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Establishment of the Right of Habitation Through Wills: Impact on Real Rights

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ABSTRACT

Wills are a significant mechanism for establishing the right of habitation, with the associated changes in real rights intertwined with the realization of the testator's intention and the maintenance of family harmony and stability. However, the "effective upon registration principle" provided by Article 368 of the Civil Code cannot be applied mutatis mutandis to the establishment of the right of habitation through wills. Instead, real rights change rules specific to wills should be applied directly based on a systematic interpretation of the Civil Code. Wills can be implemented through two primary methods: testamentary succession and bequest. Due to their distinct legal effects, the establishment of the right of habitation through wills should be further categorized into establishment of the right of habitation by testamentary succession and establishment of the right of habitation by bequest. For testamentary succession, Article 230 of the Civil Code directly governs the process, and the right of habitation become effective upon the opening of the succession, with registration serving a public declaration function. Conversely, the establishment of the right of habitation through bequest falls under Article 209 of the Civil Code, with the right of habitation taking effect upon registration, adhering to the "effective upon registration principle".

KEYWORDS

Civil Code; Testamentary Succession; Bequest; Right of Habitation; Changes in Real Rights.

1. INTRODUCTION

The institution of the right of habitation has a long and rich history, dating back to Roman law and continuing to modern civil codes. Its unique advantages in safeguarding the right of habitation of specific groups and improving the diversified utilization rate of housing have made it an important component of civil law regulations in various Western countries. However, East Asian countries, influenced by traditional Confucian ideology, have historically paid less attention to this system.

In China, the "integration of the right of habitation into law" has been a gradual process, evolving from value discussions during the drafting of the *Real Right Law* to legislative debates surrounding the *Civil Code of the Republic of China* (hereinafter the "Civil Code"). Finally, the drafters of the *Civil Code* deviated from established legislative pattern by incorporating specific provisions for the right of habitation in the Book on real rights, marking an innovative move in China's civil legal system.

As discussions surrounding the *Civil Code*'s interpretation continue, academics have made significant strides in understanding the legal provisions governing the right of habitation. However, despite the existence of two avenues for establishing the right of habitation-contracts and wills-research tends to favor the theoretical aspects of establishing the right of habitation through contracts (hereinafter the "contract-based establishment", with less focus on establishing the right of habitation through wills

(hereinafter the "will-based establishment"). Consequently, the critical issue of real rights changes in the context of will-based establishment remains unresolved, lacking a unified consensus.

In practice, compared to the contract-based establishment, the will-based establishment primarily finds application in family life, representing a targeted distribution of the property rights of the testator. This approach reflects the testator's concern for specific individuals and often involves the interests of family members. It can be said that the change of real rights in the will-based establishment is related to the realization of the testator's intention and the maintenance of family harmony and stability. Therefore, it is of great practical significance to clarify the change of real rights in the will-based establishment at the present stage.

2. CORRECTLY INTERPRETING "APPLY MUTATIS MUTANDIS" IN THE WILL-BASED ESTABLISHMENT

Chapter XIV of Book Two (Real Rights) of the *Civil Code* establishes the comprehensive framework for the right of habitation, comprising six legal provisions. Articles 366-370 stipulate the definition, purpose, establishment requirements, boundary of rights, and termination grounds for the right of habitation established through contracts. Article 371, however, involves the establishment of the right of habitation through wills, stipulating that "Where a right of habitation is created by will, the relevant provisions of this Chapter shall be applied mutatis mutandis." "The relevant provisions of this Chapter" mentioned here refer to the provisions of Articles 366-370 on the establishment of the right of habitation through contracts.

At the beginning of the inclusion of the right of habitation into the *Civil Code*, some scholars, when interpreting the change of real rights in the establishment of the right of habitation through wills, suggested following the legislative direction of Article 371 of the *Civil Code* and applying mutatis mutandis the "effective upon registration principle" from the provisions of Article 368[1] on the establishment of the right of habitation through contracts. This implied that without registration, the right of habitation established through a will would not be considered effective.[2] This view found support among certain judges in practice.

However, as scholars have gradually deepened their theoretical understanding of the relevant systems of the right of habitation, many scholars have questioned this conclusion, believing that there is another way to interpret the change of real rights in the establishment of the right of habitation through wills, and it is not necessary to apply mutatis mutandis the provisions on the establishment of the right of habitation through contracts.[3] This has led to the controversy of "whether Article 368 of the *Civil Code* should be automatically applied mutatis mutandis to the change of real rights in the establishment of the right of habitation through wills." This paper believes that the key to resolving this controversy lies in correctly understanding the relevant theories, especially the application requirements, of "apply mutatis mutandis" in the establishment of the right of habitation through wills.

(I) Meaning and function of "apply mutatis mutandis" in the will-based establishment

The term "apply mutatis mutandis" refers to the explicit legal provision for extending rules governing specific matters to other substantially similar matters.[4] As a commonly used technique in codified legislation, "apply mutatis mutandis" has such functions as enhancing the coherence between the rules of different chapters within the code, preemptively addressing legal loopholes, storing a large number of legal norms, and saving legislative resources[5].

