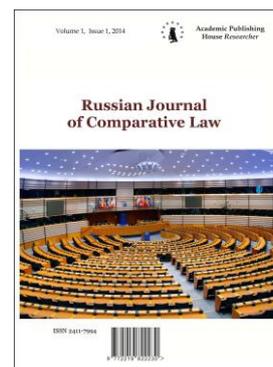


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Published in the Slovak Republic
 Russian Journal of Comparative Law
 Has been issued since 2014.
 E-ISSN 2413-7618
 2018, 5(1): 41-49

DOI: 10.13187/rjcl.2018.5.41
<http://ejournal41.com>



The Legal Nature of Land Use Rights in Vietnam

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Abstract

This paper focuses on analyzing and clarifying the emergence of land use rights in Vietnam as a legal creation for the implementation of land ownership by the entire people. The authors address such issues as the limitations of existing perspectives on the current legal nature of land use rights in Vietnam and on proving land use rights as a kind of rights in rem. At the same time, the article also specifies the components of land use rights as a kind of right in rem.

Keywords: land use rights, property rights, land ownership by the entire people, right in rem.

1. Introduction

Since the ownership of land by the entire people was established and maintained in Vietnam, individuals, households and organizations in Vietnam has not been entitled to own land but are rather legally recognized with "Land use rights". The legal nature of land use rights has been a research issue which attracts great interest of various legal scientists in Vietnam in recent years. This problem, however, has not been properly or adequately researched when land use right was not considered a type of right in rem. Therefore, this article will clarify the creation of land use rights as a result of the existence of land ownership by the entire people in Vietnam, proving land use rights as a kind of right in rem and analyzing its components as a kind of right in rem.

2. Material and methods

This paper is conducted based on previous research results of some legal scientists such as: "The Role of the State in the Implementation of the Land Ownership by the entire people" (Nghị Hữu Phạm, 2005); "Provision of rights and the issue of modifying the" Property and Ownership Rights in the 2005 Civil Code of Vietnam" (Hang Thi Thuy Phạm, 2013); "The concept of right in rem should be used in the Civil Code" (Hue Dang Duong, 2015). This paper is written with the concurrent use of various methods such as analysis, synthesis, dialectical materialism, methods of interpretation and comparative method.

3. Discussion

Before the establishment of the 1980 Constitution, the term "Land use rights" had not been used in the Vietnamese legal system to refer to the rights of individuals, households and organizations to land, instead the term "Ownership" is used, such as: "... to implement the land

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ownership regime of farmers" ([Land Reform Act, 1953, Art. 1](#)); "The State, under the law, protects the land ownership and other production materials of the farmers" ([Vietnamese Constitution, 1959, Art.14](#)). In terms of content, the term "ownership" is also understood as including: "These three rights of possession, use and determination are closely interdependent and interrelated" ([Phong Khanh Trinh, 1975](#)).

On December 18, 1980, at the Seventh session, the VI National Assembly adopted the 1980 Constitution. A sole land ownership regime in Vietnam was established, which is the public ownership regime under the name "ownership by the entire people" ([Vietnamese Constitution, 1980, Art. 19](#)). On that basis, the 1987 Law on land was enacted and the concept of "land use rights" was formally adopted. Since then, through several times of substitution in the Constitution and in the Law on Land, the regime of land ownership by the entire people has continued to be maintained and the concept of "land use rights" has still been used. Having been established in such a context, "land use rights" is a legal creation to realize all-people ownership of land in Vietnam which is also a legal instrument to help the state implement its authority (power) of ownership. This can be analyzed as follows:

First, as the representative of the entire people's land ownership, the state has all the three powers of the owner, namely possession, use and determination on land. In practice, the state has been implementing these powers but in an indirect and macroscopic way ([Nghii Huu Pham, 2005](#)). The state with the basic function: "On behalf of the society to manage the different aspects of life, to ensure the stability, social order and the interests of the entire social community" ([Doan Minh Nguyen, 2014](#)), can not stand to directly exploit and use each land plot to generate profits. Meanwhile, in order to carry out production and business activities, many the subjects in society is daily and hourly in need of land as an indispensable asset. In order to obtain land, the subjects should be allocated land by the state. However, given the allocated land without any power to that land, the subjects can not have any impact on the land to satisfy their needs. As a consequence, subjects must have certain powers over the land that the law must recognize to ensure the rights and interests of the subjects who directly use the land, so that they are ensured with long-term use and exploitation to invest their capital and effort to improve land. In addition, recognizing the powers of land users will directly creates the basis for effective land management, desertification and land waste avoidance, and regulations of land benefits for socio-economic development of the country. The powers that the state grants to the subjects are different but all are generalized under the general concept of "land use rights". The term "land use rights" here is not one of the three powers of the owner but a general concept used to refer to a set of powers that the state grants to the land owner. Thus, the "land use rights" of land is an independent right arising from the ownership of the entire people of land and exists independently of the land ownership by the entire people, represented by the state as the owner of the land.

