A study of the process-based construction path for the speedy adjudication process for personality rights injunctions

Shengcheng Lv 1,*

1College of Public Administration, Shandong Agricultural University, Taian 27100, Shandong, China

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Abstract. The adjudication process is a central part of the overall personal rights injunction process. The procedure for adjudication of personality injunctions includes the commencement of personality injunction proceedings, the jurisdiction of the case, the manner of hearing, the content of the hearing and the standard of review, as well as the making of the ruling on the personality injunction, and other specific elements. Among them, the clarification of the application conditions and examination criteria for injunction is pivotal to the correct application of personality injunction. The current legal provisions are relatively homogeneous and far from meeting the needs of judicial decisions. Therefore, this article will focus on the conditions to be met in order to initiate a personality injunction and the factors to be taken into account by the court in granting a personality injunction.

1 Introduction

Personality injunctions and conduct protection have both their similarities and distinctive features, and there is a degree of crossover in their functions, i.e. to stop the counterparty from committing a particular act in a timely manner [1]. An application for a personal rights injunction is relatively independent of litigation, and can be applied for regardless of whether litigation has been initiated, whereas there are certain requirements for the preservation of conduct, i.e. it is usually done before or during litigation [2]. When an applicant applies to the court to stop a particular act of the opponent, how should the applicant identify whether the application belongs to the procedural law of preservation of conduct or the substantive law of personality rights injunction? In this regard, some scholars have put forward their own opinions, which can draw on the experience of overseas legislation and distinguish between injunction to exclude nuisance and injunction to stop nuisance in the field of injunction. In the case of a nuisance exclusion order as a civil litigation law preservation system, after the issuance of a nuisance exclusion order, the applicant should take the initiative to resolve the dispute through settlement, mediation, arbitration and prosecution within a specific period of time stipulated by law, otherwise the nuisance exclusion order will expire due to the expiry of the period [3]. A cessation of nuisance injunction, on the other hand, could be a special procedure, making it independent of civil proceedings and making the duration of the cessation of nuisance injunction dependent on the duration of the infringement, so that the cessation of nuisance injunction could function as a stand-alone injunction to stop the infringement. Scholars have not discussed the boundaries and criteria for creating an injunction to exclude nuisance and an injunction to stop nuisance, and there is no doctrinal basis for the distinction between the two [4].

2 Commencement of personal rights injunction proceedings

2.1. Clarify the subject of application

The subject of an application for an injunction of personality includes, in addition to natural persons, legal or unincorporated organisations with personality rights [5]. When a natural person applies for a personality injunction, the legal interest it protects should be the range of personality rights that the legal entity can enjoy as recognised by law, for example, in the first Guangzhou Internet personality injunction case, the real estate developer applied for a personality
injunction on the grounds that Li's actions had caused damage to the company's right to reputation [6].

2.2. Limited scope of application

The first question to be addressed in determining the scope of application of a personality bar is whether an infringement of a personality interest can be subject to a personality bar [7]. According to some scholars, Article 990, paragraph 1, of the Civil Code enumerates the specific types of personality rights and paragraph 2 provides for the general provisions on personality interests. Therefore, the meaning of "personality rights" in the Civil Code includes both the specific personality rights and other personality interests explicitly enumerated in the law. The author is not convinced by this view, as the inclusion of personality interests in the connotation of personality rights erases the distinction between personality rights and personality interests [8]. The fundamental reason why the law distinguishes between personality rights and personality interests is that personality rights and personality interests are fundamentally different and should be protected and limited differently. If personality interests enjoy the same protection as personality rights, it disregards the intent of the law to provide for separate provisions, and personality interests involve more abstract content, the standard of review is not uniform, and the time limit for injunction hearings is too short to accurately determine the scope of protection of personality interests. Therefore, impairment of personality interests should not be a condition for an application for a personality injunction, but should be determined by a formal court trial [9].

2.3. Proof of necessity for the application for an injunction

Under the principle of "whoever claims, whoever proves", an applicant for an injunction should prove the necessity for the court to grant an injunction to restrain the other party's conduct in order to prevent abuse of the application for an injunction of personality rights. First of all, when the applicant files an application for an injunction, there must be evidence to prove that his or her personality rights are being damaged, or there is imminent damage and it may be difficult to restore the urgency of the loss if not stopped in time, so it can be seen that the main proof of the necessity of applying for an injunction of personality rights is to prove the "urgency of the situation", and how to define the urgency of the situation requires specific analysis on a case-by-case basis. Second, the standard of proof of the parties should meet the standard of likelihood of infringement. There are two theoretical views on the standard of proof for personality rights injunctions: one is the standard of likelihood of success; the other is the standard of likelihood of infringement [10]. The likelihood of success standard requires the applicant to provide evidence that demonstrates a likelihood of success in a future personality rights action. The criterion of likelihood of infringement means that the acts already committed by the respondent are likely to cause significant damage to the applicant's personality rights. The author favours the likelihood of infringement standard, which is more in line with the value of personality rights injunctions and does not deprive applicants of the opportunity to obtain timely relief due to the stringent standard of proof [11].

