

Usufruct Right: A New Real Right in the Vietnam Civil Code 2015

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Abstract: *The usufruct right is a new and complex right in the Vietnam Civil Code 2015. This article analyzes some legal aspects of usufruct right, clarifies the concept and legal basis of the usufruct right, subjects of the usufruct right as well as the rights and obligations of the related subjects of the usufruct right, thereby unifies the perception of law in practice.*

Keywords: usufruct right, real right, other rights to property

1. Introduction

Part two of the Civil Code 2015 is the ownership rights and other rights to property, which contains many groundbreaking new contents in the Civil Code 2015. This part is considered to be the core of the innovation of the Civil Code while the other parts are just minor modifications to suit reality. In this part, there is a new regulation that has never been found in the previous Civil Codes, which is the usufruct right. This is the right to exploit and enjoy all the benefits and income that originate from a property under the ownership of an individual within a limited period of time.¹ By correctly understand of the importance of the usufruct right will help on effectively establishing and perfecting the legal system on usufruct right in regulating the arising relationships related to it. For that reason, this article will clarify the basis for establishment, the rights and obligations of the usufructuary, thereby contribute to the improvement of the guiding documents for the enforcement of the usufruct right in particular and other rights to property in general in the Civil Code 2015.

2. Method

It is a normative legal research using secondary data, such as: academic articles, legal normative documents, reports, journal articles as well as conference papers and other documents having correlation with usufruct right. The data were collected using library research, then legal interpretation method was employed to analysis data.

3. Results and Discussions

3.1. Overview on the usufruct right

The usufruct right is an application of foreign law, however, it is not a new content in the Vietnamese legal system, it has been recorded in the Southern Code, the Central Civil Code under a different name (quyền dụng ích). Its definition was: a right that authorizes the enjoyment and profit of a property belonging to another person for a period not exceeding the life of the user, with the obligation to keep the property

intact.² However, in the new period, from the time when Vietnam completely unified the country, the Civil Code 1995 and the Civil Code 2005 did not have any provisions on usufruct right. The reason the absence was that the legislative point of view was only to regulate ownership and it considered ownership as a supreme power, but in fact, property ownership was only one of the other rights. Currently, usufruct right is recorded from Article 257 to Article 266 in the Vietnam Civil Code 2015, in which it is understood as the right to exploit and enjoy all the benefits and income that originate from a property under the ownership of an individual within alimited period of time. Regulations on the right to usufruct are a reform in legislative thinking in Vietnam, to overcome the lack of regulations and suitable for social life.

In fact, the term “usufruct” has its roots in ancient Rome. According to the spirit of Roman law, property rights were considered to have three components including the right to use (usus), the right to enjoy the yield (fructus) and the right to dispose (abusus). If a person grants others usufruct right over his property, it means that he grants to others the right to use and the right to yield and retains the right to dispose. The usufruct right allows the grantee to obtain various benefits from the property such as residence, hunting, plowing, driving. . . Of course, possession of the property is a fact to exercise this right. The right to enjoy the yield entitles the grantee to enjoy all - natural fruit and civil fruit from the property. Yields are property (or products) created or obtained from another property without losing or diminishing its substance. Natural yields are the product of land or animals. Civil yields are income derived from property by force of law or by a legal act (contract or unilateral legal act). The Vietnam Civil Code 2015 addresses these two types of yields as “benefit” and “income”.³

When considering the concept of usufruct right in Article 257 of the Civil Code 2015, it is necessary to make a distinction with the concept of the right to use which was

²Article 417 Saigon Civil Code 1973.

³Ngo Huy Cuong, (2010), The idea of the usufruct rights regulation in the future Civil Code of Vietnam, Journal of Legislative Studies, No. 17 (178), <https://luatminhkhue.vn/y-tuong-ve-che-dinh-quyen-huong-dung-trong-bo-luat-dan-su-tuong-lai-cua-viet-nam.aspx> accessed on 17/4/2023

¹Article 257 Vietnam Civil Code 2015

specified in Article 189 of the Civil Code 2015 because both concepts are rights to publicly exploit, reap the benefit and income that originate from a property.

