

Law on land dispute mediation – some inadequacies and orientations for improvement

Pháp luật về hòa giải tranh chấp đất đai – một số bất cập và định hướng hoàn thiện

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Abstract: Land dispute is one of Vietnam's most common and complicated disputes today. There are many methods to resolve these disputes, and currently, most disputes over land use rights are resolved in court. However, mediation is one of the most effective and convenient methods for resolving disputes. This is considered a peaceful method, ensuring the will and rights of the parties involved and minimizing potential damage that may arise in the dispute. Therefore, in this article, the author focuses on studying the legal regulations on land dispute mediation and analyzing the forms of land dispute mediation. Based on this, the article points out shortcomings and challenges and proposes effective recommendations and solutions to improve the legal framework for land dispute mediation and ensure the legitimate rights and interests of the people.

Keywords: *Conciliation; inadequacies; land disputes; perfection*

Tóm tắt: Tranh chấp về đất đai là một trong những loại tranh chấp rất phổ biến và rất phức tạp ở Việt Nam hiện nay. Có rất nhiều phương thức để giải quyết tranh chấp này, hiện nay đa số các vụ tranh chấp về quyền sử dụng đất thường được giải quyết ở Tòa án. Tuy nhiên, một trong những phương pháp hiệu quả và thuận tiện nhất để giải quyết tranh chấp, đó là phương pháp hòa giải. Đây được xem là phương pháp ôn hòa, đảm bảo ý chí và quyền lợi của các chủ thể, cũng như hạn chế tối đa các thiệt hại có thể xảy ra trong tranh chấp. Chính vì vậy, trong bài viết này tác giả tập trung nghiên cứu các quy định pháp luật về hòa giải tranh chấp đất đai và phân tích các hình thức hòa giải tranh chấp đất đai. Trên cơ sở đó, chỉ ra các bất cập, thách thức và đề xuất các kiến nghị, giải pháp hữu hiệu nhằm hoàn thiện pháp luật về hòa giải tranh chấp đất đai, cũng như đảm bảo quyền và lợi ích chính đáng cho người dân.

Từ khóa: *Bất cập; hòa giải; hoàn thiện; tranh chấp đất đai*

1. Introduction

In the context of globalization, Vietnam needs a complete and transparent legal system regarding land to develop the country and promote economic development. With the increasing population of Vietnam, the demand for land and housing for people is also increasing. Therefore, it is evident that land disputes are becoming more and more common. These disputes are

usually complex and are mostly resolved in court. Land use disputes are directly related to rights and often have significant property value, making them difficult to limit and control when disputes arise in reality. Therefore, one of the solutions the state encourages to resolve land disputes is reconciliation, which is also considered a compulsory pre-litigation procedure in the dispute resolution process [1]. The use of

reconciliation has many benefits for both parties and the state. It ensures the freedom of will, freedom of agreement, and both parties rights and interests while reducing the burden on the court system. However, the current legal regulations on land dispute reconciliation, particularly, and land law, in general, still need to be perfected. The regulations on pre-litigation reconciliation have not been standardized, and some issues still need to be specifically addressed. Therefore, it makes it difficult for parties and state agencies to apply the law in resolving land disputes in practice. Therefore, in this article, the author studies the legal regulations on land disputes and analyzes the forms of land dispute reconciliation. From there, the article identifies the constraints and drawbacks and proposes recommendations and solutions to improve the legal regulations on land dispute reconciliation.

2. Legal regulations on land dispute mediation

Along with the country's development, social relationships are also constantly evolving. Therefore, conflicts over the rights and interests of parties in social relationships are inevitable. Accordingly, civil relations are a common and close social relationship. This relationship places respect for the freedom of will of the subjects on top, so sometimes the interests of the subjects are conflicting, leading to disputes. Land disputes are also a type of civil dispute. According to Article 24 of the 2013 Land Law, "Land dispute is a dispute over rights and obligations of

