaches from the time of Roman law onwards, then highlights for systematic analysis the issue of whether the law should recognise a single all-encompassing personality right or a ‘bundle’ of specific rights. In her view, each approach has its competing advantages and disadvantages. The adoption of a single personality right of general scope gives the courts freedom to develop the law in response to social change, allowing new aspects of personality to be granted recognition and protection as the need becomes apparent. Conversely, the task of filling in the content of the general right is left to the courts, who may be ill-suited to resolving difficult questions of balance as between the opposing interests involved. It is not clear that courts are better placed than legislators to identify and reflect social values and attitudes. Specifying a long list of protected aspects of personality, on the other hand, has the merit of making explicit what elsewhere has to be drawn out by interpretation, but it may leave gaps as well as (one might add) tending to ‘fossilise’ the law in an area that is peculiarly subject to changing social attitudes. Further, in the absence of any explicit hierarchy of interests, it may be understood as placing all aspects of personality on the same level, thereby obscuring

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8 Barbara C Steininger, The Protection of Personality Rights in Comparative Perspective: Basic Questions, this volume.
9 Eva Ondreasova, Personality Rights in Different European Legal Systems: Privacy, Dignity, Honour and Reputation, this volume.
some important differences between the different aspects of personality that are legally protected.

7 In fact, whichever approach is adopted, it is important to bear in mind that personality rights (narrowly so-called) are a subset of interests in the person that differ from the absolute rights to life, health and bodily security by virtue of the qualified protection they receive. The rights to honour, reputation and privacy are qualified rather than absolute rights – in the sense that they must be weighed against opposing interests such as freedom of expression and the freedom of the press. This balancing process is of the essence in determining whether a violation of personality rights has occurred, irrespective of whether the ‘single right’ or ‘bundle of rights’ approach is taken.

8 The final section of Ondreasova’s paper examines the scope of protection given by different European legal systems to particular interests in personality: dignity, honour and reputation; privacy; image and likeness (with separate analysis of the topic of commercial appropriation); personal identity; and self-determination. She submits persuasively that privacy is the overarching category into which all legally protected interests in personality other than dignity, honour and reputation can be fitted.

9 Addressing the legal mechanisms that protect the various interests in personality, Hinteregger identifies four distinct aims: (1) compensation; (2) prevention; (3) restoration of the pre-existing state of affairs (status quo ante); and (4) restoration of unjustly acquired gains. The law of tort is crucial to the first of these aims, and arguably to the second and third too—assuming one views injunctions as remedies in tort. Tort compensates for the losses consequential on the interference, and the threat of liability in damages provides an incentive that deters future interference. Injunctions constitute a more direct mechanism to prevent the repetition or continuation of behaviour that violates personality rights (prohibitory injunctions) and to require the defendant to take positive steps to restore the plaintiff’s pre-tort position (mandatory injunctions). It may be added that, in modern legal systems, such orders are often supplemented by specific provisions relating to (for example) the removal of offensive content from websites or the printing of apologies or corrections in respect of defamatory newspaper stories.11

10 In principle, a rational legal system would make the remedy proportionate to the circumstances that allow it to be invoked. Greater fault, for example, warrants a remedial response of greater severity, all other things being equal. Along these lines, Barbara Steininger suggests in her chapter that injunctions, typically involving less serious consequences for the defendant, should be available in a wider range of cases than the remedy of compensatory damages – for example, where there is an immediate risk of harm but no fault (even in circumstances

11 As explored in some of the contributions to Part 3 of this volume.
where fault would be need to establish a liability in damages).\textsuperscript{12} No doubt the proposed principle of proportionality embodies good legal sense, but it is not clear that all would accept that injunctions generally involve less serious consequences for the defendant than compensatory damages. Common law systems, in particular, have traditionally been reluctant to grant injunctions or other forms of what is known as ‘specific relief’, precisely because the interference with the defendant’s liberty of action thereby entailed is viewed as typically more serious than the imposition of an obligation to pay damages – which may be viewed as licensing or at least tolerating the defendant’s interference with the plaintiff’s rights. Thus, it is a general principle that no injunction should be granted where damages would be an adequate remedy – and this applies not only for past infringements but also for possible infringements in the future, which may be ‘licensed’ in advance.\textsuperscript{13}

