



VIETNAMESE LAW ON DURATION OF FARMERS' LAND RIGHTS: DEVELOPEMENT AND LIMITS

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ABSTRACT

Land tenure security is important to enhance farmers' incentive in land investment and to agricultural development. The security of farmers' land rights has been significantly improved in Vietnam since the first Land Law of 1987. However, the improvement has limits. In terms of legal certainty, one of the limits is related to the law on the duration of land rights for farmers. At present, farmers can hold their arable land rights for only 50 years, which may affect tenure security and land investment negatively. Although the land rights are subjected to renew, the procedure is problematic. It is, therefore, ideally to allow farmers to hold their arable land rights in perpetuity in order to enlarge the security of their land rights and give them more incentive to have long-term land investment.

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1 INTRODUCTION

Since its Doi Moi or economic reform starting in 1986, Vietnam has enacted four land laws. The first land law was passed in 1987 and then was replaced by the 1993 Land Law. The National Assembly of Vietnam amended the 1993 Land Act in 1998 and 2000, and finally replaced it with a new one in 2003 to meet demands of new socio-economic conditions. The 2003 Land Law lasted for ten years and was replaced by the 2013 Land Law. The 2013 Land Law is the existing one, which was adopted on 29 November 2013 and comes into force on the first of July 2014.

The four Land Laws mentioned above had changes in land tenure in general and in farmers' land tenure in particular.¹ The changes, among other

things, help improve land tenure security, which is important to enhance farmers' incentive in land investment and to agricultural development. However, the improvement has limits. One of the limits is related to duration of land rights, which is part of tenure security.² This paper aims to analyse these limits in the existing land law of Vietnam and make suggestions thereto. Firstly, it gives a general introduction to the concept of land tenure security and the relation of duration of land rights and tenure security. Secondly, it analyses the development

this paper, farmers' land rights are referred to the rights to use arable land that the State grants to farmers.

² In Vietnam, we do not use the term private land ownership but the term land use rights to refer to land rights or real property rights of individuals or corporations. However, land use rights under the existing Vietnamese law can virtually be considered as de facto private ownership of land (see Nguyen Lan Huong, 2014, pp. 62-65). Thus, in avoidance of misunderstanding of the term, we use the term land rights to refer to the real property rights of individuals and corporations in Vietnam.

¹ The Vietnamese Land Law classifies land into several categories and land users of different land categories have different rights and duty. For agricultural land, land can be either granted for free or rented (with rent). In

of the Vietnamese law on duration of farmers' agricultural land rights. Finally, the weaknesses of the existing law related to duration are analysed, and possible suggestions are made to deal with the weaknesses to improve farmers' land tenure security.

2 LAND TENURE SECURITY AND DURATION OF LAND TENURE IN A NUTSHELL

2.1 The concept of land tenure security

Land tenure systems play an important role in economic growth as well as social welfare. One of the optimal goals of land tenure arrangements is to make security of land tenure. This is mostly because tenure security affects land-related investment and agricultural production. In general, tenure security can bring three benefits: (i) creating incentive for farmers to invest in land; (ii) enabling farmers to improve their financial capacity to invest in land by using land rights as collateral for formal loans; and (iii) facilitating land sales and rental markets (Feder, 1987). The first two benefits directly contribute to agricultural productivity. The third helps to redistribute land from ineffective farmers to effective ones through market mechanism, and land can be used effectively. These advantages make tenure security more and more important to agricultural development, especially in the context that nowadays agriculture meets challenges such as land loss, land degradation and climate change.

The concept of land tenure security is not new. It has been raised as a concern since the 1970s (Van Gelder, 2010), and has attracted a number of ongoing theoretical and empirical research. Until now, there is no consensus about the definition of land tenure security. Several researchers, however, consider certainty as an element of land tenure security and security of tenure as one's perception of the certainty of his rights to a piece of land.³ For example, a farmer feels secure in his land rights if he believes that his rights to land may not be forcibly taken against his will. Based on the nature of tenure security as the perception of people on the certainty of their rights to land, Place *et al.* (1994) gave a detailed and comprehensive definition of land tenure security. Accordingly, land tenure security includes three elements: breadth, duration and assurance.⁴ Breadth means the number and the

quality of rights someone is entitled to hold on a plot of land. Duration relates to how long these land rights can be held, and assurance refers to how well the land rights are protected against the outsiders.⁵

2.2 The relation between duration of land rights and land tenure security

As said previously, land tenure security is composed of the breadth, duration and assurance of land rights. Improvement of one element, therefore, contributes to increase the whole security of land tenure. Since duration of land rights is part of tenure security, improvement of duration affects tenure security. Duration determines how long land rights holders can make profit from their land. The longer land rights can be held, the more profit the holders can get from the land. As such, duration will affect the holders' land-related investment decisions (Gebremedhin and Swinton, 2003). As analysed by Currie (1981), the duration of lease determines tenants' investment decision and affects the tenants' perception of tenure security. The longer a property right can hold its enforcement, it is presumed, the securer the tenure is (Hanstad *et al.*, 2009). In this regard, it is important to note that this holds true if the other measures of tenure security are unchanged. In other words, if the breadth and assurance are not improved, an extension of the length of land rights could probably enlarge tenure security.

