

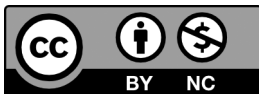
The System Construction of “Three Rights Separation” of Homestead Land—Based on the Analysis of Qualification Rights and Use Rights

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Abstract: With the acceleration of urbanization in China, the problem of idle rural homesteads has become increasingly prominent, and the reform of “three rights separation” of homesteads has become an important policy path to activate land value and protect farmers’ rights and interests. There is a gap in the definition of qualification right and use right in the current law. The qualification right should be characterized as a homestead use right with both identity and property, and its power includes the right to apply, the right to hold, the right to recover, the right to compensate, and the right to manage public affairs. The realization of qualification right needs to solve the problems of subject identification, standard unification, and withdrawal mechanism improvement, and should take the source of life as the principle of identification, and build a diversified withdrawal compensation and risk prevention mechanism. In terms of institutional structure, it puts forward the three-right structure of ownership (collective land ownership) - qualification right (homestead use right or membership right) - secondary use right (creditor’s right or usufruct).

Keywords: Homestead “three rights separation”; Qualification right; The right to use; Right to use housing land



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1 The Question Raised

With the acceleration of the urbanization process in China, the employment opportunities provided by cities continue to increase, the young and middle-aged people in rural areas continue to flock to cities and towns, and the idle rural homestead keeps increasing. The value of rural land cannot be fully realized due to the restriction on and transfer of the right to use the homestead. Therefore, in order to maximize the value of rural land and increase the property income of farmers, in 2015, China began the pilot work of homestead reform practice in Yiwu City, Zhejiang Province, and other places. In 2018, the No. 1 document of the Central Committee of the Communist Party of China, the Opinions of the Central Committee of the Communist Party of China and The State Council on the Implementation of the Strategy of Rural Revitalization (hereinafter referred to as “Opinion 1”) proposed that “improving the policy of idle homestead and idle farm housing for farmers, Explore the ‘three rights’ of homestead ownership, qualification rights and use rights, implement collective ownership of homestead, protect the qualification rights of homestead farmers and farmers’

property rights in housing, and appropriately activate the right to use homestead and farmers' housing." In 2022, the No. 1 document of the Central Committee of the Communist Party of China and The State Council on Doing a good Job of Comprehensively Promoting the Key work of Rural Revitalization in 2022 proposed to "carefully promote the pilot reform of the rural homestead system" and further clarify the reform of the "separation of three rights" of homestead. However, the Constitution, the Civil Code, and other laws in China do not explicitly address the right of use and the right of qualification regarding the "three rights separation" of homestead land, which primarily exist in village rules and regulations, as well as local regulations, or government guidance documents. In practice, the level of the organs or institutions that formulate these documents is relatively low. The scientific and procedural nature of the standard cannot be guaranteed, so it should be stipulated by the law of national unity.

The implementation of the "three rights separation" system of homestead land must adhere to the bottom line of collective land ownership and household residence security, and clarify the relationship between qualification right and use right. Therefore, based on the needs of reform practice and policy, as well as the absence of laws and regulations, it is necessary to clarify the value pursuit of the "separation of three rights" system, the legal nature and realization path of the qualification right, and explore the institutional structure between the qualification right and the right to use.

2 Legal Structure and Realization Path of Homestead Qualification Right

2.1 The Legal Nature of the Right of Qualification

Clarifying the legal nature of the qualification right is the theoretical premise for clarifying the realization path of the qualification right and determining the system structure of the qualification right and the right to use. The academic and practical circles have different opinions on the definition of the legal nature of the qualification right, but no consensus has been reached. At present, there are mainly three viewpoints: "residual right theory", "homestead right theory", and "member right theory".

"Residual right theory" holds that "in order to make the right of use of homestead land active and realize the economical and intensive use of homestead land, the qualification right of homestead land should be interpreted as a residual right enjoyed by the owner of the right of use of homestead land after transferring the right of use for a certain number of years." (Qin, 2021; Li & Zhao, 2018) In the author's opinion, this view seems reasonable at the macro level, realizing the separation of homestead qualification right and homestead use right in the "separation of three rights" of homestead land. However, this theory only defines the scope of the right of qualification right in a general way, but cannot clarify its specific power. In other words, what kind of power the "residual right" contains and what kind of power it does not contain cannot be clarified. In practice, the right of homestead qualification can not be put into practice.