Second, legally, each property has only one ownership by an established owner, which is the exclusive and absolute characteristics of property rights ([Dien Ngoc Nguyen, 2009](#)). If the simultaneous recognizing the ownership of different entities on an asset, it will result in a severe conflict of rights and interests between the entities, which will be the root of socio-economic instability. As a result, the law stipulates the land ownership by the entire people cannot at the same time regulates that the certain subjects in the society also have the ownership of land. There is a need for a new legal concept to recognize the rights of direct land users and to differ it from the notion of ownership. Of the three powers of property rights, the right to use is the most economically meaningful and practical right, thus the use of the term "land use rights" is also a reasonable choice for Vietnamese lawmakers.

At present, there still exist many inaccurate and inadequate perceptions of the legal nature of land use rights.

The first point of view is that land use rights are the content separated from the land ownership by the entire people. Many Vietnamese scholars view land use rights as a right to be separated from the entire people's ownership of land ([Hanh Hong Le, 2017](#), [Thai Quoc Luu, 2016](#), [Nam Hong Sy, 2016](#)). This is a simple view of land use rights based on the concept of "use right" as defined in the Civil Code. According to Article 189 of the Civil Code 2015: "The use right is the right to exploit the utility of, enjoy the interests and profits from the property. The right to use may be transferred to another person by agreement or in accordance with the law." Basically, this concept is one-sided, less scientific because when the state grants land use rights to the subject, not only the

use rights are granted but also the right to possession of land, because without possession, it is impossible to exploit and use land. In addition, entities are allowed to dispose of their land use rights through transactions (transfer, inheritance, capital contribution, donation of land use rights) or through relinquishment of land use rights (return land to the state). Entities are always in an unequal position because they only have one of the three powers of the entire people's land ownership, thus the state can easily interfere by administrative decisions on the land use rights of subjects.

The second view is that land use rights are property rights. From the viewpoint of many Vietnamese scholars today, land use rights are considered as property rights (Trang Thuy Nguyen, 2017, Huy Quang Ho, 2017). Basically, this view is right because the land use rights have all the elements and characteristics of a property right, namely:

(i) Land use right is also the right of the subject to be executed on a specified parcel of land that is clearly demarcated (satisfying the property right as the right to a property);

(ii) Subjects of land use right are allowed to exploit the natural properties of land to create material possessions or to carry out transactions such as transfer, lease, capital contribution, mortgage, sublease ... to recover a certain benefits (satisfying the property right is a right can be valued in money).

However, if only the recognition of land use rights as a single property right is incomplete, inaccurate and inevitably leading to some of the following unwanted consequences:

First, recognizing land use rights as a mere type of property right does not permit the specification of the relationship between land use rights and land ownership by the entire people. Land use rights are a type of derivative right, which is formed on the basis of the land ownership by the entire people. Without land ownership by the entire people, there will be no land use right. Land use rights are a legal tool created by the state so that the actual ownership of the entire people in which the state acts as owner representatives can be realized. Therefore, it will be impossible to demonstrate the derivative nature of land use rights in relation to land ownership by the entire people. In addition, the independence of land use rights in relation to the land ownership by the entire people is not reflected, because although it is derived from the land ownership by the entire people, after it has been allocated to the subjects, the land use right is relatively independent from the land ownership by the entire people.

Second, the restrictions on the protection of the legitimate rights and interests of the subjects include land use rights. For example, in case when an individual is granted a land use right by the state and the individual has rented the land to another person for a period of 20 years. During this period, the third party has committed land acquisition. In this case, the individual who is granted the land use right by the state is entitled to the property right and concurrently the land tenant also has the property rights with the land he has rented. When the land is occupied, who has the right to the property is the person who has the right to file a case for land? Obviously, the land use rights as property rights in this case has not clarified the legal status of the subjects, showing a restriction in protecting the legitimate rights and interests of the right holders.

