Orientation of "Law" in the General Principles of the Civil Code

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***Abstract**: The construction of a society under the rule of law in China has entered the "Civil Code Era", and the exploration of the Civil Code has also entered the "Interpretation Era". The text of the Civil Code is an empirical basis for understanding civil law. The term "law" appears frequently in the General Regulations of the Civil Code, which either refers to this law, or refers to legal norms outside this law, or refers to the non-existent provisions. "Law" is a channel linking the Civil Code with other legal norms. The establishment of "Law" should take necessity as an important consideration, the balance of certainty and flexibility as the direction guide, and the construction of a systematic and integrated civil law system as the construction of the rule of law the ultimate goal.*

***Key words**: General Regulations; The direction of "law"; Civil Code*

The Classification of the Use of "Law" in General Provisions of the "Civil Code"

In the General Rules of the Civil Code, "law" appears quite a few times. In the 204 articles in the General Rules of the Civil Code, excluding irrelevant expressions such as legal acts, legal binding force, and legal responsibility, it appears 64 times in total. Many articles refer to the term "law". What kind of provision does the term "law" refer to? What function does "law" have in this clause? By clarifying the direction and function of "law", it analyzes the legislative technology adopted by it. On the one hand, it helps judicial officials save judicial costs, quickly retrieve the applicable norms of legal facts, and give full play to the guiding function of the law; on the other hand, it is also an important window to understand the systematization and integration of civil law.

Due to the different content of different legal clauses, this article divides them into the following three categories. This classification can be used to judge whether they are in harmony with the legislative intent of the Civil Code according to the color of rights in different legal clauses.

Rights Protection Clauses

In the General Principles of the Civil Code, the following situations are as follows: Article 62, paragraph 2, "After assuming the aforementioned civil liability, the legal person has the right to indemnification, in

accordance with law or its articles of association, against its legal representative who is at fault." There are also Articles 126 and 127, Article, Article 128, Article 129.

In addition, this type of clause has a main form of expression: it is expressed as "protected by law", such as Article 3, Article 34, Paragraph 2, Article 109, Article 111, Article 112, and Article 113.

The surname of the Civil Code is "citizen". It stipulates the relationship of rights and obligations between equal subjects. It is a treasure book to protect people's rights in the new era. The Civil Code has a new personality rights edition, focusing on "parabolic objects at high altitude" and adding a "divorce cooling-off period."

It is precisely because the Civil Code places such emphasis on the protection of rights, the legal provisions pointed to in the rights protection clauses must fully reflect this right protection color of the Civil Code.

Restrictive Clauses

This situation includes as in Article 10 "Civil disputes shall be resolved in accordance with law. Where the law does not specify, custom may be applied, provided that public order and good morals may not be offended. " Similar0 clauses also include legal clauses that stipulate the establishment conditions and procedures: for example, Article 68, paragraph 2 of the Civil Code, "Where there are laws or administrative regulations providing that the termination of a legal person shall be subject to approval of the relevant authority, such provisions shall be followed." There is also Article 58 paragraph 2, Article 61 paragraph 1, Article 70 paragraph 2, Article 71, Article 72 paragraph 2, Article 74, Article 85, Article 89, Article 92 paragraph 2, Article 94 Paragraph 2, Article 103 Paragraph 1 and Paragraph 2, Article 134.

Prohibitive provisions: such as Article 8 "When conducting a civil activity, no person of the civil law shall violate the law, or offend public order or good morals." There are also Article 136 paragraph 2, and Article 161 paragraph 2.

Others: Article 104, Article 117, Article 131, Article 135, Article 140 Paragraph 2, Article 153 Paragraph 1, Article 163 Paragraph 2, Article 176, Article 178 Paragraph 3, Article 197.

The exercise of civil rights or private rights is the subject of rights claiming the content of the rights in order to realize the benefits they receive and enjoy the protection of the law. However, the right holders cannot exercise their rights without restriction, and there should still be boundaries. According to basic legal principles, protective and restrictive clauses are mutually opposed. The former is the norms that the Civil Code grants rights and guarantees the exercise of rights, while the latter is the norms that the Civil Code emphasizes the procedures for exercising rights and restricts them. The protection of rights generally requires restrictions on power. The two are mainly due to the difference in content. The legal provisions pointed to by the corresponding restrictive provisions cannot be protected by rights.

