

# Judicial Application and Improvement of Rules for the Right of Habitation in China's Civil Code

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**Abstract.** The addition of the right of habitation system in the Civil Code is of great significance, which not only makes up for the deficiency of relevant laws and regulations, optimizing the allocation of real estate resources but also helps to strengthen the protection of person having a right of habitation. However, there are still some defects in the relevant provisions of the right of habitation, such as failing to link up with the mortgage system, failing to stipulate the preemption right, the legal right of habitation, and the single way of extinguishment. Based on this, the article discusses the right of habitation system from the above aspects, points out the shortcomings of the existing norms in the Civil Code, and puts forward corresponding suggestions, which can be used for reference in order to improve the relevant legislation of the right of habitation in China and refine the protection of the right of the person having a right of habitation.

**Keywords:** Right of habitation; Legal right of habitation; Civil Code.

## 1. Overview of the right of habitation system

### 1.1 The background of the right of habitation system's incorporation into the Civil Code

China's habitation right refers to the usufruct to occupy and use another's housing unit so as to meet the needs of living. Before the promulgation of the "Civil Code of the People's Republic of

China" (hereinafter referred to as "Civil Code"), the right of habitation has not been explicitly guaranteed by law, and the absence of the right of habitation system has brought great difficulties to the entitled party and the judgment of the court.

On one hand, first of all, because China has not stipulated the ways and forms of protection of the right of habitation, most entitled parties can only protect their rights and interests through litigation, which not only increases the burden on the parties but also causes a great waste of judicial resources. For example, in *Xiong A v. Chen A Yuan of Succession*,<sup>[1]</sup> although the parties have established their rights through litigation, they have gone through two trials, retrial, and other complicated procedures, which lasted for two years and consumed a lot of time and energy. Secondly, the existing legal provisions can no longer support the development of the judicial practice of the right of habitation. Because there are no clear legal provisions, judges can only refer to contract law, civil law principles, and other relevant provisions to judge such issues. However, with the continuous development of the right of habitation, such big framework clauses can no longer meet the needs of real life, and judges are confronted with problems such as difficulty in judging, unfounded citing, etc., and disputes over the right of habitation are difficult to solve. [2]If the details such as the establishment of the habitation right can be stipulated by legal form, the daily workload of judges and the cost of safeguarding the rights and interests of parties will be greatly reduced.

On the other hand, the right of habitation is closely related to family problems, therefore establishing the right of habitation is of great significance to ensuring the stability of family life and promoting social stability. Since the 21st century, there have been more than 50,000 cases related to the right of habitation. Among them, one-third of the cases are related to inheritance and divorce disputes. Before the right of habitation system was put into the code, most people didn't know the operation system of the habitation right, let alone how to protect their rights and interests. For example, in *Zhao v. Lu of Divorce*<sup>[3]</sup>, the parties reached an agreement in oral form to establish the right of habitation, which laid a serious hidden danger for the subsequent determination of rights. Only when people have a stable family life, can there be a harmonious society. Frequent disputes over the right

of habitation are not conducive to people's happiness and social stability, and it is imminent for the right of habitation system to be incorporated into the code.

## **1.2 Significance of the right of habitation system's incorporation into the Civil Code**

The right of habitation system's incorporation into the Civil Code is of great significance to make up for the deficiency of existing laws and regulations, optimize the allocation of real estate resources, and strengthen the protection of the person having a right of habitation.

First, the establishment of the right of habitation system makes up for the deficiency of relevant laws and regulations. Before the promulgation of the Civil Code, judges cited contract law, civil law principles, and other relevant clauses in the resolution of disputes. The process was complicated to demonstrate, which greatly increased the workload of judges. On New Year's Day, 2021, the Civil Code came into effect, and the right of habitation was written into Title 14 of Property Rights. The relevant provisions include six parts, such as definition, establishment, and extinguishment. Judges can directly quote the relevant provisions for judgment. This provides the relevant legal basis for judicial decisions, better regulating disputes of habitation rights in judicial practice, and also guarantees the unity of judicial decisions. As an important usufruct, the right of habitation fills the legal vacancy.

