

# **Điều kiện xác lập quyền sở hữu do chiếm hữu đất không có căn cứ pháp luật trong hệ thống pháp luật của Việt Nam và Hoa Kỳ**

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## **TÓM TẮT**

Nội dung tổng quan của bài báo cung cấp những hiểu biết cơ bản về điều kiện xác lập quyền sở hữu đất do chiếm hữu không có căn cứ pháp luật trong pháp luật của Việt Nam và Hoa Kỳ. Thông qua việc sử dụng phương pháp so sánh, tác giả chỉ ra sự tương đồng và khác biệt về điều kiện xác lập quyền sở hữu trong pháp luật Việt Nam và pháp luật Hoa Kỳ. Kết quả nghiên cứu đóng góp cho việc cung cấp và phát triển lý thuyết pháp lý về xác lập quyền sở hữu tài sản tại Việt Nam.

**Từ khóa:** Chiếm hữu, chiếm hữu không có căn cứ pháp luật, xác lập quyền sở hữu, tài sản, thời hiệu.

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# Requirements to establish title by adverse possession in Vietnamese and American legal systems

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## ABSTRACT

The overview content of the article provides basic understanding of the conditions for establishing land ownership rights due to illegal occupation in the law systems of Vietnam and the United States. Using the comparative method, the author points out similarities and differences in the conditions for establishing property rights in Vietnamese Law and U.S. law. The research results contribute to consolidating and developing legal theory establishing property rights in Vietnam.

**Keywords:** Possession, adverse possession, establish title, property statute of limitation.

## 1. INTRODUCTION

Establishing a title based on adverse possession is recognized in most legal systems. In legal systems, recognizing rights for adverse possessors is a controversial issue due to its potential impact on the legitimate rights and interests of property owners, the state, or society. In modern society, most land is owned by individuals or managed by the state. Recognizing adverse possession rights for individuals without a legal basis for the land can terminate the rights of other parties or the state over that land parcel. In Vietnam, the Vietnamese Civil Code 2015 acknowledges adverse possession as a legal act and recognizes rights for adverse possessors if the possession is continuous, open, and in good faith.<sup>1</sup> Additionally, the Vietnamese Land Law of 2013 stipulates that individuals using land without legal basis (without documentation proving their rights to the land) can still be granted a Certificate

of Land Use Rights under specific requirements<sup>2</sup>. The draft Land Law, which might be passed by the end of 2023, also allows individuals without legal basis to be granted land use rights under specific requirements.<sup>1</sup>

Therefore, Vietnamese Law permits establishing land rights for adverse possessors without legal basis under certain conditions. Similarly, adverse possession rights for individuals without legal basis are recognized in the United States. Individuals who possess land without legal basis can establish ownership rights through the "adverse possession" theory and statute limitation. In the US case law, establishing ownership rights through adverse possession requires meeting specific conditions as accepted by the courts.

The question arises: What are the similarities and differences in the conditions for establishing adverse possession rights for land

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in Vietnamese and U.S. legal systems, and what are the reasons for these differences? Studying foreign Law in Vietnam has become a trend in the integration process. In recent years, the legal concept of adverse possession has been studied by authors in Vietnam as well. The work titled "Applying the doctrine of adverse possession to regulate the legal relationship concerning land in Vietnam" published in Journal of Legal Studies Issue 1/2021, provided a general overview of some initial theoretical knowledge regarding the "adverse possession" theory.<sup>3</sup> This included the content and significance of the theory, as well as its impact on regulating land relations in Vietnam. We recognize that there are many issues that require further research. This article focuses on answering questions about the similarities and differences in the requirements for establishing title for land without legal basis in the United States and Vietnam. Researching the similarities and differences in the laws of the United States and Vietnam on conditions for establishing ownership by statute of limitations on land possessed without legal basis can bring the following benefits: (1) find out the reasons for differences in the conditions for establishing rights to land due to possession without legal basis to evaluate the reasonableness of the conditions provided by each country's law; (2) evaluate the conditions for establishing rights to land possessed without legal basis in comparison with countries with developed economies, through which better legal solutions can be drawn. The research results in this article (1) contribute to developing the theory of establishing title for adverse possessors without legal basis in Vietnam; (2) improving Vietnamese legal provisions related to the requirements for establishing title for land that adverse possessors without legal basis occupy.

