

Right of Passage Under Vietnamese Civil Law – Defects And Recommendations

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Abstract: *The right of passage is one of the other rights to property stipulated in Article 254 of the Civil Code 2015. However, when applied in practice, this provision still has some limitations and shortcomings that need to be further studied to improve the law. This article studies the legal provisions and adjudication practices related to the right of passage under Vietnamese civil law. On that basis, the article points out the limitations and shortcomings and makes recommendations to improve the provisions on the right of passage in Vietnamese civil law.*

Keywords: *Right of passage; adjacent property; other rights to property.*

1. Introduction

In real life, there are cases where the real estate of an entity is surrounded by the real estate of other entities without access to public roads. In order to effectively exploit and use the surrounded real estate, the laws of many countries, including Vietnam, allow the owners of the surrounded real estate to open a passage through the surrounded real estate to be able to go to the public road. For example, the French Civil Code stipulates that the owner of the surrounded real estate without or without enough access to the road necessary for agricultural, industrial, commercial production activities or for the implementation of construction work, has the right to request the owners of the adjacent real estate to provide him with a satisfactory path on their land, on the condition that he must compensate accordingly for the damages incurred (Article 682, The French Civil Code). The Russian Federation Civil Code also stipulates that the owner of real estate has the right to request the owner of adjacent real estate and, if necessary, the owner of another real estate (adjacent real estate) to grant him the right to limited use of the adjacent land plot. The right to limited use of adjacent real estate can be established to ensure the passage through the adjacent real estate, to provide for the installation of power lines, communications, installation of water pipes, as well as other needs of the surrounded real estate (Article 274, The Russian Federation Civil Code).

Opening a passage through the surrounding real estate is a sensitive issue because it directly affects the owner of that real estate. It not only makes the owner lose the rights to the real estate for which the passage is opened, but also continuously affects their daily life, business, etc (Bui Ai Gion, 2023). Therefore, to ensure and balance the interests of the owner of the surrounded real estate (real estate enjoying the right) and the owner of the surrounding real estate (real estate subject to the right), Vietnamese civil law has stipulated the basis for the emergence and termination of the passage through the adjacent real estate; the rights and obligations of the parties in the relationship regarding the opening of a passage through the adjacent real estate. However, the provisions on the right of passage in Vietnamese civil law still have some limitations and inadequacies, leading to different understandings and applications in the legal science community and judicial practice in Vietnam. Therefore, it is necessary to study the regulations on the right of passage in order to make recommendations to contribute to perfecting the law to ensure consistency in the application of the law by local courts.

2. Legal regulations on the right of passage

2.1. Conditions for establishing and terminating a passage

Article 254 of the Civil Code 2015 stipulates, the owner of real estate surrounded by other real estate with no or insufficient passage to the public road has the right to request the owner of the surrounding real estate to provide him/her with a reasonable path on their land. Thus, the right to open a passage can be exercised when the owner of the surrounded real estate has no access or has access but the access is not sufficient to access the public road. For example, a path width of only a few tens of centimeters is not enough for traffic to the public road. In the case where the surrounded real estate has access to a public road, even if that access is inconvenient, the owner of the surrounded real estate does not have the right to request the opening of a passage through other real estate. To avoid the formation of surrounded real estate and lead to disputes over opening the passage, the law also stipulates that in case real estate is divided into many real estates according to agreement or decision of competent authority or judgment of the Court, when dividing, it is necessary to determine the way for the newly divided real estates without compensation.

When the owner of the real estate enjoying the right or the real estate subject to the right of passage transfers the real estate to another person, the transferee inherits the rights and obligations of the transferor. In other words, the right to adjacent real estate is the right exercised on a real estate to serve the exploitation of another real estate owned by another person. This right is attached to two real estates, the surrounded real estate and the surrounding real estate, and will not be lost but transferred from the old owner to the new owner when the owner exercises the right of disposal or a civil transaction arises (Lu Van Moi, 2021).

The right of passage will terminate when the grounds for establishing the right of passage no longer exist, specifically: i) The land plot was previously surrounded but now the State has opened the road so it is adjacent to a public road; ii) The owner of the surrounded real estate and the owner of the surrounding real estate are the same person; iii) The right of passage may also terminate by agreement of the parties; iv) Other cases prescribed by law.

