

An exploration of balancing public and private law in traditional cultural expressions

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Abstract. Traditional cultural expressions face numerous problems in protection and inheritance, especially in the aspect of balancing public and private law. This paper focuses on the issue of balancing public and private law empowerment in traditional cultural expressions. It thoroughly analyzes the current legislative status and existing problems in China and proposes solutions to achieve rational empowerment and effective balance between public and private law. The study concludes that only through the coordinated action of public and private law can we better protect and inherit traditional cultural expressions, motivate right holders and inheritors, promote cultural diversity, and advance the common progress of human civilization.

Keywords: Traditional cultural, public and private law, protection and inheritance, effective balance.

1. Introduction

1.1. The definition of traditional cultural expressions

“Traditional cultural expressions” (TCEs), also known as "expressions of folklore," refers to traditional artistic expressions created by one or more individuals or communities over a long period, based on practice or daily life. These works encompass various forms, including folk literature, folk visual arts, folk music, folk dance, and folk drama. This paper considers that, in a broad sense, TCEs include both the original "traditional cultural expressions" and their derivatives.

1.2. The methodology of this paper

The empowerment of TCEs in China faces significant challenges in law empowerment. It is obvious that legislative and judicial practices emphasize public law while ignoring private law in the long term, resulting in an imbalance (Zeng, 2023). This paper investigates the ways of achieving balance in public and private law empowerment in TCEs using various research methods. The paper presents practical policy suggestions to optimize public law's functions, clarifying public authority and protect private law rights. This aims to promote the coordinated development of traditional cultural expressions in cultural heritage, industry growth, and social value, ensuring their sustainable prosperity and advancing cultural diversity and human civilization

2. The Current status and issues of public and private law empowerment in TCE

2.1. Current status and issues of Public law

China enacted the Intangible Cultural Heritage Law of the People's Republic of China in 2011 at the public law level to protect TCEs. Thereafter, local authorities at various levels also promulgated relevant regulations on the protection of intangible cultural heritage, forming a public law protection system based on financial support and administrative management (Zeng, 2023). For example, the Regulations on the Protection of Ethnic Minority Folk Culture in Guangxi Zhuang Autonomous Region and the Regulations on the Protection of Ethnic Minority Folk Culture in Yunnan Province were issued by Guangxi Province and Yunnan Province respectively. However, these regulations have currently expired without new revised versions. Additionally, this paper has identified more than eight other autonomous regulations and special regulations, two of which have also expired.

Firstly, the public law field lacks valid legislation that perfectly matches the concept of TCEs. It is important to clarify the differences between traditional cultural expressions, intangible cultural heritage and traditional folk culture. The scope of traditional cultural expressions is broader than that of intangible cultural heritage, which requires identification, documentation, archiving, and other complex procedures. In contrast, some traditional cultural expressions remain unidentified, undocumented, and unarchived. Additionally, the scope of traditional folk culture is relatively broad and not entirely congruent with that of traditional cultural expressions. For example, folk beliefs (such as sacrificial rituals) and certain folk customs (such as marriage and funeral rites) are established by usage which can not be called TCEs. Therefore, the laws enacted as mentioned above cannot precisely meet the protection needs of TCEs.

In addition, there is currently a lack of higher-level legislation in the public law domain. Much of the existing legislation is confined to specific ethnic autonomous regions without a higher guidance. Moreover, the content regulated by these protection regulations varies. As a result, the legislative deficiencies in the public law domain may lead to an inability to fully and effectively cover the public domain of TCEs that should be protected.

