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DIFFICULTIES AND LIMITATIONS IN ADMINISTRATIVE ENFORCEMENT IN VIETNAM

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Abstract

Administrative enforcement is a procedure for executing court judgments and decisions. However, compared to criminal or civil enforcement, administrative enforcement has specific characteristics that pose certain difficulties and obstacles for individuals and organizations responsible for implementing administrative judgments and decisions. Based on an analysis of the relevant regulations on administrative enforcement, this paper identifies the limitations and shortcomings and proposes solutions to improve the law on administrative enforcement.

Keywords: *Administrative law, administrative enforcement, administrative procedure, administrative case*

1. To state a problem

The enforcement of administrative judgments (EAI) is a crucial activity of the state apparatus to ensure that court judgments and decisions are effectively executed. Effective enforcement not only demonstrates the rule of law and the authority of the state but also serves as an effective tool to restore the legitimate rights and interests of the state, society, and citizens that have been infringed upon by illegal acts. However, EAI is a complex and challenging process, as it involves not only the general characteristics of enforcement but also specific features that distinguish it from other types of enforcement. Notably, EAI has a high degree of voluntary compliance due to the lack of a specialized agency for administrative enforcement.

In recent years, the Party and the State have issued numerous policies aimed at addressing the limitations and challenges in the enforcement of administrative judgments (EAI), such as Resolution No. 48-NQ/TW dated May 24, 2005 on the strategy for building and perfecting Vietnamese law by 2010 with an orientation towards 2020, and Resolution No. 49-NQ/TW dated June 2, 2005 on the judicial reform strategy until 2020 of the Politburo, which identified the need for reforming the organization and operation of enforcement. Moreover, from a single provision governing administrative enforcement in the Ordinance on the Procedure for Resolving Administrative Cases enacted by the National Assembly Standing Committee on May 21, 1996, to the Administrative

Procedure Code 2015 passed by the 13th National Assembly on November 25, 2015, which includes 7 articles with significant amendments and supplements on administrative enforcement, this has laid an important foundation for the development and implementation of administrative regimes through specific and clear regulations. However, the issue of administrative enforcement still faces many difficulties due to various reasons, causing the regulations on EAI to not yet fully achieve their practical effectiveness.

2. Administrative court rulings are being implemented

The judgments and decisions of the court in administrative cases (ACs), also known as the subject of administrative judgment enforcement (AJE), are stipulated in Article 309 of the 2015 Code of Administrative Procedure (CAP). This provision demonstrates the diversity of judgments and decisions subject to enforcement, ranging from first-instance, appellate, and cassation judgments to special decisions of the Supreme People's Court and even decisions on provisional measures applied during the proceedings. This broad definition is consistent with judicial practice. In different levels of trial or in retrial procedures, the court issues rulings in various forms such as judgments and decisions. Once these judgments and decisions become legally binding, their enforcement must be ensured to protect the legitimate rights and interests of the parties.

According to the Code of Administrative Procedure, judgments and decisions rendered by courts of first instance and appellate courts are considered subjects of administrative judgment enforcement. However, the author argues that not all court decisions made in administrative proceedings can be classified as such. This is because it is necessary to examine the content and purpose of these decisions. Based on the provisions of the Code, courts issue various decisions to carry out procedural activities during the trial, such as decisions assigning judges, changing parties, adjourning or suspending the trial, and those related to evidence collection. Therefore, administrative judgment enforcement refers to the execution of obligations associated with administrative decisions and acts issued in the course of state management as determined by a court judgment. Conversely, the decisions listed above are not substantive rulings on the merits of a case but are merely procedural decisions that are executed during the course of the proceedings (Clause 3, Article 140 of the 2015 Administrative Procedure Law). In summary, under the current Code of Administrative Procedure, except for decisions on provisional measures, no first-instance or appellate court decisions exist in the form of a decision to resolve the substance of a case.

3. Enforcement of administrative judgments

The procedure for enforcing judgments and decisions of the court in administrative cases is stipulated in Clause 1, Article 311 of the 2015 Code of Administrative Procedure and is detailed in Articles 10 to 19, Chapter 2 of Decree 71/2016/ND-CP. However, these provisions do not clearly outline the specific steps in the enforcement process, leading to various interpretations. The first viewpoint suggests that the enforcement procedure can be divided into two cases: the procedure for enforcing property and property rights as stated in the court's judgment or decision, and the procedure for enforcing the court's judgment or decision regarding administrative decisions or actions (Ho Chi Minh City University

of Law, 2012). The second viewpoint proposes that the administrative judgment enforcement procedure can be divided into several phases: the voluntary enforcement phase, the phase of requesting a decision to enforce, and the phase after a decision to enforce has been issued (Nguyen Thi Phuong Ha, 2016). Furthermore, according to the third viewpoint, the administrative judgment enforcement process consists of the following steps: voluntary enforcement; requesting a decision to enforce; enforcement of the judgment or decision upon issuance of a court order to enforce; supervision and urging of enforcement; and receipt, monitoring of court judgments and decisions related to enforcement (Tran Thuy Mi, 2016).

