

# Research on the realization path of activating the right to use moderately under the "separation of rights" of homestead

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**Abstract:** In the pilot promotion of homestead reform, successful practices have been formed, including paid use of homestead, replacement of homestead, mortgage of homestead use right and so on. However, it is still faced with legal dilemmas such as the vacancy of the main body of ownership in the "separation of rights", the incompleteness of the right to use and the lack of legislation of qualification rights, which affect the legislative transformation of the reform policy. Therefore, the legislative transformation of "moderate release" under the current legal and theoretical framework of Chinese should aim at invigorating the existing homestead use right and perfecting the innovative homestead usufruct as the logical starting point. The subject of homestead property rights is endowed with complete disposal rights and income rights, the scope and way of circulation of homestead use rights are appropriately released, and the operational use of homestead (rural housing) use rights is broaden. Finally, the systematization and legalization of the system of "moderately invigorating" the right of use under the "separation of rights" of homestead are realized.

**Keywords:** separation of rights; right to the use of homestead; moderate release; realization path

## 1. Introduction

The new strategy of urbanization and rural revitalization continues to advance, while the current closed homestead system lacks complete rules for the transfer of homestead use rights, which to a certain extent hinders the development of rural economy and the integration of urban and rural areas. The core of the reform of "separation of rights" of homestead is "moderately invigorating" the right to use homestead. However, the existing reform documents only point out the macro direction of "moderately activating homestead and farmers' housing ownership". A unified and clear institutional plan has not yet been formed about "moderately invigorating". In 2018, the "Central document No. 1" formally defined the reform of the separation of rights of homestead, and proposed to "implement the collective ownership of homestead, protect the qualification rights of farmers in homestead, and appropriately release the right to the use of homestead and farmers' houses." In 2021, the "Central document No. 1" emphasizes the reform of the "separation of powers" of homestead as the focus, and further deepens the pilot reform of rural homestead system. Pilot work has been carried out in Lu County, Sichuan, Jingde, Anhui, Meitan, Guizhou, Yiwu and Deqing, Zhejiang, and other places, including paid use of homestead, replacement of homestead, mortgage of homestead use right and withdrawal of homestead qualification right. Although the pilot reform areas have carried out active exploration, they are still in their own exploratory stage, and no consensus has been reached on the nature and boundary of homestead ownership, qualification right and use right.

## 2. The practical predicament of the transfer of the right to the use of Homestead

### 2.1. Legal connotation of homestead

The term "homestead" has distinct Chinese characteristics and is a unique concept of our country in the continental law system. Homestead is initially divided into urban homestead and rural homestead, but it specifically refers to rural homestead after the Constitution of the people's Republic of China in 1982. At present, homestead refers to the land used to build housing and its ancillary facilities in rural areas. Therefore, the right to the use of homestead means that members of rural collective organizations build houses and their ancillary facilities on collectively owned land, and enjoy the right of possession and use of homestead in accordance with the law. Based on the understanding of the relevant legal

provisions and concepts of the right to the use of residential land, the right to the use of residential land has the identity of the subject of the right. The subject of obtaining the right to the use of homestead is limited to the farmers of the collective economic organization, and its membership is the basis for obtaining the right. Identity refers to the specific subject of the application for the right to the use of homestead, security means that the purpose of the system is to ensure that farmers have their own houses, and welfare means that the obligee can obtain the homestead free of charge and keep the homestead indefinitely. Among them, identity is the basis of security and welfare.<sup>[1]</sup> both initial acquisition and successive acquisition are limited by this range. Only farmers in collective economic organizations can obtain the right to use homestead when they meet the conditions for application or transfer.

## **2.2. Current situation of practice**

First, there is a serious conflict between the welfare function and asset function carried by the right to the use of homestead. Due to the acceleration of urbanization and other factors, the welfare security function of the right to the use of homestead to farmers is gradually declining, and the property function of homestead is becoming increasingly prominent. For a long time, the homestead system has the characteristics of attaching importance to the identity of members and weakening property rights. the single applicable subject and limited use restrain the market allocation and property realization ability of homestead use right. Second, the closed circulation of the right to the use of residential land restricts the market allocation of land elements. Different from the unlimited subject and scope of the transfer of the right to the use of urban residential land, the right to the use of homestead is limited to the transfer among the members of the collective economic organization. The closeness of the circulation of homestead and the difficulty of market-oriented exit make recessive transactions such as farmers' housing and small property rights widely exist, which bring problems such as lack of legal regulation and challenge the order of market supervision. Third, the strict limitation of the right to the use of homestead has formed a sharp contradiction with the actual expansion. In the urban suburbs of economically developed areas or rural areas with better economic location conditions, it is not uncommon to arbitrarily dispose of the right to the use of homestead and obtain income beyond the provisions of the law. such as house rental, transfer, inheritance, gift, mortgage and so on. The fact that the actual power of the right to the use of homestead is obviously expanded reflects the actual power needs of farmers in the use of homestead.

