

# *The Preemptive Right of Habitation Right Holders*

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**Abstract:** As the first law named after "Code" of New China, the right of residence, which conforms to the development needs of The Times, was quietly incorporated. Residence is a necessary condition for people to survive, live and even produce. The right of residence is the type of real right to live in other people's residence, which belongs to the category of exclusive real right. Since then, a natural person can not only live in his own house under the framework of property right, but also live in others' house through the right of residence. However, as the "usufructuary right" of the first European legal system to be fully introduced, our country has no relevant judicial experience. Although there has been a long discussion about the right of residence in Chinese academic circles, it mainly focuses on the debate about the existence and abolition of the right of residence, namely the debate about the legislation of the right of residence. However, with the entry of the "right of residence", the issue of the existence and abolition of the right of residence has become a dust, and the application of the right of residence and related system design problems have become a new research hotspot. Through the study of the nature and characteristics of the right of residence, this topic will explore the debate on the "right of residence before purchase", and give a brief opinion, in order to make a modest contribution to the system design of "right of residence".

## **1. Overview of the Right of Habitation and the Right of First Refusal**

### **1.1 The concept of the right of habitation**

From the perspective of comparative law, the right of habitation originated from Roman law and is an inherent part of the civil code and a private law right in civil law countries. With the development of society, economy and technology, this system has been widely applied in the modern market economy and has become an important civil legal relationship protected by law. According to Article 366 of the Civil Code, the right of habitation is a usufructuary right that the right holder enjoys over another person's residence as agreed in a contract, aiming to meet the need for living and having the characteristic of independence.[1] Its exercise must meet specific effective conditions. It was originally one of the servitudes in Roman law, which was proposed by Justinian in the Institutes. Servitudes are rights to use another person's property for the benefit of a specific person, including usufruct, use and right of habitation. The right of habitation also retains this feature, providing institutional assistance to the weak to meet their basic living needs. The subsequent regulations on the right of habitation also inherited the spirit of Roman law. For instance, the French Civil Code classified the usufructuary right under the category of personal servitude, and the usufructuary right was composed of the right of use. The right of habitation was a type of the right of use, which was

limited to the needs of family residence in marital and family relations, and was non-transferable.[2] Meanwhile, in the early 20th century, the German Civil Code, while stipulating the usufructuary right and restricting the personal servitude, in order to address the housing needs of divorced families and the transfer of agricultural land, established the right of habitation under the restricted personal servitude, allowing "a specific person other than the owner to set up the right of use of a house for their own residence on another person's building". Moreover, the inheritance of the right of habitation was also reflected in numerous subsequent codes such as the Swiss Civil Code and the Russian Federation Civil Code. These will not be elaborated on one by one here.

Although the right of habitation was first explicitly stipulated in the Civil Code, it has already been reflected in the legal practice of our country. The Supreme People's Court's "Interpretation on Several Issues Concerning the Application of the Marriage Law" clearly states that one party can use the right of habitation or ownership of the housing to help the party with financial difficulties. In judicial practice, courts often rule that the spouse without a residence continues to reside. This clause is sometimes analogically given the effect of opposing ownership. In addition, the "Draft of the Chinese Property Law (for Public Comment)" of 2001 already included the norms of the right of habitation and was retained in the "Property" section of the 2002 Civil Code. The second draft of the Property Law on October 15, 2004, set up a separate chapter of "Right of Habitation" with eleven articles to regulate it. From the Property Law to the Civil Code, it has gone through several rounds of revisions, and finally the right of habitation was stipulated in the Civil Code. However, among the six articles in the Civil Code regarding the right of habitation, only the generation and extinction of the right of habitation are covered, and the effect of the right of habitation is not addressed. Moreover, there is no relevant concept of servitude rights in China, so the study on the effect of the right of habitation cannot be deepened, and thus the issue of the priority purchase right related to the right of habitation cannot be truly clarified.

## 1.2 The concept of the preemptive right

The right of first refusal, also known as the right of pre-emption or the right of priority purchase. The right of first refusal is an important system in the field of private law.