Third, the perception of land use rights as a mere property right causes a lot of problems in the legislation and law enforcement. The current law on land of Vietnam contains many provisions relating to land use rights in Clause 20, Article 3 of the Law on land 2013 such as: "transfer of land use rights"; "lease of land use rights"; "land price is the value of the land use right per unit of land area". These concepts are unscientific, incomprehensible and self-contradictory. For example: In point b, Clause 1, Article 3 of the Ministry of Natural Resources and Environment's Circular No. 36/2014/TT-BTNMT of June 30, 2014 detailing the methods of land valuation; building and adjusting the land price index; specifying land prices and land valuation consultancy, when discussing the valuation of land use rights, in reality, we value each specific parcel of land for the purpose of land use, location, profitability, conditions of technical and social infrastructure, area, size That is, though the regulation is "transfer of land use rights" but in fact, it is the purchase and sale of each parcel of land.

To be able to assert that land use rights are indeed a limited right in rem, it is necessary first to clarify the content of limited right in rem.

Right in rem or right of things (*droit réel*) is a legal concept derived from ancient Roman law. Throughout the long-term development process, rights in rem have proved its particularly important role in the legal system of many developed countries, mainly in ones with the civil law

traditions such as France, Germany, Japan.

Right in rem in narrow sense is the civil right of a subject, allowing the subject to perform acts directly and immediately on things. Rights in rem are operated without having to depend on other subjects, thus the right includes two factors, namely subject of rights (individuals, organizations) and the objects of rights (Dien Ngoc Nguyen, 2011). To a larger extent, right in rem is a statutory body which encompasses all the legal norms of the object of the right, the content of the rights, its derivatives and abolishments, principles of implementation, protection of rights and limitations that right-holders have to abide by when exercising their powers ... (Hue Dang Duong, 2015).

Contrary to the right in rem is the personal right or right in persona (droits personnels), which is the civil right of a subject (a creditor) to request another subject having responsibility (credit receiver) to perform certain acts to achieve their own interests. Rights in rem and rights in persona differ from each other but all are the rights valued in money or in other words property rights. Compared with the right in persona, the right in rem has the following characteristics:

First, the right in rem is of absolute characteristic. The absolute nature of the right in rem is manifested by the fact that the rightful subject is permitted to perform all acts (including physical and legal acts) directly and immediately upon his or her own property without depending on the will of other subjects, so long as such acts are not contrary to the prohibitions of the law or cause harm to the public interest (Dien Ngoc Nguyen, 2010). At the same time, the right in rem is binding on all people, so that everyone has to respect and is not be allowed to infringe upon the rights of others.

Second, the subject has the right to recourse (also known as the right to follow the property (Mau Van Vu, 1961), or the right to pursue (Dien Ngoc Nguyen, 2013) and the right of priority with the property. The right to recourse allows the right holder to exercise his rights over an object at any time even if the object is held by another subject. For example, the subject of the right in rem can file a lawsuit to recover his property; An adjoining property may use the passage even though the adjacent property has a change in ownership (Hang Thi Thuy Hoang, 2013). Priority right is that the right in rem holder has the right to be paid more preferentially than the right in persona owner and even to the other right holder without the registration of that right in rem in the exercise of rights on the property. The priority right of the right in rem subject is manifested in case right in rem is a method to ensure the implementation of an obligation, such as: The creditor who accepts one's loan or property mortgage shall be entitled to priority payment by the proceeds from the sale of the pledged or mortgaged assets when the obligation is not more fulfilled with the unsecured creditors.

Third, the right in rem has the characteristic of being public which is derived from the absolute nature of the rights. Therefore, they must be made public so that people know the existence of and the legal status of the rights in rem to eliminate the acts of infringing upon the rights of others or being harmed due to the lack of knowledge of the legal status of the rights. Unlike the rights in rem, when the right in persona is established between the creditors and the credit receivers, the law is not obliged to disclose to all people and the parties have the right to agree to keep secrecy about the right in persona.

Fourth, the right in rem is stipulated by law. Since the right in rem is of special importance, the specific types and content of the right in rem are provided for by the law. Article 175 of the Japanese Civil Code states: "No other right shall be established other than those provided for in this Code and other laws." Entities do not have the right to create new objects outside of the rights provided for by the law.

