



The Construction and Practice of the Right of Residence System from the Perspectives of China

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Author's contribution

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ABSTRACT

In the history of civil law, the residence right system, as a representative of human servitude, originated from Roman law and continued to develop in the "French Civil Code" and "German Civil Code". Based on the differences between Chinese and Western social and cultural traditions, Japanese civil law did not accept the human servitude system in the initial legal inheritance, and modern Chinese civil law also abandoned the human servitude system based on similar cultural value judgments. With the major changes in social life, based on the response to real social needs, the "Civil Code of the People's Republic of China" created a system of residency rights. This article uses the comparative method to study the historical evolution of the housing rights system, and explore the legal and cultural roots behind the establishment of the system. At the same time, with the help of typical cases, it analyzes the practice of the right of residence after the promulgation of the Civil Code and discusses the legal perfection of the right of residence system. This article points out the unpaid nature of the right of residence, which can easily hinder the development and effectiveness of the right of residence system. In the future judicial practice, we need to expand the interpretation of the law, expand the scope of the right of residence, and expand the legal function of the right of residence system, so as to make full use of social resources to meet the public's housing needs.

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1. INTRODUCTION

The residency system is derived from Roman law and is a manifestation of human servitude. This system is clearly stipulated in the major civil codes of European countries. In the inheritance of laws in modern East Asian countries, proceeding from their own national conditions, they have adopted a repulsive attitude towards this system. The modern civil law system, which created after the legal reform in the late Qing Dynasty in China was based on a similar value judgment and did not establish the right of residence system in the legislation. After the reform and opening up, due to the rapid development of urban and rural economy and the promotion of housing commercialization, objective social demands have been generated for the housing rights system. The Property Law once initially established this system in the draft legislation, but unfortunately, the final legal text was not adopted. In the "Civil Code of the People's Republic of China", the residence right system was formally confirmed in legislation for the first time, and some judicial decisions concerning residence rights were produced after its enactment. However, there are still some controversies in academia regarding the legal nature of residency rights. Regarding the future development trend of residency rights, scholars have also put forward many different opinions, which are worthy of further study. From these issues, this article starts from the discussion of the evolution of the housing rights system in the history of Chinese legislation and points out that this system is adapted to the practical needs of social life, and it will inevitably continue to develop with the changes in social practice. In this sense, the housing rights system established by the "Civil Code" also needs to continuously increase the connotation of commercialization in accordance with the development of practice.

2. THE RIGHT OF RESIDENCE SYSTEM FROM THE PERSPECTIVE OF COMPARATIVE LAW

Roman law is the most developed law in the simple commodity economy and society. The ancient Romans created a rich civil law system in their long-term life practice. The concept of the right of residence originated from Roman law. In Roman law, usufructuary rights, rights of use, and rights of residence are collectively called

human servitude. The servitude of the person is the servitude established for the benefit of a specific person. The original purpose was to bequeath usable rights so that certain family members with inheritance rights (especially widows or unmarried daughters whose inheritance rights were deprived) might obtain a kind of support [1]. Chen Zhaobi, a scholar of the Republic of China, also believed that the right of residence was a special form of usufructuary right in the real right, and it was an individualized real right [2].

The "French Civil Code" is influenced by Roman law. The scopes of right of residence, generation and elimination, etc. are the same as the right of use, but in fact, it has more restrictions than the right of use. Articles 632 to 634 of the French Civil Code stipulate: "A person who has the right of residence in a house may live in the house with his family, even if he is not married when the right of residence is granted; the right of residence belongs to the people who have this right and their families. They only have the right to live but cannot either sell or lease." We can find that the rule of residency in France is: to have the nature of property rights, however, there are clear restrictions on the specific residents, with strict personal attributes.

Article 1093 of the German Civil Code stipulates that the owner of the building are excluded to take the building or part of the building as a residential house and can also be set as a restricted human servitude; the right owner has the right to admit his family in the house and Service and nursing staff equivalent to their status. From the German Civil Code and the French Civil Code, we can see that the German Civil Code more clearly defines the concept of "human servitude", explaining the right of residence that can be set above real property, as well as clear restrictions on the use of personnel, namely "Family members" and "service and nursing staff equivalent to their status." In addition, the "Italian Civil Code", "Spanish Civil Code", and "Louisiana Civil Code" all provide express and even special chapters on the right of residence, and their positioning is the right of servitude with personal attributes.

With legal reforms in the late Qing Dynasty in China, the Qing government introduced the modern Western civil law system. The formulation of the civil law in the late Qing

Dynasty was an indirect inheritance, and the German civil law was studied by inheriting the Japanese civil law. Regarding the choice of legal value, more is the transplantation of modern western law, lack of reflection on the national culture, so there is no establishment of human servitude system in the civil code system. This legislative style was adopted by the subsequent "Draft of Civil Code" and "Civil Code of the Republic of China". The legislative grounds of the Civil Code of China's Taiwan Region specifically pointed out the reasons for not adopting the concept of servitude: "European civil laws have provisions on easement and servitude. The only difference is the Eastern and Western customs. There is no human servitude in East Asian countries. The Japanese Civil Law only provides for easement rights, and there is no clear text about easement rights for people. The customs in Taiwan are the same as those in Japan, so this law only provides easement rights [3]." But today's Japanese law has more Major legislative adjustments. In 2018, Japan amended the Civil Law, adding a chapter to the fifth chapter of inheritance, which stipulates the residence rights of spouses, and stipulates the residence rights of spouses and the short-term residence rights of spouses [4].