land users between two or more parties in land relationships." For this concept, land disputes are defined very broadly, not specifically or clearly, making it difficult to determine land disputes in practice and apply the law if based solely on this concept. However, based on Clause 2 of Article 3 of Resolution 04/2017/NQ-HDTP, it can be understood that land disputes are disputes aimed at determining who has the right to use the land. When resolving this dispute, the court's task is determining which subject has the right to use the land. Accordingly, disputes over land use rights arise during the use of land by the subjects. Land disputes are unrelated to land transactions (transfer, donation of land use rights) and disputes over the inheritance of land use rights. Types of land disputes include disputes between land users about the boundaries between land areas due to the encroachment of land use subjects (disputes over boundaries of adjacent land, alleys) [2]. This type of dispute often arises because one party unilaterally changes the boundary, or both parties cannot determine the boundary with each other, and in some cases, one party even occupies the land area of others [3]. In addition, land dispute resolution is also a type of land dispute. This type of dispute occurs when the land in question was previously owned by the disputing parties or their relatives, but for various reasons, it is now being managed and used by others. The original owners or their relatives want to reclaim the land, leading to a dispute. It is important to note that determining a land dispute

differs from a property dispute. Specifically, a property dispute includes all land-related disputes, including disputes over land use rights. Properly identifying a land dispute helps the parties and state authorities protect the legitimate rights of land users, avoid wasting time for state agencies, and accurately apply the laws in the dispute resolution process. Land disputes are quite common and highly complex in Vietnam today. These disputes often involve very large amounts of property, directly affecting the interests of the parties involved.

Currently, based on the provisions of Articles 202 and 203 of the 2013 Land Law, there are several commonly used methods for resolving land disputes, such as (i) negotiation between parties; (ii) mediation through a third party; (iii) request resolution through administrative procedures by district and provincial People's Committees, through administrative decisions; and (iv) filing a lawsuit in court, with judgments and proceedings. The methods of reconciliation and negotiation are still characterized by peace and respect for the parties' agreement. They are not coercive or mandatory compared to other methods of resolving land disputes. Currently, there is no legal regulation for the negotiation method, which is entirely based on the agreement and self-resolution of the parties before the dispute becomes too large and requires the intervention of state agencies. As for the reconciliation method, it has been specifically regulated by the state in legal documents. It is even mandatory

and considered a step in resolving land disputes. The essence of reconciliation is to persuade the parties in dispute to express their will and viewpoints and reach the best solution for both sides with the participation of an intermediary entity as a mediator. This is a fairly common and effective method of resolving disputes and helping reduce the burden on the court system. Accordingly, there are two forms of reconciliation: reconciliation in litigation and reconciliation outside litigation:

Regarding reconciliation in litigation, this is a form applied in trial agencies (courts), also called pre-litigation reconciliation. This is because it is carried out within the preparation period for the trial and is also aimed at distinguishing it from reconciliation during the trial process in resolving a case. At this point, the parties have chosen to sue in court, and the court has considered and accepted the lawsuit. However, in this case, the court does not immediately proceed to trial, but within the preparation period, the court will reconcile the parties so that the parties have time to reconsider and negotiate to resolve the case before the trial. This is a mandatory provision in the litigation procedure according to the regulations in Article 205 of the 2015 Civil Procedure Code. This regulation provides an additional opportunity for the parties to reconcile to resolve the dispute before the court issues a compulsory judgment against the parties. Therefore, it shows that legal professionals still prioritize the reconciliation method and respect the

parties' will in resolving land and civil disputes in general.

Unlike reconciliation in litigation, reconciliation outside litigation is considered a method of reconciliation that is not carried out through legal proceedings [4, P.39]. In the land field, the reconciliation method outside litigation includes (i) reconciliation at the grassroots level; (ii) reconciliation at the Commune People's Committee. With regard to reconciliation at the grassroots level, this is also a reconciliation measure that depends entirely on the goodwill of the parties, aimed at resolving disputes through the agreement of the parties in a certain area or locality. However, in the form of grassroots reconciliation, the state only encourages parties in dispute to reconcile or settle disputes through grassroots reconciliation voluntarily. In other words, this is an optional form of reconciliation with a local character [4. P.40]. At the same time, based on Article 2 of the 2013 Law on Mediation at the Grassroots Level, this concept is defined as "Mediation at the grassroots level means the mediator guiding and assisting the parties in reaching an agreement, voluntarily resolving with each other conflicts, disputes, and violations of the law under the provisions of this Law". Thus, this form involves the participation of an intermediary subject, a mediator of the Mediation Association, a self-managed organization of the people established in hamlets, villages, communes, wards, neighborhoods, and other residential clusters [5]. This subject will support the parties in reaching an agreement to

resolve the land dispute and is specifically regulated in the 2013 Law on Mediation at the Grassroots Level.

