

# Analysis of the Application "Dilemma" and Scientific Rechtsfortbildung of the Right of Habitation System in China's Civil Code

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## ABSTRACT

The establishment of the right of habitation has positive practical significance for improving China's social security system and promoting the use of goods. This article aims to correctly understand the essence and modern attributes of the right of habitation, and conduct an objective evaluation and analysis of the current norms of the right of habitation in China. After pointing out the "dilemma" in the application of the new regulations on the right of habitation in the "Civil Code", this article tries to improve the current law through legal interpretation and learning from the experience of comparative law, and finally puts forward the prospect of the "marketization" of the right of habitation in China.

**Keywords:** Right of habitation, Civil Code, Personal servitude, Usufruct, Rechtsfortbildung, Function outlook.

## 1. INTRODUCTION

The "Civil Code of the People's Republic of China" (hereinafter referred to as "Civil Code") was officially passed in May 2020. The establishment of the right of habitation was the first initiative of China to introduce usufruct from European countries, and made up for China's long-term lack of the right of habitation. [1] This measure of enriching the types of property rights responds to the requirement of the 19th National Congress of the Communist Party of China to "take a multi-pronged approach to achieve housing for all people" [2]. The establishment of the right of habitation promotes the social support atmosphere, fully reflects the will of the owner, balances the interests of different subjects, and can also realize the function of payment-oriented government.

However, China's "Civil Code" currently only adopts six articles to regulate the right of habitation system, which is obviously too rough. Such a general legislative model cannot withstand the test of right of habitation theory and law hermeneutics, and it is also difficult to deal with complicated actual disputes. Specifically, the shortcomings of the current residency norms include but are not

limited to the following: The definition of the right of habitation concept is too simple and fails to show the complete scope of the connotation of the subject and object of the right of habitation, which easily leads to misunderstandings, overemphasizes the servitude of the right of habitation, does not understand the right of the right of habitation, and ignores the legislative needs of special laws, etc. This article will point out the shortcomings of the existing norms, and discuss how to liberate the right of habitation system from the existing "dilemma" from the perspective of ensuring the coherence and connotative stability of the right of habitation system [3] to help the localization of China's right of habitation system.

## **2. THE EXISTING APPLICATION "DILEMMA" OF THE "CIVIL CODE" RIGHT OF HABITATION SYSTEM**

### **2.1 Legislative Content**

#### **2.1.1 Object**

Article 366 of the "Civil Code" only stipulates that the object of the right of habitation is the "residence", and does not further define or specify the physical connotation and specific types of "residence". Although the core function of the right of habitation is to guarantee the realization of "housing for all people", as the only usufruct with housing as the adjustment object in China, it is a must to realize the mission of maximizing the utility and value of the house, and at the same time satisfying the different needs of the owner of ownership, the holder of right of habitation and even third parties, instead of restricting the ownership of the house [4]. In this way, the right of habitation constitutes a special case of the principle of one property, one right. Therefore, the overly vague norms of the right of habitation object may lead to whether the object is eligible or not fall into the scope of the referee's subjective judgment, affect judicial personnel's judgment on whether the right of habitation is effectively established, and cause academics to question the principle of one property, one right.

#### **2.1.2 Establishment Method**

The "Civil Code" establishes a contract or a will as the method of establishing a right of habitation, and stipulates that the establishment of a right of habitation by a will should refer to the relevant provisions of Chapter 14 of the Property Rights. However, from the perspective of system interpretation, the establishment of the right of habitation through wills also cannot ignore the relevant provisions of the "Civil Code". Therefore, not any type of will can effectively establish the right of habitation, but from the perspective of system integrity, it should be examined whether it fully complies with all the relevant norms of the Civil Code and cannot be treated separately. Therefore, the general provisions of Article 371 of the Civil Code may cause confusion in people's understanding. In addition, it is worth pondering whether the current law provides for the

establishment of the right of habitation is too narrow.

#### **2.1.3 Content**

The right to occupy the specific space of other people's houses and the long-term, stable and exclusive right of use by the holder of the right of habitation are the inevitable results of being the owner of the property right. The principle of "consistency of rights and obligations" requires that the holder of the right of habitation must bear corresponding obligations, and since the significance of the obligation of different subjects is to solve the series of conflicts of interest that may occur between the holder of the right of residence and the owner, the owner also has corresponding obligations. However, China's "Civil Code" does not provide for the obligations of the parties to the right of habitation, and it is urgent to fill this part of the legal gap.