3. THE LEGISLATIVE CHOICE OF RESIDENCY AFTER THE FOUNDING OF NEW CHINA

After the founding of the People's Republic of China, the discussion on the right of residence was mainly carried out in the field of property law. When the property law was enacted, scholars had reached a preliminary social consensus on the legal attributes of the right of residence and the establishment of the right of residence system. This consensus is embodied in the formulation process of the "Property Law". In 2002, "Property Law (Draft)" for the first time on the residency provisions of the 8 provisions. Until 2005, "Property Law (Draft)" was once increased to 12 articles, but in the end, it was deleted by all legislators due to "apply a very narrow" [5]. With the continuous development of the housing market, the diversification of the supply of housing sources has become the consensus of society. The report of the 19th National Congress of the Communist Party of China proposed to speed up the establishment of a housing system featuring multi-subject supply, multi-channel guarantee, and simultaneous rent and purchase so that all people can live in a place. To this policy, administrative law

enforcement and other fields and departments have responded positively. At the legislative level, the "Civil Code" also responded to this positively. The "Civil Code" of China used six articles to confirm the residency system in the legislation for the first time. Article 366 of the Civil Code clearly stipulates the usufructuary attribute of the right of residence, clarifying that the purpose of the right of residence is to meet the needs of life and residence. This provision fundamentally solves the long-standing problem of the relationship between residency rights and leasehold rights. There are certain similarities between the right of residence and the leasehold system in terms of form. Although the lease right belongs to the category of creditor's rights, in order to protect the interests of the lessee, the stipulation that "sales do not break the lease" makes it possess a certain property right attribute.

From the establishment of rights and obligations of the right of residence and the right of a lease, it can be seen that there are essential differences between the two. There are essential differences in the formal requirements, duration of rights, and gratuitous nature of establishment. From the perspective of the form of the establishment, the lease right is a creditor's right, and its establishment adopts the principle of autonomy of will, and the establishment only needs to reach an agreement between the two parties. However, the right of residence is a real right. In accordance with the principle of statutory real right, the establishment must go through registration procedures. Article 368 of the "Civil Code" clearly states that "a person who establishes the right of residence shall apply to the registration agency for registration of the right of residence. The right of residence shall be established at the time of registration." It can be seen that the right of residence is a usufructuary right that needs to be registered against a third person, to maximize the protection of related parties' interests. From the perspective of the gratuitous nature of rights, the two have essential differences. The "Civil Code" also clearly mentions: "The right of residence is established free of charge unless otherwise agreed by the parties." This kind of gratuitousness is mainly in response to the inherent demand for the establishment of the right of residence, that is, the public's mentality of belonging and the Urgent housing demand accordingly. The lease right is paid, and the lease right is established based on the lease contract, and the lease right generally requires the lessee to pay the consideration. From the perspective of the

duration of rights, there are also great differences between the two. Article 705 of the Civil Code stipulates: "The lease term shall not exceed 20 years. If it exceeds 20 years, the exceeding part shall be invalid." In practice, the limitation on the lease right term is to implement the creditor's nature of the lease right and prevent the parties Circumvention of the law. But for residency, the "Civil Code" section 370 provides that if there is the expiry of the term of residency or deaths of residency owner, residence can be destroyed. Judging from this provision, the right of residence is not subject to the 20- year time limit and the elimination of the right of residence is subject to the purpose of establishing the right of residence in law.

4. JUDICIAL PRACTICE AND IMPROVEMENT OF RESIDENCY RIGHTS AFTER THE ISSUANCE OF THE CIVIL CODE

4.1 Judicial Practice of Residency Rights

According to the author's data search on the magic weapon of Peking University, it was found that after the "Civil Code" was promulgated, legal judgments on the right of the residence appeared all over the country. A more typical case is the following case: Wang Di (pseudonym) is the daughter of Wang Jiahe (pseudonym) and Li Fang (pseudonym). Wang Jiahe and Li Fang divorced a few years ago and Wang Di lives with Wang Jiahe in the house involved. After Wang Jiahe remarried Zhang Yang (pseudonym), Wang Di claimed that Zhang Yang would not allow him to live in the house involved in the case and requested confirmation of the right to live in the house involved in the case. In this case, the plaintiff Wang Di claimed that I was the daughter of Wang Jiahe and Li Fang. Wang Jiahe and Li Fang divorced a few years ago. The two parties agreed that Wang Di should be brought up by Wang Jiahe, and the house involved in the case would be owned by Wang Jiahe. Wang Jiahe promised that Wang Di could live with him in the house involved in the case. Wang Jiahe remarried Zhang Yang. After the marriage, Zhang Yang drove Wang Di out of the house and prevented her from living in the house involved. In order to protect her legal rights and interests, Wang Di went to the court to confirm her right to reside in the house involved. Wang Jiahe argued that "when I divorced my ex-wife, I agreed that Wang Di