There are many different criteria for the classification of rights in rem. If basing on the criterion of the relationship between the object and the subject, and the adequate and complete nature of right in rem, it can be divided into two types: the principal and the limited right in rem.

First, the principal right in rem (full right in rem)

Right in rem or real right is the basis for the creation of other rights in the right in rem system. The principal right in rem has all the characteristics of right in rem in general, apart from one distinction which is the feature of permanence. The principal right in rem only disappear when the object is no longer in existence or is transferred to another subject. Ownership is the principal right in rem, which includes the right to possess, use, and determine, allowing the subjects to do all acts that are not legally prohibited to the property in order to achieve his or her

own interests. Ownership is strictly and absolutely protected by law. All other subjects must respect ownership right. All infringements of ownership, depending on the nature and extent are liable to legal responsibility.

Second, the limited right in rem

Limited right in rem is the right of the subject who is not the owner of the property. Limited right in rem is derived from the ownership rights of the owner or in accordance with the law. There are different reasons for the formation of various limited rights in rem. For some limited rights in rem such as tenure rights and surface rights, the primary reason for the emergence of these rights is: "The human need is very diverse and is growing, while not everyone has their own property to use that for satisfying their needs. Therefore, they can only satisfy their needs through the use of other people's property. On the contrary people with property do not always have the need to use and exploit their property directly. Consequently, there is a "convergence" in terms of aspirations as well as in terms of benefits between property owners and non-owners in exploiting the utility of property" (Hue Dang Duong, 2015). For the limited rights in rem such as rights of easement (the right to adjacent real estate), the birth of this kind of right in rem is primarily to ensure the interests of other subjects in the normal exploitation of their property in some special cases such as adjacent real estate, surrounded by each other .

On a property can exist many different limited rights in rem, while there is only one principal right in rem existing on the property. That principle has existed since Roman times, accordingly there can be only one form of ownership right on a subject. For example, on a parcel of land, apart from the ownership of that parcel of land which is the principal right in rem, other types of limited rights in rem can also co-exist, such as easement; entitlement; surface rights, etc. It can be noticeable that a plot of land cannot have both ownership by the entire people and public or private ownership (ownership of the individual, ownership of the legal entity). The limited right in rem also carry all the characteristics of the right in rem but in comparison with the principal one, it is not permanent but depends on the time limit prescribed by the law or within the time agreed upon with the owner (Yen Thi Hong Vu, 2015). Some limited rights in rem include easement right, rights to pledge, mortgage, surface rights.

From thanalysis of limited rights in rem, it is noticeable that the land use rights in Vietnam have full characteristics of a limited right in rem. This is manifested as analysed below:

First, the object of land use right is "thing" - a specific land plot which is clearly demarcated.

Rights in rem are the right imposed over things. Therefore, the first requirement of the right in rem is that its object must be considered as "things". So can the land (a specific parcel of land) be considered a thing (an object)? Land is an object because it satisfies the following requirements that an object must possess.

Land is a part of the material world. A "thing" as commonly understood is "the cubic, existing in space, perceivable". (Instutite of Linguistics, 2003). Thus, anything that is to be regarded as an object must exist in reality with certain shapes, sizes that anyone can perceive via normal senses without having to experience the complex thinking and abstractions.

"Land as a natural entity with its own origins and development history, is the entity with the complex and diverse processes that take place in it" (Krasil'nikov, 1958). With such characteristics, land is an object. However, if the land is isolated and separated from other elements of nature, the land is merely subject to research in the fields of geology, chemistry, environment ... but is not yet the object that the subjects targets because it does not satisfy their need. Land is also the concept of "land" to a large extent, not only that of land but also of many other elements of nature: "Land is a limited vertical area of space, including: climate of the atmosphere, soil cover, vegetation, animals, water surface" (Hinh Van Luong, 2003). Thus, the land exists in an objective and tangible way, which is a body that can be perceived by normal senses, thus it is possible to assert that the land is an object. Thus, the land exists in an objective and tangible way, which is a body that can be perceived by normal senses, thus it is possible to assert that the land is an object.