Regarding the form of reconciliation at the Commune People's Committee (at the commune level, including communes, wards, and towns) where land is being disputed, it is regulated in Clauses 2 and 3 of Article 202 of the 2013 Land Law [6]. Accordingly, if the parties cannot reconcile the land dispute, they must submit a request to the Commune People's Committee, where the land is in dispute for mediation [6]. With this form of reconciliation, the Chairman of the Commune People's Committee is responsible for organizing the mediation of the land dispute. The Council must mediate the land dispute for Advising on the Settlement of Land Disputes of the commune, ward, and town established by the People's Committee of the commune, ward, and town [1. P.52]. Based on Article 88 of Decree No. 43/2014/NĐ-CP dated May 15, 2014, of the Government regulating in detail the implementation of some articles and clauses of the Land Law, the composition of the Council for Mediation of Land Disputes at the Commune People's Committee is specifically regulated, as well as the procedure for mediation of the Council. Therefore, this conciliation agreement must be recorded in a document that is signed by all parties and confirmed as either settled or not settled by the People's Committee at the commune level [7]. This document must be sent to the disputing parties and kept at the People's Committee at the commune

where the dispute occurred. In addition, it must be carried out within a specified timeframe and according to a clear and specific procedure. However, it should be noted that conciliation at the People's Committee at the commune level only acts as a mediator to assist the parties in reaching an agreement to resolve their land dispute rather than making decisions to resolve the land dispute. Furthermore, according to Clause 2, Article 3 of Resolution 04/2017/NQ-HDTP, it can be seen that conciliation at the People's Committee at the commune level is a mandatory legal procedure. If not conciliated, the parties will be considered not to have met the conditions for filing a lawsuit. They will not have the right to file a lawsuit in court or send a petition to the People's Committee at the district or provincial level for resolution. Therefore, this can also be considered a pre-settlement stage for the court and the competent state administrative agency [1. P.52].

3. Some shortcomings and obstacles in the regulations of land dispute reconciliation law

The land is an extremely important resource for every country, as it is a means of production, a place to live, and a foundation for economic, social, and national defense and security development. Therefore, the land becomes a very special type of property, owned by the people as represented by the state and managed uniformly. Citizens are granted the right to use land in accordance with the law. However, land use is currently becoming scarce, making land a valuable asset and a common issue of dispute in reality.

Land disputes are always associated with the process of land use by subjects, affecting not only the interests of disputing parties but also the state's interests [8]. Currently, there are many methods of resolving land disputes, but the method that is usually encouraged to apply by parties and the state is reconciliation. After more than eight years since the Land Law 2013 took effect and went into practice, along with a series of legal documents guiding enforcement in the field of land issued, it shows the importance of the Land Law in the daily lives of citizens [9]. However, during the implementation and application of the law, the regulations on land dispute reconciliation, in particular, and the settlement of land disputes, in general, have revealed some shortcomings and obstacles that need to be timely overcome and adjusted to meet the land use needs of subjects, as well as to improve the quality of land dispute reconciliation by state agencies. The following are some of the shortcomings and obstacles in the regulations of land dispute reconciliation law:

Firstly, the law has not yet regulated the case of places where there is no commune-level administrative unit, then which agency will play the role of reconciliation. According to the provisions of Article 202, Article 203 of the 2013 Land Law and Clause 2, Article 3 of Resolution 04/2017/NQ-HDTP, reconciliation at the commune-level People's Committee is a mandatory legal procedure. Only when the parties have undergone reconciliation at the commune-level

People's Committee where the disputed land is located can the parties be considered as having enough conditions to initiate a lawsuit at the court and file a petition requesting the administrative agency to settle the land dispute. However, in reality, some localities still do not have commune-level administrative units due to their special locations, such as Bach Long Vi district of Hai Phong city, Con Dao district of Ba Ria - Vung Tau province, Con Co district of Quang Tri province. In these places, when land disputes arise, it will cause difficulties and limitations for the parties and state agencies in determining which agency will perform the reconciliation task of the commune-level People's Committee. This makes it difficult for the parties when they cannot conduct reconciliation and do not have enough conditions to continue submitting petitions to settle land disputes in the following stages [10].

