

The Legal Basis of Highway Right of Way Maintenance

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Abstract: Right of way maintenance is inseparable from the development of transportation and human rights protection. China's research on "right of way" is still imperfect, and the boundaries of the relevant theoretical concepts are unclear, and there is a large controversy in judicial practice. On the basis of the connotation of right of way and the legal relationship elements of right of way, we analyze the rationality and legality of right of way maintenance. At the same time, based on the legislative, judicial and administrative measures of right of way maintenance in China, we propose corresponding countermeasures in order to explore the jurisprudential basis and rule of law connotation of right of way maintenance, and provide reasonable suggestions for the rule of law and modernization of right of way maintenance and road management system.

1. Existing problems in the field of right of way jurisprudence research

1.1 Controversial fundamental issues of the concept of right of way

At present, the domestic academic community on the "right of way" and its jurisprudence research is relatively small, the scope of research is narrow, and the concept and nature of the right of way still needs to be further clarified. The lack of clarity of the concept of right of way will lead to the lack of awareness and understanding of traffic regulations, affecting the traffic management departments on road safety management.

The specific connotation of right of way is still debated in the academic community. In general, divided into four cases: right of way "monism", including only the priority of starting; right of way "dualism", including the priority of starting and the wayleave; right of way "triism", including the priority of starting, wayleave, and the right of occupancy; right of way "quadratic", on the basis of the ternary theory added to the right of way [1].

1.2 The conflict between the priority of starting and the wayleave

In the classification of the right of way, there are two basic rights that are covered by most definitions, namely, the wayleave and the priority of starting. Between these two, there are often conflicts and competing issues.

1.2.1. Wayleave

The Wayleave is the right of a traffic participant to use the road to pass within a certain space and time according to traffic regulations [5]. The law mainly plays a restrictive role on the wayleave. When individuals exercise the wayleave, it will inevitably conflict with the rights of others, and then it should be restricted, such as "right-hand traffic", "lane splitting", "exclusive use of lanes", etc., as stipulated in Articles 35 to 37 of the Road Traffic Safety Law. The rules of "dedicated lanes" and other rules are the state's restrictions on the use of road resources by individuals [6].

Road wayleave restrictions are an inevitable requirement for resolving road wayleave conflicts, and the restrictions on wayleave should follow the principles of legitimacy, legality, and proportionality. In practice, there are often excessive restrictions, invalid restrictions and other problems.

1.2.2. Priority of starting

Priority of starting, refers to the law grants some traffic participant's priority over others in the wayleave, and restrict the right of way of others or require them to undertake the obligation to avoid. Priority of starting has strong technical properties, all kinds of traffic relations participants in the process of passing meet, that is, the comparison of rights, the party that conforms to the technical rules enjoy priority; does not comply with the rules of the party to limit their rights and obligations to avoid.

Article 53 of the Road Traffic Safety Law provides that police cars, fire engines, ambulances, etc., when carrying out emergency tasks, under the premise of ensuring safety, are not subject to the restrictions of the route, direction, speed and signal lights, other vehicles and pedestrians should give way. This article provides for the Priority of starting of specific subjects in emergency situations, as well as restrictions on the right of passage of other subjects.

In legal practice, the priority of starting conflicts to some extent with the wayleave. As the concept refers to, the law grants one party priority of starting, will necessarily involve restrictions on the wayleave of other parties. How to balance such a conflict is the urgent need to solve the problem.

2. The rationality and legality of road right of way maintenance

2.1 Analysis of the properties of the right of way

According to existing research, this paper defines the right of way as "the right of the subject of road traffic relations", refers to road traffic relations participants in accordance with the provisions of road traffic regulations, the right to carry out limited road traffic activities on the road.

The author discusses the natural rights and legal rights in the connotation of the right of way, taking the source of the right as the classification standard.

2.1.1. Right of way and natural rights

Natural rights, refers to all life in nature inherent and innate rights. This concept originated from the ancient Greek natural law theory [2]. In addition to the right to life, natural rights also include the right to equality, freedom, etc.

The right to travel is one of the most basic needs of human life. The act of movement is one of the rational acts of human free will, which originates from the nature of human "free movement". According to Kant, land is the basic natural resource that human beings can acquire, and it is the natural and legitimate right of human beings to freely dispose of and use the land they own. The right of access is precisely the human need and use of land resources and road resources, which is the embodiment of the subject's possession of personal freedom [3].