Secondly, the establishment of the right of habitation system will help to optimize the allocation of real estate resources. Based on China's basic national conditions and development situation, most cities in eastern China are faced with many problems, such as a large population but little land, housing shortage, and high housing prices. Housing is the most basic guarantee for people's lives, but at present, many people are still faced with the situation of no house to live in. [4]Although the purpose of using other people's houses can be achieved by leasing or borrowing, the power and effectiveness of creditor's rights can't compare with real rights. Moreover, leasing is an onerous juridical act, which can't be fully applied to relations such as marriage and family relationships. [5]Under the right of habitation system, the entitled party can occupy other people's houses for free, protect his legitimate rights and interests, and meet the housing needs of people.

Thirdly, the establishment of the right of habitation system strengthens the protection of the person having a right of habitation. After investigation and analysis, the conflicts of habitation rights in recent ten years mostly occurred in cases of inheritance and divorce, and the vulnerable groups accounted for a relatively high proportion. [6]When the right of habitation is incorporated into the Civil Code, it is equivalent to the state equipping each entitled party with a sword. When being illegally infringed, the person having a right of habitation can take legal weapons to protect his legitimate rights and interests. For example, many elderly people try their best to buy houses for their children when they grow up, but some unfilial children are cruel enough to drive their parents out of their homes, leaving them nowhere to live. If parents set up the right of habitation for themselves while buying a house for their children, if such a situation occurs, they can protect their rights and interests through legal procedures and obtain corresponding housing security.

## **2. The defects of the existing rules of the right of habitation**

### **2.1 Inadequate protection of the person with a right of habitation**

After the promulgation of the Civil Code, the state has set up a series of systems to protect the rights and interests of the person having a right of habitation, such as the acquisition and extinguishment of the right of habitation. However, from the macroscopic point of view, there are still some problems such as insufficient and incomplete protection for the person having a right of habitation.

#### **2.1.1 Failing to connect with the mortgage system**

"The right of habitation and mortgage is the use of other functions of a specific object without transferring the ownership. In terms of nature, the right of habitation and mortgage are both real rights.

"Mortgage right is a security interest that does not transfer ownership, and habitation right is a usufruct that is premised on housing ownership. Both of them can become a burden attached to housing ownership at the same time." [7]

In real life, judicial organs will face the problem of selection and claim of rights in judgment, which can be divided into two situations: the establishment of habitation right before mortgage right and the establishment of habitation right after mortgage right. Before the promulgation of the Civil Code, the Supreme People's Court has made relevant responses to this issue. In *Shaanxi Branch of Bank of Communications Co., Ltd. v. Zhang Wen*, the objection lawsuit was re-trialed. [8] In China, the Supreme People's Court held that the housing buyer's habitation right has priority in effectiveness compared with mortgage right. However, it should be noted that the right of habitation mentioned in this case refers to the right of habitation enjoyed by house buyers.

By searching the dispute settlement cases, it can be found that there are few disputes about the right of habitation and mortgage in judicial practice at present, and the mentioned right of habitation is mostly those enjoyed by the owner or lessee of the house, which deviates from the concept of the right of habitation in the Civil Code. However, with the popularization and development of the right of habitation, such conflicts will continue to increase in the future. At present, the Civil Code and judicial interpretation have not given a solution, there are no relevant guidelines for legislative work in practice, and no consensus has been reached on this issue in judicial practice. The people's courts have a large discretionary space for such cases.

### **2.1.2 Ambiguous stipulation on the preemption right of the person with a right of habitation**

"The preemption right is the right of a specific civil subject to purchase a specific subject matter before others in accordance with the law." [9] There is a preemption right in both tenancy relationship and co-ownership. But at present, the Civil Code and judicial interpretation fail to stipulate the preemption right of the right holder. Therefore, it is believed that the preemption right of the right holder should be stipulated for the following reasons:

First of all, in a tenancy relationship, the lessee enjoys a statutory preemption right. Although the leasehold has the trend of turning into reality right in recent years, it still belongs to creditors' rights. According to general jurisprudence, the real right is superior to the creditor's right, and a right of habitation belonging to the real right should enjoy the preemption right. [10] Secondly, the change in housing ownership will directly affect the living interests of the person with a right of habitation, which is of great significance. If the person with a right of habitation lacks the preemption right, his rights will not be fully protected. Therefore, to better protect the rights and interests of the person with a right of habitation, the right holder should be allowed to enjoy the preemption right. Finally, in the real situation, due to the limited statutory ways to produce the right of habitation, coupled with the traditional Chinese's tendency to stay in their native land and unwilling to leave, the person with a right of habitation should have a closer relationship with the owner than with the lessee and the co-owner. Suppose that the lessee and the person with a right of habitation compete for the ownership of the house, the result is that the lessee gets the house due to the preemption right, while the person with a right of habitation fails to, which will not only directly affects the interests of the person with a right of habitation but also leads to a series of problems such as family disputes that are not conducive to social stability.

