

Social Identity Factors in Judging the Civil Liability for Personality Right Infringement

Based on Article 779 of the Divisions of Civil Code (Draft)

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Abstract—The division of personality rights in the Divisions of Civil Code (Draft)¹ of China stipulates the social identity, and regards social identity as one of the considerations in judging the civil liability for personality right infringement. This may be due to the fact that Chinese have long had unclear distinction between social identity and legal identity, and conceptually paid more attention to social identity than legal identity. In judicial practice, the judge and the parties also have a large number of considerations on identity factors in the sharing of responsibilities and the distribution of rights and obligations. Indeed, under the premise of formal equality and individuals' freedom development, there is inevitable difference between their substantive identities. However since modern times, the equality of personality in worldwide public and private laws has been established, and the concept of modern human rights also emphasizes the equality and freedom of people. The setting of the personality right in the Civil Code should comply with and guarantee the equality clause in the Constitution, and provide basic judicial guarantees for eliminating identity discrimination and realizing social justice. Legal workers should systematically isolate social identity from legal identity, face the factual differences between people, and use the compelling power of laws and policies to guide and adjust social distribution relations, correct some existing identity privilege status, and enhance the compensation to the weak.

Keywords—*personality right; personality equality; social identity; legal identity; substantial fairness*

I. INTRODUCTION

The term of "social identity" appears in Article 779 of the third division of the Divisions of Civil Code (Draft) of China: Personality Right. In this Article, social identity is regarded as one of the considerations in judging the civil liability for personality right infringement. With respect to the concept of social identity appeared in private law, its corresponding legal basis is debatable. At the same time, it is wondered whether the "social identity" specified in this division may have negative guidance risk of generating "personality inequality" and "identity discrimination" in the society.

¹ On September 5, 2018, www.npc.gov.cn published the "Divisions of Civil Code (Draft)" and publicly solicited opinions from the society until November 3, 2018.

Article 33 of the Constitution of China stipulates that "all persons who have the nationality of the People's Republic of China are citizens of the People's Republic of China and are equal before the law. The state respects and protects human rights". The establishment of citizenship gives all citizens a uniform and equal identity and qualification; providing homogeneous citizenship is the guarantee of personality equality. Then, is there a certain tension between the "social identity" appeared in the division of personality right and the equality clause and human right guarantee under the Constitution of China? As stated in the Universal Declaration of Human Rights approved by the United Nations in 1948, "The recognition of the inherent dignity and equal rights of all members of the human family is the foundation of freedom, justice and peace in the world". This statement reflects that the basic meaning of human rights includes personality dignity, personality equality, personality independence, and so on. Those rights are not only to be confirmed by the Constitution but also the right to be recognized and guaranteed by private law.

The so-called personality right under Constitution is essentially the content of the basic rights of citizens, while personality right under civil law is the right of natural persons in private law. The basic rights under the constitutional system and the personality rights under the civil law system have respective development paths and subjective right attributes, but they both have objective law attributes of basic rights. Basic rights and personality rights work specifically under different systems, achieving indirect interaction, so that the protection of personality interests is carried out simultaneously in both constitutional and civil law fields.² The interaction between personality right under the Constitution and that under civil law "should try to get the basic rights listed in the constitution converted into civil basic rights",³ while the equality clauses under the Constitution should certainly also be reflected in the expression of personality right under civil code.

² Zhang Shanbin. Independence and Interaction of Civil Law Personality Right and Constitutional Personality Right [J]. Law Review, 2016, 34(06):50-60.

³ Xu Xianming. The Civil Code should fully reflect "respect and protect human rights" [J]. The People's Congress of China, 2016:14.

II. CONSIDERATIONS ON THE USE OF SOCIAL IDENTITY UNDER THE DIVISION OF PERSONALITY RIGHT

A. Possible Reasons for Using Social Identity in Legislation

1) *Long-term overlapped application of legal identity and social identity in China:* Sociologists believe that identity mainly contains multiple meanings: first, the position in society; second, the position in the hierarchy; third, the social status inherited; fourth, the status and reputation measured by any objective characteristics (such as occupation, income, etc.); fifth, the collection of rights and obligations, and so on.⁴ For reason that the complexity of human's social life indeed exists but conflict with the basic meaning of personality equality, the said social status, social hierarchy and so on also deviate from the principle of personality equality in private law. However, the inclusion of objectively measurable factors, such as occupation, income, and labor ability, in Article 779, has reasonable legal basis.

