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Justification of Income Power of the Right of Residence

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Abstract
366 of the Chinese Civil Code stipulates that "the occupant has the right to enjoy the usufruct right of possession and use of other people's houses in accordance with the contract, so as to meet the needs of living ." According to this, our legislation only limits the right of residence to occupy and use, and the inhabitant's right to usufruct can be excluded.However, at this stage, the author thinks that the right of habitation legislation system with only possession and right of use can not meet the urgent practical needs, and in practice, it is often not suitable to the law.Therefore, it is very necessary to discuss the usufruct of the right of residence from the aspects of the nature of the right, legislative purpose, theoretical basis and practical needs, deepen the theoretical research on the usufruct of the right of residence, improve the legislation of the usufruct of the right of residence, so as to better promote the circulation and appreciation of property, so as to achieve the needs of living.

Key words
civil code; the right of residence; usufructuary right; income power

Foreword

The right of residence has the right to possess and use, which has become the consensus of China, and is confirmed by the laws of most mainland legal countries. However, people's cognition of whether the right of residence has benefits is often not clear enough, and the theoretical research is very little, and the national legislation is rarely reflected. In view of this problem, the author believes that with the transformation and development of economy and society and the rapid change of the overall social environment, if the right of residence is limited to the level of possession and use right, on the one hand, it is difficult to realize its circulation value in the field of economic use, and on the other hand, it is not conducive to the protection of the residential needs of specific groups. Therefore, if the right of residence can be restricted with a certain income right, the housing interests of the right of residence can be guaranteed to the greatest extent. This paper tries to provide an explanation and explanation for the establishment of the right of residence from three dimensions based on the theoretical basis and practical needs of the right of residence.

The right of residence system changes

(1) the historical source of the right of residence

As an ancient right type, the right of residence originated in Roman law. The ancient Roman law divided easement into two kinds, namely easement and human easement, according to the needs of social life, the human easement was divided into profit right, use right, residence right and slave use right. Among them, the right of residence actually refers to the right of use or the right to use the house. Therefore, to explore the problem of the right of residence, it is still necessary to start from the perspective of human easement and combine the right of benefit and the right of use. The so-called "human easement" refers to the right to use the property of others for the benefit of a specific person, that is, the right to use the things of others for their own use and income. Throughout the history of Rome, the original intention of the system is that " with the development of society, at the end of the Republic, there are many liberation days without husband marriage and slaves. Every time the parents die, the life of those who have no inheritance right and lack or lose the ability to work becomes a problem. Therefore, the husband and the family owner bequeathed part of the use right, usufruct and residence right of the property to their wives or liberated slaves, so that they had something to rely on and support for their old age."As for the establishment of the right of residence, its essence is to protect the needs of the vulnerable groups to realize the interests of residence. This legislative spirit coincides with the current "right of residence" in China to solve the housing problem of the masses and achieve the goal of "living".

(2) Changes of the right of residence

From the perspective of time, the succession of the residence system in the continental legal countries is an overall continuous intermittent trend, that is, showing the characteristics of intermittent. The 19th century the French civil code of the French civil code of Chile, the 20th century, the Italian civil code of the Ethiopia civil code of Algeria, the Russian federal civil code (the first part) and our Macao "civil code" of residence system for different degree of succession and transplantation. Among them, the French civil code is relatively complete follow the Roman law residence system, stipulates the "residence to the right to obtain people and their families live necessary to", "to the house, although the right is not yet married, together with its family to live in the house" "residence shall not sell or lease" clause, highlights the distinctive personal attachment and family ethics, from the perspective of development, with the human society of human rights, the emergence of residence benefits is an inevitable trend.

(3) the dialectical application of the right of residence

Some regions in Asia, includingapan, South Korea and Taiwan, do not stipulate the right of residence system. The reason is that the complaint says that "things have different habits", so east Asian countries rarely have a human easement system. Zheng Yubo once believed that "only theapanese civil law did not have the habit of 'human service', and it again hindered the economic circulation, so it only took the easement". At the same time, some scholars believe that "the deep reason for the introduction of human easement is the superficial

understanding of human easement function, which believes that the main function of human easement is pension. In East Asia," filial piety "is preferred and the family pension system is implemented, there is no space for the application of human easement, and the evolution of human easement is interrupted". In this regard, the author believes that the reason for the interruption of the right of residence in East Asian countries is not single and absolute. In habits, national conditions, culture, customs, economic and social conditions, and many other elements under the combination of superposition, to make residence in east Asian countries were stopped, but China's national conditions is different from the countries, the role factors are different, not mechanical handling of residence, should be conform to the national conditions of the correction.