First, on the terms of enjoyment of the right, if the right to use is exercised by the owner of the property, this right is indefinite, but the usufruct right is a type of right with a definite term. Article 260 of the Civil Code 2015 stipulates: "The terms of the usufruct right shall be agreed upon by both parties or as provided by law, with the maximum term to be the full life of the first usufruct if he/she is an individual, and if in the case the first usufruct is a legal entity, this term shall last until the existence of the legal entity is terminate, but must not exceed thirty years". If the right to use arises from a contract to rent or borrow a property - claim right, this contract period depends on the agreement of the parties.

Second, in terms of content of rights, the usufruct right is somewhat above the right to use⁴because according to Article 261 of the Civil Code 2015, the usufructuary may, by themselves, permit others to exploit, use and receive benefits and incomes that originate from the property of the usufruct right; leases the usufruct right to the property without depending on the will of the owner, while the user in the lease or loan contract can only exercise the rights to the property as prescribed in the contract without making arbitrary decisions.

Third, while the usufruct right is a real right, the right to use from a lease or loan contract is claim right.

The usufruct right is a type of property right with a temporary nature. Article 257 of the Civil Law 2015 stipulates that: *Usufruct right is the right of a subject to exploit and enjoy all benefits and income ...within a limited period of time*". Also, Article 260 of the Civil Code stipulates that: *"The terms of the usufruct right shall be agreed upon by both parties or as provided by law, with the maximum term to be the full life of the first usufruct if he/she is an individual, and if in the case of a legal entity, this term shall last until the existence of the legal entity is terminate, but must not exceed thirty years"*. If compared with the French Civil Code, it is shown that Article 619 stipulates that if the subject of the usufruct right is not an individual, the usufruct right only lasts for 30 years. This provision shows that the usufruct right of a legal entity is no more than 30 years. Without specifying the duration of the usufruct right, the usufruct right becomes a permanent right, which is impossible because only ownership right is meant to last forever.⁵

3.2. Basis for the establishment of the usufruct right

Article 258 of the Civil Code 2015 stipulates that: *"Usufruct right shall be established in accordance with the law, agreements or under a will"*.

⁴Do Van Dai (2016), Scientific commentary on the new points of the Civil Code 2015, Hong Duc Publishing House, p. 261

⁵See also: Nguyen Thi Thuy và Le Minh Khoa (2017), The usufruct right - The perspective of French civil law and implications for Vietnam, Journal of Legal Science, No. 08 (111), p. 27

Thus, usufruct right can be established from either agreements or the unilateral will of the subjects, and these are common basis. Hence, the owner of the property can, by his own will, enter into a contract with the person entitled to usufruct or make a will to grant the right to own the property and leave the usufruct right to different people who are selected by the owner. The regulation on the basis for the establishment of the usufruct right under the will is a fundamental reform that allow exploiting the property of the deceased through usufruct right granted to a subject who is not the recipient of the property nor the right to own the property according to inheritance.⁶Regulations on the basis for the establishment of usufruct right under the will grant the ability to preserve the property left by the deceased and ensure the rights of the legal heirs, when the first usufructuary dies or after the maximum statutory term of usufruct right of 30 years.⁷

Article 258 of the 2015 Civil Code also stipulates that usufruct right may be established in accordance with the law. This is the case where the law stipulates that under certain conditions, one subject has the usufruct right over another's property, for example, to ensure equity in the case of property division. However, according to the current law, the usufruct right establishes in accordance with the law has no basis in legal documents, except where the land use right is a very special form of other right to property, or a special form of usufruct right through reference to the Land Law 2013. Accordingly, Article 166 of the Land Law 2013 stipulates that the person with the land use right has the right to enjoy the results of his labor and investment on his land and benefits derived from facilities that was constructed by the State for the protection and improvement of agricultural land. In this regard, French law stipulates that the living spouse has the right to choose between the usufruct right over the total existing property of the deceased spouse or the right to receive one - quarter of this property in full ownership if the deceased spouse leaves one or more children; or in another case, parents have the usufruct right to the property of the minor child. Previously, in Vietnamese ancient law, similar cases could be found for elderly parents have the usufruct right to the house owned by their children or minor children having the right to stay in their parents' house. Usually, the cases where usufruct right may be established in accordance with the law are formed on the requirement to ensure the interests of certain protected subjects such as the elderly, children, and disabled people.⁸