In addition, land is useful and all human activities are conducted on land and exert impacts on land. The usefulness of land can satisfy certain needs of human. Firstly, it is the need for shelters then come the others such as the needs for production-business, culture, social of mankind. Land is a material element which is indispensable and cannot be substituted. Because this, the right to access and use land is considered as the human right in the socio-economic area (Wickeri and Kalhan, 2010). Though land is useful, it is by no means that land naturally yields

benefits for different subjects. Instead the subjects have to use their acts to affect land in different ways depended on their purposes or law provisions for that land, such as planting trees, digging ponds, building works, grazing livestock, residence ... on the land. Without impacts on the land, human cannot receive the desired interests. The impact on the land may be indirect with this subject, but with the other subject there must be a direct impact on the land, as in the case where a subject gains rental benefits from the landleasing or subleasing of the land, the recipient of this benefit does not directly affect the land mechanically, but to yields profits, the tenant or the subleader must still have an impact on the land to obtain benefits for themselves since then to fulfill the obligation to pay land rent. As a result, all living and human production and business activities are attached to land and carried out on land, so the right in persona nature of the land use rights is undeniable. In addition, valuable land, any particular parcel of land can be priced into a certain money amount, depending on factors such as land use purposes, area, shape, location, legal status of the parcel of land ... The fact that it can be valued in money allowing land to enter into civil and commercial transactions which increases its value. Land becomes the object that subjects in the society target and wants to legally establish its rights on the land, thereby gaining protection from the state for this valuable asset.

Second, land use rights are stipulated by laws

One of the right in rems is its statutory characteristics, which means that the right in rems cannot be laid down by the parties, but must be governed by law (which is usually the law - normative legal document promulgated by the highest state power agency). The study of legal regulations in Vietnam shows that land use rights are fully statutory. In particular, although the content of land use rights for different types of land is different, in general, all land use rights have specific content (the specific powers that the law provides for the land user. use that land); the basis for arising and terminating; legal consequences of the violation; methods of protection of land use rights. For example, for annual agricultural land, the land user has rights such as conversion, transfer, sublease, inheritance, donation, mortgage, contribution of land use rights ([Law on land, 2013, Art. 179](#)).

Third, land use rights are limited.

As with all other types of limited rights in rems, land use rights are of limited nature. This attribute is manifested in the following points:

Land use rights are the derivative right from the land ownership by the entire people. The land ownership by the entire people comes before the land use rights. From the land ownership by the entire people as stipulated by law, the state is the representative owner of the entire people who allocates land use rights to subjects in the form of land allocation, land lease and recognition of land use rights. Land use rights for subjects only arise at this point. If the state does not provide the land use rights to a certain subject, then the land owner has no right to use the land. Therefore, the land use right is the right which derives from the land ownership by the entire people.

The land ownership by the entire people is independent, while land use right is dependent, thus it is full and complete. The state has full authority to manage, use and dispose of all land within its territory by regulating the content of land use rights, deciding to provide land use rights to the subject, the right to revoke land use rights... Meanwhile, the content of land use rights represented by the state is based on the type of land and the forms of land use rights that emerge. The land use rights are limited in terms of various contents, such as not all land use right holders having full rights to transfer, convert, lease, sublease, inherit, mortgage, contribute capital by land use rights; When being granted the land use rights by the state, these rights must not be used with the right purpose of the land. At the same time, the land ownership by the entire people is only represented by the state without any other subjects being allowed.

Moreover, the land ownership by the entire people is permanent, while the land use right is not. The permanent nature of land use right by the entire people is that it is not limited in time, yet the land use right is restricted to the duration of land use for each specific land type, such as the expiry date of land for the construction of the headquarters of a foreign organization with diplomatic functions is no more than 99 years or the period of use of agricultural land leased by the State is no more than 50 years ... at the end of the land use term, if not being extended by the state, the land use rights of the subjects are terminated.

Thus, it is possible to assert that the land use right in Vietnamese law is a limited right in

rems and that the concept of land use rights can be defined as follows: "Land use rights are a type of limited rights in rems derived from the principal right in rems of land ownership by the entire people, with the state as the representative of the entire people allocating land in different forms, such as land distributing, land lease and recognition of land use rights. Subjects possessing land use rights shall have the right to possess, use and dispose of land within the prescribed scope of law and must comply with certain legal obligations in the course of exercising their powers. "

Land use rights are made up of three elements: subject, object and content.

Regarding the subjects, land use rights are granted as stipulated by law. In order to be the subjects of land use rights, individuals, households and organizations must have the right to use the land in the following forms:

(i) Directly granted land use rights by the state through land allocation, land lease and recognition of land use rights;

(ii) Receive land use rights through transactions such as conversion, transfer, inheritance, donation, mortgage or capital contribution using land use rights.