## 2. RESEARCH HYPOTHESIS AND METHODOLOGY

### 2.1. Research hypothesis

The central hypothesis of this study asserts that the establishment of ownership rights for land

through adverse possession, without legal basis, in the legal frameworks of both Vietnam and the United States is contingent upon fulfilling specific conditions. Nevertheless, there exist both similarities and distinctions in these conditions between the two countries.

Furthermore, the research aims to delve into the nuanced intricacies of these requirements, exploring the legal nuances that shape the criteria for establishing ownership rights through adverse possession in the distinct legal landscapes of Vietnam and the United States. The hypothesis further contends that the comparative analysis of the conditions for adverse possession in both jurisdictions will contribute to a comprehensive understanding of the underlying legal principles governing property rights and land ownership. Through a detailed examination of case studies and legal precedents, the study seeks to identify commonalities, and divergences in the application of adverse possession requirements, shedding light on how cultural, historical, and legal factors influence the evolution of these requirements in Vietnam and the United States.

### 2.2. Research methodology

*Legal Norm Analysis:* This method analyzes and determines the requirement for establishing adverse possessors' rights in Vietnamese Law. This method involves analyzing provisions in relevant legal documents.

*Case law study:* This method examines case law within the United States legal system related to adverse possession without legal basis. By studying case law, the author identifies the content and conditions for establishing ownership rights for adverse possessors without legal basis in U.S. law.

*Comparative law:* This methodology compares the similarities and differences in the conditions for establishing ownership rights for adverse possessors without legal basis between the two legal systems. The reasons for disparities are identified, and recommendations for improving Vietnamese legal provisions are proposed.

*Analysis and synthesis:* This method is used to study theories about establishing ownership rights for adverse possessors without legal basis from both Vietnamese and foreign authors. Analyzing and synthesizing information from these works helps identify the legal perspectives of both Vietnam and the United States in recognizing the rights of adverse possessors without legal basis.

In summary, this study employs various methods such as legal norm analysis, case law study, comparative Law, and analysis and synthesis to investigate and compare the conditions for establishing ownership rights for adverse possessors without legal basis in the legal systems of Vietnam and the United States. Through these methods, the study aims to understand the similarities and differences between the two legal systems and provide suggestions for improvement.

### **3. SIMILARITIES AND DIFFERENCES IN VIETNAMESE LAW AND AMERICAN LAW ON REQUIREMENTS FOR ESTABLISHING TITLE FOR ADVERSE POSSESSION**

#### **3.1. The US case law**

In the United States, to establish title through adverse possession, possessors must prove that their possession was actual, adverse or hostile, exclusive, open and notorious, and continuous for the statute of limitations.<sup>4</sup> Establishing rights through prescription requires similar elements, but the Law adds that if a possessor without legal basis holds the property under the guise of ownership, the color of title, and pays taxes for ten years, it can also be an element in some cases.<sup>5</sup>

To comprehend these conditions for establishing rights, let us explore the interpretations provided by the US case law:

*Actual possession:* For adverse possession purposes, "actual possession" is the current capacity to control the land and the intent to exclude others from that control. To determine actual possession, continuous actions such as

clearing, cultivation, construction of fences, or other improvements, along with paying taxes, constitute evidence of actual possession. The claimant did not establish actual possession of land. Thus, her actions were insufficient to constitute adverse possession. (See in Becker v. Murtagh, 19 N.Y.3d 75, 968 N.E.2d 433, 2012)

*Adverse or hostile.* Stake, J. wrote: "cannot gain title by adverse possession unless her possession is "adverse"<sup>4</sup> that another name is hostile or under claim of title. Under this simple construction, "adverse" means without the legal right to possess the land." A person claiming title by adverse possession must establish intent to maintain physical occupancy and control of the land. An entry onto the land of another is a mere trespass if done without claim of right, but it is an ouster if made with necessary intent. Regarding the occupier's intention, in the United States, some legal opinions argue that it is also a requirement to establish a right of possession without a legal basis.