China has a long-standing cultural foundation that values social identity and despises legal identity, and potentially plays a role in daily life, even in legislation and administration of justice. Legal identity is formed in the operation of modern law. Once entering, it means that the social member accepts the unified procedural rules, his individual identity characteristics are excluded from the legal system and independently form "the identity of the party defined in the principle of rights and stated in the specific case", namely "legal identity".⁵ Social identity, originated from social operation, is determined in the process of socialization, and also contains a series of distribution of powers and responsibilities and orientation of roles.⁶

From a deeper level, the mixed use of legal identity and social identity depends on China's legal culture. According to anthropologists' interpretation on the concept of culture, culture is not only "a simple accumulation of classics, accumulation of institutional achievements and accumulation of artifacts or achievement accumulation of facilities",⁷ but also the "co-living concept system, values and codes of conduct" of specific groups⁸, namely culture is a code of behaviors guided by concepts and having certain historical continuity. Therefore, legal culture can guide people's legal behavior. However, this kind of guidance is mostly presented in an unconscious mode that is not observed by social members.⁹ As for putting the said theory into practice of

China's specific conditions, firstly, the identity concept and identity system followed in ancient China still deeply influences the contemporary society. Although under the impact of "identity to contract", the concept and behavioral rules of identity formed in ancient China lost the expression at the institutional level, but they still exist in the deeper level of China's legal culture, and have long influenced the legal thinking and legal practice.¹⁰

2) *The large number of social identity factors in China's judicial practices:* In contemporary China's judicial practices, the judge, the parties, and public opinions' attitudes toward social entity have long been ambiguous. The judge often allows the entry of social identities and roles in the case, and determines the legal obligations and responsibilities of the parties according to the moral requirements of their social identities. The parties also show the cross use of their legal identity and social identity, sometimes emphasizing legal rights and obligations, and sometimes complaining the counterparty's behavior and justifying self-behavior based on the role orientation of social identity¹¹. Since the opening of network speech, the cases of bringing social entity in public opinion become endless, and the evaluation mechanism based on social identity is divided into two directions: one is the identification to an identity, and the other is the resistance to the identity. For example, public opinion always tends to impose light punishments on Xu Ting, Deng Yujiao and et al, and strict disposal on Yao Jiaxin, Hu Bin and et al. And to certain extent, public opinion may inevitably put pressure on the judiciary.

B. Social Identity May Affect Personality Equality and the Like and Further Highlight Identity Discrimination

1) *Gradual determination of personality equality in private law:* As regulated in article 773 of the third division of the Divisions of Civil Code (Draft) of China: Personality Right, "This division adjusts the civil relations arising from personality rights". As a legal concept, personality has multiple meanings. The first meaning is the subject of the rights and obligations in private law, namely legal personality; the second meaning is the capacity for civil rights; the third meaning is the sum of the capacity for rights, the capacity for act, and the rights of freedom, reputation and name; the fourth meaning is a kind of legally protected interests, including the life, body, health, freedom, dignity, reputation, and so on of natural person. It is also called personality interest in order to distinguish it from other legally protected interests such as property interests.¹² Of course, personality also has many definitions in philosophy, psychology, and sociology.

⁴ Li Qiang. *Social Mobility in Contemporary China* [M]. China Economic Publishing House, 1993:2.

⁵ Zhang Jing. *Status Identity: Idea, Attitude, Justification* [M]. Shanghai: Shanghai People's Publishing House, 2006:200.

⁶ Thomas Stephens. *Order and Discipline in China: The Shanghai Mixed Court 1911-27* [M]. Washington: University of Washington Press, 1992: 91.

⁷ Chen Xiaofeng. *Research on Chinese Constitutional Culture* [M]. Wuhan University Press, 2014: 19.

⁸ Luo Hongguang. *Anthropology* [M]. China Social Sciences Press, 2014: 12.

⁹ Claude Levi-Strauss, (trans.) Xie Weiyang, Yu Xuanmeng. *Structural Anthropology* [M]. Shanghai Translation Publishing House, 1995: 104.

¹⁰ Xu Yawen, Gao Yifei. *Analysis of Identity Factors in Judicial Practice in Contemporary China* [J]. *Journal of South-Central University for Nationalities (Humanities and Social Sciences)*, 2017, 37(03):109-113.

¹¹ Zhang Jing. *Status Identity: Idea, Attitude, Justification* [M]. Shanghai: Shanghai People's Publishing House, 2006:200.

¹² Liang Huixing. *The General Theory of Civil Law (Fourth Edition)* [M]. Beijing: Law Press ·China, 2011:91.