There is an opinion on Article 165 of the Civil Code 2015 which stipulates that in case a person finds and keeps domestic animals, poultry or aquaculture stock which has been lost, he or she is entitled to the usufruct right of those domestic animals, poultry or aquaculture stock during the period of bona fide possessor possession of these domestic animals, poultry or aquaculture stock. However, there is a confusion here between usufruct right and ownership right because if in case a person discovers that domestic animals, poultry or aquaculture stock are lost, the finder will be

⁶Phung Trung Tap (2016)Comments on usufruct and surface rights, Journal of Legal Science, No 15 (319), p. 40.

⁷Phung Trung Tap, ibid

⁸Hanoi Law University (2017),Textbook on Vietnamese Civil Law, Volume I, People's Public Security Publishing House, p. 276-277

entitled to own the benefit, income that these domestic animals, poultry or aquaculture stock bring, not just the usufruct right.

3.3. Subject of the usufruct right

The current Civil Code does not stipulate the scope of the subject of the usufruct right. Therefore, it can be understood that the subjects of the usufruct right are all types of property that are specified in Article 105 of the Civil Code 2015. Clause 1 Article 105 of the Civil Code 2015 stipulates that “property comprises objects, money, valuable papers and property rights”. However, currently there is a view that the subject of the usufruct right can only be objects because “when the owner transfers the object to another person through an agreement or as prescribed by law for the transferee to exploit, enjoy the benefits or income from the object, the transferee has some rights to the object” and “the usufruct right can only be established on non - consumable object”.⁹The view above draws the reader to the conclusion that only “objects” can be the subject of usufruct right. So, besides “objects”, can other types of property not be the subject of the usufruct right?

According to Article 257 of the Civil Code 2015, usufruct right is the right to exploit and enjoy the benefits and income that originate from a property under the ownership of another subject... In this provision, it shows that for the subject of usufruct right is property, not limited to “objects”, so from the perspective of the document, there is no basis to assert that the subject of usufruct right is limited to only “objects” but rather it should be understood that the subject of usufruct right is property in general.

Usufruct right can be established on all types of property: tangible property, intangible property, tangible movable property or intangible movable property. The usufruct may be established to a legal entity or another personal right. Therefore, it is necessary to have necessary legal regulations for the establishment of the usufruct right base on its subjects.

If a non - consumable property is the subject of the usufruct right, the usufructuary must enjoy the property as a conscientious manager and return it upon termination of the usufruct right. The usufructuary is to return the property to its original owner in as good condition as possible after taking possession of it. Therefore, binding the usufructuary to the obligation of a conscientious manager to maintain the property in that condition is necessary for the benefit of the original owner and to not cause waste to society.

If the usufruct right is established on consumable property, the usufructuary may exhaust the property, transfer ownership of such property or use it to ensure the performance of civil obligations. If the property for the usufruct right is a consumable property, the usufructuary may not return it.¹⁰So the problem presented here is that the usufructuary must return a corresponding value to

compensate for the usage of the property or returns another asset of the same quantity and quality. Thus, according to the provisions of civil law, in Vietnam, consumable or non - consumable property can become the subject of the usufruct right.

However, the usufruct right is not an ownership right but just a “other right to the property”, thus the property is still owned by another person, and the usufructuary is only granted some of the same rights as the owner. The usufructuary may exhaust completely the property through usage as the subject of the usufruct right is a consumable property, so the right of the usufructuary is somewhat similar to the that of the owner. This is only one component of the rights of ownership that is transferred to the usufructuary while the other rights of ownership are not.¹¹Therefore, the usufructuary may exhaust the property but cannot sell or transfer or use such property to ensure the performance of a civil obligation.