2.2. Location, width, height of the walkway through adjacent real estate

When the conditions for opening a passage through adjacent real estate are met, the owner of the surrounding real estate is required to provide a passage for the owner of the surrounded real estate to go to the public road. The passage is opened on the adjacent real estate that is considered the most convenient and reasonable, taking into account the specific characteristics of the location, the benefits of the surrounded real estate and the least damage to the real estate on which the passage is opened. Therefore, to assess what is the most convenient and causes the least damage to the real estate on which the passage is opened, the Court must base on the specific characteristics of the real estate. In principle, the passage is opened through the real estate closest to the public road in the case where the surrounding real estates have the same conditions and circumstances. However, in the case where the surrounding real estates have all built solid houses and only one surrounding real estate has not yet built a solid house, the passage must be opened through the land plot that has not yet built a solid house. Because, if the path is opened through a land plot with a solid house, it will cause great damage to the owner of the real estate where the path is opened. In the case where the surrounding real estate has not yet built a solid structure, it must be based on the current status of the surrounding land plots. For example, the surrounding land plots have a

frontage of 4 meters, some have a frontage of 5 meters, so it is necessary to open a path through the land plot with a frontage of 5 meters. According to common logic, with the same width and height, the shortest passage takes up the smallest area and the least space. However, if to open that passage, it is necessary to destroy the construction or trees, the damage may be greater than opening a long path and sometimes it cannot be done in practice (Judgment No. 86/2018/DS-PT). The location, length, width and height limits of the path are agreed upon by the parties, ensuring convenience for travel and causing little inconvenience to the parties. In case the parties cannot reach an agreement, they have the right to request the Court to resolve the dispute over the right of passage

2.3. Compensation issue for land area used to open the passage

Article 254 of the Civil Code 2015 stipulates: “*The owner of the real estate enjoying the right of passage must compensate the owner of the real estate enjoying the right, unless otherwise agreed*”. In principle, the compensation value when requesting to open a passage is agreed upon by the parties. If the parties cannot agree on the compensation value, they have the right to request the Court to resolve it. In practice, some Courts have forced the owner of the real estate enjoying the right of passage (the owner of the surrounded real estate) to compensate the value of the passage to the owner of the real estate enjoying the right (the surrounded real estate) at the market price based on the valuation certificate. For example, according to a Court judgment, “*The Plaintiff is obliged to pay the Defendant an amount of money equivalent to the value of the land area for which the passage is requested and the value of the property on the land. According to the valuation certificate dated November 12, 2022 and the Price Notice Letter dated December 12, 2022 of Consulting and Valuation Company Limited, the total value of land and assets on the land to open the path includes: Land value: $46\text{ m}^2 \times 1,503,000\text{ VND/m}^2 = 69,138,000\text{ VND}$; assets on the land: $10\text{ coffee trees} \times 307,800\text{ VND} = 3,078,000\text{ VND}$. The sum of the two amounts is $72,216,000\text{ VND}$ (Judgment No. 08/2024/DS-ST)*. In addition, in the case of many people using the path, the compensation value for the owner of the real estate entitled to the right will be divided equally among the owners of the real estate entitled to the right. For example, in a court judgment, it was stated: “*The common path is the common use area of 04 plots of land of Ms. K, Mr. H2,*

Mr. H3 and Ms. H4. The court of first instance decided to allow Ms. G to use this common alley and forced Ms. G to pay 1/5 of the land value (equivalent to 124,000,000 VND) to Mrs. K's family has ensured the legal rights of Mrs. K's family" (Hoang Nguyen). In the above situation, the Court held that the walkway belongs to the common use of five people, so the plaintiff only has to pay 1/5 of the value of the land used as a common passage.

3. Inadequacies and some recommendations to improve regulations on rights of passage

Researching Article 254 of the Civil Code 2015 and trial practice shows that the provisions on the right of passage still have the following limitations and shortcomings:

Firstly, determining which cases are considered "there aren't passage" to public roads has different interpretations and applications. The Civil Code 2015 stipulates that the owner of a surrounded real estate has the right to request the opening of a passage through adjacent real estate in cases where there aren't passage to a public road. However, there are many different interpretations of which cases are determined to be "there aren't passage" to a public road because in addition to roads, there are also waterways and railways. For example, a plot of land surrounded by other real estates has no access to a public road but can be accessed by waterway, does the owner of the surrounded real estate have the right to request the opening of a passage? According to a case, the land plot of Ms. T and Mr. D is surrounded by real estates and is adjacent to a public canal. Mr. T and Ms. D asked Mr. Ch, the owner of the surrounding real estate, to open a path to the public road, but Mr. Ch did not agree, leading to a dispute. The Court determined that if Ms. T and Mr. D were allowed to go by boat along the public canal as Mr. Ch stated, it would be very inconvenient because it would depend on the tide and weather. Therefore, both the Court of First Instance and the Court of Appeal accepted the request to open a path of the owner of the surrounded real estate (Judgment No.109/2023). It can be seen that in the above case, the Court held that although the land is adjacent to a waterway, the use of the waterway is very inconvenient, so the Court accepted the request to open a path. Thus, conversely, if the surrounded land is adjacent to a waterway and the use of the waterway is not too inconvenient, the request to open a passage will not be approved.