### **2.2 Legislative System**

Personal servitude is the original attribute of the right of habitation, and the special status of the obligee is a necessary prerequisite for enjoying the right of habitation. The right of habitation that has the nature of insisting on personal servitude specificity, unpaid nature, nontransferable nature, non-leasable nature, time-limited nature and functionally restricted nature belongs to the narrowly defined right of habitation [5]. With the development of society and economy, the value of investment right of habitation has been discovered. Although the traditional human servitude of the right of habitation still largely affects the recognition of the multiple functions of the right of habitation by China's legislators, the original single function of the right of habitation to "ensure housing for certain disadvantaged groups" has become an inevitable trend for diversified development in the future. Moreover, since the human servitude of the right of residence originated in the inheritance field of Roman law and still plays an important social security function, in the Marriage and Family section and the Inheritance section, it is more reasonable to emphasize and stipulate the characteristics of personal servitude, such as the personal dependency of the right of habitation, in terms of the system setting of the right of habitation system. However, Chinese legislators only uniformly regulate the right of abode in the "Civil Code" property rights, without combining the diversified development trend of the

function of the right of habitation to investigate whether the series of norms are compatible or not, and there are no special norms and cohesive norms in the Inheritance and Marriage and Family sections.

### **3. RECHTSFORTBILDUNG CONCEPTION OF THE RIGHT OF HABITATION SYSTEM IN "CIVIL CODE"**

#### **3.1 Law Hermeneutics**

##### **3.1.1 Object**

The laws and regulations related to real estate in China do not see the definition of the physical connotation of "residential", so the author gives the following definition combining Article 39 of the "Constitution of the People's Republic of China" "The residence of citizens of the People's Republic of China is inviolable. It is prohibited to illegally search or trespass into citizens' houses" on the object "residence" of the right of habitation: a closed space that is legally constructed and used for residential purposes and that outsiders are not allowed to enter at will, such as urban commercial houses, rural self-built houses, and other buildings whose ownership is recognized by law and whose owners have complete disposal rights. And whether the auxiliary facilities of the residence belong to the category of object, it is more appropriate to measure whether it is necessary for the holder of the right of habitation. The specific space other than the residence that must be occupied in order to meet the basic needs of life should be regarded as the object of the right of habitation, and it is not advisable to expand the interpretation of "basic needs" at will. For example, parking spaces, warehouses, vegetable plots, etc. are not necessarily related to the purpose of ensuring "housing and living" under normal circumstances. As far as the relationship between "residence" and the principle of one property, one right is concerned, a narrow interpretation of "residence" can be made. That is, on the premise that the purpose of establishing the right of habitation is expected to be achieved, the right of habitation should be allowed to be established in a space that can be used independently within a whole house, so as to avoid excessive sacrifices to the interests of all people and waste of space resources. This is also the inevitable requirement of principle of making the best use of everything.

##### **3.1.2 Establishment Method**

According to the "Civil Code", there are six legal forms for a will: self-written, written on behalf of others, printed, audio and video, oral, and notarized. However, since the establishment of the right of habitation in the form of a will should refer to the relevant provisions of the chapter of the right of habitation, the establishment of the right of habitation in a will should meet the "written" requirements of Article 337 of the Civil Code, and the specific connotation of "written" should refer to the provisions of the "Civil Code" Contract Compilation General Rules, that is, "the contents contained can be tangibly expressed by means of electronic data exchange, e-mail, etc., and the data messages used for checking can be retrieved at any time, and regarded as written form", and the audio and video will conform to the characteristics of "electronic data exchange". Therefore, the system explains that all five types of wills except oral wills can establish the right of habitation.

In addition, it should be noted that in practice, groups that are in urgent need of housing security may not be able to reach a right of habitation contract with the owner by themselves, and they do not have the conditions to enjoy the right of habitation through a will. The limited and closed way of establishing the right of habitation in the Civil Code is likely to defeat the purpose of protecting certain groups of "housing". Based on this, "judicial coercive force" should be allowed to intervene, and it is necessary to add "court judgment establishment" as one of the methods of establishment of the right of habitation. This method of establishment will play an important role in unilateral disadvantaged group disputes [6] (such as divorce disputes, "three support" disputes, etc.) that urgently need housing security.

##### **3.1.3 Content**

The design of the obligations of the holder of the right of habitation and the owner can refer to the relevant specifications of the lease contract in the "Civil Code" contract. Accordingly, the obligations of the holder of the right of habitation include but are not limited to: properly using the specific space according to the standards of a good manager, not to improve the specific space without authorization, returning the specific space when the right of habitation is eliminated, etc. Fulfilling the duty of tolerance is a necessary prerequisite for the owner to maintain a good housing relationship with

the owner. As far as the holder of the right of habitation is concerned, he/she should tolerate the reasonable use of the part of the space without the right of habitation and the joint use of necessary facilities in the same suite. As far as the owner of ownership is concerned, it should passively tolerate the proper use of the house by the owner of the right of habitation, but the repair costs incurred by the proper use are usually borne by the holder of the right of habitation. However, if there is damage that is sufficient to affect the right to use the right of habitation, the repair costs should be borne by the owner of ownership, which is more in line with the principle of fairness. In addition, if the holder of the right of residence is at fault for the occurrence of the damage, he/she shall share the maintenance costs in proportion to his/her fault. In short, the subject of relevant expenses should be determined based on the principle of fairness, the standard of "the party that can get more beneficial significance", and the essential difference between the right of habitation and the tenant rights.