Thus it can be seen that the right of residence has undergone many changes since its emergence, which has considerable plasticity, and China's social situation reflects a certain demand for the right of income. Therefore, if the proposition that the right of residence should be profitable has sufficient rationality, the existing right of residence system can be moderately adjusted.

The evidence of the legal interpretation dimension

(1) the necessity of the legal interpretation

In the current law, the establishment of the right of residence has been completed. From the perspective of legislation, the right has been stable, but there are still problems in the practical application, especially as a measure to solve some social problems, and the problems, which involve the level of interpretation. From the dimension of legal interpretation, the right of residence that has entered the Civil Code can be improved and further explained without shaking the stability of the right of residence itself, which can enrich the system of the right of residence and realize the purpose and social effect of the right of residence.

According to the Israeli scholars harrell (Harel) summarizes the internal reasons and the external reasons of the two basic path of the argument, residential benefits of the rationality and legitimacy constitute the internal reason of the rights should exist, and the internal reasons affect the right argument, the foundation of interests and will, belongs to the essentialism rights theory, in the case of inadequate internal reasons, rights cannot be fixed, more cannot be accepted. Through the perspective of legal interpretation, can discuss the usufruct of usufruct can conform to the legal system and legislative purpose, have legitimacy and rationality, and convert it into a normative concept of constant, and property law system and Chinese society needs, as a kind of independent of the situation, have the concept of unified rigor.

(2) the integrated system of the benefits of the right of residence

China defines the nature of the right of residence under the framework of usufructuary right, so it is inevitable to explore the right of residence system from the perspective of usufructuary right. From the essence of usufructuary right, from the perspective of legal economics, resources are limited, but people's demand for resources is infinite. With the development of social economy and productive forces, the limited resources will be more scarce under people's unlimited demand. In order to solve the problem of reasonable allocation of resources, the usufructuary right system was born.usufructuary right enables non-owners to enjoy certain rights to use and benefit from the things owned by others. Therefore, the usufructuary right system provides a path for the rational allocation of resources, and realizes the purpose of being versatile and making the best

use of things. Similarly, the right of residence defined under the framework of the usufructuary right system should also be guaranteed to have such an effect. The right of residence should be a kind of private law right, which is about the right of "personal interests", and should keep a certain distance from the public law, which requires the right of residence to have a higher requirement on the autonomy of will in the process of exercise, and provides support for the right of income of the right of residence to be exercised.

Secondly, the right of income excluding the right of residence loses the balance of the legal provisions, and there may be contradictions within the legal system. Article 323 of China's Civil Code stipulates that "the usufructuary right holder has the right of the right to possess, use and profit from the realty or chattel owned by others according to law". Under the usufructuary right system, the contracted management right of land contract, construction land and the use right of house land have the right to possess, use and profit, but it is inappropriate to exclude the right of income of the right of residence. Although the creation of law does not rely entirely on logic, it is urgent to give the right of residence a certain amount of income. Residence "into", rules for a kind of usufructuary right, but due to the lack of the corresponding host law, residence in the system is weak, difficult to implement, so the academic problem also put forward solutions, such as professor SuiPengSheng claims will residence into creditor's rights, and rely on policy security system, and put forward the new concept of "useful debt". But the creditor's rights to solve the lack of host law and supporting law, but on the relevant policy, cost is not reduced, good uncertainty, and will lose real right as absolute right and control strong safeguard ability, and if converted into creditor's rights, and the lease of lease will increase, further weaken the good, is not desirable.