In the era of separate civil laws like the *General Principles of Civil Law*, and the *Contract Law*, the effectiveness of "apply mutatis mutandis" was restricted by the isolation of individual laws, making it difficult to fully exert its due function. The formulation and promulgation of the *Civil Code* has transformed this fragmented landscape, unifying civil laws into a single document. This interconnected network of legal provisions, interacting and forming a coherent system, significantly

expanded the application scope of "apply mutatis mutandis". According to statistics, the legislative technique of "apply mutatis mutandis" is employed 28 times across the 1,260 legal provisions of the *Civil Code*, including Article 371.

Regarding the function of Article 371 of the *Civil Code*, scholars have pointed out that among the existing six legal norms on the right of habitation, the legislator has devoted most of the space to stipulating the establishment of the right of habitation through contracts, which indicates that the legislator actually regards the establishment of the right of habitation through contracts as the target to be regulated under the chapter on the right of habitation. It is precisely through the "apply mutatis mutandis" provided by Article 371 that the legislator has expanded the scope of application of the right of habitation norms from the establishment of the right of habitation through contracts to the establishment of the right of habitation through wills[6].

This legislative design of "apply mutatis mutandis" arranged by the legislator in Article 371 of the *Civil Code*, on the one hand, can indicate to those who apply the law the direction of application of the legal norms for the establishment of the right of habitation through wills, preventing gaps in legal frameworks. On the other hand, it can redundant stipulations for common aspects between the establishment of the right of habitation through wills and the establishment of the right of habitation through contracts, thus simplifying legislation[7].

(II) Categorization of "apply mutatis mutandis" in the will-based establishment

Based on the field, scope, and content of the provision being "applied mutatis mutandis", "apply mutatis mutandis" can be categorized as follows.

1) Categorization based on the field of the object to which "apply mutatis mutandis" is applied:[8] (1) Cross-domain "apply mutatis mutandis": For example, Article 71[9] of the *Civil Code* applies mutatis mutandis the provisions of the *Company Law*, directly crossing the boundaries between different branches of law. This is a typical example of cross-domain "apply mutatis mutandis". (2) Intra-domain "apply mutatis mutandis": For example, the "apply mutatis mutandis" provision in Article 439[10] of the *Civil Code* and the clause to be applied mutatis mutandis are both located in the Book of Real Right, making it an intra-domain "apply mutatis mutandis".

2) Categorization based on whether the scope of the provision being "applied mutatis mutandis" is clear:[11] (1) Limited "apply mutatis mutandis": For example, Article 414[12], Paragraph 2 of the *Civil Code* stipulates that "The preceding paragraph shall be applied mutatis mutandis with regard to the priority order of payment for other security interests that are registrable." This type of "apply mutatis mutandis" with a clear direction is a limited "apply mutatis mutandis". (2) General "apply mutatis mutandis": For example, Article 464[13] of the *Civil Code* stipulates that the "apply mutatis mutandis" is for the provisions of the entire Book. The specific applicable provisions within the Book are to be determined by those who apply the law based on the nature of the personal relationship agreement. This type of "apply mutatis mutandis" only indicating the direction of application without specifying the specific provisions is a general "apply mutatis mutandis".

3) Categorization based on the content of the provision being "applied mutatis mutandis":[14] (1) Standard "apply mutatis mutandis": Applying dynamic standards that may evolve over time, as in Article 453[15] of the *Civil Code,* which stipulates that "The appraisal or sale of the retained property shall be based on the market price." (2) Normative "apply mutatis mutandis": Applying static norms, often signaled by phrases like "relevant provisions shall be applied mutatis mutandis" or "provisions of the preceding paragraph shall be applied mutatis mutandis" found in the *Civil Code*.

The "apply mutatis mutandis" in Article 371 of the *Civil Code* falls under the categories of intra-domain, general, and normative "apply mutatis mutandis". Intra-domain and normative "apply mutatis mutandis" indicate that the provision being applied mutatis mutandis in the will-based establishment is a static norm under the *Civil Code*, eliminating the need to search for legal norms or dynamic standards outside the *Civil Code*. General "apply mutatis mutandis" indicates that the

provision being applied mutatis mutandis in the will-based establishment is a group of norms within the *Civil Code* with a certain scope, rather than a fixed article or paragraph as in limited "apply mutatis mutandis". Under general "apply mutatis mutandis", those who apply the law are in fact granted a certain degree of discretion. They can select and apply some of the rules in the group of norms being applied mutatis mutandis based on similarity, and they have the obligation to provide arguments and justifications.[16] In other words, not all five rules for the contract-based establishment are automatically applied mutatis mutandis to the will-based establishment, allowing for exclusion of inapplicable provisions from Articles 366-370.

