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Interests below justice:
Limitation of actions

蒋浩著

正义名义下 的利益考量

诉讼时效制度研究



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图书在版编目(CIP)数据

正义名义下的利益考量——诉讼时效制度研究 / 蒋浩
著. - 贵阳: 贵州人民出版社, 2010. 12

ISBN 978 - 7 - 221 - 09229 - 8

I. ①正… II. ①蒋… III. ①诉讼时效 - 司法制度 -
研究 - 中国 IV. ①D923. 104

中国版本图书馆 CIP 数据核字(2010)第 231977 号

书 名 正义名义下的利益考量——诉讼时效制度研究
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出版发行 贵州人民出版社
责任编辑 谢丹华 唐锡璋
封面设计 何明菲
印 刷 贵阳兴顺发彩色印务有限公司
规 格 889mm × 1198mm
开 本 32
印 张 9.5
字 数 250 千字
版 别 2011 年 3 月第 1 版
版 次 2011 年 3 月第 1 次印刷

书 号 ISBN 978 - 7 - 221 - 09229 - 8
定 价 32.00 元

序

作为一项古老的民事法律制度,民事诉讼时效制度肇始于古罗马裁判官法,专司时间经过对权利产生之各类法律效力。蒋浩博士进入西南政法大学攻读民法学博士学位时,正值民事诉讼时效制度研究回暖之时。其时,他征求意见是否可将诉讼时效作为博士学位论文题目,我深表赞同,也提出了一些具体的注意事项与理论难点。可喜的是,蒋浩博士毕业一年后,经过修改的博士学位论文较答辩之时又有了新的进步。

概括而论,我认为本书的特色和创新表现在以下几个方面:

一、从利益的角度研究诉讼时效制度,使研究视角从制度层面上升到价值理念层面。一定程度而言,各类部门法,特别是民法,都是在保护和限制不同主体的利益中实现其价值。甚至可以说,作为私法的民法,利益既是其制度建立的基石,也是其制度的载体,更是实现私法正义的终极价值追求。

二、本书的研究思路和路径,为诉讼时效制度的研究提供了一种新的视角和新的切入点。就利益识别层面考察,诉讼时效制度中的利益具有多元性;就价值层面考察,诉讼时效制度致力于维护既已形成的某种事实状态,藉此实现有限

资源的有效利用；就规范层面考察，诉讼时效期间之种类设定、期间长短均彰显了法律对各主体利益保护之差异。

三、本书考察了整个诉讼时效制度的宏观结构及制度内部的联系，有助于该制度的进一步发展成熟；同时，从利益衡量的角度对我国有关诉讼时效的现行法律与司法解释进行了评价，肯定了其立法价值与成功之处，指出了不足，并提出了一些具体的立法建议；此外，本书还对诉讼时效制度理论与实践一些重大、疑难问题进行了较为深入的探讨，取得了一些实质性突破。

尤当言者，蒋浩博士三年脱产学习期间，为人谦逊温和，勤学善思，孜孜矻矻，与师门内外师长、学友、同侪多所交流，故其论文既有较为深厚的理论积淀，更能体现突出的实务特色。作为导师，我本人深感欣慰，也希望本书的出版能开启诉讼时效制度研究的新视角并对司法实务产生积极的参考作用。是为序。



二〇一一年二月二日

摘 要

民法上的时间,是一种生活的抽象,具有合理确定和平衡当事人利益的功能。时间作为法律制度中的一个重要因素,在法律上最为直接的表现形式就是时效制度,诉讼时效制度更是典型的围绕时间要求设立的民法制度,其在某种意义上也是一把双刃剑,因为其不仅阻却不正当的请求,也可能影响正当的请求,这是该制度付出的代价,长期休眠的权利,带来的不公平大于带来的公平。德国著名学者萨维尼认为,诉讼时效制度是最重要、最有意义的法律制度之一,至今仍被一致认为是现代法律体系中不可缺少的组成部分。我国台湾学者王泽鉴先生也认为,诉讼时效制度是一个值得深入研究的专题。