3.4. Rights and obligations of the usufructuary

3.4.1. Rights of the usufructuary

The usufructuary has the right to receive the property in its current condition at the time when the usufruct right establishes. The usufruct right allows the usufructuary to exploit and enjoy all the benefits and income that originate from that property for a definitive period of time and must return the property after the termination of the usufruct right. Therefore, the provision on this right is not only to determine the actual right of possession of the property, but also to determine the time of enjoyment of the related rights.¹² The usufructuary has the right to request the owner of the property to repair the property to ensure that there is no significant deterioration resulting in the property being unusable or completely losing its utility and value. In case the usufructuary performs the repair obligation on behalf of the owner, he has the right to request the owner to reimburse the repair cost.

The Civil Code 2015 of Vietnam only allows the usufructuary the right to lease out the usufruct right for a period corresponding to the term of the first usufructuary. Thus, the rights of the usufructuary is more limited than the rights of the owner and in these rights there is no compensatory or uncompensated transfer of the property. One thing to keep in mind when the usufructuary leases the usufruct right is that the lessee of the usufruct right can only exercise the rights within the scope of the agreement between the lessee and the usufructuary. Therefore, if the lessee of the usufruct right wants to sublease the usufruct right, the consent of the first usufructuary must be obtained.

Clause 1 Article 261 of the Civil Code of 2015 stipulates that the usufructuary by him/herself or by allowing others has the right to exploit, and receive all benefits and income that originate from the objects of the usufruct right. The usufructuary has ownership right to the benefits or income

⁹Nguyen Van Cu & Tran Thi Hue (editor) (2017), Scientific commentary on the Civil Code 2015, People's Public Security Publishing House, p.420 and p.423

¹⁰Nguyen Van Cu & Tran Thi Hue(Editor), Ibid, p.423

¹¹Do Van Dai (2017), Subjects of the usufruct right in Vietnamese law, Journal of Legislative Studies, No 23 (351), December 2017, p.13

¹²Ngô Huy Cuong, (2010), Ibid, p.28-34

from the objects of the usufruct right. This right arises from the moment the usufruct right is entered into force. In the event that the usufruct right terminates prematurely before the period for the usufructuary to reap and enjoy all promised benefits and income, then, when this period is to come, the usufructuary shall be entitled to enjoy all the rightful benefits and income that originate from that property in proportion to what he/she is supposed to be entitled to. After this period, the benefits and profit belong to the owner. This regulation is a rather flexible regulation of the Civil Code 2015, contributing to the protection of the legitimate rights and interests of the usufructuary. In fact, in order for the property, being the subject of the usufruct right, to generate benefits and income, the usufructuary must also invest a lot of effort, money, and time to care, nurture and develop that property. Therefore, if in the event that the usufruct right terminates prematurely before the period for the usufructuary to reap and enjoy all promised benefits and income, in order to ensure the legitimate rights and interests of the usufructuary, the law allows the usufructuary to be entitled to enjoy all the rightful benefits and income that originate from that property in proportion to what he/she is supposed to be entitled to. This provision is similar to the provisions of the French Civil Code¹³. The French Civil Code stipulates that the usufructuary has the special power of the owner of the property right to use and exploit the utility of the property owned by another subject and to own the benefits obtained from the property being the subject of the usufruct right during the validity of the usufruct right.

In some cases, the usufructuary cannot, for some reason, exploit, use or receive all benefits and income from the property by themselves, they can “allow” others to exercise this right. The “allowance” can be understood as the usufructuary authorizes another person to exercise their rights on behalf of them. The question is, can this “allowance” be obtained through “leasing”, “lending”, “buying and selling” or using usufruct right to secure the performance of civil obligations? If it is to be understood as above, the provision in Clause 3 Article 261 of the Civil Code 2015 on leasing usufruct right to properties is unnecessary and is a repeat of this case.

Some views believe that the term “allow” here does not include buying, selling (transferring) or using the usufruct right to secure the performance of civil obligations because in the current context, there are still concerns about the risks toward the owner and other people related to the owner of the property. This is due to the fact that the transferee or pledgee, transferee of the usufruct right may abuse the right and cause damage to the property owner. Hence, the regulations in the Civil Code are reasonable due to such cases.¹⁴

The answer for the above question comes from the subject of the usufruct right. The usufruct right is defined as a property right, one of the types of property under Vietnamese law.

