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Conflicts on the Rights of Personality and Its New Aspects: A Study from the Perspective of Japanese Private International Law*

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Introduction

According to the contemporary theory, a person has rights unto himself, that is, his personality. These rights (rights of personality, personal rights, or rights to personality – hereinafter referred to as "rights of personality") are recognized in the legislation of many countries, specifically under the context of torts. Article 28 of the Swiss Civil Code, for example, provides that a person whose personality was illegally infringed can claim the protection from the court ("*celui qui subit une atteinte illicite à sa personnalité peut agir en justice pour sa protection contre toute personne qui y participle*")[1].

The concept of the rights of personality, however, is not same around the world. It differs from country to country. Furthermore, even a concept in one country is not always the same. This fact leads that the difference in the concept can lead to legal conflicts.

What conflicts can occur? How can we treat the conflicts relating to the rights of personality? In this paper, the issue of conflict in the rights of personality will be examined. First, we will define what is the right of personality (1). The question on the possible problems will follow and we will analyze what solution can be taken (2). Some problems on the right of personality, which emerge today due to the change of society, will be pointed out (3).

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[1] The article 823 of German Civil Code, BGB, for the another example, provides that "a person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this". The English translation is done by the German Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*), available at http://www.gesetze-im-internet.de/englisch_bgb/ [latest access: 2014.08.14].

1. Concept of "right of personality"

The right of personality is not a single concept. This term includes several rights concerning the personality of a person. In this chapter, we will confirm the concept of the right of personality to have the basis of the discussion.

The scope of the right of personality has been expanding. Existing legislations share some traditional concepts, but some newly-born concepts in one country are sometimes totally unknown in another country.

In this chapter, we will have an overview of the traditional concept of the right of personality. Then, the newly-emerged concepts concerning personality will be examined.

(i) Traditional concept

The first question is that, what rights do we have to our personality? This discussion has a long history[2] and developed in Europe, specifically in Germany, within the context of natural right. To summarize, a person has rights which are not alienable and are connected his existence as a human being.

The concept of rights of personality is distinguished from the concept of human rights. While the latter shows the right to be object to States' power (that is, it has been discussed in the field of the constitutional law), the former is the concept developed within the domain of private law[3].

The catalog of the right of personality is not totally the same around the world, but modern countries share some common ideas. Here, some traditional "rights of personality" will be introduced[4]: Right to life, body and health, right to freedom, right to name, right to honour, and right of privacy. These rights can be considered as traditional type of the right of personality and are more or less embedded in the legislation of many countries.

The right to life, body and health is fundamental and there are little objection, because it is inevitable to being human. For example, the article 832 of the German Civil Code, BGB, clearly mentions that the infringement to the life or body of others is illegal and must be compensated[5]. Nobody can apply euthanasia to a sick person who is suffering from pain or can boycott to threaten the life of others, or mistreat someone physically or mentally[6]. Today, this right is considered to also apply to the aspect of the environment

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[2] It can be found in the Law of the Twelve Tables (*Leges Duodecim Tabularum*); the provision on the *actio injuriarum* could cover the protection of the personal interests. HIROSHI SAITO, STUDY ON THE LAW OF PERSONALITY [Jinkakuken-ho no Kenkyu] (written in Japanese language), Ichiryu-sha, 1979, pp.4-7.

[3] See, Giorgio RESTA, *The New Frontiers of Personality Rights and the Problem of Commodification: European and Comparative Perspectives*, 26 Tulane European and Civil Law Forum 33, 2011, pp.34-35.

[4] Of course, there are other types of the right of personality, such as right to image. Sometimes the moral right, one side of the author's right is also considered as the right of personality. However, the discussion about the nature of the moral right is quite complicated and this paper will not examine the topic because of the page limitation.

[5] "A person who, intentionally or negligently, unlawfully injures **the life**, **body**, **health**, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this" [emphasis added].

[6] H. SAITO, *supra note* 2, p.225.

or of the milieu and the right of personality can be the basis of the claim against air, water, or noise pollution or food contamination[7].