(III) Application requirements for "apply mutatis mutandis" in the will-based establishment

Based on the relationship between "apply mutatis mutandis" and other legislative techniques, for the "relevant provisions" on the contract-based establishment to be applied mutatis mutandis to the will-based establishment, at least two conditions must be met:

Firstly, "apply mutatis mutandis" is only applicable in the absence of directly applicable legal provisions for the will-based establishment. If there are directly applicable provisions, there is no need for "apply mutatis mutandis". This is determined by the essential difference between "apply mutatis mutandis" and direct application. "Apply mutatis mutandis" means that there is a substantial similarity in the normative elements between the clause concerned and the clause to be applied mutatis mutandis, while direct application means that there is an identity between the two.[17] Identity does not need to be argued, and direct application is explicitly stipulated, leaving no room for discretion. Only when there are no directly applicable explicit provisions and the law stipulates "apply mutatis mutandis", can those who apply the law compare the similarities between the clauses within the scope of the "apply mutatis mutandis", determine which clauses can and cannot be applied mutatis mutandis, and provide sufficient arguments and explanations. After the conclusion is reached by "apply mutatis mutandis", it must also be placed within the law to be tested systematically, to ensure that the conclusion so reached will not conflict with other provisions[18].

The wording of Article 1001[19] of the *Civil Code* reflects this difference in the order of direct application and "apply mutatis mutandis". Article 1001 directly stipulates that for the protection of relation-based rights arising from marital and familial relationships, the relevant provisions of Book One and Book Five of the *Civil Code*, and other laws shall be applied first; in the absence of such provisions, the relevant provisions on the protection of personal rights in this Book shall, based on the nature of the right, be applied mutatis mutandis. As far as the will-based establishment is concerned, wills are covered by the Book on succession, and the right of habitation are covered by the Part on rights of usufruct. Therefore, "apply mutatis mutandis" for the change of real rights in the will-based establishment cannot be considered only within the Chapter on the right of habitation, but also needs to be examined systematically within the framework of the *Civil Code*. Only when it is determined that there are no directly applicable rules within the *Civil Code* can we consider applying Article 368 of the *Civil Code* mutatis mutandis.

Secondly, the legal relationship and constituent elements of will-based establishment and contract-based establishment must be substantially similar for "apply mutatis mutandis" to be justified.[20] In the process of case handling, those who apply the law sometimes use "apply by analogy" to fill the loopholes in law. "Apply mutatis mutandis" is also known as statutory "apply by analogy" and authorized "apply by analogy". When the law explicitly authorizes the application of provision for extending rules governing specific matters to other substantially similar matters, this is called "apply mutatis mutandis". However, when the law does not explicitly make such authorization, and those who apply the law still apply the provision for extending rules governing specific matters to other substantially similar matters, then this is called "apply by analogy" [21].

Judicially mature "apply by analogy" practices are sometimes transformed into "apply mutatis mutandis" through legislation. "Apply mutatis mutandis" is not the end of "apply by analogy" in judicial practice, and "apply by analogy" will continue to play a role where "apply mutatis mutandis"

is not applicable.[22] The core of "apply by analogy" is to compare the similarities between the constituent elements of the case in dispute and the case stipulated by law. "Apply by analogy" is only applicable when there are substantial similarities between the two.[23] In view of the relationship between "apply mutatis mutandis" and "apply by analogy", the key to whether "apply mutatis mutandis" can be made lies in similarities between the case in dispute and the case stipulated by law. In other words, "apply mutatis mutandis" requires those who apply the law to judge the similarity of the legal structure and facts between the provision concerned and the provision to be applied mutatis mutandis, including examining their legislative purpose and normative intent, the nature of the legal relationship, and the constituent elements of the legal provisions[24].

In this regard, some scholars have specifically compared the structural similarities between the will-based establishment and the contract-based establishment, concluding that the primary difference between the two lies in the ways of establishment. Apart from that, there is no essential difference between them.[25] A will is a unilateral juristic act, a transaction mortis causa (in German: Rechtsgeschäft von Todes wegen), while a contract is a bilateral legal act, an inter vivos act. In the Chapter on creation, alteration, alienation, and extinguishment of real rights of the Book on real rights of the *Civil Code*, wills and contracts are subject to different real rights change rules.[26] The Supreme People's Court of China, in its interpretation and application of the Book on real rights, also pointed out that the difference between the two establishment methods, wills and contracts, will not affect the content of rights, effects, restrictions, and extinguishment grounds of the right of habitation established through contracts to be applied mutatis mutandis to the right of habitation established through wills. However, it will lead to the inability to apply mutatis mutandis the real rights change rules for the right of habitation established through contracts provided by Article 368 of the *Civil Code* to the change of real rights in the right of habitation established through wills.[27] In other words, even without considering the issue of systematic interpretation, the "effective upon registration principle" provided by Article 368 of the *Civil Code* cannot be applied mutatis mutandis to the change of real rights in the will-based establishment due to inherent differences between wills and contracts.