*Open and notorious possession:* the US case law maintains that in cases of adverse possession without legal basis, the requirement of "open and notorious possession" is met when the possession is visible, widely recognized, and publicly known. Additionally, courts recognize open and notorious possession if it is of a degree that would put the valid owner on notice of an adverse claim. (See in Strickland v. Markos, 566 So. 2d 229, Ala. 1990)

*Exclusive possession:* An essential aspect of adverse possession without a legal basis is exclusive possession. In this context, "exclusive possession implies that the claimant demonstrates ownership over the property solely for themselves, excluding others. To meet the requirement, the claimant must completely exclude the owner from possession to meet this requirement." (See in Strickland v. Markos, 566 So. 2d 229, Ala. 1990)

*Continuous possession:* In terms of continuous possession, it is established over

"at least ten years." Continuous possession "signifies uninterrupted possession that remains effective and unbroken, even in the face of other individuals" attempts to possess. Regarding continuous possession, there is a theory of "tacking land". This doctrine allows the disadvantaged occupier to add-or "stick"-the time of his possession to the time of the previous occupier in order to achieve the legally required term." In addition, "continuous possession is synonymous with unbroken possession" which means that the possession of another does not effectively disrupt the possession. (See in *Strickland v. Markos*, 566 So. 2d 229, Ala. 1990)

*Statutory limitation:* The length of continuous possession depends on state regulations. Different states have different timeframes, usually ranging from 10 to 40 years. For instance, South Dakota has 20 years, (see in *Strickland v. Markos*, 566 So. 2d 229, Ala. 1990) Oregon has ten years (see in *Cuka v. Jamesville Hutterian Mut. Soc.*, 294 N.W.2d 419, (S.D. 1980) and Ohio has 21 years. (See in *Evanich v. Bridge*, 2008-Ohio-3820, 119 Ohio St.3d 260, 893 N.E.2d 481)

### 3.2. The Vietnamese legal system

In the Vietnamese legal system, possession entails a subject directly or indirectly holding property, representing a legal entitlement. Possession is divided into possession with a legal basis and possession without a legal basis. Those with the legal basis for possession can establish a title-fix legal basis. Possessors without legal basis can establish titles according to norms in the Vietnamese Civil Code 2015 and the Vietnamese Land Law 2013. To establish title by possession without a legal basis, the possessor must prove four elements, including good faith, continuous, and openness possession.<sup>1</sup>

*Good faith:* Possession in good faith means the possession that the possessor has bases to believe that he/she has the right to the property under his/her possession. Possession not in good faith means that the possession that

the possessor knew or should have known that he/she has no right to the property under his/her possession.<sup>1</sup>

*Continuous possession:* Continuous possession of property occurs over time without dispute relating to such property or with a dispute. However, practical judgment or decision on settlement of such dispute is not issued, including when the property is delivered to another person for possession.

*Open possession:* Possession of property shall be deemed overt possession when it occurs transparently, without concealment, when property currently being possessed is used following its functions and usage and is preserved and retained by the possessor as if it were his or her property.<sup>1</sup>

Additionally, the Vietnam Land Law 2013 stipulates the requirement for possessors without legal basis to be granted a Certificate of land use rights.

Article 101. Grant of a certificate of land use rights and ownership of houses and other land- attached assets to households and individuals that are using land and have no documents on land use rights

1. Households and individuals using the land prior to the effective date of this Law and having none of documents prescribed in Article 100 of this Law that have a book of status of permanent residence in the locality and are directly engaged in agriculture, forestry, aquaculture or salt production in areas with difficult socio-economic conditions or challenging socio-economic conditions, and are certified by the commune-level People's Committee that the land has been used stably and dispute-free, shall be granted a certificate of land use rights and ownership of houses and other land-attached assets without having to pay land use levy.