本文以诉讼时效法上的利益为逻辑出发点,抓住诉讼时效制度中不同利益关系的保护需求这条主线,在宏观层面对诉讼时效制度中的利益特性、权利限制、利益平衡作了阐述;在历史哲学层面对诉讼时效制度的历史沿革、立法动机及目的、价值取向进行了探讨;在制度层面对诉讼时效适用范围、期间、效力等核心问题展开了分析论述。

第一章诉讼时效法上的利益问题。本章阐述了利益的含义、利益的分类、利益构成的基础。指出了利益与法律是一对紧密联系的范畴,利益是法律形成与发展的内在驱动力,法律则是对利益的确认、界定及分配,并从利益的角度对诉讼时效制度中的利益结构进行了分析。

诉讼时效制度是民法本体论中重要的法律制度,其所体现的利益关系具有以下特性:一是利益关系的主体具有特定性和对应性;二是利益关系的发展具有动态性和诱导性;三是利益关系的内容具有对立

统一性；四是旧的利益关系尊重新的利益关系；五是利益冲突的克服需要通过利益协调和均衡的途径实现。

平衡作为现代法律的精神，既是一种状态，也是一个过程。发现和确立诉讼时效制度中利益平衡的标准，是构建诉讼时效制度的基础，笔者认为作为诉讼时效制度利益平衡的标准，一方面是权利本位。民法作为“权利本位法”，它承认并贯彻“以权利为主导，义务围绕权利而设定”的民法观，诉讼时效制度作为一项重要的民事法律制度生存于民法之中，自然应体现民法的“权利本位法”思想；另一方面是社会公共利益。诉讼时效通过其独有的弱化甚至消灭权利的功能，尽可能保障一般社会的交易安全，维护全体社会成员的社会公共利益。

第二章诉讼时效制度的立法动机、目的、价值取向等诸问题探讨——利益平衡下的思考。本章介绍了诉讼时效制度的起源，大陆法系、英美法系法域对诉讼时效制度的继承与发展，以及我国诉讼时效制度的历史沿革，考察了诉讼时效制度确立的动机及其目的，并对诉讼时效制度效益价值与公正价值进行了再探讨以及两种价值兼顾的实证分析，还讨论了诉讼时效制度与相关制度的关系。

消灭时效产生于罗马法最高裁判官法，它是弥补市民法的不足和缺陷，通过司法造法所创制的法律制度，其作为一项全球性的法律制度为各大法系所继受，有其存在的正当化理由。任何法律制度在社会中都有一定的功能和作用，这是由其所实现的目的决定的，诉讼时效制度是从社会公共利益出发对私权的保护施以时间限制的法律制度，其目的的达到无非是保护真正权利人的直接目标和维护社会公共利益目标两个主要方面，这可以称为诉讼时效制度的二元价值目标。这种二元价值目标是以效益优先、兼顾公正为基础，以利益平衡调节机制为手段加以实现的。

第三章诉讼时效的适用范围——法律利益的选择与衡量。诉讼时效适用范围的确定直接关系到诸对价值之间的平衡，诉讼时效的适用范围主要为债权请求权。

请求权本身的性质决定了其无法自己实现，须借助他人的行为，权利人不能直接取得这种权利所体现的利益，只能请求义务人履行自

己的义务,从而间接地取得利益。权利人长时间不行使权利的外在表象会使义务人产生权利人不再主张权利的合理信赖而对外从事交易行为。因此,权利人及时行使权利与否将影响义务人的行为自由、其与第三人从事的交易行为的确定性、法律关系的稳定性,进而影响社会交易秩序的稳定,所以法律有必要规定诉讼时效制度以对权利行使的期间进行限制。请求权具有诉讼时效的适用性还在于:请求权实质上通过为民事主体行使诉权提供实体法上的基础,向民事主体寻求司法保护提供了手段,在诉讼时效制度和请求权之间形成了内在的紧密联系,构成了诉讼时效适用的对象;从诉讼保护的需要出发,有必要使请求权受到诉讼时效的限制,这也符合诉讼时效制度的立法目的;请求权所处的权利层面所决定的救济性特征使其与诉讼时效追求的目标相契合,因而也应成为诉讼时效的基本客体形态。