In this case, granting the right of residence and the right of income can make the whole usufructuary right structure system more rigorous, logic more rigorous, while also losing the balance of legal provisions. In terms of the provisions, there is no clear denial that the right of residence can have the right of income, but the right of residence belongs to the category of private law, in the field of private law, the law can be prohibited. The original intention of the establishment of the right of residence is to protect the vulnerable groups, and the most urgent and most important demand of the vulnerable groups is naturally life, to improve the living security of the vulnerable groups, and make the phenomenon of the law of the jungle as little as possible. Then, in order to achieve this purpose, under the framework of "autonomy of meaning", it is more logical to reasonably and appropriately give the right of residence a certain amount of income power to fully protect the realization of its interests.

Finally, from the perspective of the comparison between China and foreign countries, the German Civil Code, following the system of the Roman law, which shows that the traditional right of residence gradually changes to the modern earning right of residence, and the right of personal attachment gradually incline to the contractual right. In 1951 through the residential ownership and long-term residence law, residence is defined as a kind of free circulation of long-term residence, the law of the long-term residence can achieve and inheritance, especially the occupancy right of rental, makes the residence out of personal specificity, to better meet the demand of the era of commercial housing, it can be seen that residence from appear should have the benefits of form a complete set with property right system.

(3) the purpose of the usufruct of the right of residence

Residence in Rome era is in order to meet the needs of vulnerable groups, for example, to restore freedom slaves provide basic life guarantee, but due to the change of The Times of the development, the market, clos-

er contact, between countries, so single can create value can quickly realized through commercial activities, for example, migrant workers farmers can quickly find the site or hire restaurants to work, survival interview success rate multiplied by the work location for interview can get the success rate. This is the dividend brought by the development of commerce, and in the Roman law period, there was a lack of means to quickly realize labor, so the right of residence was needed to protect the survival of the foundation. So in the new era, the "task" of the right of residence should be changed. Here to return to the purpose of the establishment of residence —— "to solve the housing problem of the masses, to achieve the housing", here involves several concepts, that is, what degree is "solution", "the masses" refers to which part of the population, "living" what is the meaning.

From these three concepts to understand the right of residence will be more clear.first, "Resolution" cannot be total eradication, There are gray areas in all legal enforcement, So as long as the vast majority of the argument can be; next, "The masses" are inevitably impossible to refer to the extremely vulnerable as in Roman law, In the new China, where the productive forces are gradually developing, Among the vulnerable groups after the existing social relief means, The basic survival concept of living is no need to worry about, What they need is a more stable "housing"; last, "Living in a place" cannot be simply understood as the ownership concept of "everyone has a house", This is relatively unrealistic, Although the country has a vast territory, However, the large population and the gathering of talents determine the current situation of unbalanced population distribution. At least in big cities, the situation of "hard to find a house" is difficult to improve, and the feasibility of a solution from ownership is in doubt, and other solutions need to be sought.

The development of the residence right system in China has experienced a tortuous course from scratch. In 2002, the Property Law (draft for Comments) in 2002, the residence system was confirmed for the first time. The 2005 Property Law (draft) (four review draft) improved the right of residence system with 12 provisions. Later, due to the great disputes in academic theories and prominent differences of views, the relevant provisions of the right of residence system. Since the 19th National Congress of the Communist Party of China, China's economy has shifted from a stage of high-speed growth to a stage of high-quality development, social transformation and urbanization have been accelerating, and the people's demand for housing has been growing. "housing" has become an important livelihood goal of reform and development. For this reason, the residence system has returned into the public view. In 2018, the Real Rights Code (draft) of the Civil Code specifically stipulated the right of residence system, which was incorporated into the Civil Code after deliberation. China's laws should highlight the background of The Times, and also reflect the concept of the rule of law of putting the people first and making legislation for the people. In the past, the opposing scholars in China believed that the function of the right of residence could be completed by other relief ways or the right of residence system was refuted with the habit of no "human service" as a reason. However, after entering the new era, in order to realize the needs of housing security and meet the people's yearning for a better life, the ancient right of residence system should show new vitality through continuous improvement in the new period, so as to give full play to the value of the right of residence.