The right to freedom is also one of the stereotypes of the right of personality[8]. This "freedom" is understood as physical freedom, that is, a person can decide freely when he moves and where he moves to. If another person, for example, prevents his movement, it can be an infringement of his right of personality[9].

The right to name is more complicated. It has several dimensions: Firstly, a person can have the right to decide his name. This is considered as one of the aspects of the self-determination because the name is the symbol of the personality. This can be problematic when a person demands to change his name according to his proper will. Whether it can, or should be admitted or not.

The second dimension is the right to object to the misuse of the name[10]. If someone assumes the name of another person as his own, it can be an infringement of the other's right. If, for another example, someone uses another's name without permission or authorization, it can also be an infringement of that right.

The third is the right to demand the correct pronunciation or writing of the name. It is not the question of the name itself, but of how to present that name. This covers the dilemma, for example, when a foreign name is transformed into another language or a different spelling[11].

The scope of the right is also to be examined. Does the right to name cover only the real name or does it cover also the pseudonym? The attitude to this question varies from country to country[12].

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[7] In Japan, for example, the right of personality of habitants is claimed in the case that the injunction of the usage of a house by a gangster group (Decision of Fukuoka District Court Kurume Division, 27th March 2009).

[8] The German Civil Code, BGB, provides clearly this right in the article 832. For its text, see, *supra note* 4.

[9] See, for example, an old but leading Japanese case: Judgment of Supreme Court, 16th January, 1964 (Case No. 676 (*o*) 1960, *Minshu* Vol.18 No.1 p.1). In this case, a resident of a village blocked a village road with shelf and prevented the traffic of other residents. The court decides that this act of the resident infringes the right of freedom of others and it consists of a tort. For the detailed argument of the infringement of the right of freedom (movement), see Shin'ichi WADA, *The Right of Passage as the Right of Personality [Jinkakuken to shite no shido tsuko ken]* (written in Japanese language), Ritsumeikan Law Review, No.271=272, 2000, pp.1145ff; the text is also available at http://www.ritsumei.ac.jp/acd/cg/law/lex/00-34/wada.htm [latest access: 2014.08.14].

[10] The article 12 of BGB has a provision for "the right to a name", saying that "If the right of a person to use a name is disputed by another person, or if the interest of the person entitled to the name is injured by the unauthorised use of the same name by another person, the person entitled may require the other to remove the infringement. If further infringements are to be feared, the person entitled may seek a prohibitory injunction."

[11] In Japan, a case is found concerning this topic. See, the judgment of Supreme Court, 21st July, 1983 (*Hanrei Jiho* No.1094, p.55).

[12] For example, in Italy, the pseudonym is protected as long as it is used as the same importance with real name. See, the article 9 of the Civil Code (*Codice Civile*), "*Lo pseudonimo, usato da una persona in modo che abbia acquistato l'importanza del nome, può essere tutelato ai sensi dell'art.7*". On the other hand, in Japan, the pseudonym is not assimilated to the real name if it is in question in the context of economic usage, such as a trade name or business name. HIROSHI SAITO, PROTECTION OF THE VALUE OF PERSONALITY AND CIVIL LAW [Jinkaku teki Kachi no Hogo to Mimpo] (written in Japanese language), Ichiryu-sha, 1986, p.63.

The right of honour is considered as one of the oldest categories of the right of personality. This right is protected in many legislation under the provision of the tort (*defamation*)[13] and sometimes also in the criminal code[14].

Here, one question arises: what is the honour of a person? Generally speaking, the honour of a person is understood to be his reputation in society. If then, for example, a person feels to have been defamed because of a word or an act of another, but does not damage his social reputation, can the act still be considered illegal? It must be pointed out that it differs country to country. It must be objective in some countries, but on the other hand, only subjective damage is enough to claim the defamation[15].

The right of privacy has a difficult question as well. The concept of the privacy was born in 19th century and it was originally understood as the "right to be let alone"[16]. It was developed in the middle of 20th century[17] and finally reaches today's concept, "the right to control one's own information"[18].