2.2. Current status and issues of private law

Due to the controversy over the private law legislative theory of TCEs in China, and the complex issues and subjects of rights involved, there has been a gap in this area. For example, Article 6 of the Copyright Law of the People's Republic of China stipulates that "The methods for the copyright protection of traditional cultural expressions shall be separately provided by the State Council." However, the Regulations on the Protection of Copyright in traditional cultural expressions (Draft for Comments) issued by the National Copyright Administration have also not been officially promulgated. The absence of private law legislation has created difficulties in judicial practice. The most common one is the lack of clear provisions on the scope of copyright protection for TCEs, which causes difficulties in determining whether a work qualifies as a TCE. For example, in the case involving musician Wang Luobin's children, Wang Haicheng and Wang Ping, over the dispute of the right to disseminate the work "Ma Yila" via information networks, the lack of relevant legal provisions on the copyright protection of traditional cultural expressions led to controversy over whether Wang Luobin's version of "Ma Yila" constituted an original work. Specifically, there was a debate over whether it should be considered as containing the author's unique intellectual creation or merely as a public domain folklore material, and thereafter whether his children should have inheritance rights (Tianjin Higher People's Court, 2022)

The absence also makes it difficult to resolve ownership disputes over derivatives of TCEs, and may even trigger strategic litigation. For example, in the Shaoxing Light Textile City pattern infringement case, Zhou Furen, under the circumstance of knowing that his client did not have the actual copyright, still instructed Wang Jiangmei and others to fabricate the creative ideas and explanations for the patterns, and backdated the creation by one year to assist in the copyright registration. After discovering that other merchants in the market were using these patterns, Meisu Company, under the guise of protecting rights, claimed that its client's copyright had been infringed and demanded compensation through sending lawyer's letters and filing lawsuits, defrauding a total of over 3.4 million yuan (The Supreme People's Procuratorate, 2023). It is because of the lack of laws and regulations on the copyright protection of TCEs that creates loopholes for illegal actors to exploit for profit. This has an extremely negative impact on the protection of TCEs, discourages the innovation of copyright holders of TCEs, and is detrimental to the protection of their copyrights as well as the inheritance and development of TCEs.

2.3. The imbalance of public law and private law empowerment

Public law and private law play distinct roles. Public law focuses on cultural preservation and revitalization. For example, in the appeal case of unfair competition dispute between Hubei Guo Weihua Zhenggu Medical Science and Technology Development Co. Ltd. and Luoyang Guo Canruo

Guo's Hall Medical Science and Technology Co. Ltd., Article 31 of the Law of the People's Republic of China on Intangible Cultural Heritage was effectively applied to clarify that representative inheritors do not have ownership or exclusive usage rights over intangible cultural heritage skills which facilitates further cultural dissemination and development (Henan Higher People's Court, 2023). Private law focuses on the allocation of economic interests and the regulation of infringement (Zeng, 2023). For example, in the infringement lawsuit involving Wang Luobin's children mentioned above, it helps to protect their copyright inheritance rights and corresponding property rights.

The imbalance of empowerment in public and private law is reflected in the tendency of emphasizing public law while neglecting private law in China, failing to achieve an effective balance in legislative and judicial practices over the years. The persistent gap in private law legislation will severely undermine the protection of TCEs. On one hand, existing TCEs cannot obtain the comprehensive legal protection they deserve, leading to frequent infringements that disrupt the creative ecosystem of TCEs and are detrimental to cultural diversity. On the other hand, since most of the works originate from traditional practice and living experiences and modern production and lifestyles have become highly diversified, traditional ways of life are facing significant challenges. The changes greatly reduce the appeal of TCEs to the new generation of inheritors. Without private law protection of the economic and spiritual rights of folklore groups, the new generation may choose other career paths and lifestyles in the context of modernization. The reduction in the number of inheritors will directly lead to the decline of traditional culture.

Some scholars argue that copyright protection for TCEs should be opposed, considering it a product of international political struggles and a manifestation of intellectual property games between developed and developing countries in this field (Shi, 2024). However, this paper contends that a one-size-fits-all approach is inappropriate. TCEs mentioned by these scholars tend to be categorized as public domain materials, without detailed classification and the consideration of the derivatives. China has made efforts in protection, yet some are still rapidly disappearing with the rate of destruction outpacing that of protection. One reason is China's vast territory and diverse ethnic groups, which produce a large number of folklore works. In contrast, given the limited human, material, and financial resources of the state, comprehensive protection is challenging. Therefore, the improvement and supplementation of private law become even more necessary. This paper suggests that protecting the private rights of holders can motivate them to preserve and pass on. It is crucial to pay attention to the scope of rights granted to copyright holders of folklore works. If the rights are too extensive, it may lead to exclusive possession, hindering others' ability to learn from and disseminate these works, which is detrimental to their long-term protection. In contrast, the protection will lose meaning (Shang and Wang, 2009).