The author argues that the first perspective is inappropriate because the enforcement of administrative judgments does not include the enforcement of court judgments or decisions related to property. Moreover, approaching the enforcement procedure from the second and third perspectives is also unreasonable as it does not encompass all possible cases that may arise during the enforcement process as recognized by current administrative procedure and enforcement laws. According to Clause 1, Article 311 of the 2015 Code of Administrative Procedure and Articles 15 to 19 of Decree 71/2016/ND-CP, which detail the cases of enforcement, there are two types of enforcement: First, enforcement of court judgments or decisions rejecting a lawsuit; second, enforcement of court judgments or decisions accepting a lawsuit filed by the claimant or a related party. Based on these provisions, it can be concluded that the enforcement procedure can be divided into two cases: one is the enforcement of court judgments or decisions rejecting a lawsuit; and the other is the enforcement of court judgments or decisions accepting a lawsuit filed by the claimant or a related party (Le Viet Son, 2018).

(1) In cases where the court's judgment or decision rejects a lawsuit: If the administrative decision, disciplinary decision to dismiss, decision on a complaint regarding a decision on a competitive matter, or voter list has not been fully executed or has only been partially executed, the parties concerned must continue to execute that decision. The competent authority has the right to apply administrative coercive measures to enforce an effective administrative decision in accordance with the law if the person subject to enforcement does not voluntarily comply with the court's judgment. This provision accurately reflects one of the characteristics of administrative judgment enforcement, which is the voluntary nature for the parties subject to enforcement. Voluntariness is manifested in the fact that the claimant and the related parties, based on the rights and obligations determined in their lawsuits, continue to fulfill their obligations. This is because in the executed court judgment or decision, the court only declares that "the claimant's request is not accepted because it is groundless" or "the appeal or protest is rejected and the judgment or decision of the court of first instance is upheld" without clearly defining the rights and obligations of the parties. Meanwhile, the content of the challenged administrative decisions clearly defines the obligations that the affected subject must perform and the rights that they enjoy. The time for the parties to voluntarily execute the court's judgment or decision is stipulated in Clause 2.a, Article 311 as 30 days. If, after the deadline stipulated in Clause 2 of this Article, the person subject to enforcement fails to comply, the person entitled to enforcement has the right to submit a petition to the court of first instance to issue a decision to enforce the court's judgment or decision. Upon expiration of the voluntary enforcement period, Clause 2, Article 15 of Decree 71/2016/ND-

CP also clearly stipulates that "the competent authority has the right to apply administrative coercive measures to enforce an effective administrative decision in accordance with the law." Thus, in this case, enforcement is carried out through administrative procedures.

(2) *In cases where the court's judgment or decision upholds the claimant's request:* The court has issued a judgment annulling the subject matter of the lawsuit or declaring the administrative act to be unlawful. Depending on the specific case, the defendant must perform duties or official acts as specified in the judgment and in accordance with the law, such as issuing a new administrative decision, ceasing the administrative act, reinstating a dismissed employee, or supplementing the voter list. This is because if the defendant's administrative decision has been annulled by the court or the administrative act has been declared unlawful, only the defendant has the authority to issue new administrative decisions to replace the old ones or to perform administrative acts as prescribed (Articles 16 to 19 of Decree No. 71/2016/ND-CP). If the defendant fails to voluntarily comply with the judgment within the prescribed period, the judgment creditor has the right to request the court of first instance to issue an order for enforcement (Article 311, Clause 2 of the 2015 Administrative Procedure Law). Once the court has issued a decision to enforce the judgment, the judgment debtor is obligated to immediately execute the legally effective judgment or decision of the court. For each type of lawsuit, Decree 71/2016/ND-CP provides detailed procedures for enforcement from Article 16 to Article 19:

i) If the court's judgment or decision annuls the entire administrative decision or the decision resolving a complaint regarding a decision on a competitive matter, the judgment debtor must perform duties or official acts as specified in the court's judgment and in accordance with the law; implement the court's recommendations on how to handle the annulled unlawful administrative decision; and if the decision has been fully or partially executed, the agency that issued the decision must take measures to restore the lawful rights and interests of the parties as prescribed by law. In this case, the defendant must fulfill the rights and obligations determined in the court's judgment or decision. In court judgments or decisions on administrative lawsuits, the rights and obligations of the parties are determined as follows: 'Accepting in part or in full the claim, annulling in part or in full the unlawful administrative decision and the related decision resolving the complaint (if any); compelling the state agency or authorized person in the state agency to perform duties and official acts as prescribed by law; and simultaneously recommending how to handle the annulled unlawful administrative decision' or 'Accepting in part or in full the claim, annulling in part or full the unlawful decision resolving a complaint regarding a decision on a competitive matter; compelling the agency or authorized person who issued the decision resolving the complaint regarding a decision on a competitive matter to reconsider the case in accordance with the law on competition'. According to this provision, the enforcement of judgments largely depends on the performance of the defendant, as only the defendant has the authority to issue new decisions or reconsider the case in accordance with the law. Therefore, the enforcement of administrative judgments in Vietnam currently does not have a specialized enforcement agency.