The scope of the privacy is not yet totally defined. Therefore, it is not clear as to what extent, information can be protected based on the theory of privacy. If the right is understood in the limited meaning, one can claim his right only when his private area is invaded. If, on the contrary, it is understood under a broad meaning, he may be able to claim even when the information in question is not very private, but concerns his personality.

As is mentioned previously, in summary, the terminology of "right of personality" traditionally includes several concepts[19]. It covers many aspect of a human being.

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[13] For example, Japanese legislation has the provision on the defamation in the articles 710 and 732 of the Civil Code. The texts are as follows [emphasis added]:

Article 710: "Persons liable for damages under the provisions of the preceding Article must also compensate for damages other than those to property, regardless of whether the body, liberty or **reputation** of others have been infringed, or property rights of others have been infringed."

Article 723: "The court may, at the request of the victim, order a person who defamed others, to effect appropriate measures to restore the **reputation** of the victim in lieu of, or in addition to, damages."

The translation is done by the Ministry of Justice, available at http://www.japaneselawtranslation.go.jp/?re=02 [latest access: 2014.08.14].

[14] See, for example, the article 230, paragraph (1) of Japanese Penal Code ("A person who defames another by alleging facts in public shall, regardless of whether such facts are true or false, be punished by imprisonment with or without work for not more than 3 years or a fine of not more than 500,000 yen.").

[15] According to the Japanese tort law, a mere subjective damage is not considered as defamation (Judgment of Supreme Court, 18th December, 1970, *Minshu* Vol.24, No.13, p.2152).

[16] Samuel D. WARREN & Louis Dembitz BRANDEIS, *The Right to Privacy*, Harvard Law Review, vol.4, no.5, 1890, p.195.

[17] William L. PROSSER, *Privacy*, 48 California Law Review 383, 1960, p.389. It was divided four categories: (1) intrusion upon the plaintiff's seclusion or solitude; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

[18] Charles FREID, *Privacy*, 77 Yale Law Journal 475, 1968, p.482 ("Privacy is not simply an absence of information about us in the minds of others; rather **it is the control we have over information about ourselves**)[emphasis added].

[19] In the German discussion, it is explained that there is a classification of "general right of personality" and "individual right of personality". The general right of personality is the *mother* of the individual rights, that is, the individual rights are reified from the abstract concept of the "general right".

(ii) Newly-born concept

The catalogue of the rights of personality is ever increasing: New concepts of the right of personality are developed even today. Here, some of new concepts are introduced.

One of the examples is the right to be forgotten, which is sometimes called "right of oblivion"[20]. This concept is newly born upon the arrival of the information society. In today's society, a great deal of information is in digital form. Information about individuals is, sometimes without us noticing, collected in governmental or municipal database, stocked in companies' caches or floated on social network services.

The right to be forgotten has been proposed under this backdrop[21]. Standing on the right to be forgotten, it is possible to claim to have information deleted (text or pictures for example) if he does not wish for that information to be kept in the *cloud*.

This right, while not yet accepted in legislation of many countries with the exception of the European Union[22], is actively discussed today[23].

Another example is the right to personal identity[24]. This right is to protect the image of a person from the public misunderstanding arising out of the misinformation or misleading report of media. This concept, however, has not yet been clearly demarcated, even in France where the right is being argued. The content of this right can overlap with the right of privacy, the right to name or sometimes the right of publicity[25]. So far, there is no clear rule or jurisprudence, but the concept is getting recognized.

Due to the development in technology and changes within society, many new concepts aimed to the protection of personality are proposed. It is still, however, quite difficult to define the new concept concerning personality for the reason of the difficulty in the boundary decision.

2. Possible problems

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[20] Literally translated from the French terminology "*droit à l'oubli*".

[21] Just for the further information, the right to be forgotten was proposed "historically […] in exceptional cases involving an individual who has served a criminal sentence and wishes to no longer be associated with the criminal actions." Meg Leta AMBROSE & Jef AUSLOOS, *The Right to Be Forgotten across the Pond*, 3 Journal of Information Policy 1, 2013, pp.1-2.