第四章诉讼时效的期间——利益冲突的平衡器。立法者通过对诉讼时效期间之长短、中断、中止、延长等规定,来平衡当事人之间的利益。中国特有的国情,意味着太短的诉讼时效使债权人迅速丧失了寻求法律保护的权利,法律的天平在其中失去了平衡。德国债法现代化法将大多数时效中断的事实构成修改为时效中止的事实构成,并增加了时效中止的事实构成,有利于保证权利人具有积极行使其权利的足够时间,不至于因为诉讼时效期间过短而发生时效届满权利效力减损的效果,值得我国在时效立法上予以借鉴。我国《民法通则》规定的诉讼时效延长制度能防止原告因不知情以外的其他正当原因没有及时起诉时带来的不公平,应在完善的基础上保留该制度。

笔者认为,在考虑设置诉讼时效期间长短时,一个总的原则是,应特别关注三方利益的平衡:一是权利人有充分的时间去了解自身权利存在并主张权利,以维护法律对神圣私权的尊重和关怀;二是义务人可以确信自己在特定的时间经过后能受到保护,以保护面临不正当或过时请求的义务人;三是资源的有效利用与诉讼的及时终结,确保第三方的合理信赖利益,以维护社会公共利益。

时效制度的根本意义不在于限制权利本身,而在于维护业已形成的与原有的法律关系对抗的新的秩序与稳定性,只有当权利人不行使

权利的事实状态持续经过较长的期间时,才会使得由此形成的社会关系具有稳定性与确定性。我国《民法通则》所确立的普通诉讼时效期间并不符合我国民众法律生活的实际需要,其过于超前的立法不仅无助于对民事法律生活关系的调整,反而可能冲击诉讼时效制度自身的正当性。

诉讼时效制度最主要的目的是保护被请求人的利益以及建立在法律关系确定性上的不特定第三人的信赖利益而形成的社会公共利益,时效期间何时起算关系到对权利人利益的保护和义务人免受不正当请求或者过时请求的干扰之间的平衡。我国现行法上的诉讼时效期间起算形式,并不像其他法系国家规定得那样复杂,也没有对侵权之债的诉讼时效期间作出特别的规定,对所有权利都是从知道或应当知道权利受侵害之时起算,同时设置了一个以权利被侵害之日起算的最长 20 年诉讼时效期间予以限制,这种诉讼时效期间起算的形式在结构上尽管还显得比较粗糙,但是却符合时效期间最新的发展潮流和趋势。就诉讼时效期间的中断而言,笔者认为,如何科学地规定时效中断的事由,并非易事,它涉及实体法与程序法的配套和协调问题,随着我国民事诉讼法的修改与完善,也应当相应地修改民法中的相关内容,否则我们将面临新的困境。就诉讼时效中止事由而言,我国采取的是折衷主义,即一方面对某些类型的中止事由做具体列举,同时辅以抽象概括的规定,而且司法解释对于“障碍”的规定作了广义的解释,有利于保护时效期间中权利人的利益。我国《民法通则》规定的诉讼时效延长制度的宗旨与“禁止诉讼时效滥用”的法理相同,能防止原告因不知情以外的其他正当原因没有及时起诉时带来的不公平,应在完善的基础上保留该制度。

第五章诉讼时效的效力——利益的意思自治。诉讼时效的效力是诉讼时效制度中的一个根本问题,各国民法持有的不同态度决定了各国在该制度上的价值选择的差异性。虽然诉讼制度中体现了较多的法律强制性,但诉讼时效的效力却更多的体现了当事人利益的意思自治。

我国未来的民法典在诉讼时效的效力上应采抗辩权发生主义,并

明确法官不得对诉讼时效进行释明以及明确当事人援引时间。诉讼时效届满产生被请求人获得时效利益的效果,在不损及国家、集体及第三人的合法利益的情形下,诉讼时效的援引与否应由时效受益人来决定,另从维护社会公益角度出发,时效利益不得预先抛弃。

结语对全书内容进行了归纳。民法设诉讼时效制度,着眼于维护社会公共利益,维护社会经济秩序。诉讼时效制度的实质,在于法律对权利人权利的行使施以时间上的限制。诉讼时效的价值目标是在社会公共利益视角内对公平与效益价值目标的衡量、对权利保护与权利限制的衡量、对权利人个体利益与不特定第三人利益的衡量以及个体利益之间的衡量,这也是该制度存在的正当性的法理基础。