Through the above analysis of the relevant theories of "apply mutatis mutandis" in the will-based establishment, we can see that Article 371 of the *Civil Code* opens up a channel for the relevant provisions on the contract-based establishment to be applied mutatis mutandis to the will-based establishment. However, this "apply mutatis mutandis" is not an automatic "apply mutatis mutandis" for all provisions, requiring specific conditions. The "effective upon registration principle" provided by Article 368 of the *Civil Code* cannot be applied mutatis mutandis to the change of real rights in the will-based establishment because the application requirements are not met. Given the highly interconnected nature of the *Civil Code*, to thoroughly resolve the issue of the change of real rights in the will-based establishment, we might as well expand our vision beyond Chapter XIV (Right of Habitation) of the Book on real rights and make a systematic, comprehensive analysis encompassing various chapters of the *Civil Code* to identify directly applicable rules.

3. THE CHANGE OF REAL RIGHTS IN THE WILL-BASED ESTABLISHMENT FROM A SYSTEMATIC PERSPECTIVE

The term "creation of real rights" usually refers to the creation of limited real rights on the property of another person, signifying the emergence of limited real rights. The emergence of real rights, as observed from the specific real right holder, is the acquisition of real rights.[28] From the perspective of real rights, the essence of will-based establishment is the creation of real rights. It is the testator who establishes the right of habitation for others on his own dwelling through a will. From the perspective of the Book on succession of the *Civil Code*, the emergence of the right of habitation means that others have acquired the right of habitation according to the will. Therefore, scholarly

discussions on the applicable rules for real rights changes in the will-based establishment have adopted an approach of systematic interpretation of the *Civil Code*.

(I) Disputes over the applicable rules for the change of real rights in the will-based establishment

Some scholars propose that the establishment of the right of habitation through wills should be directly governed by the provisions of Article 230[29] of the *Civil Code* on the acquisition of real rights through succession, and the right of habitation established through wills should take effect at the time when the succession opens.[30] However, some scholars have also raised objections to this view, arguing that the acquisition through succession provided by Article 230 of the *Civil Code* is for a deceased person's estate, and the right of habitation established through wills do not fall within the scope of such estate. Therefore, the establishment of the right of habitation through wills cannot be directly governed by Article 230 of the *Civil Code*.

Alternative views propose that a will is merely one avenue for establishing the right of habitation, and a will establishing this right is legally a will with obligations. However, since the death of the testator is the reason for the change of real rights, Article 230 of the *Civil Code* can be applied mutatis mutandis to the establishment of the right of habitation through wills.[31] Of course, some scholars also describe it as an "apply by analogy" of Article 230 of the *Civil Code*[32].

Other scholars also propose that the right of habitation established through wills impose a burden on the owner of the dwelling, classifying them as negative property requiring fulfillment. Therefore, they are not considered part of the estate and thus not subject to Article 230 of the *Civil Code*[33].

Finally, some scholars argue that, given the unilateral nature of wills, the will-based establishment should be categorized as creating a right to usufruct through a juristic act, subject to the "effective upon registration principle"[34].

(II) The core issue: can the right of habitation be considered estate?

While scholarly responses to the change of real rights in the will-based establishment differ, the central debate revolves around "whether the habitation right constitutes part of the estate upon death of the testator, or represents a right subsequently created through legal mechanisms like registration." The scholars who believe that the change of real rights in the will-based establishment should be directly governed by Article 230 of the *Civil Code* hold the view that the habitation right falls under the scope of estate upon death of the testator. The scholars who believe that Article 230 of the *Civil Code* should be applied mutatis mutandis or should not be applied to the change of real rights in the will-based establishment hold the view that the habitation right does not fall under the scope of estate, but is a right subsequently created through legal mechanisms like registration upon death of the testator.

To be more precise, these scholars recognize the principles "Nemo potest sibi servitutem constituere" (one cannot create a servitude in their own favor) and "Dominium solo cedit" (ownership absorbs other real rights).[35] Their primary concern is how the testator, while owning the dwelling and lacking the right of habitation, can pass it on to others as part of their estate. In fact, clarifying "whether the habitation right constitutes part of the estate upon death of the testator, or represents a right subsequently created through legal mechanisms like registration" is indeed the key to solving the issue of the change of real rights in the will-based establishment. We will approach this from two angles: the creation principle of the right of habitation in the Roman law period and the current provisions on estate provided by the *Civil Code*.

1) The creation principle of the right of habitation in the Roman law period

In the early Roman society, the right of habitation was commonly manifested as usufruct for the purpose of habitation. To prevent their wives in manus-free marriages and unmarried daughters from becoming homeless after their death, the paterfamilias often provided these members who did not have the right to succession with a place to live by way of bequeathing usufruct. After the death of

the paterfamilias, these members could enjoy the usufruct for the purpose of habitation in the house of the paterfamilias before his death by virtue of the will. After the death of these members, the usufruct would be reintegrated into the ownership of the house, and the succession of the ownership of the house by the heir of the paterfamilias would finally be fulfilled[36].