"The theory of members' rights" holds that "the right of homestead qualification is the right of farmers to request collective allocation of homestead, and it is an integral part of members' rights." (Song, 2021) According to the author, this theory simply defines the qualification right as the right of farmers to apply for homestead based on their collective membership, and the qualification right is eliminated after the farmers apply for homestead, which is not in line with the legal principle, and ignores other functions of the qualification right, such as recovering the right to use, that is, in the process of transferring the right to use into the market after the homestead application. If the assignee violates the

agreement, laws and regulations, and other mandatory provisions, the qualification right holder may take it back.

“The theory of homestead use right” holds that “farmers’ qualification right is not a member right, it is the right to use the homestead itself, but it represents the right to use the homestead after the establishment of secondary use right.” (Liu, 2019) Scholars put forward the following three reasons for opposing the view that the right of homestead qualification is used as the “right to use homestead”. First, “as a right, the right of qualification can not only reflect the identity of the subject, but also protect the residence function and property interests of the subject, so it is not necessary to follow the concept of” homestead right “, which is easy to cause confusion.” (Ran, Li & Yin, 2023) Second, the introduction of the “right of management of homestead” into the legislation can solve the problem of how to circulate homestead. It seems that the concept of “homestead qualification right” is not necessary to create alone, which is contrary to the purpose of the top-level design. (Wen & Chen, 2022) Third, “the claim that the qualification right is the right to use the original house land fails to see the unique value of the qualification right itself, which is not only a property right, but also has the property of residence security.” (Sun, 2019)

In fact, the author believes that it is not contradictory to define the qualification right as the right of membership or the right to use the homestead. However, it should be made clear that the expression of the qualification right in the content of membership right is not only the right to apply for homestead, but also the right to retain the homestead after application, as well as the right to vote and supervise the collective affairs related to homestead. The right to use homestead still follows the connotation of the “separation of two rights” stage, and in this stage, the right to use homestead is obtained according to collective membership. Therefore, the qualification right is defined as the membership right or the right to use homestead, which is in line with the legal principle, but the content of the membership right is far greater than the qualification right, that is, the content of the qualification right is the right related to homestead in the membership right, and the content of the right to use homestead is in line with the qualification right.

2.2 The Power of The Qualification Right

Understanding the power of the right of qualification is of great significance to practice, and can make the right of qualification put into practice. However, at present, there are various opinions on the power of the right of qualification in the academic circle, and there are mainly the following three viewpoints: The first point of view, “Based on the property of the qualification right, it is believed that the qualification right of homestead has all the usufructuary rights similar to the ownership of homestead, including the acquisition, occupation, use, transfer, income, recovery at the end of the transfer period, disposition and inheritance of the usufructuary rights of homestead.” (Yang, 2020) The second view, based on the identity of the qualification right, thinks that the qualification right of homestead includes four powers, namely, the right of homestead acquisition, the right of residence, the right of circulation, and the right of income. (Qin, 2021) The third view, “Based on the dual attributes of qualification right and property, thinks that the qualification right of housing land includes the management of internal affairs of collective economic organizations, the right to distribute collective land and the right to dispose of part of collective property.”

The author believes that the analysis of the homestead qualification right should be based on the qualitative aspects of the homestead qualification right, that is, the legal nature of the qualification right. As mentioned above, the qualification right of homestead should be characterized as the right to use homestead, and the right to use homestead has both identity and property. Based on the identity, the primary function of the right to the use of homestead is

to realize the residential security of farmers, that is, farmers can “household” as a unit, apply for homestead to the collective, maintain the homestead, and at the same time, they can participate in the voting rights of the homestead allocation plan, the supervision of the implementation of the plan, and the right to recover the transferee who violates the contract or legal provisions. For property, the right to use a homestead is not directly reflected in realizing the economic value of a homestead, because in the construction of the homestead system, the “separation of three rights” is divided into “homestead ownership -- homestead use right -- secondary use right”. The secondary use right mainly bears the goal of realizing the economic value of the homestead, while the right to use the homestead mainly bears the goal of housing security. However, it still has a certain economic value; for example, when the applied homestead is expropriated, farmers will get economic compensation. To sum up, according to the personal and property characteristics of the homestead qualification right, the power of the homestead qualification right includes the right to apply for the homestead, the right to retain, the right to recover, the right to compensate, and the right to manage and supervise the public affairs of the homestead.