3. Pathways to Balance public And Private law Empowrment

3.1. Strengthening legislative empowerment of private rights

3.1.1. Clarifying the legislative boundaries between public and private law in TCEs

To clarify the legislative boundaries between public and private law in the protection of TCEs, it is essential to define the scope of copyright protection. Some scholars have proposed altering the term "traditional cultural expressions" in Article 6 of the Copyright Law to "derivatives of traditional cultural expressions" and establishing a series of protection and review mechanisms based on this definition (Duan, 2023). However, this paper argues that the current definition in Article 6 should not be restricted solely to "derivatives of traditional cultural expressions." Instead, legislation should consider various factors, including the degree of public accessibility of the content and the different subjects of rights ownership (Li, 2017). This paper posits that it should encompass both original "traditional cultural expressions" and derivative works with originality. The most important is originality and personal intelligence must be contained.

Based on the clarification, it is necessary to strengthen the boundary provisions of public and private legislation concerning TCEs. The boundary provisions should be based on the distinct functions of public and private law. Public law should maximize its function of protecting and inheriting culture, while private law should focus on protecting the economic and spiritual rights, stimulating the creative enthusiasm of folklore workers, and regulating infringement by others.

3.1.2. Enhance and strengthen regulations to protect private rights.

The protection of private rights should encompass both economic and moral rights. For TCEs, distinct standards should be proposed for the public and private domains. Zeng Li proposed a "paid use in the public domain" model, requiring commercial users to pay fees to support cultural heritage which is practical and easy to adopt (Zeng, 2023). Duan Wei et al. suggested limiting the over-expansion of the private domain through a "prior work defense" mechanism (Duan, 2023).

In the economic sphere, experience should be drawn from the ongoing pilot projects for copyright protection of Chinese TCEs. This includes establishing and operating a database, developing a registration system for such works, and actively encouraging traditional communities, folklore artists, enterprises, and institutions to register. Certificates of registration for folklore works should be issued, and efforts should be made to build a database of registered folklore works, forming a directory of high-quality registered works in the region (Mei, 2024). Adopting a pilot-first and then expansion model, it is essential to actively explore and innovate the business models, mechanisms, and mechanisms for copyright work in the TCE sector, and to comprehensively strengthen the creation, utilization, protection, management, and service of TCE copyrights. One can also learn from the cooperation between the Southern Cultural Exchange Center and the China Copyright Protection Center to jointly build a pilot application for digital copyright chains, creating a digital platform that offers users one-stop digital copyright registration and transaction certification services. The National Copyright Administration is currently advancing the establishment of a unified national copyright registration system, standardizing various tasks such as work registration and copyright pledge registration, which includes the protection of TCE copyrights. However, for folklore works to be included in the digital system, selection should be based on their value, and technical means should be employed to achieve the transformation, classification, and collection management of TCE, ensuring that the works included in the system are properly maintained (Hariri, 2021). The pilot projects include refining copyright registration standards, developing an information platform for copyright data services, enhancing the digitalization of copyright registration, and gradually achieving online processing. They also aim to improve systems for public disclosure, data reporting, and statistical analysis. Current pilot projects in China's copyright protection cover multiple aspects, including folklore copyright protection, digital copyright registration, online mediation of copyright disputes, application of AI technology, and the improvement of copyright registration mechanisms. These pilots provide rich practical experience and a foundation for institutional innovation, contributing to the modernization of the copyright protection system.

