

On the Priority of Close Relatives in Article 726 of the Civil Code of China

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Abstract: The Civil Code has opened a new era of Chinese civil law, which stipulates the rights and obligations of civil subjects in all aspects of social life. Article 726 of the Civil Code sets up the legal right of the next of kin to purchase a house in preference to the lessee. This special provision has a profound cultural basis and value consideration, showing that civil law is moving toward a future that returns to a certain identity and membership.

Keywords: Civil Code; Next of Kin; Contractual Acts

China's Civil Code comes into force on January 1, 2021. The Civil Code has distinctive Chinese characteristics and takes the core socialist values as its legislative purpose, "In order to carry forward the traditional virtue of mutual assistance and love, and to promote the formation of the social ethos of mutual respect and assistance, the Civil Code has formulated a series of relevant systems."^[1] Article 726 of the Civil Code contains special provisions related to the relationship between close relatives, reflecting this humanistic concern with Chinese characteristics, and it is worthwhile to further explore its social reasons, theoretical basis, and whether such norms can be applied in more general legal acts.

1. Connotation of the priority of close relatives

1.1 The concept of next of kin and priority

The concept of next of kin is first of all a historical and social concept, determined by the family structure in a country's cultural tradition and the role it plays in social life, while next of kin in civil law is a legal concept determined in order to clarify the subjects of certain specific civil rights and obligations. Article 1045 of the Civil Code states that: "Spouse, parents, children, brothers and sisters, grandparents, grandfathers, grandchildren and granddaughters are close relatives." The concept of next of kin stipulated in the Civil Code covers the scope generally accepted by social concepts and traditional culture in a relatively complete manner, and specifies the corresponding subjects of legal rights and obligations.

The priority mentioned here is not the "priority" contained in the civil law system of security law, but is expressly provided for in the Civil Code, which gives priority to the effects of a specific legal act in case of competing rights, due to the fact that the two parties have a close kinship relationship as provided by law. Since the basis of this priority is the relationship of close relatives as specified in the law, it is called "priority of close relatives".

1.2 Article 726 of the Civil Code

Article 726 of the Civil Code provides that "If the lessee sells the leased premises, he shall notify the lessee within a reasonable period of time prior to the sale, and the lessee shall have the right of first refusal on equal terms; except when the joint tenant of the premises exercises the right of first refusal or when the lessor sells the premises to a close relative." This provision clearly grants a legal priority to the close relatives of the owner of the house, i.e. the validity of the contract of sale of the house between them and the owner takes precedence over the validity of the contract between the lessee of the house and the owner.

Article 726 of the Civil Code contains the right of co-ownership over the right of pre-emption of the lessee of the house. In the previous civil law has been reflected in the provisions of Article 118 of the General Principles of Civil Law Judicial Interpretation: "The lessor sells the house, shall notify the lessee three months in advance, the lessee, under the same conditions, enjoys the right of first refusal." However, this statutory priority right enjoyed by the next of kin is not available in the previous civil law provisions in China, and the provision can only be established because of the identity relationship between the next of kin.

2. Theoretical basis and expansion possibility of the priority right of the next of kin

2.1 The legal development process from identity to contract

The development of law is a long historical process, family has been the most basic and important social component throughout the long history of mankind, and the special relationship between family members and the normative requirements it brings are recognized by the law. The Confucian family model accepted by the Chinese legal system and the patriarchal system of ancient Rome are its typical representatives. In the early development of civil law (slave society and the pre-modern period of feudal society), the right to identity occupied an important position, as some scholars say "the civil law at that time was, in a certain sense, a law of

identity."^[2]In ancient Rome, where patriarchal power prevailed, parents could deprive slaves who were members of their families of their right to life. In ancient China, there is also a clause that "if a grandparent or parent kills a child who has violated a religious order, and the grandparent or parent kills him/her negligently, the parents are not guilty". In both feudal China and medieval Europe, the father of the family could physically discipline the son of the family.

Since the ideas of liberalism and Enlightenment had an unprecedented impact on the concept of human social life. Famous thinkers such as Locke believed that life, liberty and property are the inviolable rights of human beings by birth, while Kant argued that "liberty is the only original right that every man possesses according to his human nature."^[3]

The reverence for the value of liberty, and the concept of the legal act structured on the basis of liberty, has allowed the already existing kinship and legal acts in history to meet, and the incompatibility of this state of encounter can still be quoted from Maine's Ancient Law: "In the old days, all relations of 'man' were summarized in 'familial' relations, In this new social order, all these relations arise from the free consent of the 'individual'."^[4]

2.2 Humanism is not individualism

All individuals since the beginning of our history have originated from the "factual pre-existence" in a family, which led to the stubbornness of the ethical character of identity, while the functionality of identity in organizing society made it more adaptable and changeable in the process of social change, and the concept of family as a group became The concept of the family as a group has become the formal vehicle for the entrenchment of identity. William Goode asserts that: "the traditional family may have faltered in most parts of the world, but the institution of the family is likely to last longer than in any of the countries that enjoy it."^[5]

The value of individual rights and of man's existence as an individual is certainly undeniable, but is this choice of value an overkill of the long historical yoke of valuing family interests, group interests, and especially religion at the expense of caring for the individual? This is a very worthy question, just as when capital and technology keep expanding, but more people do not enjoy the fruits of it. If the starting point of human society is the awakening of human self-knowledge, then the eternal purpose of human society must be the realization of human values. Humanism is undoubtedly the absolute principle to be adhered to in the development of human society, and individualism is certainly one of the important expressions, but not the only one.

Article 726 of the Civil Code embodies this very humanism. It is natural and economically sound that we should give love and care to those with whom we are more closely connected and closer. It is a moral and, to some extent, a legal obligation that family members should help each other, and it is also most consistent with human nature. Based on this principle, it is self-evident what choice should be made when the needs of close relatives and third persons in general coexist in housing, which is an important means of life.

2.3 The possibility of expansion of the priority rights of close relatives

As mentioned before, a limited number of individuals cannot bear unlimited responsibilities, so the law should leave room for individuals who are the subjects of social relations to realize the care for their next of kin. After all, only a person who loves himself and his family can be expected to care for others in society and obey the law.

The provisions of Article 726 of the Civil Code are limited to a specific object such as a house, which is a material symbol of home, a necessity for individuals seeking material shelter, and has a special character. However, this legislative model, based on humanism and traditional Chinese culture, cannot be extended to too many areas in the modern market economy. In the case of the priority of the contract of sale, for example, it would be inappropriate to make a distinction of validity between the sale of goods in general between close relatives and between third parties in general and the seller. Not to affect the normal daily life of people with specific identity and not to violate the normal operation of social and economic life, these two points can be the basic principles for such legislation.

3. Conclusion

Article 726 of the Civil Code is a milestone of socialist legal culture with Chinese characteristics and socialist civil jurisprudence with Chinese characteristics, reflecting the light of the legal and cultural tradition of the Chinese legal system and humanism. Adhering to "cultural self-confidence" and legislative work based on the basic national conditions will certainly promote the final establishment of socialist rule of law with Chinese characteristics.

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