It needs to be acknowledged that the ancient farming civilization determined that in the society at that time personality depended on identity and the social order was maintained on the basis of the identity order. In the patriarchal system that was compatible with the productivity at that time, there could not be equal relationship between people. Although in ancient society, natural persons also had legal subject qualifications, and the law also played a role in protecting people's rights and interests, their specific suitability differed depending on their identities. It can even be said that the law is only a tool for protecting and guaranteeing the identity order. At that time, there was not the concept of personality right, and the operation of law could not, and would not be for the purpose of safeguarding human's dignity, equality and freedom.¹³

In the progress and development of the "identity to contract" in modern society, modern civil law gradually deny the identity attribute of legal personality in ancient law under the guidance of the strong natural law thoughts, namely the personality under private law was separated from "identity". As Maine pointed out, "all progressive social movements are consistent in one point (namely the gradual elimination of family attachment and the growth of individual obligations rise instead of it in the process of movement development). The 'individual' has continuously replaced the 'family' and become a unit considered by civil law"; "the form of relationship used to gradually replace the rights and obligations derived from the 'family' is 'contract'"; "if we use the word 'identity' to merely represent the state of personality in accordance with the most excellent practice, and avoid applying the word to express the suitable direct or indirect outcomes, we can think that so far, all progressive social movements are movements from 'identity to contract'".¹⁴ This shows that the identity has gradually faded in the civilization development of modern society, and the contractual consciousness advocating freedom and equality has begun to dominate.

The 1804 Civil Code of France, as a representative of modern civil law, clearly stipulates that "all French people enjoy civil rights", which legally confirms the equal personality. In 1970 and 1994, clauses of personality right are added in the norms on natural persons under the civil code. The 1900 Civil Code of Germany created the concept of the capacity for rights, namely people are entitled the capacity for rights when they are born. The copyright law of arts and photography enacted under the civil code in 1907 clearly stipulates to protect the right of portrait. After the Second World War, the Federal Supreme Court and the Federal Constitutional Court jointly established the "general personality rights" based on Article 1 (1) of the Basic Law of Germany, created personality right, and affirmed the nature of the right in private law. With the gradual abstraction of personality in modern civil law, people's legal personality became unaffected by natural or social conditions, namely,

their identity and status. However, the legal personality at that time was only the personality abstraction in the transaction or property and was not fully separated from identity in the aspects of marriage and family relations. For example, the 1804 Civil Code of France still stipulated the authority of the husband. Hence, it can be seen that in modern society, identity still influenced and even determined legal personality; the personalities between family members were not equal. This kind of rights enjoyed on the basis of the specific identity in family relationship gradually became part of the identity right in modern law. However, it is undeniable that the equality of personality in public and private laws was gradually recognized in the world.

2) *Emphasizing that social identity may affect the elimination of the household register barrier in China:* With the 40 years of reform and opening up, China's social economy and political level have developed rapidly, but the identity difference brought about by the dual household registration system has not yet been relieved. A large number of rural people have changed to urban household registration for additional welfare, and there are also many people with rural household registration who refuse to move into urban area in order to retain certain rights. In the process of urbanization, there are a large number of phenomena such as the discrimination of migrant workers' identity, which makes people chill and reflect. To certain extent, this phenomenon leads to social injustice, uneven urban and rural development, and are not in line with the socialist core values. Therefore, in the process of rapid development of China, the household registration system is also always seeking for reforms to gradually improve the drawbacks and adverse social effects brought about by the household registration system, which has achieved considerable social effects in some aspects.

However, the current dual household registration system in China still aggravates the urban-rural polarization to some extent so that it is not available to fully achieve labor freedom and further the urbanized development of China is restricted. The gap in the social welfare between people with urban and rural household registrations also causes invisible stratification in the society. Difference between different identities in aspects of social insurance, education, employment, and medical care aggravates the social contradictions and hinders the realization of social fairness and justice.

Although China's household registration system is constantly improving, there are many difficulties in reality. In particular, due to the long-standing dual household registration system, the society's awareness of identity discrimination against non-urban population has become ingrained. This is a great challenge for China to eliminate household registration barrier, the overall development of urban and rural areas, and even to realize social fairness and justice. Therefore, it is urgently needed to establish a social environment that promotes the reform of household registration system and the elimination of household registration barrier, dilute the ubiquitous awareness of social identity, and promote the concept of equality of personality.

¹³ Guo Mingrui. The Relationship between Personality, Identity, Personality Rights and Identity Rights Also on the Development of Personal Rights [J]. Legal Forum, 2014, 29(01): 5-10.

¹⁴ [UK] Henry Maine, (trans.) Shen Jingyi. Ancient Law [M]. The Commercial Press, 2010:110-112.