In addition, apart from the statutory preemption right, both parties can set up the preemption right independently by means of party autonomy to protect their own rights and interests. In the case of preemption right on a contractual basis, both parties should abide by the contract as long as the contract is valid. [11]

### **2.2 Lack of regulations on the right of legal habitation**

There have been only two ways to acquire the right of habitation so far: by contract or will. In real life, it is unreasonable to simply rely on these two ways. Although acquisition means based on the true will has advantages, it also has flaws in judicial practice, which can be made up for in a way by statutory acquisition means.

First of all, traditional Chinese believe that the house serves as life's basic stone so it is a very important personal property. The establishment of the right of habitation often involves a wide range of interests and negotiating parties, coupled with great difficulty in signing the contract. Secondly, the establishment of the right of habitation often involves family problems such as property inheritance and divorce property division, which are diversified and complicated. Therefore, the parties can't negotiate calmly to reach a settlement, which indicates the role of party autonomy is weak. Finally, the person with a right of habitation often belongs to vulnerable groups such as the elderly and children, who have poor self-protection ability and legal awareness. Being underdogs in negotiations, it is difficult for them to fight for their rights and interests. What's more, Article 368 of the Civil Code stipulates that: to establish the right of habitation, one shall apply to the registration authority for registration. Due to the poor legal and procedural awareness, the vulnerable group may fail to go through the registration formalities or even sign a written contract without the guidance of others, which may result in their failure to establish the right of habitation, thus being unable to fight against the owner. [12]Therefore, the acquisition by will is more likely to be achieved in an ideal state. So, the protection of rights and interests can't be implemented without the help of legal acquisition, considering there are still great operational difficulties in practice,

Firstly, the statutory acquisition means establishing strong protections for the right of habitation at the legal level, which is of great significance, especially for vulnerable groups. Secondly, adding statutory acquisition means can improve work efficiency and reduce the workload of civil affairs staff. In the cases of property inheritance and divorce property division, a party can directly obtain the right of habitation based on court judgment without signing a contract or registering again.

### **2.3 The narrow extinguishment method of the right of habitation**

Article 370 of the Civil Code has stipulated two ways to extinguish the right of habitation so far: the termination of the right of habitation and the death of the person with a right of habitation. It is believed that there are two disadvantages of this provision.

First of all, the death of the person with a right to habitation does not definitely lead to the extinguishment of the right of habitation. There is no provision in the Civil Code that only one person has the right to the habitation of a house. The right of habitation may be held by two or more people at the same time, in a manner of multiple persons at one time, or multiple times. When the right of habitation is not limited to one person, the death of a certain person with a right of habitation does not lead to the extinguishment of the right of habitation of others. [13]Therefore, it is believed that "the death of the person with a right of habitation" in Article 370 of the Civil Code should be modified--the duration of the house should be the lifetime of the person with a right of habitation who lives the longest in the house.

Secondly, this clause leaves out some reasons for the extinguishment of the right of habitation, including the confusion between the person with a right of habitation and the owner, the person with a right of habitation's long-term non-exercise, the voluntary abandonment of the person with a right of habitation, and the total loss of subject matter of the habitation rights.

#### **2.3.1 Confusion between the person with a right of habitation and the owner**

When the person with a right of habitation buys the house and becomes the owner, there is confusion between the right of habitation and ownership. When the person with a right of habitation holds the ownership, the original right of habitation is included in the ownership, which means his right of habitation is extinguished. [14]However, according to the existing institution of the right of habitation, when there is personality confusion and the person with a right of habitation does not take the initiative to go to the civil affairs department to cancel the registration, the registration authority will continue to retain his rights and interests of habitation. This situation may not only affect the establishment of the right of habitation of the house but also send the wrong message to relevant stakeholders.

### **2.3.2 Long-term non-exercise of the person with a right of habitation**

According to Article 369 of the Civil Code, to protect the rights and interests of the right holder, the dwelling in which a right of habitation is created may not be let on lease, unless otherwise agreed by the parties. However, if the person with a right of habitation does not exercise his rights and interests for a long time, while his right of habitation prevents the owner from renting the house, the balance of interests between the person with a right of habitation and the owner will be broken. At this time, the protection provisions in the Civil Code will become a loophole enabling the person with a right of habitation to abuse his rights. It not only ignores the protection of the owner's interests but also wastes real estate resources, failing to live up to the original intention of the legislation.