### **3.2 System Reconstruction**

The principle of "making the best use of everything" guides the right of habitation system to break through the traditional personal servitude assistance function and emphasizes the usufruct of the right of habitation. Therefore, it is more reasonable to distribute the right of habitation norms in the property rights, marriage and family, and inheritance categories. Specifically, first of all, integrating the multiple functions of the right of habitation, the basic norms of the right of habitation distributes in the property rights. The main content relates to the connotation, subject, object, method of establishment, the cause of elimination, and the rights and obligations of the right of habitation, etc.; Second, the right of habitation norms can be added to the Marriage and Family section. The main content should include the flexible extension of the main body of residence benefits based on the "marriage and family", the establishment of the "three support (raise, foster, and support)" obligations, the compulsory right of habitation, separation or In the case of divorce, there is a situation where the party with inconvenience or housing difficulties enjoys the right of habitation [7] etc.; Finally, the rules of the right of habitation should also be added to the Inheritance section. First of all, the existing "Reference" norms in Article 371 of the "Civil Code" for "Establishment of Right of Habitation by Will" should be revised and moved to the right of habitation rules of

Inheritance section to avoid system chaos; secondly, it is clear that the right of habitation is one of the statutory estates of the surviving spouse of the decedent, but in order to prevent the right of habitation from abusing or idle rights, the decedent should be allowed to set conditions for termination to prevent it; Finally, the deceased is allowed to set up the right of habitation for third persons approved by the deceased through wills or bequests and support agreements, which better reflects the deceased's will to dispose of the house.

## **4. OUTLOOK OF FUNCTION DIVERSIFICATION OF THE RIGHT OF HABITATION**

The function diversification of the right of habitation is closely related to the reconstruction of the aforementioned system. The main reason for the reconstruction of the normative system of the right of habitation in China's Civil Code lies in the fact that the right of habitation not only has the typical function of guaranteeing the "housing" of certain groups, it also has the conditions for "marketization". The exception to Article 368 of the Civil Code concerning the gratuitous establishment of the right of habitation obviously provides a possible interpretation space for the owner to obtain benefits through the establishment of the right of habitation. In addition, foreign legislative experience has long affirmed the legal status of right of habitation with investment nature. Based on this, the right of habitation can be divided into guaranteed right of habitation and circulating right of habitation [8]. The former is derived from the characteristics of personal servitude of right of habitation, and it can also be subdivided into the types of marriage and family security and social security. The latter emphasizes the usufruct of the right of habitation.

There are two main types of circulating right of habitation. One is that the holder of the right of habitation cooperates with the owner to obtain a specific space under the premise that the holder of the right of habitation will rent it out or directly transfer the right of habitation such as "one party pays money and the other offers the field" cooperative housing construction, "two-party joint venture" purchase of houses allocates ownership and right of habitation on demand, etc.; The second is that the owner establishes the right of habitation for others with compensation for the purpose of obtaining benefits, such as time-sharing resort hotels [9], and pension type right of habitation that

"replace old-age care services with money after death" [10], etc. If the "marketization" function of the right of habitation is recognized by Chinese legislators in the future, it will inevitably lead to the expansion of the right of habitation from the original "possession" and "use" to "profit". It is worth noting that the above-mentioned transfer of the right of habitation to a specific space cannot be mistaken for the right of habitation to have the power to "dispose", because the various transfer behaviors carried out by the holder of the right of habitation in the previous article are based on the agreement reached in advance with the owner of the house, that is to say, the "disposal behavior" shown by the holder of the right of habitation is still essentially determined by the disposition power of the ownership, and the two should not be confused.

Acknowledging the diversification of the function of the right of habitation and supplementing it with supporting legal norms to ensure that the right of habitation is liberated from the many constraints of the attributes of personal servitude. It is the full implementation of the principle of making the best use of things and the principle of autonomy of will, and can be used to the greatest extent, and meet the diverse needs of different groups for housing to a certain extent.

## 5. CONCLUSION

The establishment of the right of habitation in a timely manner responded to the needs of the times in China [11]. The sound operation of the right of habitation system will greatly enhance the flexibility of China's social security measures and also help to form a positive social atmosphere of mutual help and mutual assistance. However, it is undeniable that the right of habitation system stipulated in China's Civil Code is far from mature, that is, there are many legislative "hidden dangers" in the current regulations. Only by digging out existing regulatory issues and perfecting them through supporting judicial interpretations can the comprehensive effects of the right of habitation system be fully demonstrated.

## AUTHORS' CONTRIBUTIONS

This paper is independently completed by Xian Qiu.

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