2.1.2. Right of way and legal rights

Legal rights, refers to the rights granted by the provisions of the law, human beings to exercise within a certain range.

From the current judicial practice, more parts of the connotation of the right of way belong to the legal rights. The right of way is not an absolute right, it must be implemented in a reasonable and legal way on the basis of full consideration of their own and other people access [4]. For example, the "priority of starting" in the right of way, through the "Road Traffic Safety Law" provides for the rules of yielding to traffic participants in special circumstances; in the exercise of the "right of occupancy" to occupy the road, subject to the approval of the public security traffic management department; vehicle drivers must be trained and pass the test. And pass the test, and drive a vehicle that meets the relevant provisions, in order to have the right to the road. It can be seen that the right of way in the connotation of the priority of starting, the right to occupy, the right to the road, even including a certain range of the right of way, all belong to the scope of legal rights.

2.2 Value basis

As the object of the right of way of various road traffic resources, is the entire social system of the basic resources, in its planning and construction and use of management, should be fully considered the reasonable needs of the public. However, at present, the planning and construction of road traffic resources in China focus more on stimulating economic development, and less on the reasonable traffic needs of road users. At this time, the maintenance of the public right of way is particularly important.

Moreover, the highway right of way clarity and maintenance, is conducive to the rationalization of traffic accident attribution. For example, the previous attention of the Dongguan "rear car knocked over the car changing lanes" incident, the front car illegal lane change is certainly in the blame, but the rear car "crash for the right of way" attitude is also undesirable. At the same time, the conflict resolution between different types of road users has the significance of promoting, dealing with the problem of substantive inequality.

2.3 "Restriction" and the principle of proportionality

The principle of proportionality is an important basic principle of administrative law, refers to the administrative subject to implement administrative action, should take into account the goal of achieving and protecting the rights and interests of the relative, if the goal of the realization of their rights and interests may cause adverse effects, such adverse effects should be limited to the smallest possible limit. The principle of proportionality is aimed at maintaining and protecting the rights and interests of citizens, and is also an important principle for controlling discretionary power [7]. The author will analyze the principle of proportionality and its effects by taking the "traffic restriction" policy in the right of way maintenance as a typical example.

2.3.1. Traffic restrictions and their necessity

The restriction of motor vehicle traffic is a restriction of the use of private cars by the state's public power, which is also a restriction of citizens' property rights [8]. Restrictions on the use of road resources in various places, such as "motorcycle ban", "weekly restrictions by tail number", "single and double number restrictions", etc., are essentially administrative licensing acts to restrict citizens' wayleave [6].

The definition of "public interest" in this case is the basis for judging whether the principle of proportionality is correct or not, and public interest cannot be used as a shield to restrict the right of way. The purpose of traffic restrictions is to reduce traffic congestion and environmental pollution, and its purpose is legitimate. However, in order to achieve the legitimate purpose, not by any means, but through the measurement of legal interests to achieve the "maximum effect of the protection of fundamental rights" [9], such restrictions and "smooth traffic flow", "environmental excellence", "people's health "(2) The effect of the measure and its impact on the public

2.3.2. Effectiveness of measures and impact on the public

Undeniably, the motor vehicle restriction has caused some disruptions to the public's daily life. If there is an urgent need to travel by motor vehicle and it happens to be on a restricted day, it will have a certain negative impact on life. Do traffic restrictions help relieve traffic congestion and combat environmental pollution? Some scholars have concluded that traffic restrictions help smooth traffic flow, but have little impact on the control of environmental pollution. It is doubtful whether traffic restrictions can achieve the effect of pollution control and health protection.

There are many more effective measures than traffic restrictions to control the environment, such as "eliminating yellow-label vehicles", "upgrading motor vehicle oil products", and "increasing support for clean energy motor vehicles". etc., are effective measures that can fundamentally manage motor vehicle-related environmental pollution problems, and such means are more moderate and acceptable to the public [10].