This is also the case in our country. When we look at the legal development process of various countries, the concept of priority purchase rights has a long history. As early as during the Northern Wei Dynasty in China, there was the priority right of relatives to receive farmland; in the "Song Criminal Code", it stipulated: "First inquire about the relatives, affix the seals and signatures, pay the taxes, and if the original owner leaves the area" [3]- this is also the stipulation of the priority purchase right of relatives. In the legal history of foreign countries, in the legal codes of ancient Greece and ancient Rome, in order to enable tenant farmers and tenants to have the right to purchase the farmland they were tenanted ahead of others compared to others, they stipulated their priority purchase rights - this is also the rudimentary form of the modern priority purchase right system. In the legal history of China, the "priority purchase right" for farmland and houses essentially protected the interests of the feudal clans. The "priority purchase right" of relatives can largely prevent the outflow of family property. And the relevant regulations in ancient Greece and ancient Rome also maintained the land possession of the city-state. These two aspects took root and sprouted in different forms of society, but by comparison, it can be seen that regardless of what economic system it is, the design of "priority purchase right" is to better maintain the coordination of all entities under the corresponding economic system, and fundamentally it is inseparable from the social economic reality.

The priority purchase rights in our country include statutory priority purchase rights, policy priority purchase rights and agreed priority purchase rights.

The statutory priority purchase right system is scattered across various private laws such as the

Civil Code, the Company Law, and the Partnership Enterprise Law for different institutional purposes. For instance, the priority purchase right of joint tenants (Civil Code 305), the priority purchase right of lessees (Civil Code 726), and the priority purchase right of shareholders of a limited liability company. The purposes of the design of these priority purchase rights are not all the same, but ultimately they aim to grant a defensive benefit of excluding outsiders from interfering and stabilizing the existing relationship, as well as the acquisition benefit of the existing relationship holders obtaining the ownership of the property. This defensive benefit not only protects the interests of the original people but also the interests of the property. Therefore, in the discussion of the priority purchase rights of the occupier, it is natural to also shift to discussing the relationship between the occupier and the owner of the house. [4]

## **2. The theoretical possibility of establishing the priority purchase right of the occupant**

### **2.1 The necessity of judicial practice**

Before the promulgation of the Civil Code, disputes related to the right of residence had already emerged in judicial practice. After the promulgation of the Civil Code, disputes regarding the right of residence have continued to increase like bamboo shoots after rain. By searching for keywords such as "right of residence" and "execution" on the Chinese Judgments Database, there were 734 cases of disputes related to the right of residence in 2017, and by the end of 2021, the number of such disputes had reached an astonishing 1,639.

As a legislative transplantation in the field of private law, "right of residence" is bound to conflict with the existing judicial norms in our country, and the most concentrated conflict occurs in judicial enforcement cases. In the Baoding Da Fu Case Database, by using the keywords "right of residence" and "compulsory enforcement", there were 121 related cases in 2021. [5] In cases involving the execution of properties related to the right of residence, the court can determine the formation time of the right by reviewing the establishment method and registration status, and compare it with the seizure time to determine whether it can oppose the enforcement. This is the ideal situation.

In reality, the contradiction in the housing mortgage scenario is the most prominent: Mortgage auctions lead to changes in ownership, while the right of habitation lacks the protection of "no sale breaks lease", and the relationship between the two parties urgently needs clarification. If the right of habitation is established before the mortgage right, although it does not disappear with the change of ownership, the contractual agreements regarding house repairs and other creditor's rights cannot be opposed to the new owner, thereby infringing upon the rights of the habitation right holder; if it is established after the mortgage right, the habitation right holder may lose their place to live due to the auction of the property, deviating from the "combined rental and purchase" policy and the original intention of the habitation right legislation.

Therefore, establishing the priority purchase right of the habitation right holder is of great significance, as it can not only reduce the above contradictions but also maximize the savings of judicial resources.

