

The conflict of equality between civil law and non-equality in guardianship system

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Abstract: Civil law is the core of private law, and it is the general term of the legal norms to adjust the personal relations and property relations between equal subjects. Among the many basic principles of civil law, the principle of equality occupies an important position. The principle of equality is the concrete embodiment of the basic attribute and value pursuit of civil law. However, in the specific provisions of civil law, we can still find some embodiment of non-equal relations, such as the parental rights contained in the guardianship system proposed in this paper. The parental relationship between parents and children is naturally dependent and subordinate. Although the guardianship system of China's civil code does not explicitly stipulate the word "parental rights", the specific provisions are reflected. Whether such provisions are contrary to the principle of equality in civil law involves the difference between formal equality and substantive equality.

1. The connotation of the equality principle of civil law

Civil law is the general term of the legal norms to adjust the personal relations and property relations between equal subjects. Equality is an important part of the basic principles of civil law, and also the concrete embodiment of the attribute and value of civil law. The formation of the principle of equal subject in civil law is not accidental, but has a deep theoretical basis. It is deeply rooted in the social and economic foundation, legal values and the demand for human rights protection. These factors are intertwined and jointly shape the core position of the principle of equal subject in civil law.

The connotation of the principle of equality in civil law is mainly reflected in the following aspects: (1) equality of personality, that is, the capacity for civil rights is innate, lifelong and equal within a certain range; (2) equal status, that is, civil subjects are equal in specific civil legal relations, and there is no situation of who is superior to who and who enjoys privileges. In civil acts, the autonomy of will is emphasized to form agreement; (3) enjoy the equal right of relief, that is, the parties are infringed in the civil legal relationship, equal have the right to apply to the relevant authorities for relief and protection.

However, in the civil law, there are also some non-equal provisions that seem to contradict the principle of equality, such as the design of the guardianship system in the general provisions of the civil Code.

2. The particularity of the guardianship system

The guardianship system, as an important civil legal system, refers to the legal system that supervises and protects the person, property and other legitimate rights and interests of persons without civil capacity and persons with limited civil capacity. Its purpose is to make up for the lack of the ward's behavior capacity, protect their legitimate rights and interests, and maintain the stability of social order. In social life, people without civil conduct capacity and people with limited capacity for civil conduct are unable to carry out civil activities independently due to their limited cognitive ability, judgment ability and behavior capacity, and need the guardianship and care of others. The establishment of the guardianship system provides the necessary legal protection for these vulnerable groups, ensuring that they can participate in social life under the protection of the law and enjoy their due rights. The purpose of the guardianship system is to protect the weak system. It is this kind of differential treatment that it is not difficult to see the side that deviates from the principle of equality in civil law.

As the core of private law, civil law's adjustment of civil subject relationship is characterized by "voluntary", "equality" and "agreement". However, the design of the guardianship system breaks through this framework of formal equality. Due to the significant differences in cognitive ability and behavioral ability between the guardian and the ward, as well as the influence of traditional Chinese values since ancient times, the two people show inequality in some levels, and the ward has showed obvious subordination and dependence to the guardian.

3. The non-equality of rights is reflected in the guardianship system

The so-called parental rights, as an important part of the guardianship system, refer to the rights and obligations of parents to protect the personal and property upbringing of their minor children based on their status. My wife Rong, a Japanese scholar, said in her "Family Law": parental right is the right to exclude others in the sense of shouldering the responsibility of feeding, guardianship and educating children, and its content is to seek the welfare of children.

In Roman law, the subject with the ability of rights and can participate in the relationship of private law can only be the "family father", "equal, sovereign and productive family father and their mutual relations" and "endow the civil law with characteristics. In the late Roman society, as the religious ideas, family ideas fade, social dualization and accompanied by the characteristics of the father as the only subject gradually loose and eventually collapse, and gradually obtain a certain subject status, Roman law is no longer a typical group between groups, and has a certain extent of the characteristics of the law between the individual ^[1]. Under the traditional Chinese patriarchal system, there is also the thought that "the king is the key of the minister and the father is the son". In the traditional ethical and moral concepts, the parental relationship between parents and children shows obvious subordination. In the guardianship system of the civil code, this non-equality is also somewhat demonstrated.

3.1 Non-equivalence of the right source

Affinity is naturally produced based on blood relationship and has identity attributes. No matter ancient and modern at noon, there is a history of paternalism. Children have natural and historic manifestations of submission and dependence on their parents in ethics, and minor children are even more so.