At the same time, there are also certain restrictions on the application of usufruct. At the beginning of the establishment of the right of residence system, it is in order to meet the living needs of vulnerable groups. If the right of residence system is separated from this legislative purpose, it will become an "attic in the air", making it "a tree without roots and water without a source". Although the development of legal systems in various countries makes the right of residence gradually fade the color of personal dependence, the original intention of the right of residence system is still the fundamental of its development and evolution. Therefore, the right

of residence must be granted under the framework of the main premise of meeting the needs of life, so as to realize the purpose of ensuring the circulation and appreciation of property. The law should strictly limit the way of income, otherwise it will seriously infringe the rights and interests of the owner. For example, the house with the right of residence shall not be used for commercial purposes, for catering, entertainment and other business activities. First of all, this kind of commercial operation breaks through the limit of the right of residence, and does not conform to the basic original intention of the establishment of the right of residence. Moreover, engaging in such business activities will inevitably change the structure of the house, to a certain extent may accelerate the aging and depreciation of the house, bring the value of property, thus seriously infringing on the legitimate rights and interests of the owner. Similarly, if the tenant rents the house to others to realize the income, it is necessary to indicate that the lessee should use only the house within the scope of daily residence. Therefore, if the right of residence is granted the right of income, the person of the right of residence should fully assume its duty of care, in order to achieve the purpose of the income within the scope of daily life.

The proof of the real demand dimension

(1) Analysis of the demand for the benefits of the right of residence

The demand for the income right of the right of residence constitutes an external reason for demonstrating the availability of the right, which exists in a non-constant, situational and specific way, which is related to the realistic demand and cost calculation related to the establishment of the right. When the external reasons are not sufficient, although it will not deny the value and significance of the right of residence in essence, it plays an important role in applying the possibility of income in practice and evaluating the power of the right to solve social problems. It is the focus of strengthening the application of law and transforming paper law into practical law.

After collecting a large amount of data, the author found the following: The housing ownership rate of urban households in China is 96.0%, the proportion of households with one house is 58.4%, the proportion of two houses is 31.0%, the proportion of households with three or more houses is 10.5%, and the average household owns 1.5 houses. The living conditions of urban residents have improved significantly. By the end of 2008,4.5% of urban households lived in single houses; 83.0% of urban households lived in apartments; only 12.5% still lived in buildings and bungalows. According to the China Family Finance Survey (CHFS), the housing ownership rates in China in 2010,2012,2013,2015 and 2017 were 87.6%, 89.68%, 89.68%, 93.5%, 95.4% and 92.8%, respectively, much higher than 60% in the world.

These data are very encouraging at first glance. It seems that China's per capita housing area has reached a fairly good level, but there are also some problems behind the beautiful data. In particular, some survey results on China's housing ownership rate are quite different. For example, the Household Survey Office of the National Bureau of Statistics (2011) gave 89.3%, and the China Family Finance Survey Center of Southwestern University of Finance and Economics gave 90.2%.

As can be seen from this, the survey, the selection of samples and choose the scope of the survey to the survey results have very obvious and important role, the change of these factors will to a certain extent, lead to the change of the final survey results, and we have learned, these data from the census register seat population survey, the lack of migrant workers and inflow of talent, and this part of the population proportion is not

a minority, belong to should be considered is not included in the category. Therefore, the housing ownership rate does not reflect the housing problem in China, and the actual housing occupancy rate and idle rate is more objective. China's population is distributed, which is densely populated in some developed cities, such as Beijing, Shanghai and Hangzhou, but relatively sparse in less developed cities. This distribution leads to higher vacancy rates and occupancy rates, leaving less room for living rights. The emergence of the usufruct of the right of residence can help the distribution of houses, and distribute the idle houses to the people who need long-term stable housing with the invisible hand of the market. Different from the short term of the lease contract, the stability of the right of residence is more in line with the demand of traditional Chinese concepts for the concept of housing.

(2) Explanation of the demand for the income from the right of residence

1. From the perspective of personal interests

For the middle groups, especially the middle groups in developed cities, they have certain economic strength, but cannot afford the high housing price, and at the same time, they have the demand for housing, now these groups only have two choices, one is to rely on mortgage, the other is to rely on rental. If the right of residence allows income, then the middle group can get the right of residence with absolute right and dominant right, which can be regarded as a new solution.