## **2.3. Legal dilemma**

China's Civil Code still defines the right to the use of homestead through inductive provisions, which reserves a "filling space" for the legal norms of "moderately invigorating" the circulation of the right to the use of homestead, and the policy of homestead reform is in urgent need of legislative transformation. First, Article 363 of the Civil Code stipulates: "the acquisition, driving and transfer of the right to the use of residential land shall be subject to the laws and relevant provisions of the state on land management." As a usufruct, the right to the use of homestead has the essence of farmers' private rights, and points the regulation basis to public laws such as the Land Management Law. Some scholars believe that this reflects the continuation of legislative inertia. When the conditions are ripe, it is necessary to formulate special legal norms for the right to the use of homestead. Second, there is still no consensus on the nature and boundary of the "three rights" in the pilot reform areas. "Activating the right to use" shows different forms of practice, each pilot area gropes for its own, and the institutional experience that can be copied and popularized has not yet been formed. The theory and practice of the circulation of the right to the use of residential land need to be further explored. Third, the institutional causes behind the operation of homestead rights can be succinctly summarized as the "inactivity" of the transfer of rights and the "useless" of power allocation. The reform of the homestead system must aim at the "moderate release" of the right to the use of homestead and the right to the use of farmers' houses, and how to change "moderate release" from policy terms to legal terms is the meaning of the requirements of the operation of homestead rights and the realization of the rule of law.

## **3. The realization path of "moderately invigorating" the right to use Homestead**

### **3.1. Endow the subject of homestead property rights with complete disposition and income rights**

The right of land disposition includes not only the transfer and sale of land, but also the rights of lease, shareholding, mortgage, guarantee, replacement, inheritance, gift and so on. The necessary right of disposition is the guarantee for the full realization of usufruct.<sup>[2]</sup> In the reform of "separation of rights"

of homestead, Yiwu in Zhejiang Province has given village collectives and villagers a greater right of disposal, and stimulated the vitality of rural revitalization by coordinating the qualification right of homestead and activating the right to use homestead. Although the market elements and economic value of the right to the use of residential land are different from those of urban construction land, on the basis of respecting property rights and fully respecting collective ownership, farmers are allowed to dispose of the right to the use of residential land among members of this (trans) collective economic organization by means of transfer, replacement, gift, lease, mortgage, shareholding, guarantee and inheritance under certain conditions.<sup>[3]</sup> The income right is the final realization of many functions and powers in the land property right. China's property Law and other relevant laws ignore the right to the use and income of homestead, which restrains the realization of the value of homestead property. Especially in the rural land requisition and demolition, most areas only compensate the houses on the homestead, and the economic compensation for the value of the right to the use of the homestead and the right to development has not been reflected. The income right of compensation for land expropriation can be properly given to the subject of the right to use homestead. If the farmer leases the homestead to a third party for operation and use, the owner of the homestead management right should give it the right to possess, use and obtain income within a certain period of time, at the same time, it can enjoy the right of re-circulation, mortgage and the right to compensation for the residual value of the above-ground objects and homestead management right. If the state expropriates homestead, in addition to giving compensation and resettlement to the demolished, it should also give economic compensation to the actual users who use the homestead to engage in formal legal production and management activities to stop production and business.