Justinian described this scenario in his book: "Usufruct can be separated from ownership, and this separation can take various forms. For example, if someone bequeaths usufruct to another, the heir only enjoys ownership, while the legatee enjoys usufruct; conversely, if the estate is bequeathed to another except for usufruct, the legatee only enjoys ownership, while the heir enjoys usufruct. If usufruct is not established by will, it should be established by agreement or formal verbal contract. However, in order to prevent ownership from becoming completely useless due to the perpetual separation of usufruct, it is stipulated that usufruct shall be extinguished in a certain way and reintegrated into ownership.[37]"

From Justinian's statement, we can actually see that the testator, through a will, separated the ownership into two different real rights, one is the separated usufruct, and the other is the ownership devoid of usufruct. Romans later termed this latter concept "nudum ius Quiritium" (bare Quiritary title), which was also mentioned in Gaius' *Institutes*.[38] The creation principle of usufruct embodies a separation of rights concept,[39] viewing usufruct as part of ownership and not requiring a specific creation method. Its creation is a natura result of logical reasoning.[40] Dividing ownership into different real rights shows the Roman understanding of the concept of ownership. While usufruct is granted significant and extensive rights, almost indistinguishable from the real rights enjoyed by an owner, and sometimes described as special ownership or partial ownership,[41] Romans still introduced "bare Quiritary title" to maintain the unity of ownership[42].

In the later period of Roman society, this usufruct for the purpose of habitation was widely used in practice. Justinian's edict later established the right of habitation as an independent real right alongside usufruct and the right of use.[43] However, the development of the right of habitation is generally based on the trajectory of usufruct, and its creation principle is naturally the same as that of usufruct. The right of habitation is often considered a disguised and smaller-scale usufruct.[44] By bequeathing "bare Quiritary title" to one individual and the right of habitation to another, Romans, utilizing the "bare Quiritary title" concept, executed two bequest acts.[45] This unique creation mechanism allowed for unregistered right of habitation established by wills to become bequeathable, explaining how the testator, lacking the right of habitation while owning the house, could pass it on as part of their estate.

2) Current provisions on estate provided by the *Civil Code*

Based on the above explanation of the creation principle of the right of habitation in the Roman law period, we know that there is a unique way of creating rights in the will-based establishment. We will now examine whether this right of habitation separated from ownership through wills complies with the provisions on estate provided by the *Civil Code*.

When defining a will, the *Civil Code* abandons the legislative model of "Definition + Enumeration" in the previous *Succession Law* and adopts the legislative model of "Definition + Exclusion" to maximize inheritable estate.[46] Article 1122[47], Paragraph 1 of the *Civil Code*, defines "An estate refers to the property lawfully owned by a natural person upon death", and the "property" mentioned here includes property rights.[48] The right of habitation, as a type of usufruct expressly stipulated in the Book on real rights of the *Civil Code,* constitutes a lawful right.

In accordance with the *French Civil Code*, the surviving spouse can claim the right of habitation upon death of their spouse, with its value deducted from their share of the estate.[49] This shows that the right of habitation is a property right with a certain value. Therefore, the right of habitation separated from ownership through a will fully complies with the definition of estate of the *Civil Code*. The right of habitation separated from ownership through a will also does not violate the exclusion provision

of Paragraph 2 “An estate not inheritable according to the provisions of law or based on the nature of the estate may not be inherited”.

It is important to note that Article 369 of the *Civil Code*’s stipulation, “A right of habitation may not be transferred or inherited”, only applies after the heir or legatee acquires the right of habitation. The right of habitation initially separated from ownership through a will is not subject to this restriction; otherwise, the will-based establishment would be rendered unenforceable. In summary, the right of habitation separated from ownership through a will complies with the provisions on estate provided by the *Civil Code*.

Our analysis demonstrates that the testator can pass on the right of habitation as estate because of its unique creation principle, traced back to Roman law. The right of habitation separated from ownership through a will can be considered estate. Therefore, the will-based establishment can be viewed as an extension of the Book on succession in the field of real rights. The change of real rights in the will-based establishment does not need to be governed by Article 368 of the *Civil Code* on a mutatis mutandis basis, but should be directly governed by the real rights change rules specific to wills to align with the systematic interpretation of the *Civil Code*. As scholars suggest, the “apply mutatis mutandis” provided by Article 371 of the *Civil Code* masks the complex interplay between real rights rules and succession law in the case of will-based establishment[50].

4. THE CHANGE OF REAL RIGHTS IN THE WILL-BASED ESTABLISHMENT

Our analysis concludes that the real rights change rules related to wills should directly apply to the change of real rights in the will-based establishment. Article 1123[51] of the *Civil Code* provides that wills can be implemented through two primary methods: testamentary succession and bequest, based on whether the person acquiring the estate is a legal heir. Legal heirs acquire the estate through testamentary succession, while non-heirs acquire the estate through bequest[52].