### **3. The voluntary abandonment of the right by the person with a right of habitation**

When the vulnerable situation changes that the person with a right of habitation can solve the housing problem and move out of the house, the right of habitation has no value. At this time, the person with a right of habitation can give up his right of habitation. According to general jurisprudence, the right of habitation can be abandoned as a right of usufruct. When the right holder voluntarily gives up the right, the right of habitation will be extinguished. However, according to the existing legal system, this situation does not belong to one of the two statutory extinguishment methods. Even if the right holder has made substantial abandonment actions such as moving out of the house, the right of habitation will not be extinguished.[15]

### **4. The total loss of subject matter of the right of habitation**

"The right of habitation belongs to usufructuary right, which takes the value of the dwelling as its content and belongs to the right of use-value. Once the house is lost with its use-value, it makes no sense that the right of habitation continues to exist. If the house is lost, the owner has no obligation to rebuild it for the person with a right of habitation, which means he/she has no obligation to re-establish the right of habitation on the rebuilt house. Even if the person with a right of habitation carries out the reconstruction, it will not lead to the continued existence of the right of habitation." [16] We will discuss the situation when there is a partial loss of the house and when there is a replacement of the house later.

## **3. Improvement of the legislation on the right of habitation**

### **3.1 Further, refine the provisions on the protection of the right of habitation**

#### **3.1.1 Establish the preemption right for the person with a right of habitation**

According to the relevant provisions of Articles 726 and 728 of the Civil Code, the following provisions can be made to establish the preemption right for the person with a right of habitation.: if the owner sells the subject matter of the right of habitation, he should inform the person with a right of habitation within a reasonable time before the sale. What's more, the person with a right of habitation enjoys the preemption right under the same conditions. If within fifteen days, the person with a right of habitation fails to make it clear that he will make a purchase after the owner performs the notification obligation, it will be deemed that the person with a right of habitation waives the preemption right. If the owner fails to inform the person with a right of habitation or other circumstances prevent the person with a right of habitation from exercising the preemption right, he/she may request the owner to bear the obligation for compensation. However, the validity of the house sales contract concluded between the owner and the third party will not be affected.[17]

After adding the preemption right of the person with a right of habitation, an inevitable problem is how to coordinate the rights of both parties when there is a conflict of the preemption right between the person with a right of habitation and the co-owner. We believe that the preemption right of the co-owners should be protected for the following reasons: First, the co-owners enjoy the preemption right because they have the ownership of the house, while the person with a right of habitation, enjoys the preemption right because they enjoy the usufruct. In recent years, although the status of usufruct

has risen, it is based on the ownership after all. When the two conflict, the ownership should be protected first, that is, the rights and interests of co-owners should be protected first. Secondly, some owners are willing to give up their rights and interests to the right of habitation, because there is a relationship of adoption and support between the person with a right of habitation and some owners, but other co-owners do not have the above relationship, so they should not be required to undertake such obligations. Finally, as a burden attached to ownership, the right of habitation will not be extinguished by the change of ownership, that is, even if the house is transferred to other co-owners, the right of habitation will not be extinguished. From this point of view, the person with a right of habitation has been given corresponding relief. Of course, to balance the interests of the parties, if other co-owners reach an agreement with the person with a right of habitation, it should be respected.[18]

### **3.1.2 The extinguishment methods of the right of habitation due to the loss of the subject matter**

The loss of the subject matter of the habitation rights can be divided into partial loss and total loss. If the rest of the house can still meet the normal living needs of the person with a right of habitation, the right of habitation still exists; otherwise, it will be lost. That is to say, whether the right of habitation continues to exist is not based on whether the house is completely lost, and partial loss may also lead to the extinguishment of the right of habitation. It is worth noting that even if the lost house can still meet the normal living needs of the person with a right of habitation, the object scope of the habitation rights has changed. As with the above jurisprudential analyses, the owner has no obligation to rebuild the house or restore its original state to the person with a right of habitation. However, when there is either a substitute for the house or some compensation, the owner can give the person with a right of habitation corresponding compensation.[19]