The land use right certificate is a legal document to certify the land use rights of the subjects. A certificate of land use rights shall only be issued to subjects having land use rights in accordance with the law. Meanwhile other subjects without certificate, although legitimately using land through land lease transactions, borrowing or using land in practice, are not the subjects of land use rights.

The subjects of land use rights now include: Households, individuals; Domestic organizations such as state agencies, the People's Armed Forces units, political organizations, socio-political organizations, economic organizations, socio-political professional organizations, professional organizations, social organizations, socio-professional organizations, public non-business organizations and other organizations according to the civil law; Vietnamese communities such as those communities living in the same village, hamlet, residential quarter, residential quarter and similar residential area with the same customs, practices or common family; Foreign-invested enterprises including enterprises with 100% foreign investment capital, joint-venture enterprises and Vietnamese enterprises where foreign investors purchase shares, merge or buy back according to law provisions on investment.

Concerning the object of land use rights, if the subject of the entire people's ownership of land is all land within the national territory, including land, islands and territorial waters ([Hanoi Law University, 2016](#)), the object of land use rights is narrower, that is, the land which has been allocated with land use rights by the state to the subjects. For unused land, it is not subject to the land use rights. The subjects of current land use rights as defined in Article 10 of the 2010 Law on Land include two basic land categories: (i) agricultural land; (ii) non-agricultural land.

With respect to the content of land use rights, the content of the land use right shall be the powers to use land provided and protected by the law, accordingly the subjects of the right can act on the parcel of land under his management. In general, the content of land use rights includes the following basic powers: Possession of land, land use, and land disposition.

Land use rights allow the subject to legitimately hold or control the land against the infringement of other subjects. This power is the most prerequisite for the subjects to exploit and use the inherent properties of land for their own benefit as well as to exploit the benefits of land related transactions. Land use rights give land owners the ability to take possession of the land in a comprehensive manner, in both legal and practical terms. On the practical side, the subjects carry out land occupation by holding and managing a defined land area with clear boundaries. With this land area, the subjects can certainly build the fence to manage and prevent the intrusion of other subjects. Legitimate land possession is the land owner's right to use the land with the recognition of the state which in the legal documents, the name of the land owner is registered for that land. Likewise, information on the current status and legal status of the management and use of the land plots and assets attached to the land, the legal possession of the land by the land user entitled to use the land is more clearly expressed in the land register document.

Entities with land use rights can use land on their own preferences but must comply with the legal regime of the type of land as prescribed by law. The land use refers to the direct impact on land such as cultivation, aquaculture, construction, etc., but can also be implemented through transactions permitted by law such as rents, lease, mortgage, assurance with land use rights ... to recover the profits as desired. In practice, many land owners still have land use rights but are limited

to direct use of land and the implementation of land-related transactions is not possible, particularly with respect to land use rights whose procedure is strictly stipulated by law such as mortgage, capital contribution, transfer ...

The land owner has the right to dispose of his land if he does not want to continue using the land or wants to obtain benefits by terminating the land use right. The decisions about land are made by the following ways: (i) Transfer of land use rights to other entities through transactions such as transfer, conversion, inheritance, capital contribution, donation of land use rights. However, not all land owners who have the land use right can dispose of agricultural land in this way; (ii) Voluntarily return land to the state when there is no demand for land. This is a way of disposing of land which any subject who has land use rights can do so.

4. Results

From the contents presented above, this paper has obtained some following results: Clarifying that the birth of land use rights is the creation of lawmakers in Vietnam to implement the regime of land ownership by the entire people; Specifying the scientific shortcomings of existing concepts in Vietnam regarding the legal nature of land use rights; Proving in a scientific way that land use rights are a kind of limited right in rem and clarifying the components of land use rights as a limited rights in rem.

5. Conclusion

Land use rights are a legal creation and, at the same time, a legal instrument for the realization of the entire people's ownership in Vietnam. Land use rights by legal nature are limited right in rem and have the full characters of a limited right in rem. Perceiving that land use rights is a content that is separated from the land ownership by the entire people is inaccurate and considering land use rights as property rights is not adequate, leading to many restrictions in the construction and perfection of the laws related to land use rights. Therefore, it is necessary to recognize land use rights as a right in rem.

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