The three chapters mentioned so far in relation to Part I of this book were conceived as and form a coherent set. The fourth – by Ernst Karner – was not written as part of the same set, but it nevertheless usefully ties together some of the themes elaborated in the other contributions, while exploring in more detail the influence in this area of human rights law.\textsuperscript{14} He emphasises the manifold and diverse character of interests in personality interests and the consequent need to identify different categories attracting different degrees of protection. He also underlines that personality rights are interdependent with constitutional rights, the latter not being directly enforceable in ordinary private law but having indirect effect. As an example he cites the 1975 decision of the Austrian Supreme Court to award damages for non-pecuniary loss consequent upon false imprisonment by the Austrian state – notwithstanding earlier decisions going the other way – having regard to the right to liberty and security recognised in art 5 of the European Convention on Human Rights (ECHR).\textsuperscript{15} Karner then shows how the European Court of Human Rights (ECtHR) has acted as a driving force behind legal harmonisation in Europe, especially in resolving the conflict between the competing rights of privacy (art 8 ECHR) and freedom of expression (art 10 ECHR). The same may also be said in respect of the final area that Karner touches upon – the legal consequences of a violation of personality rights – as the ECtHR’s jurisprudence has been influential in several legal systems in encouraging awards of or non-pecuniary damages for violations of personality rights even where there is no express basis for this in national law.\textsuperscript{16}

\textsuperscript{12} Steininger (fn 8)
\textsuperscript{13} See generally K Oliphant, Injunctions and Other Remedies, in: id (ed), The Law of Tort (3rd edn, 2015).
\textsuperscript{14} Ernst Karner, Human Rights and the Protection of Personality Rights in Europe: Comparative Reflections, this volume.
\textsuperscript{15} OGH in SZ 48/69 = JBl 1975, 645, cited in Karner (fn 14) no 22.
B. The legal protection of personality rights in China

Opening Part II of this book, Chen Lei examines the extent to which personality rights are currently protected in China, highlighting the plethora of legal provisions that perform this function and the fragmented and unsystematic approach that results.\(^{17}\) As noted at the start of this Introduction, the GPCL and TLL both identify in non-exhaustive terms a variety of interests in personality that are protected by law, the latter in more detail than the former. Article 2 TLL expressly protects the right to life, the right to health, the right to name, the right to reputation, the right to honour, the right to self-image, the right of privacy and the right of marital autonomy. The extent of this protection is clarified by authoritative interpretations and guidance promulgated by the Supreme People’s Court. Additionally, a number of other legal sources – including not only the Constitution but also the laws of civil and criminal procedure, substantive criminal law, administrative law and consumer law – address personality rights in ways that augment or overlap with the protection provided by the TLL. A table on p 000 provides a helpful overview of the personality rights protected by Chinese law, the source of that protection, and the remedies available on their violation (see especially art 15 TLL, which refers amongst other things to cessation of infringements, removal of obstacles, rehabilitation and elimination of ill effects, in addition to compensation for damage). In a very useful annex to his chapter Chen provides English translations of legislative texts relating to the protection of specific personality rights.

Mirroring the discussion in Part I of the book, Chen then discusses the interplay between the rival approaches based respectively on one general personality right and on a set of specific personality rights. In his view, the concept of a general personality right is too abstract to be practically useful as it is still necessary to concretise specific rights of personality on the varied facts of individual cases. He doubts whether Chinese courts can be entrusted with the task of identifying new instances of such rights in responsible fashion, in view of social changes. Hence, he proposes that it would be practical for China to develop a legislative model which combines a ‘stick’ of specific rights entailing the various remedial measures with the recognition of general rights located in the general part of a future Chinese Civil Code.\(^{18}\)

Chen then provides an overview of the debate currently raging as to the desirability of codifying personality rights as an independent book in a future Chinese Civil Code. He concludes that the form that personality rights protection takes is less important than its substance. For him, in so far as there is a declarative provision recognizing protection of personality rights in the general part of a future Chinese Civil Code, coupled with concrete remedial provisions in

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\(^{17}\) Chen (fn 1).

\(^{18}\) In the civil rights section of the General Provisions of Civil Law, which was passed on 15 March 2017, art 113 provides for a list of personality rights which fall within the scope of the Law’s protection.
the tll or in a separate book on personality rights and restitution for unjust enrichment, that would not cause many concerns.

15 The issue of the introduction of a statutory right of personality is also taken up, at a rather more abstract level, by the other contribution in Part II of the book, written by Zhang Pinghua.¹⁹ Stressing the multi-dimensional structure of the interest in personality, Zhang distinguishes between its inherent and derivative aspects. Only the former is essential to what makes humans human. The influence of European, particularly German, legal theory here is especially evident in Zhang’s appeal to the socially typical and manifest nature (in German: sozialtypische Offenkundigkeit) of this inherent interest in personality. By contrast, the derivative interests in personality have not received the same degree of social acceptance and are not protected to the same extent. Zhang argues that introducing a statutory right of personality would enable clarification of its boundaries and a distinction to be drawn between specific rights in personality as such, which cannot be sold or otherwise transferred, and rights which are more akin to rights in property, such as the right to the commercial value of one’s image.

C. Specific aspects of the legal protection of personality

16 As Barbara Steininger explains in the first chapter of this collection,²⁰ one of the basic questions relating to the legal protection of personality is how the general rules specifying the interests protected, the scope of that protection and the legal mechanisms employed to provide it are applied in specific contexts. This, the subject matter of Part III of the book, provides particularly illuminating evidence of the qualified rather than absolute character of personality rights and the consequent need to weigh them against opposing interests such as freedom of expression. The papers collected here demonstrate that cultural and social context plays a large role both in the identification of relevant rights and countervailing interests, and in the balance to be struck between them.