Article 189 of the Real Right Law of the People's Republic of China(Draft) once stipulated: "If the owner of the house gets compensation due to the loss of the house, the person with a right of habitation shall be compensated; The person with a right of habitation who has no independent living ability can also give up compensation and ask for proper resettlement, except that the house is lost due to the intentional or gross negligence of the person with a right of habitation. "[20] From this clause, we think that the right of habitation has the characteristic of subrogation. [21]When there is a substitute for the house, for their rights and interests, the person with a right of habitation can continue to enjoy the right of habitation on the substitute, but the consent of the owner should be obtained. [22]When the owner gets damages and compensation for the loss of the house, he should give appropriate subsidies to the person with a right of habitation, except that the person with a right of habitation has regained the right of habitation through subrogation. Of course, if the house loss is caused by the intentional or gross negligence of the person with a right of habitation, he has no right to claim compensation and should be liable for compensation based on his fault.

### **3.2 The priority of the right of habitation over the mortgage right in conflicts**

Article 368 of the Civil Code stipulates that to create a right of habitation, an application for the registration of the right shall be filed with the registration authority. The right of habitation is created upon registration. Article 402 stipulates that to create a mortgage on the property as specified in Subparagraphs (1) through (3) of the first paragraph of Article 395 of this Code, registration shall be made for the mortgage. The mortgage shall be created upon registration. Therefore, both the right of habitation and the mortgage over immovables adopt the doctrine of registration effectiveness. Registration is an effective condition for the establishment of rights. Without it, they can't be asserted against a third person. These two rights after registration have the characteristic of right in rem. The right of habitation and the mortgage belong to the category of real right. According to the general jurisprudence, the order of protection should be determined according to the order of right establishment. [23]In this regard, we will discuss two situations: the establishment of the right of habitation prior to the mortgage and the establishment of the mortgage prior to the right of habitation.

### **3.2.1 The priority in the establishment of the right of habitation**

The Civil Code does not stipulate the priority order when the right of habitation conflicts with the mortgage, but the relationship between the mortgage and leasehold is stipulated in Article 405, which is that if the mortgaged property has been leased and transferred before the establishment of the mortgage, the original tenancy relationship will not be affected by the mortgage. According to the general jurisprudence, real rights are prior to rights in persona, so it is presumed that when the right of habitation is established before the mortgage, the right of habitation is not affected by the mortgage during its period of validity. If the mortgagor fails to inform the mortgagee in advance of the facts related to the right of habitation of the house, which causes the interests of the mortgagee to be damaged, the mortgagor shall provide corresponding compensation, except that there is malicious collusion between the person with a right of habitation and the mortgagee. Of course, the person with a right of habitation and the mortgagee can also resolve the conflict of rights through consultation, such as providing another habitation for the person with a right of habitation and giving compensation, so as to restore the ownership of the house to a perfect state.[24]

### **3.2.2 The priority of the establishment of the mortgage right**

When the mortgage is established before the right of habitation, the mortgage is realized and the right of habitation is extinguished. When the right of habitation is established, the mortgagor should inform the person with a right of habitation in written form. If the mortgagor fails to inform in written form that the house has been mortgaged, the mortgagor shall compensate the losses caused thereby. On the contrary, if the mortgagor has informed in written form, the losses incurred shall be borne by the person with a right of habitation. Fundamentally speaking, we believe that it should be forbidden to set up the right of habitation on the mortgaged house, because when the rights are juxtaposed, the rights and interests of both parties may suffer. The person with a right of habitation may have no house to live in, and the mortgagee cannot achieve the perfection of his rights. If A is the mortgagee and has obtained the ownership of house C, intending to sell house C to B. However, the current value of house C is less than the pre-mortgage evaluation value due to the existence of the right of habitation in house C, and the interests of the mortgagee A are greatly damaged. As the right of habitation and the mortgage adopt the doctrine of registration effectiveness, this kind of situation can be prevented from happening at the registration level. When the register shows that there is a mortgage on the house, the civil affairs department shall refuse to give the person with a right of habitation the registration of the habitation right. Of course, if the owner and the mortgagee collude maliciously to cover up the fact of refusing to establish the right of habitation in the name of the mortgage, the mortgage will be invalid, and the losses thus caused should be shared by the owner and the mortgagee.[25]

### **3.3 More extinguishment methods of the right of habitation**

At present, the Civil Code only stipulates two ways to extinguish the right of habitation. After the above general jurisprudential analyses, we think five ways should be added, namely, the person with a right of habitation is confused with the owner, the person with a right of habitation seriously abuses the right, the person with a right of habitation does not exercise the right for a long time, the person with a right of habitation abandons the right independently, and the subject matter of the right of habitation is completely destroyed, damaged and lost.