Neutral Clause

Expressed as "others provided by law...": such as Article 68 paragraph 1, Article 69, Article 106, Article 123, Article 143, Article 175.

Others: such as Article 11 of the Civil Code "Where there are other laws providing special provisions regulating civil-law relations, such provisions shall be followed." There are also Article 99 paragraph 2, Article 100 paragraph 2, Article 115, Article 116, Article 118, Article 2, Article 122, Article 136 Paragraph 1, Article 138, Article 146, Article 157, Article 179 Paragraph 2, Article 180 Paragraph 1, Article 188, Article 198, Article 199, Article 201, Article 204.

The Orientation of the Law

The term "law" in the General Principles of the Civil Code has appeared 64 times as a statutory law, but the meaning of the term "law" has always been controversial. There are laws based on positive law and laws based on natural law. As Professor Huang Maorong (2007) pointed out: "But what is a 'law'? Is it limited to the formal meaning of the law enacted by the Congress (legislature)? Or it also includes the 'legislative order' enacted by the legislature, or even the administrative agency Based on the 'administrative rules' promulgated by his authority?" This article makes the following classifications according to the different legal provisions:

Mainly Point to "Corporation Law"

This type of clause mainly stipulates Article 57 to Article 107 of the Civil Code, that is, the regulations on legal persons. For example, Article 61 paragraph 1, "The person with the responsibility of representing a legal person in conducting civil activities in accordance with law or the legal person’s articles of association is the legal representative of the legal person." The "law" in this paragraph refers to the legal representative. Laws such as the "Company Law" stipulate that the company’s legal representative shall be the chairman, executive director or manager in accordance with the company’s rules and regulations, and shall be registered in accordance with the law. Of course, in addition to the company law, there are other laws that stipulate the legal representative. For example, the "Higher Education Law of the People's Republic of China" stipulates that the principal of a higher school is the legal representative of the higher school (Huang, 2020).

In addition, there are articles 58 paragraph 2, Article 62 paragraph 2, Article 70 paragraph 2, Article 72 paragraph 2, Article 74 paragraph 1, and Article 85 that refer to the company law.

Point to the "Civil Code"

The codification method of the General Provisions of the Civil Code is to make general and principled provisions of civil law through the method of "extracting common factors" (Ma & Wu, 2018). This Pandekten System makes most of the articles in the General Principles of the Civil Code have general characteristics, and can well adjust the contradiction between the law and social changes. On the other hand, this method of codification inevitably needs to strengthen the close connection between the General Regulations and the

divisions through the patchwork of legislative techniques, so as to realize the systematization of the Civil Code itself. This part of the articles in the General Regulations serves as a link to each sub-edit.

For example, Article 112 "The personal rights of a natural person arising from a marital or familial relationship are protected by law." This kind of personal rights mainly refers to the personal rights arising from marriage, family, and adoption. It is embodied in the Marriage and Family Edition and the Inheritance Edition of the Civil Code.

Another example is Article 115, "Property consists of immovable and movable property. Where the law provides that a right shall be treated as property over which a real right lies, such provisions shall be followed." Property rights include ownership, usufructuary rights, and security property rights (Chen, 2011). The situation of right as the object of real right is mainly reflected in the security real right. Of course, the right as the object of usufructuary right exists in my country's actual situation, such as the establishment of easements on construction land rights and rural land contractual management rights. These provisions are reflected in the property rights of the Civil Code.

In addition to the above, the provisions of the Civil Code also include Article 72 paragraph 2, Article 129, Article 136, Article 140 paragraph 2, Article 146 paragraph 2, Article 161, Article 163 paragraph 2, Article 199.