¹³See also Article 585 and 586 French Civil Code

¹⁴Nguyen Hong Hai (2018), Some comments on the usufruct right in the Civil Code 2015, <https://phapluatdansu.edu.vn/wp-content/uploads/2018/10/QUY%E1%BB%80N-H%E1%BB%98-ENG-D%E1%BB%A4NG-TRONG-B%E1%BB%98-LU%E1%BA%ACT-D%E1%BB%82N-S%E1%BB%B0-N%E1%BB%82M-2015.pdf>, accessed on 16/4/2023

The subject of the usufruct right has the right to dispose of this property to the extent permitted by law, but currently there is no law restricting the right to dispose of property as usufruct right. Therefore, the phrase “allow” should be understood in the sense of “to give, transfer or through other civil transactions”. However, depending on each case, the owner and the usufructuary may agree on different terms or the law may provide otherwise. In addition, the permission of others to exploit, use and receive benefits and income can only be done within the effective term of the usufruct right and must not contradict the agreement between the owner and usufructuary, the will of the owner as well as not contradict the provisions of law.

Besides Article 261 stipulates the rights of the usufructuary, the Civil Code 2015 has provisions on the right to enjoy benefits and income in Article 264. However, we notice that the person who have the right to enjoy benefits and income according to the provision of Article 264 is also the usufructuary. Therefore, it is necessary to combine these two contents into one because it is not necessary to separate the rights of the usufructuary into two different provisions.

3.4.2. *Obligation of the usufructuary*

Aside from the above rights, according to the provisions in the Civil Code 2015, the usufructuary also has certain obligations. The Civil Code 2015 stipulates that the usufructuary must receive the property on the basis of its current status and must conduct proper registration if provided by law. However, the Civil Code only stipulates that the usufructuary must receive the property in its current status, but does not require the usufructuary to make a list of the subjects of the usufruct right. This shows that the law of Vietnam is lacking because if the usufructuary is not forced to make a list of the subjects of the usufruct right and their status, when the usufruct term ends, there will be no basis to determine whether the state of property is appropriate at the time of receipt and at the same time there is no basis to assess the responsibility of the usufructuary for the damage to the property, as well as minimize the possibility of abuse of the rights of the usufructuary and can result in the subjects of the usufruct right being decrease in value because the usufruct right is only temporary, so the usufructuary has no notion of preserving and enhancing the usufruct property. Therefore, the Civil Code 2015 needs to add provisions on the obligations of the usufructuary in making a list of the current state of the usufruct property upon receiving it to serve as a basis to determine the status of the property upon receipt and upon return to the owner.

The usufructuary must exploit the property in compliance with the utility and use purpose of the property. The improper usage of the property may cause the value of the property to be reduced, affecting the legitimate rights and interests of the original owner. Therefore, the usufructuary must comply with the provisions of law as well as the agreement with the owner on the appropriate usage of the property.

The French Civil Code stipulates that the usufructuary has the right to use property owned by another person as if he is the owner himself, but has the responsibility to keep the

property intact.¹⁵ In order to ensure the careful enjoyment of the property as if it were one's own, the usufructuary of the benefits or income must have a guarantee, unless the document establishing the usufruct right exempts it from this responsibility. However, for cases of parents who have the usufruct right to their children's property according to the provisions of law, the seller or the donor of the property with conditions to reserve the right to its benefits and income, they do not need a guarantee.¹⁶ In case the usufructuary can't find a guarantor, the immovable property may be leased or placed in bailment. All funds within the scope of the usufruct right will be used for investment. Food will be sold and the profits will also be used for investment. In the event that the usufructuary does not have a guarantee, the owner can order the sale of movable property damaged by usage, the profits of which will be invested in the same way as in the case of food.