#### **3.3.1 More extinguishment methods of the right of habitation**

First, when the person with a right of habitation is confused with the owner, that is, when the two legal standings of the person with a right of habitation and the owner are concentrated in one person, the right of habitation is extinguished when the ownership is acquired.

Second, the serious abuse of the right by the person with a right of habitation will lead to the extinguishment of the right of habitation. It includes serious damage to the house, unauthorized transfer of the right of habitation, change of the use of the house, unauthorized rental of the house, failure to carry out normal repairs to the house, and other serious damage to the right of the owner or

the house. [26]It is worth noting that due to the complexity of the reality, the Civil Code should not use enumeration to exhaust such situations but should leave the judge with a large discretionary space, and the judge can make specific judgments on individual cases according to this clause. In addition, we believe that in real life, it is difficult to define the time of the fact of abuse, and the serious abuse of the right by the person with a right of habitation often has the characteristics of a long time and many times. Therefore, the extinguishment time of the right should be defined as the date when the arbitration institution or judicial organ makes the final arbitration or judgment.

Third, when the person with a right to habitation fails to exercise his right for a long time, the right of habitation will be extinguished. In Comparative Law, Article 617 and Article 625 of the French Civil Code define "long time" as 30 years, and Article 1402 and Article 1412 of the Macao Civil Code of China define it as 15 years. We believe that, from the broad environment, China is currently in a period of rapid economic development, and the relationship between the housing real rights and the creditor's rights changes frequently. To protect the owner's interests and make full use of housing resources, the long-time failure to exercise his rights, which leads to the extinguishment of the right of habitation shouldn't be too long. Therefore, the Chinese Civil Code should stipulate such a period as 15 years. [27]We think that the starting point of time should be when the owner or the involved right holder has definite evidence to prove that the person with a right of habitation no longer exercises the right of habitation, such as when the person with a right of habitation moves out of the house.

Fourthly, when the person with a right to habitation voluntarily abandons his right, the right of habitation is extinguished. What needs to be pointed out is that "the abandonment of rights by the person with a right of habitation does not mean that he does not exercise his rights for a long time. The former is a subjective behavior, which must be clearly expressed in written form, while the latter is an objective behavior, and the person with a right of habitation is considered to have made an implied expression of his will." [28] When the person with a right of habitation expresses his intention in a clear way, the right of habitation is extinguished.

Fifth, the right of habitation shall terminate upon the loss of all the subject matters where a house has no remaining part as the house can no longer meet the basic needs of the person with a right of habitation.

### **3.3.2 Legal consequences after the extinguishment of the right of habitation**

After the right of habitation is extinguished due to the above reasons, there would be three legal consequences: residence returning, compensation obligation, and deregistration formalities. First of all, when the right of habitation is extinguished, the person with a right of habitation shall return to the house which shall conform to the state after natural destruction or be consistent with the contract. If the right of habitation is extinguished by the decease of the person with a right of habitation, the successor shall bear the obligation to return it. Second, if all subject matters of a right of habitation are destroyed by the person to the right of habitation, the person shall bear the corresponding obligations for compensation. If subject matters are destroyed directly by the person to a right of habitation, the right of habitation will also be extinguished. Finally, according to Article 370 of the Civil Code: where a right of habitation is extinguished, deregistration of the right shall be made in a timely manner. Therefore, after a right is extinguished, the person entitled to the right should go to the civil affairs authority to deregister in time. [29] It is worth noting that in special circumstances where there is a serious abuse of a right by the person with the right of habitation or long-term non-exercise of a right by the person with the right of habitation, or the abandonment of a right by the person with the right of habitation, other interested parties such as the house owner shall have the obligation to remind the person with the right of habitation to deregister, so as to avoid the loss of interests caused by information gap.

### **3.4 Establishment of the statutory right of habitation**

At present, the establishment of the right of habitation is single in China and the statutory acquisition means is not adequate in the sense that the right of habitation can only be acquired by two

means based on the true will. In practice, the right of habitation involves a wide range of interests which is often associated with family problems including inheritance, marital conflicts, and so on. It is unreasonable to only have acquisition means based on the true will. We suggest adding two more statutory acquisition means.