Point to the Narrow Sense of the Law Outside the Civil Code

Laws in a narrow sense only refer to the laws enacted by the National People's Congress and its Standing Committee. For example, Article 11 "Where there are other laws providing special provisions regulating civil-law relations, such provisions shall be followed." This article clarifies the existence of commercial law as a special law. From the perspective of legislative purposes, certain special commercial rules in the field of private law are difficult and improper. In the Civil Code, the "law" here can be regarded as referring to the entire commercial law system.

Another example is Article 12: "The laws of the People’s Republic of China shall apply to the civil activities taking place within the territory of the People’s Republic of China, except as otherwise provided by law." Laws that regulate foreign-related legal relations, such as the "Law of the People's Republic of China on the Application of Laws on Foreign-related Legal Relations", "The Maritime Law of the People's Republic of China", etc. (Huang, 2020).

There is also Article 58 paragraph 3, which stipulates the establishment of legal persons. The approval in this paragraph actually refers to administrative licensing. Therefore, the establishment of legal persons must comply with the provisions of the Administrative Licensing Law and also involve the fields of personal health and public interest. Some laws provide detailed regulations on the subjects implementing administrative licenses, such as the "Private Education Promotion Law" and the "Food Safety Law" (Huang, 2020). This clause has a special semantic structure, that is, the term law is used in conjunction with administrative regulations. In this case, the law usually only refers to "law in a narrow sense." Similar situations include

Article 68 paragraph 2, Article 89, Article 92 paragraph 2, Article 94, paragraph 2, Article 99 paragraph 2, Article 100, paragraph 2, Article 103, Article 135, Article 143, Article 153.

Article 71"The procedure for liquidating a legal person and the authorities of a liquidation committee shall be in compliance with the provisions of relevant laws; in the absence of such a provision, the relevant rules provided in corporate laws shall be applied mutatis mutandis." This type of clause is a referral clause, and the "relevant law" refers to Articles of the Company Law. The provisions of Articles 183 to 189 limit the legal basis cited by the non-corporate legal person clearing house (Zheng & Zhong, 2018).

In addition, there are Article 104, Article 116, Article 128, Article 180 paragraph 1, Article 188 paragraph 1, 2, Article 197 paragraph 1, and Article 198.

Point to the Law in a Broad Sense

"Law" in a broad sense refers to the whole of the law. For example, as far as our country's current laws are concerned, it includes the Constitution, laws enacted by the National People's Congress and its Standing Committee, judicial interpretations, administrative regulations enacted by the State Council, local regulations enacted by local state power organs, and people's congresses in ethnic autonomous areas. Autonomous regulations and separate regulations formulated (Zhang, 2018).

For example, Article 31 paragraph 3 "..., the residents' committee, the villagers' committee, a relevant organization designated by law, or the civil affairs department in the place where the ward's domicile is located shall act as a temporary guardian." The "law" in this article refers to the provision that is qualified to serve as a temporary guardian. The law of the non-profit organization with specific conditions for the guardian. In this regard, the "Minors Protection Law" stipulates the main body serving as a temporary guardian. In October 2018, the civil affairs department promulgated the "Administrative Measures for Child Welfare Institutions", which clarified the temporary guardianship responsibilities of child welfare institutions. (Kou, 2019)

Article 117 "Where, for the purpose of public interests, immovable or movable property is expropriated or requisitioned according to the scope of authority and the procedure provided by law, fair and reasonable compensation shall be paid." Expropriation and expropriation are mainly regulated by the "State-owned Land and Housing Expropriation and Compensation Regulations".

Article 134 paragraph 2 "Where a legal person or an unincorporated organization makes a resolution in accordance with the procedure and voting method provided by law or stipulated in its articles of association, such a resolution is accomplished as a civil juristic act." This paragraph is the provision for the establishment of the resolution. The company legal person makes a resolution in accordance with the provisions of the "Company Law", and the donation legal person makes a resolution in accordance with the "Foundation Management Regulations" and the "Charity Law" (Huang, 2020).

There is also the second half sentence of Article 157: "If the law provides otherwise, follow those provisions.

" The other provisions in this clause refer to the circumstances when there is no liability for returning property, compensating for a discount, or compensating for losses. For example, in accordance with Article 109 of the Charity Law, property collected from illegal fund-raising is collected.