2.3 The Realization Path of Qualification Right

2.3.1 The Problem of Difficult Identification of Homestead Qualification Right

At present, the difficulty of recognizing the homestead qualification right is mainly reflected in the following three points: first, the subject enjoying the homestead qualification right; second, the standard of recognizing the homestead qualification right. In the academic community, there is no consensus on the identification of the homestead qualification right, and there are great differences, but in practice, it mainly relies on judicial guidance, village rules and conventions, and local norms to provide for this, and the provisions vary from place to place. Although local regulations, such as village regulations and local norms, can be well combined with practice, there are also many problems.

(1) Homestead Qualification Right to Enjoy The Main Body

In the academic circle, there are two different views on the subject of homestead qualification rights. Some scholars believe that “the subject of the homestead qualification right should be defined as a member of the rural collective economic organization, but only when applying for and maintaining the right to use the homestead, the household as a unit to exercise the qualification right.” (Liu & Liu, 2019; Wu & Gong, 2019; He, 2022) Some scholars “according to the” Opinion 1 “in the” protection of farmers’ homestead qualification right “expression, the” Land Administration Law “in article 62 of the” rural villagers can only own one house “, And the 2015 “Civil Code of the People’s Republic of China and the General Provisions of the Civil Law Expert Proposal draft (submitted draft)” Article 55 of the title of “households as the main body of the right to use homestead”, that China’s homestead qualification right is the subject of farmers (Zhang & Wang, 2019) .The author believes that the subject of the homestead qualification right should be farmers, not farmers. According to Articles 260 and 261 of the Civil Code and Article 8 of the Land Administration Law, ¹Rural land ownership belongs to peasant collectives, so the main body of homestead, as a welfare and social

¹ Article 260 of the Civil Code of the People’s Republic of China: “Collectively-owned immovables and movables include: (1) land, forests, mountains, grasslands, unreclaimed land and beaches that are collectively-owned as prescribed by law;”

Article 261 of the Civil Code of the People’s Republic of China: “The immovable property and movable property collectively owned by peasants shall be collectively owned by the members of the collective.”

Article 8 of the Land Administration Law of the Civil Code of the People’s Republic of China: “Land in rural and suburban areas shall be owned collectively by peasants, except for those that are owned by the State as provided for by law.”

security function, should be peasant collectives. It should be made clear that not all members of a peasant household are necessarily members of a peasant collective. If the subject enjoying the right of homestead qualification is defined as a peasant household, then the non-peasant collective members of a peasant household can also enjoy such welfare. This is inconsistent with the policy goal of the qualification right, mainly guaranteeing the residence of farmers, and it is wrong to understand the subject targeted by the policy. Ignoring the ownership of rural land. In accordance with Article 62 of the Land Administration Law, ¹Farmers are the subjects who enjoy the right of homestead qualification, but the right of farmer qualification needs to be exercised jointly by households. Among them, the number of farmers who are members of the collective will affect the area of the applied homestead.

(2) The Standard for The Identification of The Right of Homestead Qualification

Qualification is a part of membership rights. The standard of the qualification right of homestead is unified with the identification of collective membership, which is related to the basic rights and interests of farmers' residence security. For the identification of collective membership, some scholars have summarized the following four standards: "one is the household registration standard, and collective membership is determined by the location of the household registration." The second is the systematic analysis, based on the theory of membership rights, the production and living conditions, combined with household registration, as the criteria for identifying the membership of collective economic organizations. The third is the standard of rights and obligations, that is, the qualification of collective membership is determined by whether the collective economic organization has fulfilled the corresponding obligations, and those who have fulfilled the corresponding obligations are members of the collective economic organization. The fourth is the standard of source of living, that is, whether collective land and other collective property are taken as the basic living security and the main source of living as the standard of identification." (Cheng, 2018)

