Remedies for Torts, Remedies for Infringement of Personality Rights

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Abstract

Comparative comments on the Draft Chinese Civil Code on personality rights and tort law; Swiss law perspective; focus on remedies for the infringement of personality rights and torts.

Reference


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Remedies for Torts,
Remedies for Infringement of Personality Rights

Prof. Christine Chappuis

I. Preliminary remarks

I would like to start by expressing my gratitude and my admiration. Gratitude because this is a colloquium in front of a most distinguished audience about an extraordinary undertaking, the elaboration of a new Civil Code for China. Admiration because China is on the verge of completing a significant and tremendous task. A civil code goes deep to the roots of a civilisation. A civil code is much more than just a law, especially when it is supposed to govern the lives of 1.4 milliards of persons. This Chinese Civil Code will be a monument for the years to come, and a most valuable instrument for anybody interested in private comparative law.

We were asked to make comments, remarks and/or criticisms on two parts of the draft Chinese Civil Code, i.e. on a topic relating to Personality rights or Tort liability. My comments will focus on the remedies for infringements of Personality Rights and for Torts. This choice is guided by what I feel is a weakness of my own law, Swiss law.

A caveat before starting: as I unfortunately don’t understand Chinese, I had to work on the basis of translations, either in German or in English, and this might have been misleading on a number of issues. I beg for the reader’s understanding in advance. However, the necessity to translate adds new perspectives to a text as the experience in a country with four national languages well shows.

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1 University of Geneva, Faculty of Law. This article is the written version of an oral presentation during the Sino-European Conference on Chinese Civil Code held at Renmin Law School, on September 21-22, 2019.
2 By way of comparison, the Swiss population is around 8.5 million people, a number comparable to the cities of Dongguan or Chongqing.
A. General liability clause and special provisions all in the same Book on torts of the Draft Chinese Civil Code

My first and positive comment is about the comprehensiveness of the Draft Book on torts. This Book starts with a general clause of tort liability based on fault (Art. 944 para. 1 of the Draft Book on TL (2019)), and goes on with specific provisions on Bearers Assuming Liability, Product Liability, Liability for Motor Vehicle Traffic Accidents, for Medical Malpractice, for Damage to Ecology and Environment, for Ultra-hazardous Activities, for Damage Caused by Domesticated Animals and for Damage caused by Buildings or Things. I understand that the 2009 law on Tort Liability already covers those topics, and will be included in the Civil Code with some changes as the Book on Tort Liability. The Swiss legislator, after more than five decades of legislative efforts, abandoned this same ambition in 20091, in the very year the Chinese legislator adopted its own law on torts.

According to Jörg Binding2, the general clause stating the “A wrongdoer who at fault infringes other’s civil rights or interests and causes damage shall bear tort liability” is less important in its application than it is in continental European legal orders because of the numerous special liability provisions which follow. It is true that, in Switzerland, the scope of application of the general clause of Art. 41 al. 1 of the Swiss Code of obligations (SCO)3 is diminished by quite a number of special provisions either in the SCO or in specific legislations. However, Swiss law has no rules on medical malpractice and, admittedly, the general clause still plays a role on this topic and others where no special rules have been adopted.

An all-encompassing book on torts is certainly something to be admired and can be seen as the happy result of the codification efforts in recent years.

B. Special chapter on Personality Rights

The codification of personality rights in a separate book of the Draft Chinese Civil Code seems to be met with criticism4. By contrast, the protection of personality rights was

2 BINDING Jörg, p. 69.
3 Art. 41 para. 1 SCO: “Any person, who unlawfully causes loss or damage to another, whether willfully or negligently, is obliged to provide compensation.”
expanded in the Swiss Civil Code (SCC) in 1983, as a part of the first book on Persons, more specifically of the first title on Natural Persons. No separate book here though Swiss law attaches great importance to the protection of personality rights as the abundant case law on the topic shows.