Article 178 paragraph 3, "Joint and several liability shall be either provided by law or agreed upon by the parties" There are many laws and regulations concerning joint liability, such as Article 24 of the Securities Law and Article 38 of the Drug Administration Law.

Article 179 paragraph 2 "Where punitive damages are available as provided by law, such provisions shall be followed." The laws that provide for punitive damages in my country’s current legal system mainly include the Labor Contract Law and the Food Safety Law. He can also be seen in judicial interpretations, such as "Commercial Housing Sales Contract Interpretation", "Food and Drug Dispute Case Regulations" and so on.

Unclearly Directed Legal Terms

After the introduction of the Civil Code, academics and the Legislative Affairs Committee of the Standing Committee of the National People's Congress published a series of interpretation books on the Civil Code. After reading many versions of the interpretation books, the author found that the author did his best to direct the word law in the clauses. Make a detailed and thorough explanation, but there are still many clauses, and the definition does not explain its specific direction. The reasonable explanation for this is that the word "law" in some clauses does not have a specific point, it is only a general statement, and even the legal provisions in some clauses do not exist at all.

(1) Bottom line clause

For example, in the first paragraph of Article 68, "other reasons stipulated by the law." This category of clauses belongs to the bottom-of-the-line clause, and the situation in the General Regulations: Article 69, Article 106, Article 118 paragraph 2, Article 126, Article 129, Article 175. The bottom line clause is mainly set up to make up for legal loopholes, and to achieve a balance between the stability of the law and the development of reality.

(2) General description

Article 3 "The personal rights, proprietary rights, and other lawful rights and interests of the persons of the civil law are protected by law and free from infringement by any organization or individual." The expression "protected by law" emphasizes the binding force or rights granted by the law and the infringement of rights When you can get legal relief. The term law in this context is a general statement, without a specific point. Similar clauses include Article 34 paragraph 2, Article 109, and Article 131.

Article 8 "When conducting a civil activity, no person of the civil law shall violate the law, or offend public order or good morals." This clause is a prohibitive provision. "Not violating the law" means not violating the mandatory provisions of the law. The law here includes not only civil law but also Other departmental

laws, where the term law emphasizes the constraining meaning of the law in the conceptual sense, and has no specific direction.

Article 10 "Civil disputes shall be resolved in accordance with law..." The "law" here includes both the laws formulated by the Standing Committee of the National People's Congress, as well as administrative regulations, departmental rules and other laws that provide for civil relations in specific areas (Huang, 2020). Civil disputes are complicated and changeable. When handling civil disputes, judicial organs should choose to apply laws in specific fields according to the specific types of disputes. Therefore, the term "law" in this clause is not clear and specific.

(3) Point to an unknown

If article 123, paragraph 2, provides for the object of intellectual property, the law lists seven objects, and article 8 provides for "other objects provided for by law". However, for the other objects provided for in paragraph 8, the various versions of the provision interpretation book do not provide for this. In the existing legal system, it is impossible to find the corresponding legal provisions. In addition to a similar provision is article 138 "Where an expression of intent is not made to any specific person, it becomes effective when the expression is completed, unless otherwise provided by law." By searching the books in the interpretation series of the Civil Code, almost all scholars have pointed out that, according to the provisions of the Succession of the Civil Code, the meaning of the inoperable person, the will, means that it has been effective since the death of the successor (Huang, 2020). However, the view of the relevant provisions of the Civil Code inheritance does not provide for the establishment of a will to indicate the effect of the death of the will, although there is a scientific consensus, but can’t be used as a "law otherwise" point (Ma & Wu, 2018).

Article 127 "Where there are laws particularly providing for the protection of data and online virtual assets, such provisions shall be followed." Data, network virtual property is a new type of property rights with the development of science and technology, its rights and attributes are complex, should be formulated by the National People's Congress and its Standing Committee of the law to make special provisions on this issue, but at present only the law at the level of regulations and regulations to make special adjustments to the network virtual property, such as the Ministry of Culture" Interim Measures for the Management of Online Games".