Then, the will-based establishment can also be further categorized as establishing the right of habitation through testamentary succession (hereinafter the “**testamentary succession-based establishment**”) and establishing the right of habitation through bequest (hereinafter the “**bequest-based establishment**”), depending on the acquisition method.[53] The change of real rights in the testamentary succession-based establishment should be directly governed by the real rights change rules for acquiring real rights through testamentary succession. The change of real rights in the bequest-based establishment should be directly governed by the real rights change rules for acquiring real rights through bequest.

Article 29[54] of the previous *Real Right Law* made a unified provision for acquiring real rights through testamentary succession and bequest, the real rights change of which are subject to the same rules. However, the words “or bequest” appeared in the Article 29 of the previous *Real Right Law* were deleted from Article 230 of the *Civil Code* during its formulation, eliminating the real rights change rules for acquiring real rights through bequest. Based on this legislative change, this paper focuses on real rights changes in the testamentary succession-based establishment, leaving the bequest-based establishment for later discussion.

(I) The first stage of the change of real rights in the testamentary succession-based establishment

The change of real rights in the testamentary succession-based establishment can be divided into two stages. The first, the testamentary succession stage, lasts from the death of the testator until the division of the estate. During this stage, the right of habitation, as part of the estate, will be transferred from the testator to the joint ownership by all heirs. The second, the division stage, starts from the division of the estate and ends with its completion. During this stage, the right of habitation, as part

of the estate, will be transferred from the joint ownership by all heirs to the sole ownership by a single heir.

The first stage of the change of real rights in the testamentary succession-based establishment should be directly governed by the provisions of Article 230 of the *Civil Code*, which stipulates that testamentary succession can directly lead to the change of real rights, and the heir acquires real rights when the succession opens. In other words, the heir acquires the right of habitation established through testamentary succession when the succession opens. China's testamentary succession adheres to the principle of automatic succession, whereby the heir's information, knowledge, or acceptance of succession are irrelevant. Succession opens immediately upon the testator's death, and the heir automatically inherits the estate's rights and obligations.[55] The heir's expression of acceptance of succession does not affect the effect of succession. If the heir expresses a renunciation of succession, renunciation will be retroactive to the opening of succession.

(II) The second stage of the change of real rights in the testamentary succession-based establishment

The second stage, estate division, is where scholarly disputes primarily arise. Some scholars propose a two-stage theory, which divides the change of real rights in the testamentary succession-based establishment into two stages with estate division as the point of demarcation. In the first stage, from the testator's death to estate division, the acquired right of habitation takes effect as a real rights change not resulting from a juristic act in accordance with Article 230 of the *Civil Code*, with joint ownership by all heirs and no registration required. The second stage, commencing with estate division, aims to transfer the right from joint to sole ownership, requiring first-time real estate registration due to its basis in the juristic act of requesting registration[56].

In contrast, other scholars propose that the testamentary succession-based establishment should adopt the declaration principle and be directly governed by Article 230 of the *Civil Code*, that is, the transfer of the right of habitation from the joint ownership by all heirs to the sole ownership by a single heir does not need to be registered and is deemed to have been directly transferred to the heir when the succession opens[57].

Comparing the two-stage theory and the declaration principle, this paper is more supportive of the latter. There are two reasons:

First, the declaration principle is more in line with the true intention of the testator. When a testator establishes a right of habitation in a will, there is usually a certain purpose, such as caring for vulnerable members of the family or repaying a family member for their meticulous care before death. Therefore, the person to whom the testator grants the right of habitation is usually specific. In the testator's cognition, he would hope that the heir would directly obtain the right of habitation, rather than having a transitioning stage of joint ownership by all heirs. Moreover, in this transitioning stage, all heirs have a joint ownership of the estate.[58] If the heir with the ownership of the dwelling disposes of the dwelling during this stage, it will inevitably lead to other heirs being unable to obtain the right of habitation, which will affect the implementation of the testator's will. The *Civil Code*, as a comprehensive guide for social life, must prioritize fulfilling people's needs and upholding their will to ensure its dignity and relevance[59].

Second, at present, China does not have a registration system aligned with the two-stage theory. *The German Civil Code* adopts the two-stage theory. In order to avoid cumbersome registration procedures, Article 40 of the *Land Registration Regulations of Germany* provides that the transitioning registration may be omitted.[60] However, there is no equivalent "omission of registration" provision in China,[61] which will prolong the time for the heir to actually obtain the right of habitation. If the two-stage theory were adopted, and the heir owning the dwelling registers the ownership and sells it to a third party before the heir of the right of habitation registers their right, the heir of the right of habitation will not be able to file a third-party objection lawsuit, nor oppose the bona fide third party due to the unregistered status of their right. Conversely, the declaration

principle ensures the heir acquires the right upon succession opening, enabling them to file a third-party objection lawsuit against a bona fide third party.