2.4. Start-up subject and start-up method

In common law systems, injunctive proceedings as an equitable remedy are initiated on the application of the parties and cannot be initiated ex officio by the court; Switzerland, as the first country to enact a personality rights law, also has better provisions for the preventive protection of personality rights. According to the Swiss Code of Civil Procedure, the conditions for an applicant to initiate preventive protection of personality rights are similar to those set out in our Civil Code, i.e. to provide evidence that his or her personality rights are being harmed, or that there is an imminent threat of harm, and that if remedial measures are not taken in time the applicant may suffer damage that cannot be easily remedied; in addition to initiating preventive measures of personality rights on application, the court may also initiate preventive protection of personality rights ex officio in certain specific cases where the preservation of evidence is necessary for litigation or to prevent certain adverse consequences.

2.5. Determining the court of jurisdiction

Habeas corpus also protects personality rights interests, and prior to the Civil Code, only the Anti-Domestic Violence Act explicitly vested the power to adjudicate on habeas corpus in the courts, leaving a gap in jurisdiction for other personality rights protections. When a person is threatened with violence, he or she generally calls the police to request protection from the public security authorities, or seeks redress and protection through ordinary judicial procedures, such as filing a lawsuit in the People's Court for infringement of the right to reputation, or reporting to the public security authorities for unlawful threats to life and health. A personal rights injunction vests in the courts the power to adjudicate on preventive remedies for personal rights, with exclusive effect.

In order to facilitate the court to quickly identify the case, to connect with the possible future litigation on personality rights, and to facilitate the supervision of the implementation of the injunction after the injunction decision is made, it is recommended that the location of the applicant, the location of the respondent, and the place where the infringement of personality rights and the infringement of the results of the infringement should be used as the jurisdictional court for personality rights injunction cases. In order to provide more timely relief for the injured rights of the parties, the judge may also indicate the parties to choose the competent court on a case-by-case basis. If the parties apply to more than two
courts at the same time for a personality injunction, the court that first initiated the ruling on the personality injunction will have jurisdiction.

3 Proceedings for Injunction of Personality

3.1. Hearing format: in pairs and exceptions allowed

There are specific and detailed provisions in national laws on how injunctions should be heard. The English Rules of Civil Procedure provide that injunctions should normally be granted in circumstances where the opposing party's right to argue is safeguarded, and only in urgent circumstances where there is evidence that safeguarding the opponent's right to argue would prejudice the applicant's interests, or where the benefit of hearing arguments would be significantly less than the benefit of not arguing, an injunction may be granted on an ex parte application, subject to security by the applicant. A substantial amount of security may enhance the veracity and credibility of the matters adduced by the applicant, and the court may also slightly lower the standard of review for an injunction accordingly.

The need to initiate personality injunction proceedings arises from the urgency of the situation, and failure to take immediate action may result in irreparable damage to the victim. Therefore, if the application for a personal rights injunction is examined in detail and comprehensively, it may defeat the original purpose of the personal rights injunction, but if the application for a personal rights injunction is only examined in brief form, it may deprive the parties of the benefit of procedural safeguards and violate the principle of procedural propriety. Therefore, a balance should be found between procedural safeguards and efficiency and convenience, so that the personal rights injunction procedure can achieve the functions of timely relief and preventive protection while taking into account procedural justice. The basis of the personal rights injunction procedure is a quasi-contentious procedure of a contentious nature, and I suggest that, drawing on the provisions of other countries, the principle of adversarial hearings and the exception of one-sided hearings should be the basis for personal rights injunction hearings.

The judge is required to hold a hearing in the case of an application for a personal rights injunction, hear the applicant's reasons for the application and give the respondent an opportunity to present its arguments, and make a decision on whether to grant a personal rights injunction based on an understanding of the basic facts of the case and the relationship between the rights and obligations of the parties. The review of personality injunctions is generally conducted on a solo basis, except in cases of great difficulty, and where an application for a personality injunction is made in the course of litigation, the review of the personality injunction is heard by the litigation trial organisation.