There is an agreement on the importance of the length of land rights as one of factors contributing to tenure security. However, the question that arises is what length of land tenure would provide the greatest certainty. Is exclusive ownership over land the most certain, or is a life expectation of 99 years preferable? It is hard to determine a fixed duration of land rights to ensure the greatest security, but the principle is that the longer a land right expectation exists, the more certain it is perceived to be. The length of a land right should be long enough for the right holder to reap his investment, including labour, capital and technology, in the land. In this respect, land tenure duration should be extended as much as possible to enhance the certainty of land rights.

³ Ubink (2009) contributed an aggregate analysis of the definition of land tenure security.

⁴ The three elements are also considered as measurements of land tenure security. However, to assess the security of a given land tenure, especially in a develop-

ing country, where rule of law is underdeveloped, another measurement should be taken into account; that is unambiguity, transparency, and stability of land tenure. For detail, see Nguyen Lan Huong, 2014. pp. 43 – 45.

⁵ See, for example, Frank Place *et al.*, 1994.

3 THE DEVELOPMENT OF VIETNAMESE LAND LAW ON DURATION OF FARMERS' LAND RIGHTS SINCE THE 1987 LAND LAW

3.1 An extension to duration of farmers' land rights over the four Land Laws

Vietnamese land law upholds the constitutional principle of long-term land allocation to encourage land users to use land economically and efficiently. The 1987 Land Law required land including agricultural land to be allocated to land users to use for a stable and long-term period. Nevertheless, the law did not explicitly define the term "stable and long-term period". By virtue of the provisions prescribed in the Law, it implied that "stable and long-term period" was meant to be indefinite.⁶ Contrary to the 1987 Land Law, the 1993 Land Law expressly determined the duration of land-use rights even though it still upheld the rule of long-term land allocation. Accordingly, the length of 20 years was applicable to land used for annual crops and aquaculture, and 50 years to land used for perennial crops. Land-use rights for constructing houses with no limited time of use remained intact in the new Land Law, but the 1998 amendment of the 1993 Act added provisions concerning lease terms for land used for investment projects. These provisions on duration of land-use rights remain unchanged in the 2003 Land Law. Additionally, the 2003 Land Law specified the types of agricultural land to which either stable and long-term land allocations⁷ or definite long-term ones are applied. Most of the types of agricultural land are subject to a definite duration of use, except for land used for growing protected forests and specialized forests. The existing Land Law passed in 2013 keeps the same duration of rights to perennial crop land, but extends the right to use land for annual crops and aquaculture to 50 years.

⁶ Although duration of land rights was indefinite, it made little sense to tenure security due to restrictions in land rights, land transfer and unfair compensation of land acquisition. For detail, see Nguyen Lan Huong, 2014.

⁷ The Law gives no explicit expression that some types of land are permitted to use in perpetuity. In fact, the law sets out two cases of duration of land use, a stable and long-term use and a definite-term use. The definite-term usage of land refers to the numerical length of time in using the land, 20 years or 50 years of use. The classification of the duration of land use provided for by the law leads us to the understanding that the stable and long-term use of land means the unlimited time of land use or the land allocated is permitted to be used until the state recovers it.

3.2 Renewal of farmers' land rights over the four Land Laws

Land rights that are held in short term can be secure if they are renewable. Since the 1993 Land Law, the term of agricultural land rights is defined in law and it was not indefinite. This could affect tenure security if the term is not long enough for farmers to get the return and profit from their land investment. To overcome such inherence, the Vietnamese Government allowed farmers' land rights renewable when the rights are expired.

Renewability of farmers' land rights was first provided for in the second Land Law. However, the provision on renewal was vague, causing difficulties for application. The 1993 Law did not make clear which conditions that land rights can be renewed. Furthermore, it set up no procedure for the renewal. The vagueness and lack of procedure prevented farmers from enjoying their legal rights that the Law gave them and paved the way for abuse of power and corruption.

