Religious Property Protection by the Provisions of the Civil Code of China

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Abstract. The compilation of a civil code is undoubtedly a way to realize law-based control over religious work in China to transform religious administration into control over religious affairs by law and make the public on alert against religious extremism and no longer sensitive about religious affairs. There is a lack of legal regulation on existing religious properties and the rights to these properties are unclear in China. Traditional administration fails to solve many problems about the rights to religious properties and even aggravates conflicts. After the adoption of the General Provisions of the Civil Law, we should co-ordinate the basic civil rights, private law, legal persons and property rights in the formulation of the civil code, so as to perfect the rule of law protection of religious property.

Introduction

In order to continuously improve the level of law-based control over religious work and proactively guide to make religion suited to socialism, it is required to transform Chinese religious work pattern inclusive of many administrative factors into law-based control over religious work and make the public on alert against religious extremism to ensure long-term peace and stability and no longer sensitive about religious affairs. The compilation of a civil code is undoubtedly a way to realize such transformation. When compiling the civil code of China, the religious property system should be considered in respect of general provisions and the real right system.

Historical Evolution of Chinese Religious Property System

In the early period after the foundation of the People’s Republic of China, religious properties were adjusted mainly according to policy documents. The policies were separated, changeful and not systematic. The Directives on the Issues of Agricultural Lands in Suburbs in the Old Liberated Areas promulgated by The Government Administration Council of the Central People’s Government on January 13, 1950 provided that all lands for the ancestral hall, temple and church shall be nationalized and properly distributed, and a land shall be appropriately allotted to a Buddhist monk or nun who was willing to engage in agricultural production. The Directives of The Publicity Department of the Communist Party of China and The United Front Work Department of CPC Central Committee on the Establishment of A Buddhist Association promulgated in December 1952 provided that for the rights to a temple, a temple shall be publicly owned by the society, generally, a Buddhist monk or nun shall have the right to use but have no the right to dispose of the temple, and a small temple privately built or purchased shall be still privately owned. A religious organization could manage religious properties in a self-supporting manner. Religious properties could be rented. The government might not expropriate religious properties without approval and shall implement the tax exemption policy thereon. In that period, the nature of the religious organization had not been defined and a religious organization was deemed as a common social organization. Afterwards, religious facilities and properties were damaged to a large extent due to the outbreak of the Cultural Revolution. After the Third Plenary Session of the 11th Central Committee of the Communist Party of China, the Communist Party and government of China re-implemented the policy on freedom of
religious belief. On April 9, 1983, the State Council approved for transmitting the Report on the Determination of National Key Buddhist and Taoist Temples in Han Nationality Regions made by the State Administration for Religious Affairs of P.R.C. In this report, 142 Buddhist temples and 21 Taoist temples (including the steles, towers, tombs and gardens belonging thereto) were determined as Buddhist and Taoist activity places, which were managed and used by Buddhist and Taoist organizations under the leadership of local departments of religious affairs, with the property rights to be owned by the state to guarantee orderly religious activities, and were subject to the supervision and inspection of cultural heritage departments and botanical garden departments in strict accordance with relevant provisions of The Law on the Protection of Cultural Relics. In that period, the laws began to focus on the adjustment of religious properties. Article 77 of General Rules of the Civil Law provided that "the lawful properties of social organizations including religious organizations shall be protected by law", which acknowledged religious organizations belonged to the class of social organizations and religious properties shall be protected by the private law. The above-mentioned provision, however, is too abstract and difficult to carry out in practice, in which whether the right to religious properties is ownership or use right and the objects purported to be lawful properties are unspecified and the relationship between the religious organization and the properties at the activity place is also unclear.

Systematic provisions on the religious property system were set forth in Chapter V (Article 30-37) of the Regulations on Religious Affairs adopted by the State Council in 2004. According to the Article 30, religious properties were regulated pursuant to uniform rules, without differentiation among religions, undoubtedly demonstrating a progress compared to the Act of Supervising Temples of Taiwan in which religious property norms were set based on different religions. Different from the General Rules of the Civil Law, the Regulations on Religious Affairs provided that religious activity places were of the same status as religious organizations belonged to the class of social organizations, but it did not recognize the religious activity place as a legal person, and thus the religious property mode "giving priority to management (the authority of the custodian is limited to ensure properties are used for the intended purpose), evading ownership (the subject in whom the ownership of properties is vested is not specified, but the relationship between the religious organization and the properties at the activity place is cut off), strengthening supervision (supervision from competent authorities and the masses) and guaranteeing normal use" was established according to the purpose-based property theory. [1] The Article 32 and 37 provided that "the house and structure used for religious activities at a religious activity place and the annex thereof in which religious personnel live may not be transferred, mortgaged or used for investment in kind" and "where the registration of a religious organization or religious activity place is withdrawn or the existence thereof is terminated, liquidation shall be carried out and the residual properties after liquidation be used for the program with an objective consistent with that of the religious organization or religious activity place", which specified the purpose range restriction in respect of the disposal of religious properties and defined the disposal of residual properties for the specified purpose.