Looking as an outsider at the Chinese draft provisions on the protection of personality rights, I would think that neither option of a separate book nor the option chosen by the SCC is preferable over the other. It all depends on the value and importance one intends to give to the protection of personality rights in the context of the general rules of the Civil Code. If I had the good fortune to take part in the making of a brand new Swiss civil code, I would follow the option of a separate book, even if personality rights presently benefit already from a strong protection, because in the present times each person represents nothing more than a small bubble in the context of big data and algorithms which command the lives of each and every human being. Professor WANG Liming’s arguments are convincing to me.

II. Available remedies

Turning now to the remedy issue, I will start with the Book on Torts and go on with the Book on Personality rights, examining what each Book has to say on remedies, after a preliminary remark.

The General Provisions of the Civil Law of March 15 2017 (not yet effective), under Chapter VIII on Civil Liability, contain a list of eleven manners in which one “primarily” assumes civil liability:


Where any law provides for punitive damages, such a law shall apply. The manners of assuming civil liability as set forth in this article may be applied alone or by a combination.”

This list seems to apply to the breach of civil obligations as well as to civil liability (Art. 176 of the 2017 General Provisions). The following paragraphs will refer to it when need be.

A. Remedies for torts

The 2009 Tort Law already lists eight remedies that the victim may exercise, either alone or in combination. This list has been taken over, and completed by the General Draft (2017) under Chapter VIII on Civil Liability, which now lists eleven remedies. According to Article 179 of the General Draft Provision (2017), civil liability encompasses three new remedies, namely: 6. Repair, reworking, or replacement, 7. Continued performance, and 9. Payment of liquidated damages, all of which are suited for contract infringements rather than for torts. This shows that the list is meant to be comprehensive and applicable to both fields of law.

The list is not, and still will not be, exhaustive since it is introduced by the word “primarily”. As far as torts are concerned, Article 944 of the Draft Book on TL (2019) uses a general expression for the wrongdoer who has to “bear tort liability” as a consequence of the infringement of the victim’s rights or interests. According to Art. 946 of the Draft Book on TL (2019), these words can refer to a number of remedies when a tortious act endangers the other’s personal safety or property, such as right to claim for cession of infringement, removal of obstruction, and elimination of danger. Art. 946 addresses, among others, the important issue of the prevention of an impending damage which has not yet occurred with the remedy of “elimination of danger”. Tort law being generally understood in a restrictive manner as liability for a damage which has actually occurred, it neglects the idea of prevention of damage. This is the case for the general rules on tort in Switzerland. That is why I consider Article 946 of the Draft Book on TL (2019) as particularly welcome.


2 Art. 179 of the Draft General Provisions (2019): “Civil liability shall be assumed primarily in the following manners” (stress added); for the 2008 version using “wesentliche Formen” in German translation of § 15 of the 2009 TL, see BINDING J., p. 46.

3 This word probably does not refer only to rights on things, which would be too restrictive a meaning.

4 For a comparison, see Art. VI – 1:102 DCFR.

Modern texts tend to resort to lists of remedies, at least in case of non-performance of a contract\textsuperscript{1}. The United Nations Convention on Contracts for the International Sale of Goods of 1980 already used this technique by listing the remedies of the buyer and those of the seller\textsuperscript{2}. More recently, in Europe, the Draft Common Frame of Reference also resorts to this technique\textsuperscript{3}. The UNIDROIT Principles of International Commercial Contracts (since their first version in 1994)\textsuperscript{4} do not adopt the listing system as such, but the available remedies clearly result from the structure of Chapter 7 on Non-performance\textsuperscript{5}. The listing technique is a good way of bringing legal certainty for tribunals and parties who will have a better access to decisions on a certain topic (remedy) through a data base. It also allows the development of the law on a given topic. However, problems of coordination might arise which will be examined below\textsuperscript{6}.