### ***3.2. Appropriate release of the circulation scope and mode of the right to the use of residential land***

Before the path of "separation of rights" is determined, there are two different views on whether the right to the use of homestead can be transferred separately: separate transfer and "integrated housing and land" circulation. Those in favor of separate circulation believe that the existence of the right to the use of homestead is not attached to the house, which has a separate usufruct power. If the transfer of the right to the use of residential land must be conditional on construction, in practice, both parties may build houses temporarily in order to facilitate the transfer, resulting in construction waste.<sup>[4]</sup> Those who oppose the separate transfer believe that the right to use the homestead must be transferred together with the ownership of the house, on the grounds that if the homestead is allowed to be transferred freely and separately, it may induce farmers to apply for the homestead not out of the actual needs of living. At present, the method of "integration of house and land" is adopted in the restricted circulation of homestead use right in our country, but this mode of "land follows the house" affects the realization of the real right attribute of homestead use right to a certain extent. As a result of the application, farmers occupy the homestead and build farmhouses on the homestead. Therefore, farmers have two types of real rights, namely, the right to the use of homestead and the ownership of rural houses. Under the background of "separation of rights", the reform of the right to the use of homestead should allow the right to use homestead to be transferred separately and break away from the mode of "land follows the house". Allowing separate transfer can solve the problem of the validity of the contract for the sale and purchase of rural houses.<sup>[5]</sup> There is a physical natural relationship between the homestead and the farm house, which is shown as "the house is built according to the land, and the land is the house". It is precisely because of this natural relationship that some rural house sales are considered invalid because of the lack of legitimacy of homestead transfer. The resulting problems in judicial practice are in fact a mess of the effectiveness of the sale contract. For example, in the Beijing painter Village incident, painters bought farm houses at market prices, and the houses increased in value many years later, and the seller backed out, arguing that the contract was invalid on the grounds that the house and homestead were prohibited from circulation and that the house sale was illegal, and the buyer's trust interests were damaged. However, the above problems will not arise when the right to the use of homestead is allowed to be transferred separately. If the right to the use of the homestead is allowed to circulate separately, the ownership of the house and the right to the use of the homestead will be stripped off and will no longer be implicated by the "integration of housing and land". In this way, even if the transfer of the right to the use of homestead is prohibited, the house can still be transferred separately, and the effectiveness of the sale and purchase of houses is not affected by the transfer of the right to the use of homestead.

### ***3.3. Broaden the operational use of the right to the use of homestead (agricultural house)***

China's current homestead system does not allow homestead to be used for non-agricultural purposes. In the realization of free circulation, separate transfer of the right to the use of residential land, the scope

of use should be expanded to allow appropriate non-industrial, non-real estate profit-making activities. In the market environment, goods must have the possibility and expectation of obtaining benefits in order to become the object of transaction for a long time. If the right to the use of homestead cannot reflect its property value, even if it is allowed to flow freely, it will be difficult to last for a long time. In the case of "integration of housing and land" circulation, expand the scope of use of homestead and agricultural houses, so that they can participate in non-industrial, non-real estate profit-making activities, which is helpful to realize their own property value. Only when it has value, and the value can be obtained, the right to the use of homestead has the vitality of long-term transaction and value-added. China's current law stipulates that the main function of the right to the use of homestead is the residence of farmers. under the use control system, homestead is strictly restricted from residential use and livestock and poultry breeding to commercial use in order to pursue higher economic benefits. However, in practice, with the closure of rural livestock and poultry farming and the rise of new business type, a new rural industry such as farm music and residential accommodation, the use of homestead in many places has been extended to business use. For example, Shanghai's "some Policy opinions on accelerating the Development of Agricultural Tourism in this City" stipulates that on the premise of being in line with the village land use planning and use, try to use the idle stock of collective construction land for new agricultural tourism projects, farm music, folk hotels, etc.<sup>[6]</sup> Therefore, in order to meet the needs of practical development, the use control of the right to the use of homestead should be restricted in law, and the general stipulation of existing laws and regulations that "the right to the use of homestead shall not be used for commercial purposes" should be changed. Through the Land Management Law, we clearly list the provisions that can be used for the development and operation of homestead.

#### 4. Conclusions

In short, the relevant laws on the circulation of the right to the use of residential land are distributed in the "Civil Code" and "Land Management Law" and other public laws, the existing legal provisions are more general, the problems in the circulation can not be effectively regulated. The reform of the circulation system of the right to the use of homestead is a major difficulty. In order to solve the various problems encountered in the circulation, it is necessary to deepen the understanding and application of the relevant legal provisions of the right to the use of homestead in the Civil Code, and enrich the relevant contents of the Civil Code based on pilot experience. The system of paid use of homestead, the effective registration system of the right to the use of homestead, and the mortgage and inheritance of the right to the use of homestead under the principle of integration of housing and land play a promoting role in the overall planning and integration of urban and rural areas, which are conducive to the intensive and efficient use of homestead, and further increase farmers' property income of homestead.

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