Experts paid close attention to the religious property system when drawing up the Real Right Law. The scholar Liang Huixing proposed that "the immovable property and movable property of the temple, Taoist temple, church or masjid shall be owned by the religious legal person". [2] Article 160 of The Proposal for the Real Right Law of China (Draft) drawn up by the scholar Wang Liming provided that "the religious properties shall be owned by the religious organization and temple...the religious organization shall, to the extent permitted by laws and regulations, have the right to independently dispose of the religious properties, without interference from any other person". [3] However, the above-said proposals were excluded from and no norm on religious properties was specified in the Real Right Law passed in 2007. Besides, Article 5 of the Real Right Law provided that "the types and contents of real rights shall be provided by law", which established the numerus clausus principle. The Real Right Law put the legal status of religious properties in an obviously embarrassing position. In March 15th, 2017, the fifth session of the twelve National People's Congress voted through the "General Principles of Civil Law of the
People's Republic of China”. In its fifth chapter about the "civil rights”, the 116th rule stipulates "the types and content of rights can only be prescribed by law”, confirming the legal system of strict property right again.

Defects in Current Religious Property System of China

Firstly, legal regulation is absent from current religious property system of China. The provision in Article 77 of General Rules of the Civil Law is poor in operability; the Regulations on Religious Affairs adopt the purpose-based property mode derived from the negative theory of the legal person, which causes the problem about the religious legal person to be evaded again; the Real Right Law even directly evades the issues of the religious legal person and religious properties. Consequently, religious property management mainly depends on the policy in practice. Nevertheless, during nearly 40 years of reform and opening up, there has been a tremendous change in Chinese economy and society, and new problems also arise from religion, where traditional administration fails to solve many problems about the rights to religious properties and even aggravates conflicts, far from embodying the CPC’s spirit of elaborately perfecting religious work and continuously improving the level of law-based control over religious work. The rights to religious properties shall be defined in the civil code to guarantee lawful religious properties and rights and interests are protected by law. Such guarantee is the role of fundamental rights in the whole legal system and inevitable based on the right standard of the Civil Law.

Secondly, since there is no definite provision on the ownership of religious properties and the subject of the ownership in the laws such as the General Rules of the Civil Law, the religious activity place without the certificate of real property ownership and land use certificate becomes an "illegal" place in practice. Although there are relevant provisions on religious properties in the Regulations on Religious Affairs, Article 5 of the Real Right Law of China has provided strict numerous clauses principle (Attention should be paid to the problems about real rights arising in traditional practice. The rights other than those categorized as existing legal real rights according to the numerous clauses principle may not be protected according to the provisions on real rights, but shall be subject to creditor rights protection, and even quasi-property protection after being announced publicly, such as the rights to the thatched cottages on Zhongnan Mountain and Jizu Mountain in which monks practice their religion), thus the adjustment of the ownership of religious properties as per administrative regulations is a controversial issue.

Finally, if religious properties are involved with the protection of cultural relics, the problem is more complicated. The religious properties identified as cultural relics shall be owned by the state according to The Law on the Protection of Cultural Relics. However, actually the ownership of some religious houses has been registered under the name of local religious associations, the departments of cultural heritage, culture, botanical garden or even tourism, or monks or individuals, causing religious property rights to be unclear and easily embezzled and damaged. For example, in recent years, some local governments, enterprises and people built religious facilities on the pretext of developing the cultural industry and religious programs, and sought profits by means of the sales of admission tickets and joss sticks and candles, leading to "a mania for religious economy" and disruption of the religious order, and in order to pursue economic growth, some local governments even embezzled religious properties, intervened in religious affairs and ran Buddhist and Taoist temples in the manner of investment management or contracted management by enterprises by claiming to protect cultural relics, seriously violating the principle of separation of religion from political power. In this regard, the scholar Sun Xianzhong pointed out that not all of religious cultural relics shall be owned by the state because the religious legal person, as the user and custodian of these religious properties, is better at protecting the cultural relics, and the state only needs to supervise the use and management of them. [4] He is rather prescient.
Improvement in the Religious Property System Reflected in the Civil Code of China Being Compiled

Article 1 of the General Provisions of the Civil Law reads clearly, "this law is enacted in accordance with the constitution." Constitutional petition system has not been established considering our country, it is of great significance to improve the religious work and raise the level of religious rule of law in order to protect the basic rights of the Constitution and private religions and to construct a supporting system including religious legal persons and religious property systems.