ii) In cases where a court judgment or decision has annulled a disciplinary dismissal decision, the head of the agency

or organization that issued the disciplinary dismissal decision must reinstate the dismissed employee and make a public announcement in accordance with the law on officials, civil servants, and public employees. The reinstatement must be recorded in a minutes, witnessed and signed by the bailiff. If, within 3 days of receiving the decision to enforce the administrative judgment, the person subject to enforcement still refuses to reinstate the dismissed employee, the civil enforcement agency shall request the parties to come to the civil enforcement agency's headquarters to record a minutes. The minutes shall state the reasons for non-enforcement, record the opinions of the parties, and any difficulties or obstacles encountered as a basis for considering disciplinary measures. If one of the parties is absent without a valid reason, the civil enforcement agency shall still draw up a minutes as a basis for considering disciplinary measures.

iii) With respect to administrative acts as the subject matter of a lawsuit, points d and dd of Clause 1, Article 311 of the 2015 Administrative Procedure Law distinguish between two execution scenarios corresponding to the subject matter of the lawsuit being an act of commission or omission. The Law expressly provides that for administrative acts constituting an act of commission, the party liable for execution must immediately cease such act upon receipt of the court's judgment. For administrative acts that have already been completed and have adversely affected the party's rights, the party may seek redress in a manner similar to that for an administrative decision causing damages as discussed above. In the case of administrative acts constituting an act of omission, the party liable for execution must perform the duties and public services prescribed by law upon receipt of the court's judgment. This is a clear provision of the 2015 Administrative Procedure Law aimed at safeguarding the rights of the plaintiff when the defendant intentionally fails to perform duties and public services that they are legally obligated to perform.

iv) In lawsuits concerning voter lists, where the court's judgment mandates that the agency responsible for compiling the voter list amend or supplement the list, the party liable for execution must promptly carry out such amendments or supplements upon receipt of the judgment. This requirement for immediate execution upon receipt of the court's judgment is intended to safeguard the rights of the plaintiff. Given the limited duration of the electoral process, a lengthy execution period as is typical for other types of lawsuits would be ineffectual, as the election day might have already passed by the time the voter list is amended or supplemented. Likewise, for the execution of interim measures, the party subject to such measures must promptly comply upon receipt of the decision, as these measures are both urgent and provisional in nature and are employed to address exigent circumstances at the request of the party or to ensure the effective execution of the judgment.

v) The execution of court judgments and decisions involving property is governed by the provisions of the civil enforcement law and entails the following procedures: issuance of certified copies of court judgments and decisions; service and explanation of court judgments and decisions; filing an enforcement request; issuance of an enforcement order; enforcement; and handling of enforcement complaints. To ensure compliance with court judgments and decisions, or in the event that the judgment or decision is not voluntarily executed following the issuance of an enforcement order by the civil enforcement agency, the competent authority may resort to compulsory execution as

provided for by law. Compulsory enforcement measures may include: garnishment of bank accounts; recovery and disposal of money and valuable papers of the judgment debtor; deduction from the judgment debtor's income; attachment and disposal of the judgment debtor's property, including property held by a third party; exploitation of the judgment debtor's property; forced transfer of objects or property rights; and compelling the judgment debtor to perform or refrain from performing specific acts.

4. Conclusion

In recent years, Vietnam's legal framework governing the enforcement of administrative judgments has made significant strides. The legal provisions on the enforcement of administrative judgments have undergone continuous amendments and supplements, resulting in a more comprehensive and practical regulatory regime. Nevertheless, despite these improvements, the existing legal framework still exhibits certain shortcomings and limitations, particularly in relation to: the enforcement of court judgments and decisions; administrative enforcement procedures; oversight of administrative enforcement; and the handling of illegal acts committed during the enforcement process.

Specifically, the existing body of legal provisions governing the enforcement of administrative judgments is inadequate to comprehensively regulate the complex relationships arising during the enforcement process. The shortcomings and inconsistencies in the current legal framework have adversely impacted the effectiveness of actual administrative enforcement, resulting in significant backlogs and delays. A more thorough and comprehensive assessment of the limitations and inadequacies in administrative enforcement, arising from both subjective and objective factors, is essential to inform the improvement of Vietnam's administrative enforcement law and enhance the effectiveness of enforcement. From the perspective of enhancing the effectiveness of administrative enforcement in Vietnam, the author proposes a range of solutions, including the improvement of the administrative enforcement law and other measures to enhance enforcement effectiveness.

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