Accordingly, the identification criteria of the homestead qualification right should also have the above four criteria, including the household registration standard. At this stage, with the process of urbanization in China, the scale of population flow is huge, at the same time, according to the 2014 State Council issued "Opinions on Further promoting the reform of the household registration system" (hereinafter referred to as "Opinion 2"), "cancel the distinction between the nature of agricultural and non-agricultural accounts and the resulting blue seal account and other household types, unified registration as a resident account," "Relax the restrictions on urban settlement" and "establish the residence permit system", China's future will break the urban-rural dual system formed since the late 1950s, therefore, this way of identification is obviously inappropriate. Second, a systematic analysis said that although the statement advocates combining various factors, it is still based on household registration, which is not appropriate. Third, the standard of rights and obligations. The practical operation of the standard is very weak, and it is unclear what obligations should be fulfilled and to what extent they can meet the requirements of fulfilling obligations. At the same time, it is impossible for people studying outside and serving sentences to fulfill their corresponding obligations, so this identification method is obviously unreasonable. Fourth, the standard of living. The reason why China does not divide land ownership into state ownership, but into collective ownership and state ownership, is to give full play to the social security function of collective ownership of land. Whether it is land contract management rights or house land use rights, it has the characteristics of strong security. Land contract management rights can ensure farmers have farming and solve the

¹ Article 62 of the Land Administration Law of the People's Republic of China: "A rural villager can only own one house site, and the area of the house site shall not exceed the standard set by the province, autonomous region or municipality directly under the Central government."

problem of food and clothing. The right to use the house land guarantees the peasants a place to live and solves the housing problem, and all of them have the characteristics of being free and long-term. At the same time, in the policy goal of the “separation of three rights” of homestead, the qualification right still assumes the function of residence security. Therefore, both the membership right and the qualification right should continue the function of farmers’ land security based on the principle of living standards. Of course, there are exceptions to the principle, in order to attract high-level talents to participate in rural construction and rural planning, to achieve rural revitalization, therefore, for those who are introduced through talent projects or policies, they can use the special way of collective resolution of village organizations to grant their qualification rights to solve the housing problem. However, it should be noted that for those members of some non-collective economic organizations brought about by the entry of private industrial and commercial capital into the countryside, it is not necessary to grant the qualification right to solve the housing problem by means of the right to use the homestead, but to solve the housing problem by means of the secondary right to use the homestead, which can revitalize the idle rural homestead and promote the market circulation. To sum up, the author believes that the standard of homestead qualification right should be based on the standard of living source, with the exception of village collective resolution.

2.3.2 Homestead Exit Mechanism

In order to make full use of idle homestead land and activate the right to use homestead land and farmers’ houses, relevant amendments have been made to our laws. Article 62, paragraph 4, of the Land Administration Law stipulates that “the state allows rural villagers who settle in cities to voluntarily withdraw from the homestead land with compensation according to law, and encourages rural collective economic organizations and their members to make full use of idle homestead land and idle houses.” However, this regulation is too general and principled, and there is no detailed regulation on homestead withdrawal, which leads to the phenomenon that can not be followed in practice, affecting the implementation of homestead withdrawal. Meanwhile, due to the lack of a perfect withdrawal mechanism, farmers are worried about their lives after withdrawal, which further affects the enthusiasm and motivation for withdrawal. Therefore, in order to implement the policy of homestead withdrawal, make full use of land resources, revitalize the market, and realize economic value, it is necessary to formulate relevant detailed provisions. The author believes that the exit mechanism can be constructed from the compensation mechanism of homestead exit, the risk prevention mechanism of homestead exit, and the way of homestead exit.

(1) Homestead Exit Compensation Mechanism

Homestead exit compensation mechanism can be constructed from two aspects: compensation method and compensation fairness

The author believes that the compensation method should not be limited to the payment of money, but can be implemented as optional compensation, and farmers can choose among various kinds of compensation, such as nursing home services, pension security, monetary compensation, housing replacement, commercial insurance, etc. This choice can be single, such as only choosing nursing home services or monetary compensation, or it can be mixed. For example, the choice of monetary compensation + house replacement can meet the different needs of different groups. The elderly tend to prefer nursing home services or pension security, while the young tend to choose monetary compensation or house replacement, which can enhance the enthusiasm and motivation of farmers to withdraw.