The third chapter of the General Provisions of the Civil Law takes the function of legal system "profit - nonprofit legal classification", the second paragraph of article ninety-second reads, "Where a legally established place for religious activities has legal person status, who can apply for the registration of a legal person and obtain the legal person status of a donor, and where laws and administrative regulations provide for all religious activities, such provisions shall prevail." For the first time the laws definite that the sites for religious activities and religious organizations should be separated from the legal persons’ status, which is undoubtedly a huge progress in legislation. And clear the donation legal person's establishment, the registration, the constitution, the policy-making organ, the surveillance organization and the prohibition property assignment and so on.

In the Civil Code being complied, for the issue of religious property protection, the religious legal person mode should be determined at first. For design of the religious legal person system of China, the system of the association and foundation constituted as legal persons can be considered or the example of Japan can be followed in establishing a special religious legal person system, to clearly define that diverse religious properties shall be vested in different subjects, and the religious cultural relics which can be well handed down from generation to generation only when they are owned by the state shall belong to the state, without any effect on orderly religious activities carried out by relevant religious legal persons and individuals. The ownership vested in the religious organization constituted as a legal person should be clearly differentiated from that vented in the religious activity place constituted as a legal person, and interim and subsequent supervision and operation procedures for the properties of the religious legal person be specified in the special law, to ensure the properties are used for the purpose of religion and charity.

In the Civil Code being complied, the adjacent relation legal system should be specially designed in respect of religious life, such as the right to freely use a religious activity place or the reflective interest brought by the place and the claim made by the adjacent immovable property oblige to the opposite party for respecting his/her religious belief. In the following case, the special requirements for the adjacent relation in religious life are typical. [5]

The villagers in Beishan Village, District B, City A intended to hold a chrysanthemum show in the square in front of the memorial hall they had built, for which they would hire the memorial hall, close the gate of Niushanchan Temple on the east of the square and require people who would enter the temple to pay RMB 10 Yuan for each admission ticket. Afterwards, through negotiation, the villagers agreed to exempt the holders of the certificate of conversion to Buddhism in that temple from payment for the admission ticket (monks' passing in and out is not limited). After communicating with the monks of the temple and villagers, it could be known that Niushanchan Temple is an old temple rebuilt by the monks from Shanghai City at village headman's invitation; the villagers wished to develop cultural tourism relying on the memorial hall and Niushanchan Temple, but the temple insisted on managing its affairs independently and refused to engage in commercial activities such as selling admission tickets; for that conflict, the villagers countered the decision of the temple by making forgoing requirement for payment. The villagers thought that neither would closing the gate hinder the monks, nor would the passing in and out of the holders of the certificate of conversion to Buddhism of this temple be limited. However, not all of the believers in the temple had converted to Buddhism and not all of the certificates of conversion to Buddhism the believers held were of Niushanchan Temple.

We hold that the construction of the temple was funded by believers from everywhere in order that the temple is open to the public. That is to say, either the believers who have or have not
converted to Buddhism in that temple or tourists should have the right to free use or the reflective interest. (The reflective interest, put forward by German jurist Jhering, is derived from the retroactive effect on a third party when an economic fact is beyond the scope of effect within the original intent of laws or the doer or obligee. A legal action can not be taken for the reflective interest since there is no ground for claim [6]). Therefore, closing the gate would improperly limit the above-said right and interest.

What's more, the villagers set a food street during the chrysanthemum show. Chickens' whining and dogs' barking seriously disturbed normal living of the monks who could not stand the noise anymore and requested the competent department to intervene. The competent department replied that the monks' request was groundless in respect of the laws.

We believe that the reply given by the competent department is improper because various adjacent relations set forth in Article 86-91 of the Real Right Law fail to cover that religious factor. But if the Civil Code being complied includes Article 19 of the proposal by Yang Lixin which provided "the exercise of civil rights shall be based on respecting others' religious beliefs and ethnic cultures, [7] Article 84 of the Real Right Law which established "the principle of "conducive to production, convenient for living, united, coadjutant, fair and reasonable" and Article 85 thereof which specified "local customs may be followed if there is no relevant provision in the laws and regulations", the Civil Code can constitute the ground for the claim made by the adjacent immovable property obligee to the opposite party for respecting his/her religious belief. That is to say, the interpretations of "convenient for living" and "customs" should be involved with religious life.

References


[5] The author has been to the temple many times since 2012 to carry out the investigation. Relevant information is kept by Chen Xiaolong. At the interviewer's request, the place name is not disclosed.