Following the 1993 Law, the 2003 Law kept the same duration of land rights, but the problem of renewal was unsolved. The 2003 Law only provided for procedure to renew land rights of other land users such as those who rent the land from the State, not for granted land⁸ In fact, several local governments met difficulties in applying the law to renew farmers' land rights when the land rights were due in 2013. As reported by the Center for Urban Studies of the Ha Noi National University (2013), local farmers in Cu Chi District, Ho Chi Minh City, could not renew their land rights because the local government did not know the procedure and had to wait for further clarification, and this caused farmers trouble to transfer land or collateralize their loans by land rights.

To solve the problem of renewal as said, the existing Land Law clarifies the conditions as well as the procedure to renew farmers' land rights. According to Section 1 Article 126 of the Law, renewal is applicable to farmers who directly do farming and the term for the renewal is the same term applicable to land grant, i.e. 50 years. In respect of the procedure, the Law authorizes the Government to issue detailed procedure in a Government Decree, a subsidiary legislation. Accordingly, renewal is automatic, but those farmers who wish to have formal evidence for such renewal can request local government to give that evidence. The procedure is to send a request to the local government where the land is located to notify that the land is entitled to

⁸ See footnote 1.

renewal. The local government then sends the request notified to Land Registration Office for making change in the term prescribed in the land rights certificate. The clear provisions on renewal facilitate farmers to prolong their land rights, which contributes to their tenure security.

4 THE LIMITS OF THE EXISTING LAND LAW ON DURATION OF FARMERS' LAND RIGHTS AND SUGGESTIONS

4.1 Limit in the rationales of the law on duration of farmers' land rights

The Vietnamese National Assembly presented the rationales for the promulgation of the time limit of land-use rights in its preparatory documents. According to the Opinions of the Legislative Committee regarding the Government's land law proposal,⁹ individual land-use rights must be determined in terms of duration of use as to be not contradictory to the public ownership regime stated by the Constitution (Legislative Committee of the National Assembly, 2010). The Committee further explained that since it was proposed to allow the transferability of individual land-use rights, it would make no difference between the public ownership of land and land-use rights if the latter were undetermined. Such an explanation was based on the misunderstanding of ownership institutions which was dominant among Vietnamese scholars at that time. It was commonly perceived by the legislators that an ownership right necessarily includes the right to possess, to use and to dispose of a property outright. Based on such an oversimplified perception of ownership rights, Vietnamese legislators took the right to use land from the absolute ownership right, creating a so-called land-use right and granting it to individuals. Nevertheless, when the land-use right was enabled to be transferable, the lawmakers felt confused about the theoretical background of property rights in land. Therefore, they had to impose limits to land-use rights to distinguish them from ownership rights.

The regulation on the duration of land use was also explained in a scholarly way. In a course book on Vietnam's land law, the authors explained the necessity of determining the duration of agricultural land use (Hanoi Law University, 2006). They argued that the provision of a specified period of agricultural land use confirms the distinction between the State as the representative of the landowner and the land users as the land grantees. In

other words, the State grants the land users the right to use land stably and for a long period, but the long period does not necessarily mean that land-use rights are held in perpetuity. The authors stated that the fixed-term allocation of land would better the land management of the State; however, they did not make any further clarification of how well the definite duration of land use benefits land management. Another discourse made by the authors is that a clearly determined length of time helps land users feel certain of their rights to land. It also enables farmers to make a proactive plan for their land investment as well as use their land-use rights as collateral for land investment.

The discourses as mentioned above make little sense in justification of the need to limit the length of the land rights when the State promotes long-term land investment and attempts to enlarge land tenure security in Vietnam. First, it is not necessary to confirm the power of the State in executing its ownership of land because in practice, the right to use land under the existing Vietnamese land law indeed is of a property right nature or *de facto* private ownership of land. In addition, even under the private ownership of land regime the state still holds public authority to control land use in order to protect the public interest. Second, the existing defined duration of land use is insufficiently long for land users to make a long-term and significantly large investment in land as well as use land economically, efficiently and sustainably as expected. Actually, one of the main suggestions made by local authorities is to allow farmers to hold land rights in perpetuity to secure their land rights and help to enhance long-term land investment and efficient and sustainable land use.¹⁰

There is, however, arguably an underlying reason for such a limited duration applicable to agricultural land rights. It is said that the rationale for the limited length of use rights to agricultural land is that the State is afraid that it may encounter obstacles in land takings for its future socio-economic development projects once the State allocates the land to individuals and households to use perpetually. Nevertheless, in practice, the State has undertaken plenty of land expropriation since its adoption of the 1993 Land Law, thanks to its regulations on land recovery without waiting for the expi-

⁹ The Legislative Committee is part of the National Assembly, which has supreme power over legislature in Vietnam.