There is a view that, to conclude whether a waterway is a public road or not, it is necessary to consider the possibility of using that road. If people in the area still use this waterway for transportation, then real estate surrounded by land but adjacent to rivers, lakes, and seas is not considered "there aren't passage" to a public road. On the contrary, if real estate is adjacent to a waterway but there is no commonly used means of waterway transportation, leading to difficulties in public transportation and community activities, it is still entitled to the right of passage (Dang Le Phuong Uyen, 2021). The author does not completely agree with the above view. Because, in the case of no public means of waterway transportation, the owner of the surrounded real estate can still use personal means of waterway transportation to go to the public road. Therefore, the competent authority needs to clearly explain the meaning of the phrase "surrounded by other real estates insufficient passage to the public road" or the Supreme People's Court needs to develop a precedent to clearly define the conditions for establishing the right of way. According to the author, in the case where the land plot is surrounded by other real estates and is partly adjacent to a waterway, the request to open a passage can only be met when the waterway is too difficult and inconvenient. This is reasonable, because according to the Civil Code, if there is a road access but the access is not sufficient, there is still the right to request the opening of a passage. Therefore, if traveling by waterway is too difficult and inconvenient due to the distance being too far or when the tide recedes, ships and boats cannot navigate, then accepting the request to open a passage is reasonable. To determine whether waterway traffic is unreasonably difficult, the Court needs to consider many factors such as distance, width, and depth of the waterway to ensure that it can meet the needs of waterway traffic, and then consider whether the request to open a passage is approved or not.

Second, determining what is "insufficient passage" to a public road has different interpretations and applications. According to the Civil Code 2015, the owner of a surrounded property has the right to request an access in case of "insufficient passage" to a public road. However, in which cases is it considered insufficient access to a public road still causes controversy among legal scholars and judicial practice. There is a view that in the case of a surrounded property that was previously a house but is now rented out as a warehouse, trucks need an access but the existing access is not wide enough. These are cases where the old

access still exists but is not sufficient to meet the purpose for which it was established, so the owner of the surrounded property can request an access through another property to facilitate access to his property (Nguyen Van Cu, Tran Thi Hue, 2017). Sharing the same point of view, author Dang Le Phuong Uyen also believes that "insufficient passage" is understood as the inability to exploit real estate normally, according to the purpose and use of that real estate (Dang Le Phuong Uyen, 2021).

The author does not completely agree with the above opinions because if the expansion of the passage is allowed based on the purpose and use of the surrounded real estate, it will be very difficult to meet. At the same time, this solution is likely to cause serious damage to the interests of the owners of the surrounded real estate (the real estate subject to the right), leading to an imbalance of interests between the parties. For example, the owner of the surrounded land plot switches to the warehouse business and requests to open a passage large enough for large vehicles such as containers and trucks to circulate, which cannot be met. In principle, it is impossible to take the interests of one subject to serve the maximum of another private interest if the subjects do not have an agreement. According to the provisions of the land law, the State only reclaims land to implement projects that are essential to serve the interests of national defense, security, national interests, and public interests. For projects that are not subject to land acquisition by the State, the investor must negotiate with the land user to have land to implement the project Article 78 and Article 79 of the Land Law 2024). Therefore, the author believes that the phrase "*insufficient passage*" needs to be interpreted by the competent state agency in the direction that the existing access is not enough to serve the daily minimum living needs. Access to serve the daily minimum living needs should be understood as enough to walk or ride a motorbike in and out of the property. In the case that the surrounded property already has access to a public road sufficient to serve the daily minimum living needs, the right to open a passage cannot be satisfied.

Third, the issue of compensation for the land used as a walkway is still problematic and inadequate. The practice of adjudication has forced the person entitled to the right of passage to compensate for the entire value of the land used as a walkway according to the valuation certificate. In other words, the person requesting the opening of the walkway must pay the

entire value of the land used to open the passage at market price. This means that the person requesting the opening of the passage must buy back the land used as a passage at market price. Determining the compensation price for the land used to open the passage at market price is not really reasonable. Because the person with the right to use this passage only has a limited right to use it, not the full right to use it like the land under his/her right of use. Furthermore, the right of way will be terminated when the basis for opening the passage no longer exists. For example, when the surrounded real estate has another way to the public road, the right of way will be terminated. Thus, although the right of way may only exist for a certain period of time and the use of this right is a limited right, the owners of the surrounded real estate must still compensate equivalent to buying back this passage, which is not really convincing. Therefore, competent State agencies need to issue guidance documents or the Supreme People's Court needs to develop a precedent guiding how to determine the compensation value for opening a way in a reasonable manner. We believe that the Civil Code 2015 should stipulate that the compensation value will be calculated according to the duration of use of the passage, similar to the case of calculating land use fees and land rent in cases where the State allocates or leases land. When the agreed duration of use of the way expires, the parties will renegotiate the compensation level to continue using the way. In case the right to use the passage has not been used for the agreed period and the right to use the passage has ended, the person who received compensation must return the value to the owner of the surrounded real estate corresponding to the remaining unused period.

4. Conclusion

Regulations on the right of way are important in helping owners of surrounded real estate to exploit and use their real estate, while also avoiding wasting valuable national resources and assets. However, in order to protect interests and harmoniously resolve the relationship between the parties, the regulations on the right of passage need to be more specific and reasonable. Through the article, the author has pointed out some limitations and inadequacies and made some recommendations to improve the regulations on the right of passage in Vietnamese civil law.

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