should be brought up by me, so my ex-wife agreed that the house involved in the case should belong to me. I also promised that Wang Di can go to school in Haidian and live in the house involved in the case." In 2008, the property rights of the houses involved in the case were changed and Zhang Yang was added as the co-owner of the houses. Zhang Yang and Wang Jiahe each accounted for 50% of the shares. Wang Jiahe thinks Wang Di has the right to reside in the house involved and Wang Jiahe agrees to Wang Di's litigation request. Zhang Yang argued that he did not agree with all Wang Di's requests. Wang Di does not have any rights to the house involved in the case. The house involved in the case is shared by Wang's family and Zhang Yang , each accounting for 50% of the shares. There was no usufructuary right in the house involved. According to the principle of legal property rights, Wang Di claimed that there was no legal basis for the right of residence.

After hearing the court held that, Some Specified Time Effect Principles of Supreme People's Court on the application of Civil Code People's Republic of China Article III, the fact that civil law disputes before the implementation of the Civil Code, which are not regulated in law and judicial interpretation but in provisions of the Civil Code provisions may apply to the provisions of the Civil Code, but significantly detract party's lawful right to benefits, increasing the legal obligations of the parties or the parties reasonably expected departure from the exception. Regarding the right of residence, the law before the implementation of the "Civil Code" has no relevant provisions, and the provisions of the "Civil Code" can be applied to this case.

In this case, Wang Di claimed the right to reside in the house involved in the case based on the divorce agreement signed between Wang Jiahe and Li Fang and the promise written unilaterally by Wang Jiahe. First of all, the divorce agreement signed between Wang Jiahe and Li Fang outside the case stipulated that Wang Di was raised by Wang Jiahe and the house involved in the case belonged to Wang Jiahe. Wang Jiahe and Li Fang outside the case did not establish corresponding rights for Wang Di when they split the house. Secondly, Wang Jiahe unilaterally promised that Wang Di can live in the house involved in the case. This promise is the guardianship obligation that Wang Jiahe should perform as Wang Di's guardian, not the right of residence in the legal sense. Thirdly, after Wang

Jiahe and Zhang Yang remarried, the property rights of the house involved were changed. Wang Di and the current house owners Wang Jiahe and Zhang Yang did not sign a written contract, nor did they register with the registration agency. Based on the above discussion, the court held that as adults now Wang Di asked to confirm the right of residence and have the residency right of the house. Without basic rights, their claims are neither relevant to law before the "Civil Code" implementation of the legal basis, nor in line with the Civil Code. So the court does not support the provisions on the right of residence in China [6]. Judging from the court's judgment, the court's judgment is divided into two parts. First, explore the legal basis used in the trial of the case. Second, explore the requirements for the exercise of residency rights. The court held that the right of residence is the intended usufructuary right, which should be a result of a written contract.

4.2 Legal Improvement of the Residency System

The right of abode is a new legal system in China, and its legal perfection should be continuously developed according to the needs of social practice. In view of the long history of legislation and practice of residency rights abroad, from the perspective of comparative law, we can try to sort out foreign legislation and practice, comparing it with the current laws and regulations in China, and explore possible legal suggestions. According to Article 368 of the current Civil Code, the way of establishing the right of residence is gratuitous in principle. From the perspective of the development process of the right of residence, the establishment of the right of residence in Roman law also emphasizes gratuitousness. The reason is that the right of residence has strong family ethics. It is mainly produced to solve the housing problem of wives and slaves who do not have inheritance rights. It has a moral color and a relief nature to help the poor [4]. The establishment of residency rights in the Civil Code of China requires no compensation in principle, but at the same time, it stipulates that except as otherwise agreed upon by the parties. From the perspective of the value of residency in current legislation, many scholars emphasize the residency of commercial issues [7], believe that the development direction of residency should be commercialized. For this view, this article believes that not only the future

development trend of housing rights is commercialization. The other settings of the civil code regarding the right of residence are also conservative, and the method of expanding the interpretation of the law should be adopted to expand the object of the right of residence and expand the function of the right of residence. The object of the right of abode should not be limited to houses but should be expanded to apply to "houses" in the legal sense. The function of the right of residence should not be limited to satisfying the needs of living but should have more space for social needs.

5. CONCLUSION

The residency system is an ancient civil law system, and its institutional norms in China have also experienced a process from scratch. From the perspective of legislative history, the choice of this system is closely related to the differences between Chinese and Western legal cultures. After the founding of New China, from the final abandonment of the provisions of the draft legislation of the Property Law to the final legislative confirmation of the Civil Code, it was mainly due to the actual needs of solving the social housing problem. In the same way, some problems exposed by this system in judicial practice also need to be continuously improved in social judicial practice. From the perspective of development prospects, it is believed that with the introduction of relevant judicial interpretations and guiding cases, the housing rights system will definitely be able to be continuously improved in practice.

COMPETING INTERESTS

Author has declared that no competing interests exist.

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