

REAL PROPERTY IN CHINESE CIVIL LAW – THE PROCESS OF DEVELOPING PROPERTY LEGISLATION

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Abstract

January 1, 2021 marks an extremely important event in China's legislative history, as the day the first Civil Code of the Democratic People's Republic of China entered into force on May 28, 2020 (the "Chinese Civil Code 2020"), after an extremely long preparation time. The 2020 Chinese Civil Code was considered China's "Declaration of Civil Rights", with a huge number of regulations. Understanding legal provisions of the Chinese Civil Code is essential because of the following reasons: firstly, as Vietnam's neighboring country, China has close relations with Vietnam in many areas of civil life. Secondly, Civil Code is a fundamental law of social life, having a profound influence, so the study of Civil Code should be given priority before studying many other laws. Thirdly, researching laws of other countries will help us realize the points that need to be improved in our laws. Up to now, legal research on this Code has not been much. Despite the prolonged lockdown in the past two years, China's real estate market is hotter than ever. Real estate is an extremely important asset, especially when the future of other economic sectors is bleak, the society's financial resources were pouring more and more into real estate, from which relevant conflicts were also increasing, requiring the constant improvement of legal regulations. This study aims to analyze the process of improving Chinese civil law provisions on real property and assess the completion level of the current regulations. To achieve these goals, the study has collected a large number of relevant regulations that China has promulgated and legal discussions of experts. The article is composed of three parts. The first is an overview of real property legislation before the Chinese Civil Code 2020, and the second part is the current regulations. Based on them, the author reports research findings and makes discussion.

Keywords: China, Civil Law, real property

More than 70 years since its independence in 1949 and more than 30 years since the reform and opening up in 1978, China has governed the country without a formal civil code. Civil issues in social life are governed by many separate legal documents, which had been a challenge for international researchers when approaching Chinese law. The Chinese Civil Code 2020 replaced a series of legal documents in force at that time, including Law on Marriage, Law on Inheritance, General Principles of Civil Law, Law on Adoption, Law on Guarantee, Contract Law, Property Law, Tort Liability Law, and General Provisions of the Civil Law of the People's Republic of China.

It must be said that China has had a long time to study and prepare for the birth of this first civil code, even though the component laws were at a remarkable level of completion.

1. An Overview of Real Property Legislation before the Chinese Civil Code 2020

Over the ages, criminal law was the law that developed in China. Any significant civil law did not develop due to a number of reasons.¹ During the period of the Republic of China (1912-1949), the Civil Law Drafting Committee was established in 1928 and began to draft and submit the civil law for approval. However, after the Communist Party of China took power in 1949, the entire legal system built according to Western thought under the Republic of China was wiped out for ideological reasons. Law in general and property law in particular were repealed without being replaced.² During this period, the two times that the civil code was drafted (*i.e.*, 1956 and 1964) were stopped due to the influence of political and social factors. After the reform and opening up, the 1982 Constitution was promulgated, China drafted and promulgated a number of more laws, including the “General Principles of Civil Law” (Chinese:民法通则) in 1986; however, this is not a complete civil code. China chose to compile the civil code as a large legal project, not just a mere promulgation of a set of laws. In 2014, the 18th Central Committee of the Communist Party of China issued a decision to codify the civil code. On the basis of the General Principles of Civil Law, the “General Provisions of the Civil Code” was enacted at the fifth session of the 12th National People’s Congress in 2017.³ A series of laws, regulations and policies systematically formulated the transaction rules in real estate market and played an active role in further reforming the housing system⁴.

General Principles of Civil Law 1986

The “Principles” consists of nine chapters (156 articles): (1)

- 1 Alsen, J. (1996), ‘An Introduction to Chinese Property Law’, *Maryland Journal of International Law*, Vol. 20 (1), p. 4
- 2 Chen, L. (2010), ‘The Historical Development of the Civil Law Tradition in China: A Private Law Perspective’, *The Legal History Review* 78, p. 159-181
- 3 Hong, N. N. P. (2021), ‘Khái quát chung về Bộ luật Dân sự Trung Quốc 2020: Bộ luật Dân sự đầu tiên sau bốn thập niên cải cách mở cửa’ [A General Overview of China’s Civil Code 2020: the First Civil Code after Four Decades of Reform and Opening up], *Chinese Studies Review*, No. 6 (238), Vol. 6, p. 18-30
- 4 Xin, D. (2017), ‘Reform of China’s Housing and Land Systems: The Development Process and Outlook of the Real Estate Industry in China’, *Chinese Journal of Urban and Environmental Studies*, Vol. 5, No. 4. Link DOI: 10.1142/S2345748117500270 [accessed 15 May 2022]

Basic principles, (2) Citizen (Natural Person), (3) Legal Persons, (4) Civil Juristic Acts and Agency, (5) Civil Rights, (6) Civil Liability, (7) Limitation of Action, (8) Application of Law in Civil Relations with Foreigners, and (9) Supplementary Provisions. Chapter 5 “Civil Rights” has 4 sections: (i) Ownership and Property Rights Related to Ownership, (ii) Obligations, (iii) Intellectual Property Rights, and (iv) Personal Rights.