Secondly, there are no mandatory sanctions for the responsibility to appear and protection mechanisms for representatives of some households who have lived for a long time in the commune, ward, or town and know well about the origin and usage process of that land parcel. According to the provisions of point b, Clause 1, Article 88 of Decree 43/2014/ND-CP regulating the composition of the reconciliation council to carry out reconciliation. The reconciliation council includes representatives of some households who have lived for a long time in the commune, ward, or town and know well about that land parcel's origin and usage process.

However, for this subject, they are entities that do not have official responsibilities with the state, and there are no mandatory sanctions for them to participate. Whether they participate or not depends entirely on their goodwill.

Moreover, due to different economic situations in different areas leading to changes in the population in the locality, it is very difficult for the local state agencies to determine which subject is a long-term resident and knows well about the origin and usage process of the disputed land parcel. At the same time, another reason makes these subjects hesitant to participate in the Land Dispute Conciliation Council. It is because of the fear of accidentally offending or getting into conflicts with people with close relationships related to land disputes. Alternatively, if they agree to participate, their statements may not be objective or honest due to their acquaintance with parties related to the land dispute being conciliated, affecting the result of the conciliation process. Furthermore, the law has not yet established specific mechanisms to protect these subjects' personal and property rights, so they often do not participate in the Conciliation Council. This makes it difficult and affects the outcome of the conciliation process because the testimony and presentation of these subjects are crucial and beneficial to the success of the conciliation process [10].

Thirdly, there are no specific regulations in the law for cases where reconciliation is not possible, which can be used as a basis for parties to file a lawsuit or request settlement at

administrative agencies. According to Articles 202 and 203 of the 2013 Land Law, reconciliation at the commune-level People's Committee is a mandatory procedure for resolving land disputes and must be recorded in a signed reconciliation agreement. In reality, during land dispute reconciliation, there are cases where the reconciliation agency issues a valid invitation to the parties, but the defendant does not attend [11]. This leads to the People's Committee being unable to carry out a reconciliation or record a reconciliation agreement due to a lack of signatures from all parties. Therefore, the People's Committee can only record an agreement that was not reached. However, the law does not specifically provide for such cases or clarify whether the People's Committee's record of a failed reconciliation has the same legal value as an agreement that was not reached. As a result, due to the lack of specific regulations, reconciliation agencies have not consistently applied the law in this situation. In some places, the record of a failed reconciliation is not accepted as equivalent to an unreach agreement. In other places, it is considered equivalent, and parties may have the right to file a lawsuit or request that the administrative agency settle the dispute. This is an urgent practical issue that needs to be specifically regulated and guided shortly to ensure the legitimate rights of land users and that the application of the law among localities is carried out in a unified and objective manner.

Fourthly, there is no mechanism to protect the parties' rights when the other party fails to enforce the reconciled results of the People's Committee at the commune level. According to the provisions of the Land Law 2013 and legal documents in the field of land, when drafting the reconciliation minutes at the People's Committee at the commune level, the minutes are based on the free will and agreement of the parties to resolve land disputes voluntarily. However, in reality, the law still has no provisions for compulsory enforcement of reconciled results, meaning whether the agreement is implemented depends entirely on the goodwill of the parties in the dispute. The reconciled results at the People's Committee at the commune level currently have no mandatory enforcement value for the parties. This has led to a situation where the parties do not follow what has been agreed upon in the reconciliation minutes, adversely affecting the other party's legitimate rights. Meanwhile, the law does not have a mechanism to protect the legitimate rights of the other party, which has somewhat indirectly reduced the legal value of the reconciliation minutes, as well as eroded people's trust in the decisions of state agencies, affecting the legitimate rights and interests of land users.

4. Some suggestions for improving the law on land dispute reconciliation

To overcome some remaining limitations and shortcomings, as mentioned in section 2, in order to further improve regulations on land dispute reconciliation and contribute to

enhancing the ability to resolve land disputes for court officials, as well as mediation organizations and mediators. From there, to ensure the legitimate rights of land users, it is necessary to continue researching and considering implementing some of the following solutions:

One, it is necessary to amend and supplement regulations towards establishing an agency to conduct land dispute mediation instead of the Commune People's Committee in areas without a Commune-level administrative unit. Accordingly, for special areas without Commune-level administrative units, such as Bach Long Vi district of Hai Phong city; Con Dao district of Ba Ria - Vung Tau province; Con Co district of Quang Tri province, the law needs to provide regulations on which agency is responsible for performing the function of mediation instead of the Commune People's Committee in this case. Only then can the legitimate rights and interests of the parties in dispute be ensured, as well as solving difficulties and obstacles for the parties, as well as state agencies in applying the law to resolve land disputes in these special areas.