3. The legal protection and implementation countermeasures of highway right of way maintenance

3.1 Legislative protection and implementation countermeasures

3.1.1. Constitutional guarantee

Right of way is the specific embodiment of constitutional principles in the sectoral law. Some commentators believe that "the Constitution is an important source of traffic law, such as the seventh amendment to the Constitution (referring to the 1993 amendment) to provide a legal basis for the development of special traffic laws, regulations and rules" [11]. The principle provisions of the Constitution of the People's Republic of China, such as "the state respects and safeguards human rights" and "the inviolability of personal freedom of citizens", are reflected in the provisions of the law on the maintenance of the right of way in the administrative sector of transportation.

However, the Constitution does not explicitly mention the words "road", "highway" and "traffic", which need to be improved in the subsequent legislative work. For example, the term "transportation" is compared with the terms "education," "science and technology," "medical care, health and sports," and "health care" in Articles 19 to 22 of the Constitution. For example, the "transportation business" is juxtaposed with the "education business," "science and technology business," "medical, health and sports business," and "cultural business," as stipulated in Articles 19 to 22 of the Constitution, so that the "transportation business" and the right of way maintenance have a standardized and specific constitutional source.

3.1.2. Legal Protection

Specifically, the legal aspects include two subsystems: one is the subsystem of highway regulations, with the Highway Law as the leading law; the second is the subsystem of road traffic regulations, with the Road Traffic Safety Law as the leading law.

The Road Traffic Safety Law has eight chapters, including "vehicles and drivers" chapter, from the perspective of social management, only eligible vehicles and drivers can be on the road, the right of way is restricted. The third chapter "road access conditions" and the fourth chapter "road access regulations", from a technical point of view, the technical rules set, reflecting the law for the maintenance of priority rights of way [6].

In contrast, the Highway Law, the opening provisions of "in the People's Republic of China engaged in the planning, construction, maintenance, operation, use and management of highways, the application of this Law", and thereafter the second to sixth chapters correspond to the planning, construction, maintenance, management and operation, but only no "road use" Chapter description, not to mention the relevant provisions of the right of way to talk about citizens. Specifically to the provisions, there are only two on the use of road access protection measures, namely Chapter 3 "road construction" in Article 32 and Chapter 4 "road maintenance" in Article 39. Which involves the use of road protection measures only one, that is, if the reconstruction and maintenance of highways affect the passage, the construction unit should "build a temporary road" to protect the road passage, and no other specific content. It can be seen that the Highway Law is overly concerned about the initial supply of road resources, while ignoring the reasonable allocation and proper use of existing road traffic resources [7].

I believe that in the "Road Traffic Safety Law", the right of way can be further specified in other connotations; and in the "Highway Law" on the basis of the existing content, should be added to the "road use" chapter, the practical significance of maintaining the right of way. In addition, the right of way for the protection of traffic law as one of the legislative purpose or logical starting point, emphasizing the legal benefits of its protection, so that the judicial work is more relevant.

The current laws and regulations on highway law enforcement is mostly to pursue administrative responsibility, criminal liability as a supplement to the accountability mechanism, so that some transportation personnel think it is irrelevant, so the lawlessness, resulting in some road damage, right

of way infringement, traffic accidents. Therefore, highway legislation should set more criminal liability to play a deterrent effect and reduce the occurrence of accidents [12].

3.2 Judicial guarantee and implementation countermeasures

In 2017, the Supreme People's Court promulgated guiding case No. 90, namely "Bei Huifeng v. Haining City Public Security Bureau Traffic Police Brigade Road Traffic Management Administrative Punishment Case". The guiding case is of guiding significance for such right of way disputes in China, and also provides a reference for traffic participants who have long been confused by "yielding".

The obligation of "yielding to pedestrians" as a moral and legal requirement was reflected in the Road Traffic Safety Law in 2003, but there are still many difficulties in the implementation of specific judicial practices [13]. One of the difficulties, ultimately, is the lack of clarity and difficulty in implementing the principle of attribution in the process of traffic accident identification.

In China's traffic accident determination, the "right of way principle" originally played an important role in the rules, but because of the "right of way" is not defined, the connotation is unclear, and there are many difficulties. There are views that the "right of way principle" ignores the causal relationship between the occurrence of traffic accidents, there are major limitations, cannot be used as the principle of traffic accident determination.

The "right of way principle" is further specified as "priority of starting", the problem is solved. For example, the unlicensed vehicles do not meet the qualifications of the right of way, so they do not have the right of way, but their basic personal and property rights are not lost due to ineligibility, in the road, they may still enjoy priority of starting [6].