III. CORRECTING IDENTITY PRIVILEGES AND ENHANCING COMPENSATION TO THE WEAK

A. Facing up to the Identity Difference and Guaranteeing Substantive Equality

Although in modern civil law, people are considered as those whose various abilities are abstracted and equal, and can act upon by their own free will. But with the development of the society, there is bound to be de facto inequality between people.¹⁵ Thus, the modern civil law has shown some new developments in the aspect of private law personality, including the continuous expansion and promotion of the value of personality rights. Meanwhile, the nature of personality rights is no longer pure and singular, such as the right of personality with property interests. The property interest of social celebrity needs to be realized through the subject. The personality identification factors such as name and portrait of the subject make the subject different from other people. The potential popularity of those factors is the basis for the subject to realize property interest.¹⁶ Therefore, it is also an inevitable requirement to protect the said rights on the basis of different social identities.

However, modern society pursues fairness and justice. Equality and freedom are the premises to achieve fairness and justice. Established on the basis of individualism and liberalism, modern civil law determines the principle of equality, adapts to the need for free competition, and mobilizes people's enthusiasm in creating wealth. But this form of equality is inevitable to cause serious social problems, such as the widened gap between the rich and the poor. Therefore, since the 20th century, especially after the World War II, China began to pose appropriate and necessary interventions in the field of private law. "The thinking of civil law has changed from extreme respect for individual freedom to attaching importance to social public welfare."¹⁷ Thus, the formal equality in private law began to be gradually transformed into substantive equality.

In summary, the identity and personality under modern civil law are indeed re-connected; whereas, this personality no longer as depends on identity as in stated in traditional culture but emphasize the special protection of "identity" for specific individuals, in order to achieve substantive equality in personality. The so-called "formal justice dilutes identity, and substantive justice highlights identity"¹⁸ reflects the transformation of personality system under contemporary civil law from abstraction to specification of personality in

¹⁵ [Japan] ほしの えいいち, (trans.) Duan Kuang, Yang Yongzhuang. *Basic Issues of Modern Civil Law* [M]. Shanghai: SDX Joint Publishing Company, 2012: 82.

¹⁶ Li Gaoya. Legal Liability for Commercial Use of Celebrity's Personality Mark without Permission — Analysis of Yao Ming's Personality Rights and Unfair Competition Disputes [J]. *Journal of Science, Technology and Law*. 2013 (1).

¹⁷ Liang Huixing. *The General Theory of Civil Law* [M]. Beijing: Law Press · China, 2011:41.

¹⁸ Tong Liechun. Appeal for Status Justice and its Implementation Mechanism [J]. *Journal of Gansu Political Science and Law Institute*, 2011(3).

modern civil law.¹⁹ Therefore, when considering social identity factors, the difference in identity between people is recognized and the force of law and policy is applied to guide and adjust the social distribution relationship, correct some existing identity privilege status, and enhance the compensation to the weak. Substantive equality is guaranteed through legal inclination regardless of the aspect denying and infringing personality equality existing in identity difference.

B. Replacing Social Identity Factors with Labor Ability Factors Under the Law of Personality Rights

Taking social identity as the factor for judging the civil liability for infringement of personality right reflects the objective recognition of identity difference and the respect for judicial practice, but at the same time may exacerbate the concept of personality inequality. As stated in article 779 of the Divisions of Civil Code (Draft) stipulates, "In judging the civil liability to be undertaken by a person for reason of personality right infringement, the following factors shall be taken into consideration: (1) the type of personality right; (2) the occupation, social identity, influence scope of the perpetrator and the victim; (3) specific details of the infringement such as the purpose, manner, location, time, and consequence". This provision comprehensively involves various subjective and objective factors that may affect the judging of the responsibility, and the factors that are indeed different for different people such as "the possibility to replace social identity with labor ability", can provide a comprehensive basis for judgment in combination with the currently specified occupation and influence scope, and can also avoid generating negative guidance such as personality right inequality and social identity privilege.

As the distinction between social identity and legal identity has been unclear for long term in China, legal workers should more consciously get the two technically isolated from each other, construct legal identity based on the citizenship under public law, and regard it as the only legal identity in legal relationship. The distinction doesn't lie in other social factors, but only lie in legal factor and follow after the "all people are equal" principle; identity difference should not be reflected due to legislative grants and social identity should not be included in the law of personality rights for comment. It should be noted that fairness and justice have always been regarded as the ultimate value of law; the basic law of evolution of modern law is still "from identity to contract"; no matter in legal theory and in legal practice, equality should both be the basic principle, supplemented by protection for specific identity of the weak.