[22] There was however an active discussion of the introduction into an EU regulation and finally, the concept is introduced in the Directive of 1999 (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data), which will be replaced by the EU Data Protection Regulation. The proposal of the Regulation is accepted 21th October 2013 (COM(2012) 11 final, 2012/0011(COD) , the text of the proposal is available at http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf [latest access: 2014.08.14]).

[23] Some discussions can be found in the United States and also other countries. For the detail, see M. L. AMBROSE & J. AUSLOOS, *supra note* 21, pp.8-10.

[24] Pierre KAYSER, *La Protection de la Vie Privée par le Droit*, 3e éd., LGDJ, 1995, p.128.

[25] However, it does not overlap totally. Let's take an example: Someone states "I find stupid the work A of the artist B." This statement is broadcasted in TV program. It is true that the speaker said the statement itself and the statement has been broadcasted as it was, that is, without any change. If it is used, however, in the context that the speaker did not expect at all (for example, "there are more and more antagonists against the art."), and if this fact of broadcasting gives to public that the speaker is antagonist against B, what effect can be found? It does not harm the social reputation of the speaker because the public has the impression that he does merely not like the art. It does not the matter of the privacy either because the speaker does not hide the fact that he does not like the work. If, however, the speaker is a strong supporter of the art and just the work A is not his cup of tea, can he be persuaded?

In the last chapter, traditional and newly-born concepts of the right of personality were briefly illustrated. Based on that, in this chapter, potential problems will be examined.

(i) *Intertemporal* conflict

One of the problems is the conflict arising from differences of the concept in a timeline. A stereotypical example is as follows:

The concept of privacy is recognized as one of the rights of personality. It is considered as "*the right to be let alone*"[26] at the initial stage. In this stage, one could claim infringement if the information, which he wants to hide, is revealed. After years, the extension of the right has been changed and it is now considered as "*the right to control one's own information*"[27]. Here, the factor of whether the information is private or not is of less importance. For the consequence, one can claim, standing on his right of personality, the injunction or compensation against the revelation of the information, which is not purely private but he does not want to put in public[28].

If, then, one asks for the remedy against the violation of the information concerning him, when the violation itself has occurred in the period that the narrower concept of the privacy is recognized but the claim is made after the acceptance of the broader one, should the claim be admitted? This question, arising from the change of the concept, is the question of the *intertemporal* conflict of law[29]. How should it be treated?

The easiest case is that a legal rule, such as law, decree or order, has a clear provision on the temporal boundary. In many cases, when the legislature makes a new rule, provisions on the question of temporal boundaries (such as limit of the temporal scope or retroactivity) should be prepared[30].

Jurisprudences sometimes play the role to decide the temporal limit. The court may show the boundary of the concept which has been change, whether it has been expanded or decreased[31].

If it still remains unclear, it should depend on the interpretation of the legal rules, consulting any references such as the discussions during the law-making process.

It can be considered that some way to resolve the intertemporal conflict should normally be prepared or can be found in the legal rule or its vicinity.

(ii) *Interterritorial* conflict

The more complicated question is the conflict of the concept between (or often among) the countries, that is, a concept right of personality in a country is different from that of another country in the same period.

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[26] See *supra note* 16.

[27] See *supra note* 18.

[28] According to the older concept, the right to be let alone, only the information to be hidden can be protected by the concept of privacy. Therefore, in this case, he may not be able to claim anything if he stands on the old concept.

[29] For the theory concerning the intertermporal conflict of laws, specifically about the theory in the United States, see John K. MCNULTY, "*Corporations and the Intertemporal Conflict of Laws*", 55 California Law Review 12, 1967.

[30] See *supra note* 28, pp.13-23.

[31] In Japan, around the years 2006 and 2007, some lower courts made decision admitting the concept of the privacy as the right to control one's own information. However, the Supreme Court still keeps silent on this issue. In this context, it can be pointed out that the "turning point" has not been shown yet.

More concretely, two types of conflict can be in question. One is the *difference* of the conflict; two or more countries have the same concept but the scope is different. Another is the *lack* of the concept; a concept of a right of personality that is admitted in one country does not exist in another.