Article 201 paragraph 2, "Where a time period is counted by hour, the period begins to run from the hour as provided by law or agreed by the parties." Article 204 "The counting of a time period shall be governed by the provisions of this Code, unless otherwise provided by law or agreed by the parties. "For these two provisions calculated during the prescribed period, the search for keywords such as "calculated by hour" on the website of "PKU LAW" has failed to search for laws other than the Civil Code, the General Principles of Civil Law and the General Principles of Civil Law. The law on special provisions of the period is also not noted in the scholars' books on the interpretation of the Civil Code.

The Term "Law" is Used in Legislative Techniques and Perfection

The formulation of the Civil Code is a historic step in the construction of the rule of law in China and an important tool for the realization of the rule of law. The language of the Civil Code should be carried out with precision and rigour, and the use of "law" should give full play to its link guidance function. On the one hand, we can integrate the legislative achievements of the legislature for more than 30 years, integrate the individual laws, judicial interpretations, etc. into an organic whole, and realize the systematization and integrity of civil law. On the other hand, we can overcome the contradiction between the complex and changeable written code and the reality to some extent, and reach the balance between certainty and flexibility.

The Need for the Vague Application

The purpose to be achieved by legal norms is abstract and general in itself. For example, the expression "protected by law" emphasizes the recognition of this by law and comes from the protection of the whole legal normative system. Legal norms and their terms have the characteristics of "openness" to a certain extent, and the word "law" in the expression, in addition to clearly pointing to a provision, but also refers to the legal system as a whole, that is, the meaning of law in a broad sense.

First of all, based on the complex and changeable social life, the rapid development of science and technology, people's cognition of things is always in the exploration, groping on the road to tortuous progress, the object of legal norms adjustment endless and out of the changing state of instability and the number of written law provisions is limited and must be relatively stable, in order to reconcile the contradictions between the two. It is necessary to apply certain legislative techniques, and the vague application of the word "law" is necessary in a realistic sense. For exceptions other than general norms, the vague application of "law" can serve as a back-up to the adjustment of the law by incorporating changes that legislators cannot expect when drafting legislation.

Moreover, the vague expression of the word "law" depends on the special body structure of civil legislation in our country on the one hand, and the setting of the general rules of the Civil Code is to abstract the general provisions from the individual laws, thus avoiding a large number of repetitive provisions, but also to show general and general characteristics in the formulation. The vague application of the term "law" can establish a channel linking the civil code with other legal norms, form a civil law system in which the civil code makes principled provisions and each legal norm makes specific provisions or exceptions.

The Balance Between "Legal" Certainty and Flexibility

First of all, certainty is the essential requirement of law (Zhou, 2010). Marx pointed out that "the law is a positive, clear and universal norm, in which the existence of freedom is universal and theoretical." (Ma & Wu, 2018). It does not depend on the wayward nature of the individual, the code is the Bible of people's freedom. "The clarity of the law stems from the role of its guiding role. People must find their own legal norms of legal behavior from the legal provisions, in order to give full play to the guiding role of the law, according to the guidance of the results to take appropriate legal action premise to find a clear and correct legal norms.

Moreover, flexibility is a rule outside the rules of law, which have general and universal characteristics,

which inevitably make it difficult to deal with complex and volatile cases, which is why legislators have left room for flexibility, intentionally or unintentionally, in the codification of the code. As Roscoe Pound put it: "The law is premised on stability, and the constant adjustment and change of social progress is the key to the vitality of the law." To take only the provisions containing the word "law" as an example, the expression "the law provides otherwise" is to achieve a balance of stability and flexibility in order to maximize the effect of the law.