With 15 articles from Article 71 to Article 83, the “Principles” established the basic rules of rights to property: ownership means an owner’s right in accordance with law to possess, use, benefit from, and dispose of his own property, State property, collectively-owned property, citizen’s personal property, co-owned property, found property, neighborhood relationships (water supply, drainage, passage, air, and light).

It can be seen that the “Principles” has solved two big issues: the definition and forms of ownership. However, there was no classification for the property. Easement rights appeared, but the related regulations still remained ill-defined.

Property Law 2007

The Property Law 2007 is a big step forward from the “Principles 1986” on property rights. It was divided to 5 parts with 247 articles in total, namely:

- Part 1 “General Provisions”: Chapter I Basic Principles, Chapter II Creation, Alteration, Transfer and Extinction of the Property Right (Registration of the Immovables, Delivery of the Movables, and Other Provisions), Chapter III Protection of the Property Right.

- Part 2 “Ownership”: Chapter IV General Stipulations, Chapter V Ownership of the State, the Collective and the Individual Person, Chapter VI Condominium Right of Property Owners, Chapter VII Neighboring Relations, Chapter VIII Co-ownership, Chapter XV Special Provisions on Acquisition of Ownership.

- Part 3 “Usufructs”: Chapter X General Stipulations, Chapter XI The Right to Land Contractual Management, Chapter XII The Right to the Use of Land for Construction, Chapter XIII The Right to the Use of House Sites, Chapter XIV Easements.

- Part 4 “Security Interest in Property”: Chapter XV General

Stipulations, Chapter XVI Interests Obtained from Mortgage, Chapter XVII Interest Acquired Through Pledge, Chapter XVIII Lien.

- Part 5 “Possession”.

The Property Law classified properties into movables and immovables. Under the influence of reformation and opening-up, civil rights grew in importance. Real property-related issues were supplemented with a series of brand-new legal regulations, such as Condominium Right of Property Owners, the Right to Land Contractual Management, the Right to the Use of Land for Construction, the Right to the Use of House Sites. Existing issues such as ownership and easements were regulated at a high level of detail.

These moves were designed to regulate property and secure the protection of property rights by identifying different types of property, safeguarding title security, and providing greater economic stability in the real property marketplace.⁵

However, this law also has certain shortcomings. Assoc. Dr. Nguyen Ngoc Dien assessed: “[t]he Property Law has only very sketchy provisions on easement, neighbor relations and no regulation on demarcation... On the other hand, the structure of the law makes people think of a coping law-making. I don’t know by what logic, when talking about property rights, the legislator added neighborly relations; then put ownership and usufruct rights into two independent institutions; solved the problem of mortgage, but did not say anything about buying, selling, renting, etc., then suddenly ended the law with regulations on possession. The brightest point is probably that China has developed a fairly standard concept of property rights, as a counterweight to personality rights. But, that is not enough to balance for the technical shortcomings of a fundamental law.”⁶

General Provisions of the Civil Law 2017

The “Provisions” consists of 11 chapters, with main contents related to basic civil principles, civil subjects, civil rights, civil responsibilities: Chapter I: General Stipulations, Chapter II: Natural Persons, Chapter

5 Kielsingard, M. D. & Chen, L. (2013), ‘The Emergence of Private Property Law in China and Its Impact on Human Rights’, *Asian-Pacific Law and Policy Journal*, 15(1), p. 104.

6 Dien, N. N. (2009), ‘Luật về quyền tài sản của Trung Quốc, nhìn từ Việt Nam luật ta tốt hơn, nhưng...’ [Chinese Law of Property Rights, Seen from Vietnam, Our Law is Better, but...]. Retrieved from <https://thegioiluat.vn/bai-viet-hoc-thuat/LUAT-VE-QUYEN-TAI-SAN-CUA-TRUNG-QUOC-NHIN-TU-VIET-NAM-LUAT-TA-TOT-HON-1034/>, [accessed 15 May 2022]

III: Legal Persons, Chapter IV: Unincorporated Organizations, Chapter V: Civil-law Rights, Chapter VI: Civil Juristic Acts, Chapter VII: Agency, Chapter VIII: Civil Liability, Chapter IX: Limitation of Action, Chapter X: Calculation of Time Periods, Chapter XI: Supplementary Provisions.

The “Provisions” strengthens some provisions for real property as follows:

- Property consists of immovable and movable property. Where there are laws providing that certain rights are deemed as the objects of property right, the provisions of such laws shall prevail. (Article 115)

- Where, for the purpose of public interests, the immovable or movable property is expropriated or requisitioned according to the authorization and procedure prescribed by law, fair and reasonable compensation shall be paid. (Article 117)

- The limitation of action shall not be applicable to the following claims: [...] (2) a claim for return of property by a party who has a property right to an immovable or a registered movable property. (Article 196)

The above legal documents were replaced by the 2020 Chinese Civil Code.