### **2.2 The legal value manifestation of the priority purchase right of the holder of the right of residence**

#### **2.2.1 Manifestation of Order**

"The existence of order is a necessary prerequisite for all human activities. Order constitutes the elements of human ideals and the basic goals of social activities. Law is the symbol of order and also a means to build and maintain it." The stability of the economy cannot be achieved without the orderly

transfer of property.

For the market economy, order provides transaction guarantees and security. The establishment of the priority purchase right of the occupier is an embodiment of order for the market circulation of the involved properties. Firstly, the occupier's long-term stable possession of the property serves as a calming agent for the occupier, enabling them to exercise their rights without any concerns within the scope of their rights. [6] Secondly, the replacement of the owner is bound to affect the stability of the legal relationship between the occupier and the owner. At the same time, the new owner does not naturally accept the use and allocation of the property by the occupier. Moreover, due to the actual control of the property by the occupier, the new owner is very likely to only obtain an "empty" ownership, and will still face a series of disputes in the future. Therefore, by affirming the priority purchase right to protect the possession of the occupier, not only can the legal relationships above the real estate be simplified, avoiding unnecessary disputes caused by the separation of rights; but also it can achieve the leap from "those who own the property have a place to live" to "those who own the property have their own houses", transforming others' houses into their own houses, and making the ownership relationship more reliable.

### **2.2.2 Manifestation of efficiency**

Free market transactions always cause resources to flow towards the party that can utilize them most effectively, in order to achieve the optimal allocation and maximum benefits of the resources.[7] For properties with established occupancy rights, the occupant must be someone who can reasonably and perfectly realize the value of the property. Compared to those who may only obtain "empty" ownership rights, the owner who cannot actually occupy the property naturally cannot utilize it reasonably. Secondly, for the original owner, the priority purchase right of the occupant can reduce certain transaction costs:

(1) The priority purchase right of the resident owner enables the owner to directly negotiate with the resident owner first, thereby reducing costs such as advertising and agency fees. Moreover, the resident owner does not need to spend time on house viewing and purchasing.

(2) The priority purchase right of the occupant enables the owner to negotiate with the occupant first, reducing costs such as advertising and agency fees. Moreover, the occupant doesn't need to spend time looking at houses or purchasing them.

### **2.2.3 Manifestation of freedom**

The priority purchase right of the occupier seemingly restricts the absoluteness of ownership, but in fact, it has no substantive impact and is beneficial to the exercise of ownership. This right does not limit the transaction parties of the house. Even when third parties have advantageous conditions, the owner can still conduct transactions with them, and at the same time, it can protect the interests of long-term occupants. It is in line with the purposes of transaction security, market competition and contractual freedom, and realizes the freedom of legal value.

## **3. Legislative Proposal for Establishing the Priority Purchase Right of the Occupant**

The construction of the rights system in our country follows the logic of "creation - exercise - extinction".[8] In the Civil Code, the provisions on the right of residence are only 6 articles, which are relatively brief and do not include the design of the right of first purchase. However, the right of residence and the right of lease share natural similarities. By referring to the system of the right of first purchase for lessees to explore its legislative approach, it is feasible.

Ownership includes the powers of possession, use, income, and disposition. By separating these related powers, the right of residence (a property right) and the right of lease (a creditor's right) are

formed, constituting a three-level power hierarchy. The Civil Code has already stipulated the right of first purchase for joint owners and lessees, but the right of residence, which is at the second level, has no relevant provisions. Based on the principle of "heavier cases are treated more severely" and the need for the improvement of the power hierarchy, establishing this right has a legal basis and should be given priority consideration.

### **3.1 The entity exercising rights**

This is consistent with the logic of the exercise of the priority purchase right by the lessee. The exercise of the priority purchase right by the occupier is carried out by those who have legally obtained the right to reside through a contract or a will. It should be noted that if the residence contract allows the occupier to lease the house, the third party who is a tenant does not have the priority purchase right.

### **3.2 The conditions for exercising rights**

The right of first refusal is a conditional formation right. The core condition is that the owner's act of selling the property must be a paid, bilateral, and in line with the reasonable market price transaction. At the same time, it must also meet the "identical conditions". This not only means that the price is equal, but also takes into account the substitutability of the acceptance of the obligation by the occupant and the third party.