The one-sided hearing model means that in urgent or exceptional circumstances, such as where the applicant has evidence that the respondent cannot be contacted or where an adversarial hearing would prejudice the applicant's interests, the decision to grant a personality injunction may be made by examining the materials alone, without verbal argument, but the opponent must still be given a timely opportunity to be heard afterwards in order to safeguard the minimum requirements of procedural justice.

3.2. Duration of hearings: categorical determination of duration of hearings

After a party has filed an application for a personality injunction, the question of how long a court should rule on whether to grant a personality injunction in order to ensure the efficiency and legitimacy of a personality injunction has been a thorny issue in the construction of the personality injunction regime. China's current Civil Procedure Law stipulates that the People's Court shall make a ruling within 48 hours when accepting pre-litigation act preservation and in-litigation act preservation in urgent cases. According to the Law against Domestic Violence, the court shall make a decision to issue a personal security protection order within 72 hours after receiving the order, or within 24 hours in case of emergency. There is also considerable controversy between theoretical and practical circles as to whether the time limit should be counted from the date when the applicant submits the application, from the date when the applicant has prepared all the materials, or from the date when the court starts to receive the case in substance. For a precautionary remedy that is highly time-barred, it becomes particularly important to clarify the duration of the hearing of a personality injunction.

3.3. The determination of "imminence of the attack"

According to article 997 of the Civil Code, an application for an injunction may be made to the court when there is evidence that the infringement committed by the respondent is prejudicial to the respondent's personality rights or that there is a risk of prejudice to personality rights. The infringement that is taking place is relatively straightforward for the court to determine because the objectively existing infringement is easy for the parties to collect the relevant evidence. In the case of imminent infringement, the determination of the situation is more controversial in practice as it only threatens the consummation of the right to personality. It is generally accepted that an infringement should only be considered "imminent" if, in the absence of a personal rights injunction, there is a substantial risk that the potential threat will turn into actual danger. This potential threat makes it difficult for the person to provide evidence, but since the person perceives that his or her rights may be threatened, the existence of the threat should be supported by relevant facts. The timing of an application for a personal rights injunction is important, whether the infringement is ongoing or threatened, as applying for a personal rights injunction
too early may make it difficult to determine the urgency of the infringement, while delaying the application may miss the best opportunity for personal rights protection. The parties, as rights holders, should be highly alert to the protection of their rights and have a strong awareness of the need to assert their rights and demand protection under the law if they are threatened or damaged.

### 3.4. Careful examination of "irreparable harm"

The positive and prudential review attitudes have their own advantages and disadvantages. The prudential review standard can prevent the abuse of personality rights injunctions, but it raises the threshold for applying for personality rights injunctions and makes it more difficult to apply for injunctions, and in practice, it is easy to run counter to the original intention of setting up injunctions. The opposite is true for positive review, which is more lenient in its examination of the terms of the party's application and more willing to grant an injunction in favour of the application. However, a personal rights injunction is originally a decision made under a simplified litigation procedure, and an aggressive review attitude may easily lead to a miscarriage of justice, and an erroneous personal rights injunction decision will not only harm the interests of the respondent and adversely affect the public interest, but may also undermine the authority of the judiciary and defeat the original purpose of the personal rights injunction. In the author's view, as a system that restricts the respondent's freedom of action without proceedings, a prudential standard of review should be adopted to raise the threshold for applicants to apply for an injunction and prevent abuse of rights. The specific ideas of the prudential standard of review are as follows: (1) the infringement is occurring or is about to occur; (2) the damage that may be caused by the infringement is a loss involving personal interests such as human dignity other than money, and that part of the damage cannot be calculated in money; (3) whether this infringement is continuing; and (4) if the result of the damage occurs, whether the respondent has the ability to compensate for the damage. When applying for a personality injunction, all four of these conditions should be met before "irreparable damage" can be found.

### 4 Conclusion

It is necessary to set a reasonable period of time for the injunction of personality rights because it is not as permanent as a judgment, but it is also necessary to set too short a period of time, which is not enough to create a deterrent effect and is a waste of judicial resources. The law provides that the maximum duration of a personal security injunction shall not exceed six months, and that a personal security injunction shall protect the right to life, the right to body, the right to health and other rights and interests of the person who have suffered serious threats to life and health as a result of domestic violence. The infringement of other personality rights will not be worse than the infringement of life and health, therefore, we can learn from the practice of habeas corpus and set the period of effectiveness of the personality injunction to six months, during which time, if the statutory conditions are met, we can apply for suspension, extension, or lifting of the personality injunction. At the end of this period, the injunction will expire, and the applicant may apply to the court again for an injunction if he or she still needs to obtain the protection of personality rights through legal means, or he or she may directly file a personality rights lawsuit.

### References