\section*{B. Remedies for infringement of personality rights}

The separate book on personality rights starts with a list of the protected personality rights, which includes but is not limited to the rights to life, body, health, name, business name, portrait, reputation, honour, and privacy enjoyed by civil subjects. The first paragraph is – somewhat surprisingly – devoted to all civil subjects, in particular non-natural persons. The second paragraph adds the rights to freedom and human dignity specifically in favour of natural persons (Art. 774 and 774-1 of the Draft Book on PR (2019)). One would rather have expected the opposite, i.e. the extensive list of personality rights granted to natural persons as a starting point, of which the two rights specifically granted to natural persons are removed where legal persons are concerned.

Now, what is the consequence of an infringement of these rights? According to Article 778 para. 1 of the Draft Book on PR (2019), “Where personality rights are infringed, the victims have the right to claim against the wrongdoer to bear civil liability in accordance with this Code and other laws.” (stress added). The second paragraph adds

\begin{itemize}
\item[1] Examples drawn from the field of contract are given below. The Swiss academic project on the general part of the Code of obligations (OR CO 2020) also contains a list of seven remedies for non-performance of obligations in Article 118, with comments: HUGUENIN/HILTY (edit.), Schweizer Obligationenrecht 2020, Entwurf für einen neuen allgemeinen Teil | Code des obligations suisse 2020, Projet relatif à une nouvelle partie générale, Zürich, Basel, Genf (Schultess) 2013 (http://or2020.ch/), p. 346 ff.
\item[2] CISG 45(1), 46-42 and 74-77 for the remedies of the buyer, and CISG 61(1), 62-65 and 74-77 for the remedies of the seller.
\item[6] Below, II.C.
\end{itemize}
more precisions: “Where claims are made in accordance with the preceding paragraph to [1] stop infringement, [2] remove obstacle, [3] eliminate danger, [4] eliminate impact, or [5] restore reputation, provisions on limitation of action are not applicable.” (numbers added). The fourth element (eliminate impact) and fifth element (restore reputation) are not mentioned in the general list of Article 179 of the 2017 General Provisions, and are specific to personality rights. This shows that the general list must be completed in specific fields.

Whenever the words “bear civil liability” are used, I take it as a reference to the book on torts (Art. 944 of the Draft Book on TL (2019)) and to the 2017 General Provisions. The words “to bear civil liability” thus encompass the claim for damages\(^1\). A whole spectre of remedies is covered: besides a right to damages, the rights to stop infringement, to remove obstacle, to eliminate danger (idea of prevention), to eliminate impact, or to restore reputation.

Article 782 para. 1 of the Draft Book on PR (2019) also mentions the right to formal apologies, an interesting remedy that, in certain cases, might be more effective than the payment of a sum of money as damages or moral compensation. The victim often and above all wants the wrong it has suffered to be recognised. According to Paragraph 2,

>“Where the wrongdoer refuses to bear the civil liability provided for in the preceding paragraphs, the court may take the forms of enforcement, such as announcing the public notice or publishing effective judgments in media, including newspaper and online, and the wrongdoer shall bear the incurred expenses.”

Does that mean the victim has to proceed in two steps: only when the wrongdoer refuses to “bear the civil liability”, i.e. refuses to stop infringement, to remove obstacle, to eliminate danger, to eliminate impact, or to restore reputation, and refuses to pay damages (step one), only then may the victim ask the court to take the above mentioned forms of enforcement (step two)? This would seem a complicated manner of organising the different remedies. A more straightforward approach may be needed.

\(^{1}\) Art. 179 Nr. 8 of the 2017 General Provisions, and Art. 944 of the Draft Book on TL (2019).
C. Coordination of remedies

Coordination is a key issue and one of the worries of the opponents to a separate book on personality rights. And it is an understandable worry.

However, if I see this correctly, the coordination of remedies is addressed by different means, first of all, by the listing technique already mentioned above at A. and B. Secondly, coordination can also be based on the words to “bear civil liability” used in Art. 778 of the Book about personality rights and in Article 179 of the 2017 General Provisions. I would suppose that “civil liability” (in the first) and “tort liability” (in the second) are the one and the same thing\(^1\). If this is so, civil liability for personal rights infringements (Book on Personality Rights) encompasses damages (from the Draft Book on Tort Liability) and the other remedies also listed in the Draft Book on Personality Rights and the General Provisions (2017).