For example, if the owner sells the property to a close relative, even if the occupant receives an equal amount of payment, they still do not have the right of first refusal. The reason is that the two parties' obligations do not have substitutability. When both parties have substitutable obligations, the comparison of the identical conditions between the occupant and the third party, without harming the interests of the owner, should include:

**Payment method:** If one party makes a one-time payment and the other makes payments in installments, the party making the one-time payment obtains the right of purchase.

**Payment amount:** If the subject matter of the ownership transfer and the subject matter of the occupancy right are completely the same, the occupant can obtain the right of purchase by paying the corresponding price. If the subject matter of the occupancy right is smaller than that of the ownership transfer, for the part of the payment for the occupancy right, paying the corresponding price can still obtain the priority purchase right within the scope of the occupancy right.

**Payment period:** To place the occupant and the third party in the same position, the payment periods of both parties should be based on the agreement reached by the owner and the third party on the payment period. The occupant and the third party, within the corresponding period, who complete the payment of the price first will obtain the right of first refusal.

### **3.3 The rules for exercising the priority purchase right of the holder of the right of residence**

Article 726 of the Civil Code stipulates: "If the lessor sells the leased property, he shall notify the lessee within a reasonable period prior to the sale. The lessee has the right to purchase the property at the same conditions; however, this does not apply if the co-owners of the property exercise the right of first purchase or if the lessor sells the property to a close relative." This rule clarifies the two obligations that the lessor should have towards the lessee regarding the lessee's right of first purchase, namely notification and a reasonable period. Similarly, for the priority purchase right of the occupier, all parties have the obligation to notify and provide a reasonable period when transferring real estate to the occupier. The Civil Code does not provide detailed explanations for the reasonable period and the notification obligation, so the following will discuss these two aspects.



### 3.3.1 The obligation of the owner to give notice

Article 306, Paragraph 1 of the Civil Code stipulates that when an equal-part co-owner transfers their share, they must promptly notify the other co-owners of the transfer conditions. Since all types of preemptive purchase rights essentially represent reasonable defensive interests and share commonalities, based on the system interpretation, although this clause only applies to equal-part co-owners, when the owner fulfills the notification obligation to the habitation right holder, they must also include the transfer conditions.[9]

### 3.3.2 The reasonable term of the occupier's right of residence

Article 726, Paragraph 2 of the Civil Code stipulates: After the lessor fulfills the notification obligation, if the lessee does not clearly express their intention to purchase within 15 days, it shall be deemed that the lessee has waived their priority purchase right. This clause clearly stipulates the 15-day period for the lessee. The Civil Code does not specify a reasonable period for the priority purchase right of joint owners in shares. Since the subject matter of the substantive rights covers both immovable and movable properties, while the subject matter of the lessee's rights is only immovable property, in order to ensure the efficiency of the housing transaction, the period for the lessee's priority purchase right is set at 15 days. Considering the nature of the subject matter of the right of residence as immovable property, it is also advisable to set a reasonable period of 15 days for the lessee's priority purchase right.

The inclusion of the right of residence in the Civil Code represents an important advancement in China's private law legislation. It not only facilitates the utilization of real estate but also implements the housing policy of "combining rental and purchase". However, the Civil Code only stipulates the establishment of the right of residence through 6 articles, without providing in-depth regulations. Moreover, there is no relevant usufructuary rights system in China, resulting in the lack of clear legal basis for residential rights disputes in judicial practice.[10]

## 4. Conclusion

Although the right of priority purchase by the holder of a residence right is not explicitly stipulated by law, it has a legal basis and is an urgent need in judicial practice and social reality.[11] Through judicial interpretation or systematic interpretation to refine the relevant provisions, it is the key to improving the construction of private law. Although simple analogy with the right of priority purchase by the tenant is inappropriate (the nature of the two rights is different), it can be properly addressed through the amendment of future judicial practice to solve the practical problems of the residence right system and respond to the society's demand for the diversity of residence rights types.

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