In addition to strengthening the protection of economic rights, it is essential to focus on the protection of spiritual rights in TCEs. Relevant commendation systems should be established to enhance the promotion, recognize and encourage the rights holders of such works, and appropriately de-emphasize property rights in favor of spiritual rights. This approach will foster a culture of knowledge and benefit sharing (He & Wang, 2009). For example, first, the right of attribution for folklore rights holders should be implemented, clarifying the origin of folklore works and indicating their sources. Second, the right against distortion and mutilation should be prohibited to protect the cultural dignity of folklore authors, strictly forbidding unauthorized alterations to the content of works and cracking down on infringement.

3.1.3. Drawing on foreign legal experiences.

In terms of policy objectives, it is essential to protect both the intellectual property rights and the cultural heritage of folklore literature and art, without conditioning protection on fixation in a tangible medium. Communities or relevant authorities could be designated as rights holders, with economic

and moral rights granted to them, while also stipulating limitations on these rights, such as fair use. Additionally, the use of folklore literature and art or their expressive forms could be subject to authorization by the relevant authorities, and regulations could be perfected to require payment for the use of folklore works in the public domain. It is essential not only to emphasize the protective role of the law but also to highlight the active role of local governments. Together with rights holders and the law, they form a stable tripartite relationship to jointly protect folklore literature and art. The government can increase the visibility of folklore literature and art through enhanced publicity efforts and strengthen the public's awareness of the law (Kusmaningtyas et al, 2023). China can legislate to clarify the public nature of folklore literature and art to prevent their improper privatization. Additionally, a global cultural framework can be established to protect the rights of folklore communities worldwide and to recognize and grant their collective rights (Ghose & Ali, 2023).

3.2. Refining legislation in the public law domain

To establish a comprehensive legislative system for the precise concept of TCE, it is essential to clarify the scope of intangible cultural heritage, folk culture, and TCE. This paper suggests drawing on the classification criteria of the World Intellectual Property Organization, which divides traditional knowledge into genetic resources, traditional knowledge, and expressions of traditional culture. The scope of folklore literature and art should be broader than that of expressions of traditional culture. Traditional medicine, hunting or fishing techniques, and water resource management do not fall within the concept of TCEs. Folklore literature and art must be a specific expression of traditional culture that contributes to the identity or cultural heritage of a particular ethnic group or region (WIPO, 2024).

Based on this conceptual distinction, higher-level government authorities should issue guiding principles and legislative documents, such as provincial protection regulations, to provide guiding principles for the protection of folklore literature and art in the region while allowing for some flexibility. In regions with complex circumstances, subordinate protection regulations tailored to local and ethnic characteristic should be permitted under the guidance of higher-level legislation. Additionally, regular supervision and review of laws in the field of folklore literature and art should be strengthened to promptly replace outdated laws.

4. Conclusion

This paper has thoroughly explored the balance of empowerment between public and private law in the protection of traditional cultural expressions. By analyzing the current legislative status, existing problems, and the imbalance between public and private law in this area, targeted solutions and recommendations have been proposed. The study finds that there is a tendency in China to emphasize public law while neglecting private law in the protection of folklore literature and art, resulting in an ineffective balance in legislative and judicial practice.

To address these issues, this paper suggests clarifying the legislative boundaries between public and private law and improving the scope of protection for traditional cultural expressions. It also recommends strengthening the protection of private rights. Additionally, drawing on foreign legal experiences and innovatively adapting them to China's national conditions is crucial. Finally, improving legislation in the public law domain and perfecting the existing legislative system is essential.

Through these measures, this paper aims to promote the improvement of China's legal protection system for folklore literature and art, achieving a rational empowerment and effective balance between public and private law. This will not only help protect and inherit folklore literature and art, and motivate holders and inheritors but also promote cultural diversity and the common progress of human culture. Future research can further focus on the new challenges and opportunities for protecting folklore literature and art in the digital age, as well as the status and application of national pilots, providing richer empirical support and theoretical basis for relevant policies and laws.

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