Swiss law uses the same legislative technique. The remedies which are listed in Art. 28a SCC are the prohibition of a threatened infringement, the order that an existing infringement cease, and the declaration by the court that an infringement is unlawful if it continues to have an offensive effect. The victim may also request that a rectification or the judgment be notified to third parties or published, an important remedy in case of infringement by the press. As to claims for damages, satisfaction, and disgorgement of profit, the provisions of the Code of obligations apply. In Swiss law as well, two separate books (Swiss Civil Code and Code of Obligations) are needed to address personality rights infringements. The system has proven satisfactory notwithstanding a few problems.

However, the very general list in Article 179 of the Draft General Provisions (2017) might prove difficult to apply in relation with specific issues. Moreover, in the August 2019 version of the Book on Torts, the main remedy is compensation for damage, which is addressed in Arts 956-963, with specific rules applying to physical injury and death (Art. 956-958), property loss (Art. 959, 961) and intellectual property rights infringement (Art. 961-1). The provision on serious emotional damage (Art. 960) is strangely placed between two provisions on property loss (Art. 959 and 961).

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\(^1\) Are the words in Chinese same the same and is there a problem of translation, or are different words and notions used?
In conclusion, even though the list of remedies and the terminology used may to some extent achieve coordination, the exercise of a specific remedy might prove difficult in a given case.

III. Is disgorgement of profit a possible remedy for infringement of Personality Rights?

Disgorgement of profits is one of the remedies the Swiss Civil Code provides for the protection of personality rights by reference to the provisions of the Swiss Code of Obligations\(^1\) as just mentioned. The reference is still a bit controversial. However, the provision has been recently applied to a case of infringement of the right to honour by the press\(^2\). The victim, presented as an extremely wealthy playboy, famous for his hot Zurich nights, was arrested one morning in 2009 at a luxury Hotel in Zurich (CH) where he resided, following two complaints of sexual coercion and sexual act with a minor. The story was all over the newspapers for three years, stimulated by the emerging online journalism, and lead to a real media hype. After a lengthy battle through the cantonal courts to the Federal Court of Switzerland, the victim won, in particular, on his claim for disgorgement of the profit. He had claimed for the profit made by the newspapers thanks to the stories published about him. At the end of the procedure, the only remaining open issue was the determination of the amount of profits. And this led to a settlement between the parties – unfortunately because it would have been the first time a court would have been bound to proceed to the concrete calculation of the profits made by the owners of the tortfeasing newspaper through an infringement of personality rights.

With this story in mind, I would now like to examine the new draft provisions on tort liability and personality rights, in the context of the 2009 tort law provisions to see if this special remedy of disgorgement of profit is also included. I don’t find any reference to the gain or profit made by the person infringing the personality rights of another in the Draft Book on PR (2019). However, if the book on Tort law is applicable, we can find guidance in Article 959 of the Draft Book on TL (2019):

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\(^1\) Art. 28a(3) SCC: “Claims for damages and compensation for moral damage are reserved, as well as the disgorgement of profits in accordance with the provisions on business conducted in the agent’s interests”.

“One who causes property\(^1\) loss by infringing other’s personal rights or interests shall compensate the loss suffered by the victim or *pay the interests that the tortfeasor would gain from the same tortious act*. But, if *such interests that the tortfeasor would gain cannot be assessed*, and the victim and the tortfeasor fail to reach an agreement on the amount of compensation, and [the victim\(^2\)] has brought about a lawsuit before a People’s Court, the People’s Court shall assess the amount of compensation according to the actual circumstances.” (stress added).