The "pedestrian priority" right of way also has the risk of abuse, "priority" is not "arbitrary passage", pedestrians and motorists are difficult to define the criteria of the principle. Therefore, the principle of "pedestrian priority" should be restricted by taking into account different road conditions and time periods, and the conditions of application of the principle should be clarified through judicial interpretation.

3.3 Administrative Protection and Implementation Measures

Corresponding to the legislative protection, there are two subsystems of administrative protection, namely "highway regulations" and "road traffic regulations". The subsystem of highway regulations includes the Regulations on Highway Management, the Regulations on Toll Road Management, the Regulations on Expressway Management, etc. The subsystem of road traffic regulations includes the Regulations on the Implementation of the Road Traffic Safety Law, the Regulations on the Administration of Transport Vehicles, the Regulations on the Administration of Road Entry and Exit, and other relevant administrative regulations and departmental rules [1].

Right of way maintenance is closely related to the administrative responsibility system. However, in the field of administrative regulations, departmental regulations and local government regulations, there is the problem of low level of regulations and rules. At present, there are fewer national administrative legislations in China, covering narrower areas and with less practicality. The author believes that the establishment of a national system of road traffic administrative regulations should be strengthened to improve the all-round and multi-level right of way maintenance system.

4. Conclusion

Laws and regulations for the right of way to maintain, in line with the natural law theory of "inherent rights" concept, but also in line with the constitutional principle of "respect and protection of human rights", but also to the "Highway Law" in the "road use It is also a response to the legislative purpose of "road use" in the Highway Law. In academic research and judicial practice, we still face many difficulties, such as: the concept of right of way is unclear, inaccurate application of the principle of proportionality, the legislative attention is weak, the principle of judicial attribution is unclear, and the administrative legislation system is not sound. Specific measures, the author in the previous article have discussed, such as: reconsideration of "traffic restrictions" measures, the development of "traffic"

into the constitution, the addition of special chapter provisions of the Highway Law. If the protection of the right of way is comprehensive and concrete, the legalization of traffic and modernization will reach a new height, and the cause of human rights protection in China will be further developed.

References

- [1] Wang Jian. Study on Right of Way [D]. Supervisor: Xiao Tangdart. Southwest University of Political Science and Law, 2012.
- [2] Yang Fan. Research on the Theory of Natural Rights [D]. Jilin University, 2007.
- [3] Zhang Mengyuan. Research on the jurisprudence of the right of way [D]. East China University of Political Science and Law, 2019.
- [4] Yu Quan, Yang Yongqin, Ren Futian. Analysis and research on the right of way in traffic engineering[J]. Road Traffic and Safety, 2006(02):10-11+15.
- [5] Yuan Xiaoxin. The scope of the right of way and its exercise method [J]. Journal of Guangdong Institute of Transportation Technology, 2015, 14(02):31-34.
- [6] Li Yiqiang. "Right of way" and "priority right of way"-jurisprudential considerations on the connotation of "right of way"[J]. Frontier, 2012(24):73-75.
- [7] Li Rui. The evidence and normative construction of the right of way[J]. Administrative Law Research, 2021(05):124-137.
- [8] Zhang Xiang. Motor vehicle restrictions, property rights restrictions and the principle of proportionality[J]. Jurisprudence, 2015(02):11-17.
- [9] Chen Zheng: "The First Abortion Judgment", in Zhang Xiang, ed; Selected Cases on German Constitutional Law (First Series): General Theory of Fundamental Rights, Law Press, 2012, p. 149.
- [10] Lv Chenglong, Zhang Liang. The dilemma of urban right of way allocation and rule of law countermeasures[J]. Zhongzhou Journal, 2017(04):56-61.
- [11] Wang W. Traffic Law, Wuhan University of Technology Press, 2010 edition, p. 6.
- [12] He Hongbin, Wang Tiantian. Seventy years of exploration on the rule of law of highway road management [J]. Journal of Chongqing Jiaotong University (Social Science Edition), 2020, 20(06):51-56.
- [13] Qian Wei, Li Bo, Yang Fang. The dilemma and regulation in the application of "pedestrian priority" right of way: an example of the guiding case No. 90 of the Supreme People's Court[J]. Journal of Wuhan Jiaotong Vocational College, 2021, 20(02):7-12.