关键词:时效 诉讼时效 利益

Abstract

The time in the civil law is an abstract life, with the function of identifying and balancing the interests of persons. As an important fact in the legal institutions, the time's direct form is limitation system, at the same time the limitation system of action is the most typical civil institution revolving the time. In part, it is a double-edged sword, because it not only negates the improper request, but also affects the legitimate request which is the cost of the system, that is long-term dormant right bring unfair more than fair. Savigny, the well-known German scholar said that the limitation system of action is one of the most important and significant legal systems and still known as an indispensable component in the modern legal system today. Chinese scholars in Taiwan, Wang Zejian also believes that it is a topic worthy of in-depth study.

This article is based on the interests as the logic starting of limitations of action, and seizes the different requirement protection in the limitation system of action. In macro level, the article clarifies the characteristics of interests, the limitation of right and the interests balance in this system; In the philosophy of history level, discusses the history, legislative intent and purpose and value choice; in the institutional level, analyzes the core issues, such as the scope, period, affection and so on.

Chapter I The interest issues in the limitations of action. This part elaborates on the meaning, classification and the foundation of interest. Then the article points out the benefits and the law is linked each other

closely, and the interest is the internal driving force promoting a the formation and development of law. On the other hand, the function of the law is to confirm, define and distribute the benefits. In the end, From the article analyzes the structure of benefit from the perspective of the limitation system of action.

Limitation system of action is an important civil law legal system, their interests reflected have the characteristics as follows: First, the subject is particular and correspondent; Second, the development of interest is dynamic and induced; third, the contents of the interest is a unity of opposites; fourth, the old interests should respects the new ones; fifth the overcoming of the conflict of interest needs coordination and balance of them.

The balance as the modern spirit of the law is both a state and a process. To find and establish the standard of balance is the basis for building the limitation system of action. The article thinks that the standard of balance is "rights-based" on the one hand. The civil law is as a "rights-based Act", which recognize and implement the civil law concept of "rights-oriented and obligation set according to the rights". The limitation system of action as one of the important system in the civil law should reflect this nature. On the other hand, the "rights-based law" thinking; on the other hand is the social and public interests. Through its unique function of weakening or even elimination of the right Limitation system of action protects transaction security and maintains the social and public interests of all members.

Chapter II The discussion of the legislative motive, purpose, values, etc-under balancing of interests. It describes the origin of the, inheritance and development in the Civil Law and the Common Jaw as well as the China's evolution of the limitation system of action. Then, it examines the motive and purpose of this system, and discusses the efficiency value and fair value as well as empirical analysis of them, the relationship of this system

and related systems are discussed as well.

Eliminating limitation arising from the highest magistrate in Roman law, it is produced through judicial law-making to make up the deficiencies and shortcomings in the civil law. As a global legal institution which is accepted by the two Legal Systems, it has the justified reason. Any legal system of the society has certain functions and roles, which is determined by the purpose. The limitation system of action offers the limitation to the civil law from the public interests for the purpose of protecting the private rights and the public interest, which is called the binary system of the action-limitation. This dual objective is to benefit the value of giving priority to justice as the basis, the balance of interests as a means of regulatory mechanisms to be achievable.

Chapter III The scope of limitation system of action—selection and measurement of the legal interest . The scope of the limitation system of action determines directly the balance of the various pairs of values. The scope of this system is credit request right.

The request right determined by its nature can not be accomplished by itself, needing other people's behavior. The right-holders should obtain such interest indirectly from the obligation fulfilled by the others. The right-holders does not exercise the right for a long time which produces the external appearance of the rights of obligors no longer claiming the right to engage in reasonable reliance of the external transactions. Therefore, the right by right-holders whether exercises in the time will affect not only the freedom of the creditor, the certainty of the transactions engaged in by the third party, but also stability of legal relations and the stability of the order of social transactions. Thereby, the limitation system of action should be provided for limiting the time to exercise the right. Otherwise, the applicability of request right to limitation action lies: the request right substantially through the exercise of the right provides the basis of substantive law for the civil subject appeal rights, provides a mean for seeking judicial protec-

tion; the intrinsic relationships is formed between the limitation system of action and the request right constituting the applicable object; The request right should be restricted by the limitation system of action due to the need of protection of the sue, and it is consistent with the legislative purpose and function of limitation system of action; the characteristics of relief of request right makes it be the basic object of the limitation system action which corresponds with the target of the limitation system of action.