Second, on the pension problem, the influence of family planning policy and modern new fertility, China's aging increasingly serious at the same time, young people per capita need to support the elderly number is on the rise, because some old man failed to meet the requirements of subsidized housing policy requirements, not government subsidized housing, and because do not rely on the market difficult to provide housing to set up housing. No circulation of money means to exclude market regulation, while free often means no circulation of money, and the settlement of the establishment of this law among relatives is really limited. From the perspective of the old man's children, many elderly is the only child, the only child in China more than one hundred million, when both husband and wife are the only child, this means that a couple to raise four or more old man and their children, housing problem is more urgent, and in the case of not introducing the market, to solve this is more difficult.

Here is divided into two parts to discuss, the first kind: the old man without a house. For this kind of old man, support, find for the old man set up housing, children may be able to provide for the old man, but to buy a house or buy a house for the old man set up housing is difficult, in this case, by the money to residential behavior can provide relatively stable living environment. The second case: the old man with a house and no money. After the elderly lost labor ability in daily life is a certain problem, the country's pension and children support generally can be solved, but children no support ability, support ability low, support will and do not enjoy the pension benefits also exist, if the old man only property is unable to maintain life, to ensure housing, only houses also dare not sell rent, so the new income way will have practical value. Here, the use of "transfer the housing ownership to the relevant institutions to obtain the currency needed for life, and require the organization to set up the right of residence", can not only obtain the objective currency needed to maintain life, but also ensure the old housing, is a new solution.

2. From the perspective of the common interests of the society

According to the survey: the national vacant commercial housing increased by 32.3% year on year, while the international warning line for vacant housing is 10%. Thus, our vacancy idle problem is very serious, even need to discuss the new "empty idle tax" to regulate this problem, in contrast, is a large number of demand in our country, the contradiction between both need a mechanism to coordinate, lease lack of stability, the lack of realistic basis, and both economy and stability of housing can act as the medium.

From the real level, the demand for housing and high idle contradiction reflects the derailment of the present situation of resources and demand, and this derailment, is the result of the market failed to intervene, no separation of the general equivalent as an additional weight, it is difficult to foresee someone will be resources in free of charge, this is a violation of human nature, a certain degree of allowed housing benefits, is can increase the intention of the ownership of housing residence. It's important to note here that if you put aside the residency factor, Looking at the idle rate and the number of people who need it, Will also get the derailment situation, But right now the market is stepping in, For this question, I explain a little: the residence exclusion model is purely market independent, Its core purpose is only profit and reciprocal exchange of resources, However, in joining the political factors and right protection of the right of residence, This goes from a market act to a guaranteed altruistic law, Its object is smaller than its purely commercial behavior, Friends, relatives, acquaintances and even nodding acquaintances, But larger than the scope of the right of residence without income, The latter determines that the right of residence will be more established. Only a right is effectively used can explain the necessity, excluding the natural power, such as the patent is applied for, the patent right has meaning, the trademark is registered, the trademark right has useful, the right of residence is established as the beginning of use, and the use, is one of the judgment of whether a right is necessary.

The right of residence is to solve the single problem of "living", and to ensure life and survival. When the right of residence can meet multiple living needs, it can not be limited to only meet the needs of "living". Residency income function eventually to the obligee life a subsidy, as the absolute right and control, compared the lease of claims more powerful, more efforts to solve the problem of housing and by expanding the object, can cover to the "people", for densely populated areas, under the ownership of affiliated residence can also alleviate housing people especially young people's housing anxiety, this is the main role of the new era.

Epilogue

The "inclusion" of the residence right system provides a new way to solve the housing problem in China. However, due to the lack of theoretical research on the benefit of the right of residence, there are great limitations in the legislative level, and it is inadequate at the legal level. So this paper to live the right as the thinking object, on the one hand, aims to cause the experts and scholars for the residential income can extensive attention, on the other hand to break through the right can the existing theory "barriers", so as to further improve the residential rights framework system, make it can both "rescue" as the center, safeguard the housing interests of vulnerable groups, and can meet the income conditions, realize the economic benefits of modern residence.

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