2. Real Property Legislation in the 2020 Chinese Civil Code

Known as the “Encyclopedia of Social Life,” the 2020 Chinese Civil Code contains everything in life such as old age, illness, death, food, clothing, housing, transportation, and economic activities.⁷ The 2020 Chinese Civil Code includes 1260 articles, divided into seven books: Book I – General Part, Book II – Real Rights, Book III – Contracts, Book IV – Personality Rights, Book V – Marriage and Family, Book VI – Succession, and Book VII – Tort Liability.

Book I - General Part deals with general matters before going into more specific groups of regulations. In this book, some real property issues have been mentioned such as: Persons of the civil law enjoy real rights in accordance with law. Real rights are the rights to directly and exclusively control a specific thing by the right holder in accordance with law, which consists of the ownership, right to usufruct, and security

7 《民法典》的这些亮点，快来一起学习吧！ [These Highlights of the Civil Code, Come and Learn Together!]. Retrieved from <https://www.mfa.gov.cn/ce/cgsp/chn/zlgxw/t1803040.htm> [accessed 15 May 2022]

interests in the property (Article 114); Property consists of immovable and movable property. Where the law provides that a right shall be treated as property over which a real right lies, such provisions shall be followed. (Article 115).

Book II - Real Rights concentrates on regulations on real property. This book is divided into three parts: Part I – General Provisions, Part II – Ownership, Part III – Rights of Usufruct, Part IV – Security Interests, Part V – Possession.

2.1. General Provisions

General Rules affirm that China develops its economy in the direction of multi-ownership, in which public ownership plays the leading role. The property rights of the State, collectives, individuals and other rights holders are equally protected by law.

(1) Registration of immovable property

- **Mandatory Registration:** The creation, alteration, alienation, or extinguishment of a real right in immovable property shall become effective upon registration in accordance with law, and shall not take effect without registration, unless otherwise provided by law.⁸ The registration becomes effective at the time when it is recorded in the Register of Immovable Property. The registration of immovable property shall be handled by the registration authority at the place where the immovable property is located. When applying for registration of immovable property, an applicant shall, in light of the different items to be registered, provide necessary materials such as the proof of real rights, metes and bounds, and area of the immovable property. The Real Right Certificate for Immovable Property (Chinese: 不动产权属证书) is a proof of a right holder's entitlement to the real right in the immovable property. The items recorded in the real right certificate for immovable property shall be consistent with what are recorded in the Register of Immovable Property; in case of inconsistency between the two, what is recorded in

8 Where a real right is created, altered, alienated, or extinguished as a result of a legal document issued by the people's court or an arbitration institution, or based on an expropriation decision made by the people's government, the creation, alteration, alienation, or extinguishment of the real right becomes effective at the time when the legal document or expropriation decision enters into effect. / Where a real right is acquired through succession, the real right as inherited becomes effective at the time when the succession opens. / Where a real right is created or extinguished as a result of a de facto act such as lawful construction or demolition of a house, the creation or extinguishment of the real right becomes effective when the de facto act is accomplished (Chinese Civil Code 2020, Articles 229–231)

the register of immovable property shall prevail, unless there is evidence establishing a clear error in the register of immovable property. (Articles 209-211, 214, 216, 217)

- Editing Registration: A right holder or an interested person may apply for retrieving and making copies of the information of the registered immovable property, but may not disclose or illegally use the registered information of a right holder's immovable property. A right holder or an interested person may apply for rectification of the registration if he believes that an item is incorrectly recorded in the register of immovable property. Where the right holder as recorded in the register of immovable property agrees in writing to make rectification, or where there is evidence establishing a clear error in the register, the registration authority shall rectify it. Where the right holder as recorded in the register of immovable property does not agree to make rectification, an interested person may apply for registration of a demurrer. Where the registration authority registers the demurrer but the applicant fails to file a lawsuit within 15 days from the date of such a registration, the registration of demurrer becomes ineffective. Where a demurrer is improperly registered and damage is thus caused to the right holder, the right holder may request the applicant to pay damages. (Articles 218, 219, 220)

- Contract-related real rights: A contract concluded by the parties on the creation, alteration, alienation, or extinguishment of a real right becomes effective upon its formation, unless it is otherwise provided by law or agreed upon by the parties; and the validity of the contract is not affected by the fact that the real right is not registered (Điều 215). Where the parties enter into an agreement for the sale of a house or on any other real right in immovable property, they may apply for registration of a priority notice to a registration authority in accordance with the agreement so as to ensure the realization of the real right in the future. Where, after the priority notice is registered, the immovable property is disposed of without the consent of the right holder as registered in the priority notice, the disposition is not effective in terms of the real right. Where, after the priority notice is registered, no application for registration of the real right of immovable property has been made within 90 days from the date on which the creditor's claim extinguishes or the immovable property is eligible for registration, the registration of the priority notice becomes ineffective (Article 221).