Custody is either legal or intended. Although the word "parental right" is not mentioned in the provisions of the civil Code on the guardianship system, the parental right is implied in the guardianship system through the natural provisions of "parents act as guardians". In the civil law

based on the principle of equality, the rights and obligations of parental rights, which is a contradiction on the surface.

3.2 Unbalance of the rights and obligations

Under the influence of the long-honored traditional patriarchal system, children (especially minor children) have a strong dependence on their parents. Even though modern laws stipulate that parents and children have equal status, according to law, in reality, it will still deprive parents of their minor children's independent consciousness and arbitrarily dispose of their minor children's property.

4. The tension of formal equality and substantive justice

The non-equality design in the guardianship system reflects the value choice of civil law between formal equality and substantive equality.

The importance of the value concept of equality has become increasingly prominent since the Enlightenment movement. In terms of its most abstract and original meaning, equality refers to a starting point of value established by subjects based on the consistency between similar subjects ^[2]. For example, "every man is born equal", no matter your property, class, intelligence, and a series of differences, are the same in the "human" group. In the long course of development, equality is divided into formal equality and substantive equality. Formal equality refers to a kind of undifferentiated and unconditional equality, with more emphasis on impartiality in the procedural process, ensuring that each subject is equal in the process of realizing its self-appeal, and there is no special situation ^[2]. While substantial equality is to analyze the deviation between each subject in the complex reality, and to carry out the differential distribution mode based on the difference to achieve the fundamental and abstract equality ^[3]. To some extent, the substantive equality can be regarded as a remedy for the formal equality, and it is a reflection and adjustment of the non-equal situation caused by the formal equality.

The guardianship system under the civil code is exactly the pursuit of substantive equality. Due to the failure of the ward to achieve the complete equality of autonomy due to the lack of behavior ability, it is necessary to make up for his weak position through compulsory legal intervention.

5. The coordination of the equality principle in civil law and the parental rights in the guardianship system

5.1 Clear on the right boundaries of parental rights

It is a key measure to further refine the boundary of equality and property from the legal level and balance the relationship between equality and inequality in the legal system. This not only helps to protect the legitimate rights and interests of children, so that they can grow up healthily under the protection of parental rights, but also can regulate the exercise of parents' parental rights, to avoid excessive intervention of parental rights to harm their children. If it is stipulated that parents' benefits to their children shall be limited to the interests of their children, and non-necessary punishment shall be prohibited.

5.2 Establish an effective parental rights relief mechanism

First of all, the relief mechanism stipulated in China's guardianship system is mainly aimed at the post-supervision, which needs to be started under some conditions, such as the guardian seriously

infringed on the rights of the ward, the guardian dispute, the guardian did not fully perform the guardianship duties. Post-supervision is passive and lagging behind. If the ward is irrevocably hurt due to the guardian's failure or abuse of rights, post-supervision often does not help. Therefore, it is also very important to improve the active supervision in advance, such as arranging the relevant units to assess irregularly during the guardianship period, timely monitoring of abnormal phenomena, and requiring the guardian to report regularly.

Thirdly, in order to prevent the unilateral monopoly of the guardianship right of the minor children after divorce, the principle of "common parental" can be introduced^[4] to ask parents to perform their guardianship duties and supervise each other.

Finally, the "principle of maximization of the interests of children" is clearly stipulated. The essential purpose of the establishment of parental rights is to protect the personal interests and property interests of minor children.

5.3 Add a system of guardianship and supervisor

Current law to set up special supervisor without mandatory requirements, for the guardian guardianship behavior mainly depends on blood, emotional and moral constraints, when the guardianship design to the larger interests, no supervisor of the supervision of the guardian is easy to breed many problems, thus to the guardian property and personal irreversible damage, so against the original intention of the guardianship system set up. Especially the new intended guardianship, meaning guardianship agreement is different from general agreement, the agreement takes effect, the guardian has entered the state of guardianship, because of lost capacity for civil conduct and unable to express their meaning, maintain their rights, the performance of the guardianship agreement cannot be effectively guaranteed, the guardian of the rights abuse risk thus^[5].

Therefore, the establishment of full-time guardianship supervisor is also a usable method. The establishment of guardianship supervisor can not only play a supervisory role on the supervisor, but also indirectly protect the rights of the supervised person.

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