Two, it is necessary to regulate the mechanism for protecting the rights and interests of representatives of some households who have lived for a long time in the commune, ward, or town and know well the origin and use the process of that parcel of land, so that they can confidently participate in the Mediation Council for dispute resolution at the Commune People's Committee. Due to the tradition of close-knit

neighborhoods and villages, neighbors often value emotional ties and limit conflicts with those who have close relationships with them, such as siblings, relatives, and neighbors who are the related parties in land disputes, or they are afraid of causing conflicts and being retaliated against. This leads to the situation where the individuals considered representatives of some households who have lived for a long time in the commune, ward, or town and know well the origin and use of that parcel of the land process are hesitant to participate in the Mediation Council. Therefore, the law needs to have mechanisms to protect their rights and interests and policies that encourage these individuals to participate in activities to resolve land disputes confidently. Because these individuals have the knowledge and practical experience about the origin and use of the process of that parcel of land, their statements and opinions can contribute to the success of the mediation session to some extent.

Three, it is necessary to supplement regulations for the case when one or both parties are absent without valid reasons on how it will be resolved. Specifically, suppose the People's Committee of the commune has already issued a valid invitation letter to the parties, but one or both parties are still absent without valid reasons. In that case, the commune will not proceed with reconciliation. It will send a second invitation letter to the parties. Suppose the parties are still absent on the second invitation. In that case, it will be considered that they have not reconciled

at the People's Committee of the commune and are not qualified to proceed with the next stage of the litigation and request the administrative authority to resolve it. Therefore, the essence of reconciliation is a voluntary agreement, reflecting the goodwill of the parties in resolving disputes, so the parties' participation in the dispute is mandatory. At the same time, reconciliation at the People's Committee of the commune is a mandatory legal procedure that the parties must implement. So, if any party does not participate in reconciliation, it must be considered that the parties have not reconciled at the commune's People's Committee. The specific regulations above will ensure the legitimate rights and interests of land users and ensure the application of laws among localities is implemented uniformly and objectively.

Four, it is necessary to prescribe compulsory sanctions to enforce the reconciliation results of the commune's People's Committee. In the case of land disputes that have been organized and reconciled, a period of about 30 days should be prescribed, during which the parties have the right to comment on changing the results in the previous reconciliation minutes [8]. If, after this deadline, the parties have no other comments, the reconciliation minutes will be legally binding on the parties. If the parties do not enforce the reconciliation results and cause adverse effects on the other party, they will be handled according to the provisions of the law. If, during that period, the parties change their opinions, they will

proceed with reconciliation for the second time, and the legal value of these reconciliation minutes will be immediately valid and binding on the parties. The regulation of compulsory mechanisms for the reconciliation results will not only help ensure the legitimate rights and interests of the parties when one party does not comply with what has been agreed upon but also increase the legal value of the decisions of the state agencies, creating the trust of people in the capacity of state agencies in resolving land disputes.

5. Conclusion

In the era of deepening international integration, the state needs to quickly and gradually build and perfect the legal system regarding land in general and regulations on land dispute reconciliation in particular. This is to ensure the legitimate rights and interests of all parties, as well as to improve the work of resolving land disputes by state agencies and reduce the workload for the courts. Currently, some legal provisions regarding land dispute reconciliation still have contradictions and are not unified. Some issues have not been specifically regulated, which has caused difficulties and confusion for all parties, as well as state agencies, when applying the law to resolve land use disputes. Therefore, the urgent issue now is for legal experts and researchers to continue to revise and supplement the legal framework to be more appropriate for social realities and to achieve consistency among legal provisions. By addressing this issue effectively, we can ensure the legitimate rights and interests of all parties in land disputes, improve

the ability of state agencies to apply the law and contribute to the development of the country's economy.

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Ngày nhận bài: 25/4/2023

Ngày hoàn thành sửa bài: 12/6/2023

Ngày chấp nhận đăng: 26/6/2023