Perfection of Legislation

(1) The formulation of a one-way law

"Social needs and social insights are always more or less ahead of the law, and we may be very close to meeting the gap between them, but there is now an eternal tendency to reopen the gap," Maine (2011) said. The codification of the law therefore needs to keep pace with the times and reflect the face of the times. As a governance tool to regulate and adjust social relations, the civil code, as a code to protect the private rights of citizens, must respond to the new rights that appear in the development of the generation at any time. However, through the above combing, it is found that the term "law" in some provisions of the general rules refers to law in a broad sense, especially some provisions refer only to administrative regulations and departmental regulations. Although this may be due to complex legislative considerations, or it may be due to bottom-up considerations, but this approach is not conducive to the protection of rights, but also to confuse the civil code and the rest of the normative rank, so that the civil code loses its due legal status. Take article 127 of the Civil Code as an example, " Where there are laws particularly providing for the protection of data and online virtual assets, such provisions shall be followed." The nature and content of the rights of data and network virtual property are more complex, and there are still disputes in practice, so the Civil Code only makes principled provisions on this, how to define the data and network virtual property, to be prescribed by special law. However, in practice, there is no corresponding virtual property single-line law, only through the "Computer Information System Security Protection Regulations", "Decision on the Maintenance of Internet Security" and other administrative regulations and regulations to provide relief in the event of infringement of virtual property, which is obviously not enough to deal with the increasingly complex network virtual property disputes, in order to improve the legal system, should be formulated network virtual property single-line law. To define the nature of virtual property rights; Clarify the subject, content and object of the legal relationship of virtual property; Standardize the ownership relationship of virtual property.

(2) The bottom clause points to perfection

The law is authoritative, but not eternal. The law can not change frequently, the bottom clause as a legislative technology, can enhance the stability of the law, for the law to adapt to social changes to leave room (Zhang, 2014). With the rapid development of science and technology, the formulation of laws is a long process and inevitably lags behind social realities, and article 123 of the Civil Code provides for the object of intellectual property rights, although it is understandable that there is room for special provisions of future laws and that the law can only be a law enacted by the National People's Congress and its Standing Committee but no other object of intellectual property rights can be found in existing law, The bottom clause has no bottom to pocket

is still not suitable as a long-term plan. It is clear that only the object of intellectual property can be stipulated by the law on "narrow sense" in order to establish the principle of "object statutory", so as to put an end to the situation of "intellectual property judge-made law" and "expanding the object of rights protection". At the same time, we should speed up the legal protection of the object of new intellectual property rights and solve the embarrassing situation of no target of the bottom clause. Artificial intelligence-generated content with copyrightability characteristics can be regulated in copyright law (Liu, 2020).

(3) Use with caution "as otherwise provided by law"

"The law provides otherwise" is in fact a formulation of the provisions of the book, in which the first half of the article provides for the general situation, from "law" to the exception. Article 204 "The counting of a time period shall be governed by the provisions of this Code, unless otherwise provided by law or agreed by the parties." The first half of the article provides for the general rules for the calculation of the period, the second half provides for exceptions, civil law respects the autonomy of meaning, provides that the parties are free to agree on the calculation method of the period in accordance with the concept of civil law, but "the law otherwise" means that the special law to make special provisions on the period to be based on the provisions of the special law, but in the current legal system there is no special provision for the period calculation of the law, the legislator for the future law to make room for the direction of consideration also seems too far-fetched. However, the use of books should be based on the criterion of necessity, and the use of books should not be used as a tool to maintain consistency and consistency of provisions. The use of legal language should be rigorous and concise, for which it seems more appropriate to delete the expression "the law provides otherwise" (Zhou, 1991).

Conclusion

The codification of civil code is the crystallization of the experience of the rule of law in our country for decades as a new era civil code with both the times and the forward-looking, the use of the word "law" should be carried out with precision and rigour, with the legal norms pointing to the reality of existence as the premise, pointing to the color of the legal norms rights to conform to the legislative intent, pointing to the object is not necessary to "narrow" on the law, to reduce the needless duplication of attention provisions in order to refine and concise the language of the code. A large number of judicial interpretations of the judiciary should be summarized and absorbed in terms of its connotation and essence, rather than simply including them in the system through the expression "the law provides otherwise". It is true that legislators can not exhaust the absolute understanding of things, should also as far as possible to establish the general expectations of the law, clear "law" to the direction of the field and scope, to achieve a reasonable allocation of legal norms, the construction of a complete system, clear responsibilities, open and conservative unity, dynamic and static combination, stability and flexibility to complement each other's exquisite civil code.

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