Whether it is single compensation or mixed compensation, certain standards should be followed to achieve

exit fairness. The author believes that the following factors should be taken into account: First, a uniform amount of compensation should be set up according to local conditions. Whether it is nursing home services or housing replacement, this compensation can eventually be converted into money to measure, and each member's withdrawal should be limited to a uniform compensation amount. However, it should be clear that the unified compensation amount is for the house land, because the house land is applied to the village collective by the qualified right holders according to the membership, there is no difference between the qualification rights, and the house on the house land is built by the qualified right holders themselves. Therefore, the unified compensation amount of the village collective is for the house land. The house on the homestead should be compensated differently according to its economic value. The uniform amount of monetary compensation does not need to be stipulated by a uniform national law, but it should be defined by each region according to local economic development and the relevant market. In order to prevent "back-door operations" and protect the rights and interests of farmers who quit, this definition can be led by the government and assisted by village organizations, that is, the government can formulate a unified compensation amount according to the actual local conditions and the village organizations can implement it, or the village organizations can cooperate with a third party to formulate it and the government can supervise it. That is, the village-level organization entrusts a qualified assessment body to formulate the compensation amount in light of the actual local situation, and finally, the amount is reviewed and supervised by the government. Second, on top of the unified compensation amount, it should be combined with the family situation of farmers, and the elderly, children, and women should be offset to a certain extent, so as to achieve substantive fairness. However, this deviation should be strictly grasped, otherwise it may lead to injustice in the pursuit of fairness. The author believes that the range of deviation and the specific object of deviation can be passed by the village collective organization through the collective resolution, because rural areas are different from urban areas, each household is more familiar with each other, of course, the family situation is also known to each other, with the village collective resolution, the elderly, children and women from wealthy families can avoid getting special care. It can also prevent the elderly, children, and women with family difficulties from receiving special care, and truly realize substantive equity.

(2) Homestead Exit Risk Prevention Mechanism

The risk prevention mechanism of homestead withdrawal can be constructed from two aspects: homestead withdrawal conditions and the homestead retention and retraction mechanism.

First, strict conditions for homestead exit should be set up. Village-level organizations can cooperate with the government to list relevant reference factors in order to develop a detailed and scientific evaluation system to avoid housing problems caused by the blind withdrawal of farmers. The author believes that the evaluation system should not only cover the current family living conditions of the retired farmers, but also involve the future development trend of farmers. In detail, the following factors should be included in the evaluation elements: Whether farmers have housing in cities and towns, whether they have participated in relevant security systems, whether they have vocational skills, whether they have stable income and the level of income, whether they have obtained urban residence permits and enjoy basic public services, labor employment, basic public education, basic medical and health services, family planning services, public cultural services, license processing services and other rights.

The second is to build a homestead reservation and retraction mechanism. The homestead retention mechanism means that farmers retain the qualification right of homestead, but return the homestead to the village collective, and the village collective compensates the farmers based on the economic value of the homestead. Within the retention

period, the farmers can return the compensation of the village collective and apply for the homestead again based on the qualification right. The homestead opt-out mechanism means that farmers cancel the qualification right and return the homestead to the village collective, and the village collective compensates farmers based on this. During the opt-out period, farmers can return the compensation, apply for the qualification right again to the government, and complete the registration and filing. The author believes that whether it is the retention period or the repentance period, 1-2 years is appropriate, because according to the second Opinion, China is committed to building a residence permit system to replace the previous household registration system, breaking the urban-rural dual system, if farmers enter the city and obtain a residence permit, they can enjoy the same basic rights as the local registered population, such as basic public education and basic medical and health services. At this time, the farmer's life will have a certain social security, and they no longer need to continue to preserve or allow them to regret. The condition for applying for residence permit in China is "citizens leave the permanent residence place to live in other cities above the city level with districts for more than half a year", therefore, the retention period and the repentance period are set at 1-2 years, which can realize the connection with China's residence permit system, so that farmers' social security can be continued. At the same time, it will not hinder the market circulation of idle house land because the retention and retraction period is too long, resulting in unstable legal relations and increasing civil disputes.