2. Households and individuals using land and having none of documents prescribed

in Article 100 of this Law that have used land stably before July 1, 2004, with no violations of the land law and such land is certified by the commune-level People's Committee as dispute-free and conformable with the land use master plan, detailed urban construction master plan and master plan on construction of rural residential areas approved by competent state agencies, shall be granted a certificate of land use rights and ownership of houses and other land-attached assets.<sup>2</sup>

So, establishing title for possessors without legal basis in Vietnam can be undertaken through two procedures: 1) litigation and 2) registration for obtaining a Land Use Right Certificate from the competent authority. In litigation, the disputing party must prove their rights against the possessor. The possessor must fulfill certain conditions to obtain a Land Use Right Certificate. State ownership of land is recognized, and the government grants Land Use Right Certificates based on the provisions of the Land Law 2013.

In conclusion, American case law and Vietnamese legal systems have specific conditions for establishing ownership rights for possessors without legal basis. While the US case law emphasizes actual possession, exclusivity, and continuous possession, Vietnamese legal system focuses on genuine, continuous, open, and exclusive possession. Both legal systems address these issues to provide a framework for resolving disputes involving possessors without a legal basis.

### 3.3. Similarities

The similarity in legal requirements establishing rights for possessors without legal grounds in the Vietnamese and American case law is that the possessor must prove the following elements: (1) actual possession, (2) persistent possession, and (3) overt possession. First, both the Vietnamese and the American case law require possessors to demonstrate an act of possession to establish ownership rights without a legal basis. This act

can be direct or indirect and must involve usage, construction, fencing, cultivation, tax payment, or granting use to others. Second, Open and notorious is also required that the possessor prove to establish ownership of the property. The possessor must have specific acts of possession influential enough for others to recognize the claimant's claim to the land they want to establish ownership. Third, both legal systems require continuous possession over a specific period for establishing ownership rights. Possession should be uninterrupted and consistent.

### 3.4. Differences

*Good faith possession and hostility:* In the American case law an established possessor must intend to possess the owner's property. In contrast, in the Vietnamese legal system, the possessor can only establish ownership if he or she does not know that he or she possesses property owned by another person. In the Vietnamese legal system, possessors can establish ownership when they consciously have grounds to believe that they possess their property.

*Continuous possession and “Tacking” Doctrine:* In Vietnam, when calculating the prescriptive period for a possessor to establish land use rights due to possession without legal basis, the person establishing the rights may include the entire period during which the possessor prior to them had been in possession, as stated in Sub-section 3, Section 153 of The Vietnam Civil Code 2015.<sup>1</sup>

*Statutory limitation:* The timeframes to establish ownership rights through adverse possession vary significantly between U.S. states (10 to 40 years). In contrast, in the Vietnamese legal system, the establishment of ownership rights due to the occupation of land without a legal basis can be divided into several cases. First, occupation through nullified civil transactions (third party). If a person occupies land without legal basis, but occupation arises from civil transaction declared null and void, the court will recognize the rights of the occupant

based on s133(2) Vietnamese Civil Code 2015.<sup>1</sup> Second, occupation through nullified civil transactions (not a third party). If a person occupying land is not a third party, involved immediately but received land use rights from the rightful occupant. When the civil transaction is nullified, the court will recognize the rights of the occupant based on Article 129(1,2) of the Vietnamese Civil Code 2015.<sup>1</sup> In the first and the second case, the time of stabling of title to land is determined according to the effective time of the legally effective judgment or decision of the Court. Third, occupation without legal basis that the land is under goverment management, occupier maybe granted a Certificate of Land Use Rights. In case a state enterprise engaged in agriculture, forestry, aquaculture or salt production is allocated land and lets households and individuals use part of that land for residential purpose before July 1, 2004, that enterprise shall make a plan for rearrangement of such residential area into a residential quarter and submit it to the provincial-level People's Committee for approval before handing over the land to the locality for management.<sup>2</sup>

#### 4. CONCLUSION

This article has highlighted the similarities and differences in establishing rights due to possession without a legal basis. This study has shown that a significant difference in the Vietnamese legal system compared to the American case law in the element of the will of the possessor. The possessor in the US case law knows that they possess the property of another

person but still act infringing upon the subject's interests, demanding the establishment of rights. In contrast, in the Vietnamese legal system, the right-establisher must satisfy the sincerity factor; that is, the right-establisher must have grounds to believe that he is the person who has the right to the property. Based on this research result, we can do further research to point out the advantages and limitations of establishing ownership rights for land occupiers with no legal basis.

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