The usufructuary is only obliged to perform repair, maintenance on the property to assure the normal use, while major repair, maintenance is the responsibility of the owner, except in case where major repair, maintenance is required because the property has not been repaired or maintained since the start of the usufruct. In this case, the usufructuary must bear the repair cost.¹⁷ In addition to the above obligations, the usufructuary must also perform other financial obligations related to the subject of the usufruct right.¹⁸

Unlike the French Civil Code, the Civil Code 2015 does not stipulate specific and detailed provisions as above, only that: "The usufructuary is obliged to preserve and take care of the property as if it were his/her own property"¹⁹. Although it is not specified, it can be seen that the Civil Code 2015 has some similarities with the French Civil Code when it stipulates that the usufructuary is obliged to periodically maintain and repair the property to ensure normal usage, to restore the condition of the property and remedy any detrimental consequences to the property, resulting from the failure to perform his/her obligations in compliance with proper technical requirements or in accordance with customary practice for the preservation of property. These can be considered as minor repairs because these periodic repairs and maintenance do not add to the value of the property, but only maintain the normal operating condition of the property. At the expiration of the usufruct term, the usufructuary must return the property to the owner

3.4.3. *Rights and obligations of the owner of the property*

The usufruct right is a real right that is comparatively independent from other rights, however, at its core, this right is a definite real right over the property of others. According to the current Civil Code, when the usufructuary commits a serious breach of his/her obligations, the owner can only request a court to annul the usufruct right of the usufructuary without any other self-protection mechanisms for the owner. In addition, only in the event of a serious breach of obligations by the usufructuary that the owner can request

the deprivation of the usufruct right. Aside from that, the owner cannot terminate the usufruct right of the usufructuary in any other cases.

Under Thailand's law, an owner can object to any illegal or unreasonable use of his/her property. If the owner can prove that his/her right is threatened, he/she can ask the usufructuary to provide additional security for the performance of such obligations.²⁰ If the usufructuary fails to provide security within a fixed reasonable time, or if, despite the owner's objections, it continues to exploit the property illegally or unreasonably, the court may appoint a different person to handle the property and replace that usufructuary... With this provision, the owner can exercise his/her right to protect the integrity of his/her property, without having to go through the courts for protection.

Therefore, in order to completely address this issue, the author proposes to separate usufruct right into two types: (1) Usufruct right is a real right established according to the will of the owner (by an agreement or by a will) and (2) Statutory usufruct right and real rights (in accordance with the law). Accordingly, the usufruct right by will of the owner will be absolute, the request for termination or change without the cause of violation of the usufructuary should not be stipulated as the owner must determine from the beginning its purpose as well as the scope of the rights and obligations of the usufructuary, to avoid the case of arbitrarily terminating the usufruct right, obstructing and affecting the exercise of the usufructuary rights on the usufructuary property. As for the statutory usufruct right, it is necessary to clearly define the cases in which the usufructuary is forbidden from doing, as well as the legal mechanism in cases of such violation. By determining the cases of limitation of the statutory usufruct right, it will protect the rights and interests of the owner, and at the same time ensure the integrity of the value of the usufruct property.

4. Conclusion

From the above analysis, the following conclusions can be drawn:

First, the regulation of the usufruct right is a major reform in legislative thinking in Vietnam, overcoming the lack of objective regulations and can be suitable for social life.

Second, the common ground of the usufruct right is based on an agreement or from the unilateral will of the subjects.

Third, the subject of the usufruct right is not only "material objects" but also includes all types of property: tangible real estate, intangible real estate, tangible movable property or intangible movable property; the usufruct right may be established on a legal entity or on another personal right.

²⁰According to Article 1423 of the Thailand Civil and Commercial Code, this right of the owner shall not apply in the event that the transferor of the property has retained for himself the usufruct right to the property. This exclusion is reasonable because the usufructuary is the original owner of the property, so he has the full right to use the property according to his or her will, and the benefit of the transferee (the latter owner) cannot be put higher than the person who has transferred the property.

¹⁵See Article 578 French Civil Code

¹⁶See Article 601 French Civil Code

¹⁷See Article 605 French Civil Code

¹⁸See Article 608, 609 BLDS French Civil Code

¹⁹See Section 3 Article 262 Vietnam Civil Code 2015

Fourth, if the usufruct property is a consumable property, then logically, the usufructuary cannot return the original property of the usufruct right, but only return the corresponding value of the property or return another property with the same quantity and quality.

Fifth, the usufructuary of a consumable property may exhaust the property but cannot sell or transfer such property or use such property as a guarantee for the performance of civil obligation because the usufructuary is not the original owner of the property that is the subject of that usufruct right.

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