This question falls under the scope of the question of the private international law (PIL). The PIL rule has not yet been unified yet globally in spite of the many efforts of scholars and organizations. The analysis in this chapter will generally be based on the theory of Japanese PIL with reference to the theory of Europe and of the US, taking some example cases.

(a) *difference* of the concept

First question revolves on how to resolve the conflict-of-laws question when two (or more) countries have the same concept but its extension does not. The right of privacy, for example, shows the typical situation. The following example will be examined:

X, a rich entrepreneur and a citizen of country A, donates money to orphan houses in the countries A and B. The fact of his contributions is not public because he does not want to be widely known for his activity, but can be known through the financial documents of X's company. However, a newspaper company Y, operating in country B, publishes an article in its newspaper about X's benefaction simply as a positive article for X. The article is distributed in countries A and B. X, who wants to hide his act of charity, is not happy with Y's article. He asks therefore for the injunction of the publication of the article in question and for compensation, standing on his right of privacy. In the country A, the right of privacy is considered as the right to control his own information. On the other hand, in country B, the right of privacy can be claimed only when it is a private information that the holder of the information wants to keep in secret. In this case, how should X's claim be dealt with?

In this case, the question of what law will govern the case[32] decides the resolution. If the law of the country A is applied, X will be able to have the injunction and compensation. If the law of country B, the claim of the injunction and the compensation cannot be admitted. Therefore, the determination of the applicable law becomes very important.

The Japanese PIL rule, Act on General Rules for Application of Laws (*Tsusoku-ho*)[33], has no clear rule about the infringement of privacy. In the academia though, there are two dominant ideas. One is the law applicable to torts, and another is the law applicable to the defamation[34].

According to the former approach, the article 17 on the issue of the tort[35] will be applied and the law of the place where the result of the wrongful act occurred (the place of the publication and the distribution of the article), will be the applicable law. In the

[32] This law is called "applicable law" in the PIL field.
[33] Act No. 78 of 2006, English translation of the texts is available at: http://www.japaneselawtranslation.go.jp/law/detail/?id=1970&vm=04&re=01[latest access: 2014.08.14].
[34] The latter seems relatively more dominant.
[35] "The formation and effect of a claim arising from a tort shall be governed by the law of the place where the result of the wrongful act occurred; provided, however, that if the occurrence of the result at said place was ordinarily unforeseeable, the law of the place where the wrongful act was committed shall govern."

example case, the law of country A and the law of country B will be dividedly applied to each act of the publication and the distribution in those countries[36].

On the other hand, according to the latter approach, another article, article 19 on the issue of the defamation[37], will be applied. Standing on this provision, the applicable law is the law of the country of the victim's habitual residence. In the case, the victim is X, whose information is revealed against his intention, and the applicable law shall be the law of country A. In conclusion, X may be able to have the injunction and the compensation for the whole case.

The US has a clear rule on this matter[38], shown in the articles 152 and 153 of the Restatement (Second) of Conflict of Laws[39], which is similar to the two dominant ideas proposed in Japan.

In the EU, there is no clear rule on the conflict of laws issue on privacy. There is however the discussion on the introduction of the rule on the law applicable to the infringement of privacy into the Rome II Regulation[40]. The proposal takes plural approaches[41] and its content is similar to that of Japan or of the US.

This example is a little complicated because sometimes the legislation does not show the clear rule to determine the applicable law. However, the point is, the question of the difference of the concept can be resolved using the general PIL approach.

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[36] X may be able to have the injunction and the compensation to the reveal of the information in the country A, but he may not be able to have anything against the act occurred in the country B.

[37] "Notwithstanding Article 17, the formation and effect of a claim arising from a tort of defamation of others shall be governed by the law of the victim's habitual residence (in cases where the victim is a juridical person or any other association or foundation, the law of its principal place of business)."

[38] See, AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW: CONFLICT OF LAWS SECOND, 1971.