C. The Division of Labor and Coordination Between the Law of Personality Right and the Tort Law

After the promulgation of the Tort Liability Law, a series of discussions were raised on whether to get the law of personality rights compiled into a separate division under the

¹⁹ Guo Mingrui. The Relationship between Personality, Identity, Personality Rights and Identity Rights Also on the Development of Personal Rights [J]. *Legal Forum*, 2014, 29(01): 5-10.

future Civil Code. The current draft of the Civil Code has already listed the personality right in the third division alone, which proves that the Tort Liability Law as a post-event relief means can neither replace the law of personality rights nor be in line with the legal concept of the law of personality rights. But the convergence of content between them and how to avoid duplication are still worth of discussion. For the content not suitable to be specified under the division of personality rights, the effectiveness of the right protection can be realized by the tort liability law.

Personality right must both be clearly defined in the law of personality rights, and have corresponding protective norms under the tort law. Therefore, it is necessary to well coordinate the relationship between the two and maintain a harmony between the two laws. First of all, the two laws have significant differences in terms of the function and the form of responsibility. In addition, in the future civil code, more attention should be paid to the division of labor and coordination between their specific rules. It should be pointed out that in modern society, the property attributes of personality rights are constantly manifested; however, it is necessary to ensure not infringe the essence of personality right and the value orientation of the law of personality right, and avoid appearing the value trend of personality inequality and different value of different destiny of people due to emphasizing social identity, while personality right is commercialized.

D. Protection Scope Under Judicial Interpretation of Personal Compensation in Supreme Law

On March 10, 2001, the Supreme People's Court promulgated the "Interpretation of Problems regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts", which is important for the construction of judicial tort law and the law of personality rights, and the judicial protection for the personality right and interests of natural persons. The judicial interpretation of compensation for emotional damages stipulates the scope of civil rights in three aspects, and clarifies that the protection of emotional damages is applicable to the case of infringement act. The protection mainly includes: personality rights and personality interests; identity rights, such as the protection for parental rights and relative rights; certain property rights with personality factors, such as compensation for mental damages against specific memorabilia.²⁰ Hence, it can be seen that the judicial interpretation made by the Supreme Court extended the compensation for emotional damage from the occasion of personality rights to the right of identity. It is true that it is undeniable to apply the compensation for infringement damages to identity rights, but social identity should not be included in the scope of personality rights. Even in Article 774 of the Divisions of Civil Code (Draft), it is stated that "natural persons have other personality rights and interests generated on the basis of personal freedom and personality dignity", and there is still no expression of "personality

equality", but the concept of modern human rights emphasizes the dignity and value of people and pursues the basic value goals of human beings such as equality, freedom and independence, which is undeniable.

IV. CONCLUSION

The first milestone of legal protection of personal right is the publication of the General Rule of Civil Law. It stipulates that citizens and legal persons have personal rights and can use the method of compensation for emotional damage to legally protect some of the personality rights. Thereafter, the Supreme People's Court passed relevant judicial interpretation which supplements the limitations in legislation, perfects the protection of personality rights in the judicial field, provides basis for the protection of identity rights, and also appropriately expands the protection for property rights with personality factors. By stipulating the compensation for emotional damages, the personal rights are more fully guaranteed; it is expected that in the process of formulating civil code of China, China's legal protection for personal rights can usher in the third milestone leap.

REFERENCES

- [1] Yang Suiquan. *The Road of China and Chinese Civil Code*. Law Press ·China, 2005. (in Chinese)
- [2] Yang Suiquan. *Comparative Civil and Commercial Law*", Law Press ·China, 2007. (in Chinese)
- [3] Liang Huixing. *The General Theory of Civil Law*, Law Press ·China, 2011. (in Chinese)
- [4] Li Qiang. *Social Mobility in Contemporary China*. China Economic Publishing House, 1993. (in Chinese)
- [5] Zhang Jing. *Status Identity: Idea, Attitude, Justification*. Shanghai People's Publishing House, 2006. (in Chinese)
- [6] Chen Xiaofeng. *Research on Chinese Constitutional Culture*. Wuhan University Press, 2014. (in Chinese)
- [7] Luo Hongguang. *Anthropology*. China Social Sciences Press, 2014. (in Chinese)
- [8] Claude Levi-Strauss, (trans.) Xie Weiyang, Yu Xuan Meng. *Structural Anthropology*. Shanghai Translation Publishing House, 1995. (in Chinese)
- [9] [UK] Henry Maine, (trans.) Shen Jingyi. *Ancient Law*. The Commercial Press, 2010. (in Chinese)

²⁰ Yang Lixin, Yang Fan. Comments on the Supreme Court's Interpretation on Several Issues on the Decision on the Civil Liabilities for the Infringement of Moral Damages [J]. *The Jurist*, 2001 (05): 50-59.