(2) *Protection of real rights* (Article 233–239)

Where a real right is infringed upon, the right holder may have the problem solved by means of settlement, mediation, arbitration, litigation, and the like. Where a dispute arises over the attribution or contents of a real right, an interested person may request for confirmation of the right. Where an immovable or movable property is possessed by a person not entitled to do so, the right holder may request for restitution. Where there is a nuisance or a potential nuisance against a real right, the right holder may request for removal of the nuisance or elimination of the danger. Where an immovable or movable property is destructed or damaged, the right holder may request for the repair, redoing, replacement, or restoration to the original condition in accordance with law. Where a real right is infringed upon and damage is thus caused, the right holder may, in accordance with law, request the infringing person to pay damages or bear other civil liabilities. The forms of real right protection may be applied either separately or concurrently according to the circumstances of the infringement of a right.

2.2. Ownership

Scope of rights: An owner is entitled to possess, use, benefit from, and dispose of his own immovable or movable property in accordance with law (Article 240). An owner of property is entitled to create a right to usufruct and a security interest on his own property. A usufructuary or security interest holder, when exercising their rights, shall not harm the rights and interests of the owner (Article 241).

Expropriation: For public interest, the collectively-owned land and the houses and other immovable property of an organization or individual may be expropriated. In the case of expropriation, land compensation fees, resettlement subsidies, and compensation fees for rural villagers' dwellings and other ground attachments as well as young crops shall be paid in full in a timely manner and social security premiums shall be arranged. An immovable or movable property of an organization or individual may, in response to an emergency such as providing disaster relief and preventing and controlling pandemics, be requisitioned within the scope of authority and pursuant to the procedures provided by law. The requisitioned immovable or movable property shall be returned to the aforementioned organization or individual after use. Where the immovable or movable property of an organization or individual is requisitioned, or where it is

destroyed, damaged, or lost after being requisitioned, compensation shall be made (Article 243-245).

Forms of Ownership: China regulates three forms of ownership including State Ownership, Collective Ownership and Private Ownership (Article 246-270).

Ownership of a Building's Units: A unit owner has the ownership over an exclusive unit of a building, such as a dwelling space or a space used for operating businesses, and has the right to co-own and jointly manage the common space other than the unit. A unit owner has the right to possess, use, benefit from, and dispose of his exclusive unit of a building. The unit owner may not, when exercising his rights, endanger the safety of the building or impair the lawful rights and interests of other unit owners. A unit owner has rights and assumes duties with respect to the common space outside his exclusive unit of a building and may not refuse to perform such duties on the ground that he has waived such rights. While a unit owner transfers a dwelling space or the space used for business operations owned by him in a building, his rights to co-own and jointly manage the common space therein shall be transferred concomitantly. The following issues are specified in detail: Determination of ownership for roads, green land, public works, parking spaces within the planning area; The issues that the apartment owners decide together and the required consent rate for each issue. Owners may form an Owners Council and elect an Owners Committee; mobilize and use maintenance funds and other expenses; manage and authorize project management for service providers; and have the obligation to protect the environment (Article 271-287).

Adjacent Relationships: The persons entitled to adjacent rights in immovable property shall properly deal with adjacent relationships in accordance with the principles of facilitation to production, convenience for daily lives, solidarity and mutual assistance, and fairness and reasonableness. Where there are laws and regulations providing for adjacent relationships, those provisions shall be applied. Where there are no such provisions, local customs may be followed. This relationship involves drainage, walkways, installation of pipes, etc. when it is necessary to use adjacent properties. Owners of rights to real estate must not violate regulations in disposing of solid waste, discharging substances that cause air, water or soil pollutants, must not make noise, create

optical radiation, electromagnetic radiation, or cause the release of other hazardous substances, jeopardize the safety of adjacent property when digging, constructing structures, laying pipelines, or installing equipment, and must make every effort to avoid causing harm to the right holder to adjoining immovable property (Article 288-296).

Co-ownership: Co-ownership consists of co-ownership by shares and joint co-ownership. The Chinese Civil Code 2020 guides the determination of co-ownership by shares and joint co-ownership in cases where the agreement is absent or unclear and how to manage and dispose of co-ownership property. A co-owner by shares may transfer the portion of shares he owned in the co-owned immovable or movable property. The other co-owners have the right of pre-emption to buy the shares under equivalent conditions (Article 297-310).

Re-acquisition of Real Property Ownership: Where a person with no right to dispose of property transfers it to another person, the owner has the right to recover it. Unless otherwise provided by law, the transferee acquires the ownership under the following circumstances: (1) the transferee is in good faith at the time when the property is transferred to him; (2) the transfer is made at a reasonable price; and (3) the transferred property has been registered as required by law, or has been delivered to the transferee where registration is not required. Where a transferee acquires the ownership of the property in accordance with the provisions of the preceding paragraph, the original owner has the right to claim damages against the person who disposes of the property without a right. Where a party acquires, in good faith, a real right other than ownership, the provisions of the preceding two paragraphs shall be applied *mutatis mutandis* (Article 311).