[39] § 152 Right of Privacy: In an action for an invasion of a right of privacy, the local law of the state where the invasion occurred determines the rights and liabilities of the parties, except as stated in § 153, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied. § 153 Multistate Invasion of Privacy: The rights and liabilities that arise from matter that invades a plaintiff's right of privacy and is contained in any one edition of book or newspaper, or any one broadcast over radio or television, exhibition of a motion picture, or similar aggregate communication are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6. This will usually be the state where the plaintiff was domiciled at the time if the matter complained of was published in that state.

[40] EC Regulation 864/2007 on the Law Applicable to Non-Contractual Obligations.

[41] The proposed provision is as follows:

(1) Without prejudice to Article 4(2) and (3), the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country in which the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected.

However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by the first sentence.

(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and that person sues in the court of the domicile of the defendant, the claimant may instead choose to base his or her claim on the law of the court seized.

(3) The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.

(4) The law applicable under this Article may be derogated from by an agreement pursuant to Article 14.

If the infringement of the name occurs, it can be considered as the tort. Almost all PIL rules prepare the choice-of-law rule on the tort[42], the judge has only to refer the clause and select the applicable law.

For the defamation as well, the legislation prepares the rule[43]. Therefore, if the honour of someone is infringed over the border, the court just refers to the PIL rule to choose the applicable law to the question.

In summary, the question of interterritorial conflict of the right of personality is not, when the concept is shared between (or among) the countries and when its infringement is in question, too difficult to resolve because the solution is already prepared.

(b) *lack* of the concept

More complicated question is when one concept is already recognized in a country but it is not admitted in another country. The concept of the right to be forgotten will be taken as example to analyze this question.

X, of nationality of country A, notices that his friends put many pictures with his face on the page of a social network service (SNS). X does not like to be "published" online and he wants to have the pictures deleted. Therefore, X requests Y, a company of country B which manages the SNS, to delete all the data of the pictures in which his face is shown. The server of the SNS is situated in country B. Country A admits the concept of right to be forgotten and standing on the right, people can ask to have their data deleted. However, country B does not recognize that new concept.

In this case, the resolution cannot be easily found. The reason is that in country B, the right itself is not recognized, that is, it does not exist. In this case, how should this question be resolved?

One possible approach is to take the PIL theory of the *preliminary question*. It means that, before tackling the main question of the infringement, the preliminary question on applicable law of the existence of the right, should be decided.

How then should the applicable law to the existence of the right of personality be determined? According to the general theory of PIL, the applicable law of the right of

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[42] See for example the article 17 of Japanese *Tsusoku-ho* or the article 4 of the Rome II Regulation.

[43] See for example the article 19 of Japanese *Tsusoku-ho* or the articles 149 and 150 of the US Second Restatement of the Conflict of Laws. The article 149 deals with the defamation (its text is as follows: "In an action for defamation, the local law of the state where the publication occurs determines the rights and liabilities of the parties, except stated as stated § 150, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied."). The article 150 governs the issue of the multiple defamation and its wording is as follows:

(1) The rights and liabilities that arise from defamatory matter in any one edition of a book or newspaper, or any one broadcast over radio or television, exhibition of a motion picture, or similar aggregate communication are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) When a natural person claims that he has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the person was domiciled at the time, if the matter complained of was published in that state.

(3) When a corporation, or other legal person, claims that it has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the corporation, or other legal person, had its principal place of business at the time, if the matter complained of was published in that state.

personality is the law of the person (*lex personalis*). The rationale is that the personality is strongly tied with the person and that it is reasonable to be governed by the law upon which that person belongs to. This law is considered as the law of the nationality.

Standing on this thought, the example case will be resolved as follows:

Firstly, the existence of the right should be decided. The applicable law is the law of the nationality of X, that is, the law of country A. According to that law, the right to be forgotten should be recognized.

Then, as the right exists, the infringement of the right can be considered. In this case, it is qualified as torts. Therefore, the choice-of-law rule on the torts should be referred. Normally, the rule designates the law of the place where the infringing act has occurred, the law of country B may be the applicable law in this example.