The origin of this provision probably is to be found in §20 of the 2009 Law on TL:

“When the infringement of the personnel rights and interests of others causes a pecuniary loss, the compensation will be calculated on the basis of the injured party's damage; if it is difficult to determine the damage suffered by the injured party and *if the injuring party has made a profit [through the infringement], the compensation shall be calculated on the basis of the profit made by the injuring party*; if the profit made by the tortfeasor is difficult to determine and if the tortfeasor and the victim do not agree through negotiations, they may introduce a claim before the People's Court, and the People's Court will have to determine the amount of damages according to the actual circumstances.” (stress added)

The reference in Article 959 of the Draft Book on TL (2019) to the “interest” seems to address the economic value the tortfeasor gains from his tortious act. §20 of the 2009 Law on TL expresses more clearly the real shift of perspective from the damage suffered by the victim to the profit (the “interest”) benefitting to the tortfeasor. My assumption is that the same idea underlies Article 959 of the Draft Book on TL (2019).

The new provision referring to disgorgement of profits relieves this remedy from its residual role in §20 of the 2009 Law on TL, as Zhicheng WU rightly points out\(^3\). Compensation of the loss and disgorgement of the profits thus seem to be alternative remedies for the infringement of personality rights. From my perspective, this would allow the victim to choose between those remedies, leaving it to the court to determine if the requirements of the chosen remedy are met. Disgorgement of profits is particularly important to offer a redress to the infringement of personality rights where

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\(^1\) The words “one who causes *property loss* by infringing other’s personal rights or interest” (stress added) (i.e. the basic requirement of this provision) probably are a not so accurate translation of the Chinese text. §20 of the 2009 Law on TL refers to the “*pecuniary loss*” caused by the tortfeasor which seems preferable.

\(^2\) Missing words added.

\(^3\) WU Zhicheng, Breach of Fiduciary Duty and Disgorgement of Profits, II, n° 4-8 (forthcoming).
there often is no actual damage suffered, as when the right to portrait, reputation, honour or privacy is infringed. This was the case in the Swiss press case mentioned before.

The second difficulty is to calculate the profit made through the infringement of personality rights. This is precisely the problem the Zurich playboy faced in his claim against the press who led the “media hype” about him. The possibility for the Court to determine the amount of profits according to the actual circumstances is paramount for an effective remedy of disgorgement. It is interesting to observe that the Swiss case would perfectly fit the new provision of Article 959 of the Draft Book on TL. As the parties finally reached an agreement, an assessment by the court was avoided.

It follows that the answer to the question raised in title is positive. The remedy of disgorgement of profits is indeed available in cases of infringement of personality rights which are part of the “civil rights” of the victim (Article 944 para. 1 of the Draft Book on TL). Even though Article 959 of the Draft Book on TL belongs to Chapter II on Compensation for damage, it seems clear that “the interests that the tortfeasor would gain from the same tortious act” do not belong to the category of the damage suffered by the victim. The remedy in Article 959 really aims at disgorgement of profits made by the tortfeasor.

The reasoning may yet be pushed one step further. As disgorgement of profits finds its basis in this provision of the Draft Book on TL, the remedy may also be used for the infringement of any “personal rights or interests”, as an alternative to the remedy of damages. This means that the remedy is not limited to the infringement of personality rights which, in my opinion, is a sound way for the law to organise the remedies in order not to leave unlawful behaviour being profitable to the tortfeasor.
IV. Conclusion

Since this was the mission of the speakers, I will end this presentation with a few conclusions and recommendations:

1. A separate Book on Personality Rights is a sound answer to the dangers the ever developing technology presents for the individual citizens. The Draft Book on Personality Rights should be kept unchanged in this respect.

2. The establishment of a general list of remedies for torts and for personality rights infringements deserves approbation. However, a clarification of the remedies available in each situation seems necessary.

3. The remedy of disgorgement of profits is a valuable complement to the damages remedy, especially where the victim suffers no damage, as is often the case with the infringement of personality rights. Article 959 of the Draft Book on TL (2019) might be clarified as to its requirements (meaning of the word “interests”).

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1 This might again be a problem of translation; “profit” would be a better counterpart to the damage.