17 The first two papers encountered here look at the particular threats to personality interests posed by the internet and the specific responses to them in Europe and China respectively. Modern social media make it easy to post, tweet or otherwise comment on others in derogatory, offensive or intrusive fashion, thoughtlessly, and under the cloak of anonymity. Being unconstrained by physical form, such communications can often be read by anyone anywhere in the world. At the same time, ‘big data’ technologies instantaneously and almost costlessly accumulate massively large, diverse and complex datasets whose

²⁰ Steininger (fn 8).
subjects are increasingly vulnerable to damaging breaches of privacy in cyberspace.

18 In her paper on personality rights and the internet in Europe, Laura Emilia Weissel inquires specifically into the potential subjects of tortious liability (the internet service provider (ISP) or even the search engine) and identifies the cardinal question regarding the liability of host providers in particular as the extent of their obligation to monitor stored information. The same actors face liability under broadly equivalent provisions of Chinese law, which are identified and critically analysed in the paper contributed to this volume by Wang Jia. Both Weissel and Wang highlight recent litigation regarding the particular position of search engines: in China, the Baidu case mentioned above; in Europe, a set of cases in different countries addressing Google’s liability for ‘auto complete’ suggestions and ‘snippets’, and litigation around ‘the right to be forgotten’ in the EU Court of Justice. The global reach of the internet means that the same issues will arise for resolution around the world, but how they are resolved will inevitably reflect both the applicable legal rules and wider social and cultural factors.

19 Regarding China, Wang highlights how privacy was not included amongst the personality rights specified in the General Principles of Civil Law of 1986 and, despite the inclusion of a right to privacy among the ‘civil rights and interests’ whose infringement is subject to tortious liability (art 2 TLL), its recognition is limited to the area of tort law and thus remains incomplete – hence the calls for an independent law of personality rights. In Wang’s view, this would facilitate the recognition of application of remedies not available under the TLL, notably the disgorgement of profits obtained through the unauthorised commercial exploitation of personal information. She stresses, however, that privacy is only one of several goals that warrant legal protection and have to be balanced against each other in modern Chinese society; these also include security, self-development, freedom of speech, accountability and social productivity.

20 The balance between personality rights and freedom of expression is further pursued in the context of the mass media in the next chapter of the book, authored by Thomas Thiede. Like Karner in his paper in Part I, summarised above, Thiede underscores the role of the European Convention on Human Rights in driving developments in national law, particularly in the balance to be struck between the right to private life (art 8 ECHR) and freedom of expression (art 10 ECHR). He offers a survey of leading decisions by the European Court of Human Rights, in which he identifies a change of emphasis over time: press freedom is no longer accorded the same priority it once had, at least when

21 Laura Emilia Weissel, Personality rights and the Internet in Europe, this volume.
23 Weissel (fn 21) no 22 ff.
24 Thomas Thiede, Personality Rights, the Mass Media and the European Convention on Human Rights, this volume.
if comes to statements of fact rather than opinion, and the constraints on its exercise when it impinges on countervailing interests – including the personality rights of others – have become notably more significant over the years. Thiede broadly approves of this trend and in particular applauds the willingness of the ECtHR to limit freedom of expression in respect of intrusions by mass media into the private lives of individuals where this does not contribute to a relevant public debate but satisfies only the prurient interests of the consumer.

21 The final two papers in this collection take us to other, perhaps less obvious areas of Chinese law. First, Ding Chunyan looks at the protection of personality rights in the medical context, especially through the ideas of patient autonomy (reflected in the right to informed consent specified in art 55 f TLL) and privacy, the latter embracing both freedom from intrusion and rights over private information.25 She finds that current Chinese law is too ready to restrict the protection given to patients’ personality rights for reasons of medical paternalism, social morality and the public interest in security, justice and public health. It thereby creates a risk of undermining the inherent value of human dignity and the scope for personal development.

22 Lastly, Fan Liying considers personality rights in the context of the laws of marriage in China, with reference to the freedom to chose one’s family name on marriage, and the right to return to one’s original name on divorce, bereavement or even during the marriage, each spouse’s right of cohabitation, and how it is reconciled with their right of sexual freedom, and their right to reproductive autonomy.26 Her account reveals a set of complex interactions between personality rights and both the countervailing rights of others and the public interest, in an area where the legal principles are strongly shaped by cultural values and liability rules have to find their right place amongst a range of other legal responses (eg divorce).

25 Ding Chunyan, Protection of Patient Personality Rights in China, this volume.
26 Fan Liying, On the Independence of Personalities and Restrictions on the Status of Spouses, this volume.