Chapter IV The period of limitation action—the equalizer for the conflict of interest. Legislators balance the interests between the parties through the length of the period of action-limitation, suspension, interruption, and extention. Due to the China's national conditions, the shorter period enables the loss the right to seek legal protection rapidly for the creditors, which the loss of the balance between them.

The majority materials of interrupted limitation were turned into the suspension in the German Credit Law, and increased the fact of suspension, which ensure that the right holders have enough time to exercise their rights because they can not too short and the effectiveness of the right. This method should be considered during our legislation about the limitation. The extent system of the limitation action under China's Civil Law should be perfected, because it can prevent the plaintiff from unfair reasons innocent legitimate reasons.

The author believes that a general principle should balance three parties benefits as follows :First, the rights holders have sufficient time to understand their rights and to claim, safeguarding the law respecting and caring sacred private rights; second, the obligation holders should be sure that he(she) can be protected in order to protect after a specific time against the improper or obsolete request; Third, the efficient use of resources and the timely end of the proceedings ensure that third parties reasonable reliance interests, in order to safeguard social and public interests.

The fundamental significance of the limitation action system is not to limit the right itself, but rather to maintain the stability of the new order against the original legal relationship. The stability and certainty of the social relations arise only when the state undergoes a longer period. The period of the common limitation period is not consistent with the actual needs of people, because the legislation is too far ahead to adjust the civil relationship, conversely, it may impact the legitimacy of the system itself.

The main purpose of the Limitation of actions is to protect the interests of the requested person and the public interests based on the certainty of the legal relations of the third party's trust. The starting point of limitation period decides the balance of the protecting to the interests of rights holders and the interference for the improper and timeout request to obligor. The starting point in China's existing law is not as complicated as the other country, and has no the special requirements for the infringement, which provides the starting point is the rights have been infringed and the maximum 20-year limitation period. The regulation appears fairly thick-made in line with the latest trends.

As far as the interruption of the Limitation of actions is concerned, the author believes that it is difficult to make the scientific provisions to the subject matter, involving the coordination between the substantive law and procedural law. The regulation in Civil Law should change according with the modification of the Civil Procedure Law, otherwise we will face a new dilemma. The regulation to the subject on the suspension in our country is eclectic, certain types of suspension of the subject to make a specific list, supplemented by the provisions outlined in the abstract, and also for judicial interpretation of "handicap" which benefit the protection of people's rights. The purpose of extending reserved in the China's Civil Law is same as "the prohibition of abuse of action-limitation" which prevents the plaintiff from causing unawares legitimate reasons other than failure to make timely prosecution brought unfair.

Chapter V The effectiveness of Limitation of actions—the autonomy of interests. The effectiveness of the Limitation of actions is a fundamental issue in the system of Limitation of actions, the different attitudes holding determines the difference of value. The effectiveness of the limitation of action is more a manifestation of the party autonomy, although it reflects the more mandatory.

The views of defense occur should be adopted in the China' Civil Code of future, and should provide clearly the judges shall not explain limitation of action and the time the parties to invoke. The requested person gets the interests of limitations, without prejudice to the state, collectives, and the legitimate interests of third party. Whether to invoke limitation is decided by the beneficiaries and the interests of Limitation of actions should not be abandoned to safeguard the public welfare.

Conclusion of the full contents. The Limitation system of action aims at maintaining social and public interests, and maintains the social and economic order. The results of the expiration of the limitation is opposite with the indigenous rights occur.

The nature of the Limitation of actions is to limit the time the person to exercise his right. The value of the Limitation of actions is to measure the equity and efficiency in the social public interests, rights protection and rights limitation and the individual interests and the interests of non-specific person, which is the reasonable jurisprudential foundation of the system.

Keywords: Limitation Limitation of actions Interests

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