Besides, even if the bona fide third party ultimately acquires ownership of the dwelling, causing the heir of the right of habitation to suffer losses, the heir can still seek real rights relief from the owner based on the right of habitation. However, the unregistered right of habitation's hidden nature might lead to a bona fide third party unknowingly acquiring ownership, infringing on the heir's right of habitation. When interpreting this point, the Supreme People's Court of China emphasized: "To avoid ownership disputes, it is necessary for the heir to register in a timely manner."[62]To safeguard their rights against future infringement by bona fide third parties, heirs can go to the real estate registration authority to register the right of habitation. With the right of habitation registration gaining momentum in major Chinese cities and ongoing promulgation of relevant regulations on the right of habitation registration, the business of will-based establishment is becoming increasingly standardized. It is crucial to understand that the effect of the registration of the right of habitation established through testamentary succession is not to create rights, but to declare its existence, manifesting the "declaration by registration principle".[63]

5. THE CHANGE OF REAL RIGHTS IN THE BEQUEST-BASED ESTABLISHMENT

There are differing opinions within academia regarding whether the real rights change rules for the right of habitation established through testamentary succession can be applied to the right of habitation established through bequest. Some scholars propose that testamentary succession and bequest are often combined in the same will, and there isn't sufficient justification for adopting different real right change models. Moreover, they argue that, aside from differences in acceptance and waiver rules, there is no difference in validity. Given that neither testamentary succession nor bequest affect the changes in real rights for the right of habitation established by will, there is no need to differentiate between the two.[64] Other scholars support the viewpoint of differentiation, arguing that the right of habitation established through wills should be categorized as the right of habitation established through testamentary succession and the right of habitation established through bequest. In cases of the right of habitation established through testamentary succession, Article 230 of the *Civil Code* should be directly applied. For the right of habitation established through bequest, Article 368 of the *Civil Code* should be applied mutatis mutandis, adopting the "effective upon registration principle"[65].

This paper believes that the key to clarifying whether the two can be subject to the same rules for changes in real rights lies in understanding whether testamentary succession and bequest have the same legal effect under the *Civil Code*. Different legal effects of testamentary succession and bequest will lead to the application of different rules for changes in real rights. If the legal effects are the same, then the same rules for changes in real rights should apply.

(I) Legal effects of testamentary succession and bequest

As analyzed above, Article 230 of the *Civil Code* explicitly stipulates that testamentary succession has real right effect and can directly lead to changes in real rights. As for the legal effect of bequest, there are still disputes within academia, mainly consisting of three viewpoints: (1) Bequest Debt Effect Theory: This theory, held by most scholars, posits that bequest only have debt effect and cannot directly lead to changes in real rights.[66] (2) Bequest Real Right Effect Theory: Although provisions regarding the effect of bequest in Article 230 of the *Civil Code* were deleted, a small number of scholars still hold the view that bequest have real right effect.[67] (3) Bequest Autonomy of Will Theory: This theory suggests that the effect of bequest can be freely determined by the testator's intention in the will[68].

After the promulgation and implementation of the *Civil Code*, we have entered the post-Civil Code era and should focus more on the interpretation and application of the articles in the *Civil Code*.[69] This paper believes that the effect of bequest should be understood and grasped systematically within the framework of the *Civil Code* in the post-Civil Code era. The bequest autonomy of will theory is merely a legislative theory, and there are no provisions in the *Civil Code* that can provide an interpretative basis for it. The bequest autonomy of will theory currently has no place in the *Civil Code*. The bequest real right effect theory does not meet the requirements of systematic interpretation of the *Civil Code*.

Firstly, if we acknowledge the bequest real right effect theory, which posits that bequest can directly lead to changes in real rights, it would inevitably lead to the "bizarre" situation of using the legatee's property to settle estate debts after the succession opens.

Secondly, the bequest real right effect theory is logically inconsistent and cannot properly rationalize the order of priority for settlement of estate debts. The claims of creditors of the estate would be settled before the real rights of the legatee, which does not comply with the general legal principle of real rights taking precedence over creditor's rights provided by the Book on real rights of the *Civil Code*, and would lead to conflicts between the provisions of the Book on real rights and the Book on succession of the *Civil Code*.[70].

Thirdly, the scope of application of the bequest real right effect theory is narrow. It can only apply to already specified objects; it cannot be applied before generic objects are specified or future objects are determined[71].

Unlike the bequest real right effect theory, the bequest debt effect theory can better align with the requirements of systematic interpretation of the *Civil Code*.

Firstly, the bequest debt effect theory aligns with the order of priority for settlement of estate debts provided by the *Civil Code*. As both are creditor's rights, the claims of the legatee would be settled after the claims of creditors of the estate, thus achieving consistency between the provisions of the Book on real rights and the Book on succession.

Secondly, the bequest debt effect theory aligns with the real rights change model provided by the *Civil Code*. Real rights change models can be categorized as either intent-based or formality-based. Countries that adopt an intent-based real rights change model emphasize the intent of the parties and generally grant bequest real right effect. Countries that adopt a formality-based real rights change model prioritize the security of transactions, and their legislation only grants bequest debt effect.[72] According to the *Civil Code,* China adopts a debt-based formality-based real rights change model.[73] Therefore, given that bequest does have a concealed nature and considering transaction security and preventing the occurrence of a large number of cases where bona fide third parties harm the interests of the habitation right holder due to the concealed nature of bequest, bequest in China should only have debt effect and require registration of immovable property or delivery of movable property to effect changes in real rights.