¹⁰ Vietnam's Government undertook its survey on the practical implementation of the Land Act of 2003 in 2010 and 2011 by collecting the local reports on the issue. The public announcement of the survey has been expected in May 2011. I have had access to ten out of the twelve local reports of the Mekong Delta region.

ry of land-use rights. Furthermore, the arguments the State made to limit the length of time of land-use rights sound unjustified, particularly in the light of the goal of improvement of long-term investment in land. The principle of fair compensation in case of land takings must be highly respected in order to protect the land users' rights and force the State to have serious consideration and high levels of responsibility in land expropriation and in using land economically.

4.2 Limit in the length of the right

As analysed above, duration of land right affects tenure security. Nowadays, agriculture is less profitable compared to industry and service sectors. Moreover, it is highly risky to invest in agriculture because of challenges such as climate change, loss of arable land and land degradation. To make agriculture more profitable farmers must invest more in agriculture and for longer time. Therefore, the security of land rights should be large enough to encourage farmers to have such large and long investment.

Additionally, individual farmers are small land users and always in a weak and vulnerable position. They have limits in financial capacity and land endorsement compared to agribusiness. To help small farmers overcome the challenges that agriculture meets, the State should support them. One non-financial support that the State can give small farmers is to extend the length of land rights in order to enlarge tenure security for farmers. When duration of land rights is longer, farmers can use land rights as collateral for long-term loans and then invest longer in land. Thus, it is desirable to allow farmers, whose land rights are entitled to pass over generations, to hold land rights in perpetuity.

4.3 Limit in the procedure

The 2013 Law improves the procedure to renew the land rights. Nonetheless, there remain obstacles to apply the law. According to Article 126 of the 2013 Land Law and Article 74 of Decree No. 43/2014/NĐ-CP dated 15 May 2014 by Government guiding the implementation of the 2013 Land Law, the automatic renewal of land rights applies only to farmers who directly involve in farming. Section 30 Article 3 of the Law further explains that "farmers who directly involve in farming" is referred to those who have stable income from cultivating the land. The question arising here is which bodies have authority to determine this. If the authority is granted to local government, which criteria are the local government based on to make such determination? At present, the Law gives a

loophole on this issue while such determination may harm people's rights. Take the case of persons A and B as an example. Both of them do farming for living at the beginning, but person A also has another paid job with much higher income compared to farming when their land rights are expired. In this case, only the person who is determined by local officials to be farmer with stable income from farming is allowed to renew his land rights automatically. The other must apply for renewal and the renewal is subject to local government's consideration. He may lose his land right if the right is not allowed to renew. This means that one ends with everything, and the other loses everything even though they started to use the land with the same conditions.¹¹ When there are no criteria to define stable income, it depends on the own will of local officials to define it, and this may give way for corruption.

5 CONCLUSIONS AND SUGGESTIONS

The law on duration of farmers' land rights has improved significantly. For annual crop land, first its term was some years and then extended to 20 and now 50 years. More important, the procedure for renewal first was vague, but in the existing Land Law it is clear. These legislative improvements help enhance the security of farmers' land rights, which affects land investment and agricultural production. However, due to the challenges of socio-economic conditions, tenure security of farmers should be improved further to continually encourage them to invest more and longer in land and agriculture. As analysed above, the existing 2013 Land Law, in spite of improvements, still entails inherence to farmers' tenure security. The limit in duration is one of these obstacles.

Land rights are extended and renewable, but the duration is limited and the procedure of renewal is problematic. To encourage long-term land investment for effective and sustainable agriculture, land rights of individual farmers (including farm households) should be held in perpetuity. It is because in case of farmers their lands can be passed over generations and land investment can be taken by generations. Perpetual land can bring the most security of land rights if the two elements breath and assur-

¹¹ This problem may lead Farmer B to pretend to transfer his land right to Farmer C, who is eligible for an automatic renewal when the land right is about to be expired. After the renewal, Farmer C gives the land right back to Farmer B with new duration of 50 years. By this way the State can not restrict persons that do not directly do farming access arable land, but it gives way for bad practice in law enforcement.

ance of land rights are constant. This can give much incentive for farmers to have long-term investment in land to use land effectively and sustainably. In addition, perpetual land rights help deal with the problem of procedure of renewal. It is, therefore, suggested that farmers' arable land rights should be held in perpetuity or at least 70 years with clear and effective procedure of renewal.

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