2.3. Rights of Usufruct

A usufructuary has the right to possess, use, and benefit from the immovable or movable property owned by another person in accordance with law. A usufructuary shall, when exercising his right, abide by the provisions of laws on the protection, rational exploitation, and utilization of resources and the protection of the ecological environment. The owner may not interfere with the exercise of such rights by the usufructuary. Where a right to usufruct is extinguished or adversely affected due to expropriation or requisition of the real property, the usufructuary has the right to compensation (Articles 323-329).

Rights of Usufruct are principally established on real estate:

- *Right to Contractual Management of Land* (Articles 330-343): A person with the right to contractual management of land may decide on his own to transfer the right to management of land to others by leasing, contributing it as shares, or other means in accordance with law. The persons with the rights to contractual management of land are entitled to exchange or transfer such rights in accordance with law. The contracted land may not be used for non-agricultural construction purposes without being approved in accordance with law. Where the rights to contractual management of land are exchanged or transferred, the parties may apply to the registration authority for registration; without registration, such exchange or transfer may not be asserted against a bona fide third person.

- *Right to Use Land for Construction Purposes* (Articles 344-361): With respect to the State-owned land zoned for construction purposes, a person with the right to use a lot of such land is entitled to possess, use, and benefit from the lot, and to use it to construct buildings, structures, and auxiliary facilities. The right to use a lot of land for construction purposes may be created separately on the surface of, above, or below the lot of land. The right to use a lot of land for construction purposes may be created by way of transfer or gratuitous grant.

- *Right to Use a House Site* (Articles 362-365): A person who has the right to use a house site is entitled to possess and use the lot of land owned by the collective, and to utilize such lot of land to build a dwelling and auxiliary facilities in accordance with law. Where a house site is destroyed due to natural disasters or for other reasons, the right to use the house site is extinguished. A new house site shall be allocated in accordance with law to the villagers who have lost their house site.

- *Right of Habitation* (Articles 366-371): A person with a right of habitation is entitled to the right to usufruct of possessing and using another person's dwelling as agreed in a contract on a right of habitation, so as to meet his needs of habitation. The right of habitation is created upon registration. It may not be transferred or inherited. The dwelling in which a right of habitation is created may not be leased to another, unless otherwise agreed by the parties.

The Right of Habitation is a new type of usufruct in the Chinese Civil Code 2020. Compared with the lease right, the long-term nature

of right of habitation provides an increased sense of stability to the right holder, making up for the gap between “house ownership” and “lease right”. In addition, the establishment of this right is conducive to the realization of the “house-for-age” model. On the one hand, the elderly can obtain economic income by transferring the ownership of the house; on the other hand, the establishment of the Right of Habitation can guarantee the elderly to live in the house until their death.⁹ Furthermore, the establishment of Right of Habitation is a highlight of the property rights compilation of the Chinese Civil Code 2020, which further improves China’s multi-level affordable housing system. In the current practice, there are still some questions in the implementation this right, such as: whether it must be established on the basis of the whole house or can it be established separately? Can one person set multiple Right of Habitation? Does the holder of the Right of Habitation have the right to allow other people to live together? Is the object of Right of Habitation strictly limited to a “house”? Can the Right of Habitation be registered on a per-time, per-unit basis to solve problems similar to a “timeshare”?¹⁰

- *Easements* (Articles 372-385): A person who has a right to easement is entitled to utilize the immovable property of another person as agreed in a contract so as to enhance the efficiency of his own immovable property. To create an easement, the parties shall enter into an easement contract in writing. An easement is created at the time the easement contract takes effect; however, without registration, such easement may not be asserted against a bona fide third person. The duration of an easement shall be agreed upon by the parties, provided that it may not exceed the remaining term of the right to usufruct, such as the right to contractual management of land or the right to use a lot of land for construction purposes. Where an owner of a lot of land is entitled to or is encumbered with an easement, when a right to usufruct, such as a right to contractual management of land or a right to use a house site is created on the lot of land, the usufructuary shall continue to be entitled to or be encumbered with the easement thereon that has already been created. Where a right to usufruct, such as a right to contractual management of land, a right to use

9 张莹琳 [Zhang Yinglin], 《民法典》对房地产领域的影响及应对建议 [《 Civil Code 》 Impact on the Real Estate Sector and Suggestions for Countermeasures]. Retrieved from <http://www.acla.org.cn/article/page/detailById/30046> [accessed 15 May 2022]

10 中国房地产争议解决年度观察 [Annual Observation of Resolving Disputes about Chinese Real Estate], (2021). Retrieved from <http://www.bjac.org.cn/news/view?id=4055> [accessed 15 May 2022]

a lot of land for construction purposes, and a right to use a house site, has already been created on a lot of land, the owner of the lot of land may not create an easement on the lot without the consent of the usufructuary. An easement may not be transferred or mortgaged separately.