This approach seems logical but it might lead a difficult situation. Consider the case that X is a citizen of country B, and the "infringement" occurs in country A. In this situation, according to the law of country A, the existence of the right will be denied. However, according to the law of country B, where the right is recognized, the infringement can be admitted. To use several applicable laws leads to such a contradiction.

This type of question is called *adaptation*[44]. This question is the conflict between (or among) the applicable laws designated by the choice-of-law rule of the forum. This question was not really analyzed standing on the opinion that the role of the PIL is to determine the applicable law(s)[45]. According to this opinion, the question of the adaptation does not, strictly speaking, fall in the scope of the PIL because this question arises at the stage of the application of the law(s). However, this question arises out of the function of the PIL[46] and it needs to be settled for the resolution of the existing problem.

One option to avoid this contradiction is to apply one only law to the case even when there are several legal questions. Generally speaking, the system of the laws of one country is harmonically-structured so that there is no contradiction between the laws which constitute that system. If the law of one only country is designated as applicable law, therefore, there should not be any contradiction. This technic is taken on a case-by-case basis, that is only when it is necessary, to avoid the unjust result and there is no clear general rule.

However, the selection of one only law to avoid this contradiction may lead to a *shopping* of the court and the law. Plaintiffs may seek for the court which the rule is favorable for them, that is, the rule which will designate the law that admits to the existence of the right (it means that the infringement is also admitted).

So far it is the decision of each court of each country that is relied upon and there is no unified opinion on this topic.

3. Today's problems on the right of personality

(i) Roots of the "new" interterritorial conflict

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[44] Also "*adaptation*" in French and "*Anpassung*" in German language. For the general discussion on this issue, see Giorgio CANSACCHI, *Le choix et l'adaptation de la règle étrangère dans le conflit de lois*, Le Recueil des Cours, t. 83, 1953, pp.79ff; Wilhelm WENGLER, *The General Principles of Private International Law*, Le Recueil des Cours, t. 104, 1961, pp.273ff; and Henri BATIFFOL, *Réflexions sur la coordination des systèmes nationaux*, Le Recueil des Cours, t. 120, 1967, pp.165ff.

[45] G. CANSACCHI, *supra note* 44, p.116.

[46] G. CANSACCHI, *supra note* 44, pp.116-117.

As mentioned in the previous chapter, today a new phenomenon is found in the field of interterritorial conflict on the right of personality, which was not seen in the previous century: Today the existence itself of the right becomes in question, although traditionally, the interterritorial conflict focused only on its infringement.

Why? Because in past days countries shared the concept of the right(s) of personality. They had common concept such as right to name, of honour or of privacy. In this situation, the existence of the right was a given and there was no need to take it in consideration.

However, today countries do not. As is shown in the example of the right to be forgotten, one country has a concept of right of personality which is unknown to another. Here, there is the necessity to examine the existence of the right at the first step to resolve the conflict.

As this situation was not considered in the past days, little legislation prepares the way to resolve and the discussion in academia is inactive. As mentioned already, however, this question cannot be left unsolved and is an urgent task for the PIL field[47]. All the problems such as the question of *adaptation* should be taken in consideration to establish the rule.

(ii) Other questions

Along with the augmentation of the rights of personality, other problems begin to emerge. Although it is considered that the rights of personality belong only to one person, himself, the possibility of the transfer or the waiver of the right, or the *post-mortem* exercise of the right is also pointed out.

Traditionally, the right of personality is considered inalienable and non-waivable. However, if the right can be transferred or be waived, the right-holder can be different from the person of that right (question of *waivability* or of *transferability*). The succession should also even more be problematic if that right is inherited (question of *inheritability*).