3 The Institutional Structure of Qualification Right and Use Right

In the separation of the three rights of homestead, the right of qualification and the right of use do not exist in isolation, but are organically connected and unified. Therefore, the right of qualification and the right of use can be constructed on the basis of the legal nature of the right of qualification, guided by policy and law.

On the basis of defining the right of qualification as the right of membership, the academic circles have the following three views on the relationship between the right of qualification and the right of use: First, the structure of the separation of three rights of homestead is "ownership (collective land ownership) - qualification right (member right) - right of use (usufruct)". In this structure, the right of use in the separation of three rights is characterized as the right of use of homestead in the current law, while retaining its usufruct attribute. (Wen & Chen, 2022) Liu & Liu, 2019) Second, the structure of the separation of the three rights of homestead is "ownership (collective land ownership) -- qualification right (member right) -- right of use". In this structure, it is proposed to cancel the original right of use of the homestead and redesign two new rights, namely the qualification right and the right of use. Qualification right is defined as the right to use certain standard homestead land enjoyed by collective members according to their membership, and the right to use is set on the qualification right, which can be a kind of usufructuary right in the meaning of private law, a kind of security right, or a kind of creditor's right with the nature of real right or a simple creditor's right. (Sun, 2019) Third, the structure of the separation of the three rights of homestead is "ownership (collective land ownership) - qualification right (homestead use right) - right of use (surficial right)". In this structure, qualification right refers to the current legal right to use homestead, and the right of use refers to the usufruct created on the original right to use homestead, that is, the surficial right (Xi, 2018).

The author believes that the structure of the separation of the three rights of homestead should be "ownership (collective land ownership) -- qualification right (homestead use right or membership right) -- secondary right of use (creditor's right or usufruct)". In this structure, qualification rights can be characterized as either membership rights

or homestead use rights, and the secondary right of use can be specified by a separate law. Its nature can be either creditor's rights or usufructuary rights, but it should be noted that when the nature of the secondary right of use is usufructuary rights, the usufructuary rights are not established on the right to use the homestead, but are established for the house or a part of the house with reference to the right of residence. This structure has the following four advantages. First, the qualification right is characterized as the right to use homestead, which can follow the provisions of the Land Management Law and the Civil Code on the right to use homestead, avoiding drastic amendments to the law and maintaining the systematization of the law. Second, the use right of homestead in the "separation of rights" period has a social security function in itself, which is consistent with the housing security of the "qualification right" under the separation of the three rights of homestead, and is in line with the policy objectives. Third, the nature of the secondary use right refers to the provisions of Article 341 of the Civil Code on land management rights. May be provided for flexibly by the parties or by separate law, depending on the duration of the rights, ¹To achieve the balance of the rights of both parties to the transfer, in detail, for the longer term of the secondary right to use, it can be characterized as usufructuary right, give play to its limiting property, stabilize the legal relationship and the transferee's psychological expectations, and avoid the loss of expected benefits due to the unilateral breach of the transferor; In the case of short secondary use right, it can be characterized as creditor's right, so as not to cause too much burden on the transferor and the land owner. Fourth, when the secondary right to use is a usufructuary right, the usufructuary right is based on the house, and the situation of "setting a usufructuary right on a usufructuary right" will not occur. In addition, the connection between the right to use and the qualification right can also be realized, that is, when the term of the secondary right to use is expired, the holder of the qualification right can recover the right to use the homestead and the ownership of the house, so that the right can be restored to a satisfactory state.

4 Conclusion

In short, the Party Central Committee only put forward the basic policy and policy of "separation of three rights" for residential land, and the specific implementation of the policy and policy needs to be goal-oriented, combined with practice, and the use of basic legal theories to be specific and standardized. In this paper, the author clarified the goal of the policy, the nature, power, and realization path of the qualification right, as well as the system structure of the qualification right and the right to use. The concrete provisions of the policy need to be further practiced, more problems are found, and further research is carried out to construct a complete legal system of the "separation of three rights" of homestead.

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