Thirdly, the bequest debt effect theory aligns with the provisions of the *Civil Code* on the types of bequest. Comparing the legislative models of bequest in major countries and regions worldwide, only comprehensive bequest that accept both estate debts and estate claims can directly lead to changes in real rights. The wording "donate" in Article 1133[74] of the *Civil Code* indicates that bequest in China can only bequeath claims and not debts. Therefore, bequest in China is not comprehensive bequest and thus does not have the effect of directly leading to changes in real rights.

Our analysis finds that testamentary succession has real right effect, while bequest has debt effect under the *Civil Code*. The effects of the two are not the same, leading to different rules for changes in real rights applied to them. Therefore, the right of habitation established through testamentary succession should be distinguished from the right of habitation established through bequest.

(II) Registration of changes in real rights for the right of habitation established through bequest

Bequest, by its nature, should be a unilateral juristic act.[75] In Chapter II (Creation, Alteration, Alienation, or Extinguishment of Real Rights) of the Book on real rights, the *Civil Code* provides specific rules for changes in real rights arising from juristic acts.[76] The right of habitation established through bequest need to comply with the provisions of Article 209[77] of the *Civil Code* regarding changes in real rights arising from juristic acts, adhering to the "effective upon registration principle". Given that Article 209 is a provision directly applicable, the right of habitation established through bequest does not need to refer to Article 368 of the *Civil Code*, as some scholars suggest.

However, the "effective upon registration principle" also carries the risk that if conflicts arise between the heir and the legatee regarding the ownership of the estate, and the heir refuses to assist in the registration process, the legatee's rights could be nullified. In reality, wills are generally held by heirs, and it would be difficult for legatees to directly register their right of habitation based on the will alone. To ensure the smooth realization of the legatee's rights, relevant law interpretation authorities should make good use of the estate administrator system in the *Civil Code*. By providing reasonable interpretations, they can include assisting with the registration of the right of habitation within the interpretative scope of item (6), "performing any other act necessary for managing the estate" among the statutory duties of estate administrators as stipulated in Article 1147[78].

In practice, Article 33[79] of the *Real Estate Registration Law (Exposure Draft)* has similar provisions. If the estate administrator fails to fulfill the statutory duty of registering the right of habitation, such as refusing to assist the legatee in registering their right of habitation, the legatee can, according to Article 1148[80] of the *Civil Code*, request the estate administrator to bear liability for compensation and has the right to demand their continued assistance in the registration process. Additionally, relevant law interpretation authorities should interpret wills that establish the right of habitation as "agreements on any other real right in immovable property" as mentioned in Article 221[81] of the *Civil Code* and Article 93[82] of the *Real Estate Registration Law (Exposure Draft)*. Before formally obtaining the right of habitation through registration, legatees can protect their rights by applying for pre-registration at the real estate registration institution to prevent bona fide third parties from infringing upon their interests.

6. CONCLUSION

The introduction of the right of habitation system is a pioneering move in the legislation of the Book on real rights of the *Civil Code*. As one of the crucial means of establishing the right of habitation, the changes in real rights arising from wills are related to the realization of the testator's intention and also concern the interests of heirs, legatees, and bona fide third parties. The issue of changes in real rights for the right of habitation established through wills must receive due attention. We should correctly understand the meaning, function, classification, and application requirements of "apply mutatis mutandis" in changes in real rights for the right of habitation established through wills. Changes in real rights for the right of habitation established through wills do not actually meet the application requirements of "apply mutatis mutandis", and thus the "effective upon registration principle" provided by Article 368 of the *Civil Code* cannot be applied mutatis mutandis.

However, from the perspective of the systematic interpretation of the *Civil Code*, it can be justified that the right of habitation separated from ownership through wills can become part of the estate. Therefore, the changes in real rights for the right of habitation established through wills should be directly governed by the rules for changes in real rights related to wills. Wills can be implemented through two primary methods: testamentary succession and bequest, and there are differences in their legal effects. As such, the right of habitation established through wills can be further categorized as the right of habitation established through testamentary succession and the right of habitation established through bequest.

Testamentary succession has the legal effect of directly causing changes in real rights. The right of habitation established through testamentary succession should be directly governed by the rules for changes in real rights for acquiring real rights through testamentary succession, as stipulated in Article 230 of the *Civil Code*, adopting the "declaration by registration principle". Bequest does not have the legal effect of directly causing changes in real rights and only have debt effect. The right of habitation established through bequest should be directly governed by the rules for changes in real rights for acquiring real rights through bequest, as stipulated in Article 209 of the *Civil Code*, adopting the "effective upon registration principle". Relevant law interpretation authorities can ensure the smooth realization of the legatee's registration of the right of habitation by providing interpretations for the estate administrator system and the pre-registration system.

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