Consider the following example:

X, a citizen of country A, notices that his friends put many pictures in which his face is shown on the pages of a social network service (SNS). X did not like to be "published" online but he died without being able to protest. Knowing his feeling, X's heir requests Y, the company of country B which manages the SNS, to delete all the data of the pictures in which X can be seen. The server of the SNS is situated in country B. Country A admits the concept of right to be forgotten and standing on this right, people can ask to have any

[47] Specifically concerning the question of the conflict of an unknown right, there can be a possibility to prepare a general clause. The actual way is to apply a provision on each right of personality (name, privacy, honour, etc.), but it is difficult to treat the new category of right. It may therefore be possible to establish a general clause which deals with the "right of personality", not the individual types of rights. Italy has such a provision. The article 24 of Italian Code Civil (Codice Civile) provides as follows:

Art. 24 : Diritti della personalità

1. L'esistenza ed il contenuto dei diritti della personalità sono regolati dalla legge nazionale del soggetto; tuttavia i diritti che derivano da un rapporto di famiglia sono regolati dalla legge applicabile a tale rapporto.
2. Le conseguenze della violazione dei diritti di cui al comma 1 sono regolate dalla legge applicabile alla responsabilità per fatti illeciti.

This article is worth to be pointed out because it has also the rule of the applicable law of the existence of the right of personality.

data which relates them, be deleted. However, country B does not recognize this new concept.

In this example, there are three questions. The first question is whether the right to be forgotten exists; the second is whether that right can be inherited; and the third is whether infringement is admitted. The applicable law should be determined in each of these questions.

The traditional PIL theory does not have the clear answer for this question, because it is considered absolutely natural that the right of personality belongs to that person and is not transferred. Traditionally it is considered that there is no meaning to build the theory of the law applicable to the existence or ownership of the right of personality[48].

Additionally, the general PIL theory itself should be reexamined. The actual theory considers the law of the nationality of a person as the applicable law to that person (*lex personalis*)[49]. However, is it really appropriate?

One of the general principles of the PIL to determine an applicable law is "the closest connection": The applicable law should connect the most closely to the question. The *lex personalis* should be therefore the law of the country that is concerned with that person the most.

Indeed the nationality is one of the clearest factors to find the connection between a person and a certain place. The traditional and existing discussion considers that a person ties strongly with the country of his or her nationality. However, is it the case today? In days past, a person lived in the country of his nationality and normally spent there whole lifetime. In this situation, there is no doubt to consider the country of the nationality as the place where that person is most closely connected. However, in today's world where the cross-border move is easy, the nationality does not necessarily "the closest connection" with the person. For example, suppose that a person has Japanese nationality, holds the green-card of the US at the same time and works in France: In this case, which of the three countries is the most closely connected to this person? Is Japan, the country of his or her nationality, the closest?

It is necessary, therefore, to reexamine the general theory of PIL itself as well as particular questions on the right of personality, to find the resolution to the conflict of the right of personality.

Conclusion

This paper has pointed out the possible "conflicts" which could arise from the extension of the concept of the rights of personality: Intertemporal conflict and interterritorial conflict.

The former has, in many cases, the resolution (or at least a clue to the resolution) in the law or from the discussion during the drafting of the law, or through jurisprudence. In this instance, the conflict can easily arise but it is not too difficult to deal with.

On the contrary, the latter shows more difficulties. These questions seem to arise from the insufficient discussion of the PIL theory.

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[48] YOSHIO TAMEIKE, PRIVATE INTERNATIONAL LAW [Kokusai Shiho Kogi] (written in Japanese language), 3rd ed., Yuhikaku, 2005, p.534.

[49] More precisely, there are two dominant ideas for the *lex personalis*: One is the law of the nationality and another is the law of the domicile. Generally speaking, civil law countries are familiar with the former idea and common law countries take the latter.

In the actual theory on the PIL, only the resolution for the infringement of the right of personality, of which the concept has already been shared between or among the countries, is prepared. The theory does not prepare the question of the infringement of unknown right of personality or the question of the existence or of the ownership.

Interterritoral conflicts on the right of personality should be increasing with the development in technology. To fill up the lack of theory, some topics in PIL field need to be more deeply developed.

Of course, in addition, the extension of the rights of personality leads to other "conflict", such as conflict between the right of personality and human rights or public interest[50]. It is not in the scope of this paper, but such a tropic should be taken in consideration when law-making is prepared.

[50] The conflict between the privacy and the right to know is one of the typical examples.