2.4. Security Interests

Where a creditor needs to secure his claims in a civil activity such as lending, buying and selling, and the like, he may create a security interest. To create a security interest, a security contract shall be entered into by the parties. The scope covered by a security interest includes the principal claim and its interests based on the principal contract, liquidated damages, compensatory damages, and the expenses arising from safekeeping the collateral and enforcing the security interests (Articles 386–393). Security interest which can be applied to real property is mortgage. Notable regulations include:

- Where a building is mortgaged, the right to use the lot of land in the area occupied by the building for construction purposes shall be mortgaged concomitantly. Where a right to use a lot of land for construction purposes is mortgaged, any building on the lot of land shall be mortgaged concomitantly. Where a mortgagor fails to concomitantly mortgage the property as provided in the preceding paragraph, the unmortgaged property in question shall be deemed to be concomitantly mortgaged (Article 397).

- The following property may not be mortgaged: land ownership; the right to use the land owned by a collective, such as house sites, land and hills retained for household use, unless it may be mortgaged as provided by law; educational facilities, medical and health facilities, and other public welfare facilities of non-profit legal persons established for public welfare purposes, such as schools, kindergartens, and medical institutions; property of which the ownership or right to the use is unclear or disputed; property that has been seized, detained, or placed under custody in accordance with law; and other property that may not be mortgaged as provided by laws or administrative regulations (Article 399).

- Where a right to use a lot of land for construction purposes is mortgaged, any newly added buildings on the lot of land are not part of the mortgaged property. Upon enforcement of the mortgage on the

right to use the lot of land for construction purposes, the newly added buildings on such land shall be disposed of concomitantly with the right to use such land for construction purposes, provided that the mortgagee has no priority to be paid from the proceeds obtained from disposition of the newly added buildings (Article 417).

The “Interpretation of the Supreme People’s Court on the Application of the Guarantee System in the Civil Code of the People’s Republic of China” was issued on December 31, 2020 and took effect on the same day as the new Chinese Civil Code 2020.¹¹

2.5. Possession

The 2020 Chinese Civil Code does not provide a definition of possession or the circumstances to consider whether such is in good faith. Only two matters are covered namely, the applicable law and infringement cases.

Applicable law: In the case of possession of immovable or movable property based on a contractual relationship, matters such as the use of the immovable or movable property, the benefits therefrom, and the default liability shall be subject to the agreement in the contract. Where there is no agreement in the contract or the agreement is unclear, the relevant provisions of laws shall be applied (Article 458).

Infringement cases (Article 459–462): Where damage is caused to the property by its possessor as a result of use of the property, a mala fide possessor shall be liable for compensation. Where a property is in the possession of another person, a person holding a right in the property may request the possessor to return the original property and its fruits and proceeds, provided that the necessary expenses incurred by a bona fide possessor for the maintenance of the immovable or movable property shall be paid. Where a property is trespassed or converted, its possessor is entitled to request restitution. Where there is a nuisance against the possession, the possessor has the right to request the removal of the nuisance or the elimination of the danger. Where damage is caused as a result of the trespass, conversion, or nuisance, the possessor has the right to request compensatory damages. The possessor’s right to request for restitution is extinguished if such a right has not been exercised within one year from the date the trespass or conversion.

11 A full Chinese version can be found on: <http://www.cirea.org.cn/content/7713>.

In addition, there are two related regulations:

- The limitation period for a person to request the people's court to protect his civil-law rights is three years. However, it does not apply to a claim for return of property of a person who has a real right in an immovable or a registered movable property (Articles 188, 196 Book I General Part).

- Where the place of performance an agreement is not clearly stipulated, the contract shall be performed at the place of the party receiving money where payment of money is involved, or, where real estate is to be delivered, at the place where the real estate is located. For other subject matters, the contract shall be performed at the place where the party performing the obligation is located (Article 511 Book III Contracts).

3. Research Findings and Discussion

3.1. The 2020 Chinese Civil Code inherited almost all regulations from the 2007 Property Law, including unresolved shortcomings

Compared with the 2007 Property Law, Book 2 of the 2020 Chinese Civil Code has no structural difference among the inheritance of all titles. The only difference is that when going into a few regulations on the procedure, the 2020 Chinese Civil Law provides more specific details. These differences are more related to administrative factors than the civil nature of property and rights. It can be said that the 2007 Property Law has been elaborately built, so the Chinese Civil Code 2020 just needs to inherit the provisions of the former. The 2007 Property Law but not the 2020 Chinese Civil Code deserves to be considered a demarcation milestone for the development of real property.

There are highlights that need to be mentioned in the 2007 Property Law, which the 2020 Chinese Civil Code inherited as follows:

Firstly, the importance of real property registration was particularly emphasized. Property right is a model right and is at the center of civil law, because it is the highest right established on property which has primacy over any other rights relating to said property. This property right also becomes the basis for all other principal rights tied to a property. The nature of property rights entails the right to exclude others. Therefore, the right of exclusion is seen as the backbone of

property rights in all legal traditions.¹² The meaning of real estate registration is information about rights or creating rights¹³. China is in the direction of determining that it is registration that has a direct effect on establishing rights. The registration is valid against third parties. The issue of real property registration was developed into an independent chapter with many detailed regulations.