### **3.4.1 The acquisition of the right of habitation by law**

We can see from the comparative law that the acquisition of the right of habitation by law has become a common acquisition system. For example, Article 579 of the French Civil Code stipulates that "Usufruct is established by law or by a person's wish." [30]; Paragraph 1 of Article 764 of the French Civil Code confirms the legal right of habitation of the surviving spouse [31]. Other Laws such as Paragraph 2, Article 540 of the Italian Civil Code [32], Paragraph 2, Article 612a, [33] and Paragraph 1, Article 219 [34] of the Swiss Civil Code so and forth also have relevant stipulations. We believe that China can refer to the relevant regulations in other countries to directly stipulate the establishment of the right of habitation by law. For example, in the case concerning adoption and support, the law can directly stipulate that minor children may acquire the right of habitation against the dwelling house owned by their parents, and parents may acquire the right of habitation of the dwelling house owned by their adult offspring. [35]

Of course, to prevent endless enumerations with regards to the situations, the Miscellaneous Provisions such as "the right of habitation is established by law" are suggested to be added to the Civil Code. The general content can be stipulated in The Book Real Right of the Civil Code, while the specific situation of the establishment of the statutory right of habitation can be transferred to other special laws for adjustment. In this way, not only is the statutory right of habitation kept open and flexible to a certain extent to adapt to the development of the times but also various special laws are linked up well to ensure the right of habitation functions as the real right in a special law and make the civil law system more scientific. [36]

### **3.4.2 The acquisition of the right of habitation by the court judgment**

Article 230 of the Civil Code stipulates that "Where the real right is altered as a result of a legal document issued by the people's court, the alternation of the real right becomes effective at the time when the legal document enters into effect. The right of habitation which is a usufruct can be subject to this regulation. [37]" We think that the acquisition of the right of habitation by court judgment can be mainly used in the following three situations: first, the severance of divorce property adjudicated by the people's court; second, the succession partition; third, the disputes on support and adoption. [38]

First of all, Article 1090 of the Civil Code stipulates that "Where one party is in financial hardship upon divorce, the other party, if financially capable, shall render appropriate assistance. The specific arrangements shall be determined by the spouses through agreement or adjudicated by the people's court where no such an agreement is reached." Paragraph 3 of Article 27 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Marriage Law of the People's Republic of China (I), which was formulated in 2001, once stipulated that "Where one party is in financial hardship upon divorce, the other party may render assistance by the right of habitation or the right of ownership of the dwelling house under the personal asset. The existing system can continue this supplementary clause, and under certain circumstances, the court can directly confer the right of habitation to the party with financial difficulties. [39] Secondly, Article 1132 of the Civil Code stipulates: Any issue arising from succession shall be dealt with through consultation by and among the successors in the spirit of amity, unity, mutual understanding, and accommodation. The time and mode for partitioning the estate and the shares to be distributed shall be determined by the successors through consultation. Where no agreement is reached through consultation, they may apply to a people's mediation committee for mediation or institute legal proceedings in the people's court. Therefore, when it comes to the estate partition, the court can judge it directly by establishing the right of habitation. However, it should be noted that the premise of establishing the statutory right of habitation is "Where no agreement is reached through consultation". [40] Last but not least, in terms of disputes of supporting and adoption, the people's court can entitle the supported and the adopted

with the right of habitation against the dwelling houses owned by the person who is liable for the supporting and adoption, by which the rights and interests of vulnerable groups can be protected.[41]

Of course, what needs to be emphasized here is that the judge's discretion is not free from regulation. Only when the law clarifies that the party needs assistance, adoption, and(or) support of the other party, can the judge decide on whether to establish the right of habitation in different individual cases.[42]

#### 4. Conclusion

The system of the right of habitation plays an important role in enriching and improving China's usufruct system, facilitating the effective allocation of real estate resources, and promoting the stable development of society. Admittedly, the inclusion of the Right of Habitation is a milestone, but there are still many deficiencies and defects. In this paper, relevant explanations and suggestions from four aspects are put forward: the protection regulations for the right of habitation in detail, the order of protection when the right of habitation conflicts with the mortgage right, and additional ways of the extinguishment of the right of habitation and the establishment of the salutatory right of habitation. It is expected that the rules of the right of habitation in China will be further developed in the future, and the person with the right of habitation will be further guaranteed.

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