Secondly, possession is separate from ownership. Possession has always been considered as a component of ownership. It is natural for an owner to exercise his rights by possessing an object, but it cannot be ruled out that a person who is not the owner possesses an object. Before the Property Law 2007, China still considered possession as a part of ownership only. By the time the Property Law 2007 was formulated, China's civil law-makers had recognized many cases of possession occurring outside of ownership and had developed regulations about them. In practice, this happens with real estate quite a lot, because real property owners usually have a limited need to use (a parcel of land, a house), the rest they can let others use. The civil law must take into account the rights of the person who is legally possessing the real estate under an agreement. In addition, real estate has an immovable character that makes it difficult for owners to manage. In case of being illegally possessed by another person, there should be regulations to deal with the said situation.

However, this full inheritance does not mean that the 2007 Property Law was perfect. The following are some limitations of the 2007 Property Law which are still present in the 2020 Chinese Civil Code:

Firstly, there is still no definition of property types. In the 2020 Chinese Civil Code, apart from the provisions on property classification in Article 15 (*i.e.*, “[p]roperty consists of immovable and movable property. Where the law provides that a right shall be treated as property over which a real right lies, such provisions shall be followed”), it does not provide any definition or list to make readers understand exactly what

12 Cuong, N. H., ‘Những bất cập về khái niệm tài sản, phân loại tài sản của Bộ luật dân sự và định hướng cải cách’ [Inadequacies in the Concept of Property, Property Classification of the Civil Code and Directions to Reform]. Retrieved from http://vibonline.com.vn/bao_cao/nhung-bat-cap-ve-khai-niem-tai-san-phan-loai-tai-san-cua-bo-luat-dan-su-va-dinh-huong-cai-cach, [accessed 15 May 2022]

13 Dien, N. N., ‘Lợi ích của việc xây dựng chế định vật quyền đối với việc hoàn thiện hệ thống pháp luật tài sản’ [Benefits of Building Real Rights Institution for the Improvement of Property Legal System]. Retrieved from http://hvta.toaan.gov.vn/portal/page/portal/tandtc/baiviet?p_page_id=1754190&p_cateid=1751909&article_details=1&item_id=6180489 [accessed 15 May 2022]

immovables and movables are. They are easy to define in case of things but much more difficult to define in case of rights considered as property.

Secondly, the extent of the real property is not clearly defined physically. It can be seen that the 2020 Chinese Civil Code has not clarified the demarcation issue. In the article “China’s property rights law, from Vietnam’s perspective, our law is better, but...”, Assoc. Dr. Nguyen Ngoc Dien made his point of view: “[w]e must build a land regime solving three major technical problems. Firstly, in order for each owner to freely exercise the rights to the real property owned by him and not to infringe upon the rights of neighboring owners, it is necessary to clarify the boundaries of the real estate, by demarcation. Secondly, the exploitation of a real estate may require the establishment of a particular relationship, characterized by the fact that a real estate must serve as a service for another real estate, through easement. Thirdly, real estate owners live in neighborly relations which has constraints, requiring each owner to accept sacrifices or limit his freedom, expressed in the form of performing obligations in neighborly relations.”¹⁴ The scope of a real estate can be determined using the measure of a parcel of land, a house on the ground, but the scope of a real property is broader, it is not only a matter of area but also related to parts of the space in which a right holder can exercise his right, such as the ground, surface, or above. These spaces may belong to different owners and this issue has not been resolved by the 2020 Chinese Civil Code.

3.2. The scope of civil law is too broad, covering issues that should belong to other laws

Firstly, the appearance of too many regulations on administrative management is incompatible with the nature of civil code. Real property has an important characteristic related to registration which needs a procedure before the registration authority. This registration is necessary to create civil rights and to restrict third parties. However, the Chinese Civil Code 2020 did not limit itself in the scope of civil perspective but added many detailed regulations on how to organize the registration, process and operation of the authority, which are matters of administrative law. Just take some examples include Articles 212 and 213, which specify the acts that the registration authority shall perform and the acts that the registration authority may not engage. A party who provides false materials upon application for registration and thus causes damage to another person shall be liable for compensation. Where damage is caused to another person

14 Dien, N. N. (2009), *supra* note 6

due to a clerical error upon registration, the registration authority shall be liable for compensation. After having made such compensation, the registration authority has the right to indemnification against the person who has made the error (Article 222). Fee for the registration of real property collected on a piece-by-piece basis and may not be collected in proportion to the area, size, or purchase price of the immovable property (Article 223). A person who has the right to use a lot of land for construction purposes shall pay the transfer fee and other fees in accordance with law and the contract (Article 351). All of these issues in the book of real rights are quite out of place.

Secondly, despite having Book 3 “Contracts”, there are provisions about the content of real property contracts in Book 2 “Real rights”, such as:

- A contract for the transfer of the right to use a lot of land for construction purposes generally contains the following clauses: the name and address of each party; the metes and bounds and area of the lot of land; the space occupied by the buildings, structures, and the auxiliary facilities thereof; the planned use and zoning conditions of the lot; the term of the right to use the lot of land for construction purposes; the transfer fee and other fees, and the mode of payment thereof; and the means of dispute resolution (Article 348);

- An easement contract generally contains the following clauses: the name and address of each party; the location of the servient land and the dominant land; the purposes and methods of utilizing the servient land; the duration of the easement; the fees and the mode of payment; and the means of dispute resolution (Article 373);

- A mortgage contract generally contains the following terms: the type and amount of the secured claim; the term during which the debtor shall perform obligations; such particulars as the name and quantity of the mortgaged property; and the scope of the security interest covered (Article 400).

The detailing of contractual agreements makes the content of Book 2 overlap with Book 3; it shows rights to person rather than rights on property.

Thirdly, Some groups of provisions of civil law can be separated into independent laws, such as the group of regulations on real estate registration (how registration is organized), or Chapter VI “Ownership of a Building’s Units” – Book 2 “Real Rights”, this chapter integrates issues

of real estate business in providing services: “[t]he property management service enterprise or otherwise a manager shall, as entrusted by the unit owners, manage the buildings and their auxiliary facilities within the construction zone in accordance with the provisions of Book 3 of this Code relating to contracts for property management service, subject itself to the supervision of the unit owners, and respond to the unit owners’ inquiries about property management services in a timely manner. The property management service enterprise or other managers shall carry out emergency measures and other management measures implemented by the government in accordance with law and actively cooperate in the performance of the relevant work” (Article 285). A unit owner has the right to request the developer, the property management service enterprise or other managers, and other unit owners to bear civil liability for any act done by them that infringes upon his lawful rights and interests (Article 287)... Land use right is also real property, but land issues are rationally formulated in civil law; other details are governed by the law on land management. Meanwhile, regulations on housing were built too much, even beyond the scope of civil law.

Although civil law is an important law, it does not mean that it must contain too many detailed regulations. This not only affects the scope of the law, but also easily leads to frequent amendments.

3.3. Adjacent Relationships and Easements

From Article 288 to Article 296 (Part 2 “Ownerships” – Chapter VII “Adjacent Relationship”), the Chinese Civil Code 2020 stipulates what rights and obligations the person entitled to the real rights in immovable property and the persons entitled to an adjacent right have towards each other. From Article 372 to Article 385 (Part 3 “Rights of Usufruct” – Chapter XV “Easements”, easement contracts and transferring easement are regulated. *Firstly*, these two groups of regulations cover the common legal issue but are not even next to each other. This is really a confusing way of structuring laws. *Secondly*, it is not appropriate to include Adjacent Relationship in the part of Ownership because it does not represent the owner’s rights to his own land. *Thirdly*, easements are still considered as real rights. However, Part 2 built it up as rights and obligations between two persons.

Personal relationships are far more significant and influential in China than in Western legal systems; in fact, these personal relationships form a

critical component of social networking in China.¹⁵

The subject property of the relationship should be emphasized: Easement is established to facilitate the operation of one property through the service of another. It is not a relationship between two owners. In other words, easement is a right attached to real estate; it exists as long as the real estate exists and necessary conditions for the title to be established are met, even if the real property concerned is transferred from a person to another. Because easement is the service of one real estate to another, so anyone – not only the owner – using and exploiting that real estate has the right to enjoy the easement attached to that real estate.¹⁶ As can be seen, the nature of easements in Chinese civil law is unclear. These two groups of regulations should be combined and modified to match the nature of a real right.

Conclusions

In general, China's civil law has grown tremendously in terms of the number of regulations governing real property issue. Various types of real estate are governed by extremely detailed regulations. The current regulations on real estate are basically inherited from the 2007 Property Law. China also added a number of necessary provisions based on the requirements of social reality. Although there are still some points needed to be improved in terms of the legal structure as well as in specific regulations, the 2020 Chinese Civil Code is still the most important official basis of China for addressing and protecting legal rights to real property. A large number of detailed regulations governing real estate in the Chinese Civil Code have a great reference value to Vietnam in the process of improving legal provisions not only of civil law but also of other related laws such as housing law, administrative law. Instead of absorbing much from laws of other countries, China focuses on the realities of what social life entails in order to build its own unique regulations. “*Haste makes waste*” – a long preparation time that China spent on the Civil Code also shows its caution with this top important law. There are many things that Vietnam can learn not only from the content but also from the process of building the Chinese Civil Code. ●

15 Stein, G. M. (2016), ‘Chinese Real Estate Law and The Law and Development Theory: Comparing Law And Practice’, *Florida State Journal of Transnational Law & Policy*, Vol. 25, p. 1, p. 4

16 Dien, N. N., *supra* note 13

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