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**RESEARCH PROJECT**

**CUSTOMARY LAWS – THE CURRENT SITUATION AND SOME**  
**RECOMMENDATIONS FOR ENHANCING THE EFFECTIVENESS OF THE**  
**APPLICATION OF CUSTOMARY LAW IN VIETNAM**

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The opinions and recommendations in this report are those of the authors and do not necessarily reflect the position as well as the opinions of the Supreme People's Court, Ministry of Justice and United Nations Development Program.

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## INTRODUCTION

### 1. The necessity of the research

In the current period of accelerating the judicial reforms process aiming at building a Vietnam's Socialist law-based State, the issue of development and improvement of the legal system is identified as one of the key tasks. Directions for the process of improvement of the Vietnamese legal system is defined in Resolution No. 48-NQ/TW of the Political Bureau dated 24/05/2005 on the strategy to development and improvement of the legal system in Vietnam to 2010 and orientations for the period up to 2020 determined that "roots from practice of Vietnam, and selectively acquire international experience on drafting and organizing the implementation of laws; harmonize cultural identity and good tradition of the nation and the modern of the legal system." In this regard, relating to recognition and implementation of customary laws in Vietnam, Resolution 48-NQ/TW specified requirements as to *"study the possibility of exploitation and using precedents and customs (including international trade customs and practices) and the rules of professional associations in order to supplement and improve the Vietnamese legal system"* (Part III, Section 1). Regarding contract laws, the Resolution No. 48 mentioned above clearly requires "to improve law of contract in the direction of respecting for the parties' agreement, is not contrary to morals, does not violate public order, in accordance with customs, and practices of international trade."

Currently, customary laws are widely recognized worldwide as a form of law and the State ensures the implementation in practice. In fact, the use of customary law has a positive meaning when it is likely to replace the adjustment of the law in a certain ranges, in a number of social relations; simultaneously, customary laws

can supplement to the law in certain circumstances. In Vietnam, a number of customary laws have been recognized by the State, mainly in civil area. When customs are recognized by the State, it shall become the customary law and being implemented through a number of specific provisions of law. Customary laws do not only have positive meanings in dealing with civil or commercial disputes, in remote, mountainous areas with difficult socio-economic conditions, but also enhance access to justice and protect the rights of the people.

In Vietnam, the application of customary laws has been established and developed for a long historical period of time. Under the feudal dynasties, there are many customs such as village conventions, traditions and customs of the communities which have played an important role for the replacement of laws, and they have partly contributed to the social stability. In recent years, the application of customary law in the civil procedures has proved to be more and more effective.

However, in Vietnam, because of legal matters and practical situations, the recognition and application of customary law still have some limitations. For example, the current legislation does not include definitions for 'customary law' or not yet fully defined conditions for its application in practice; until now there has been no "List of customs". These matters have been the reasons making the Court appear to be not actively in applying customs and the Courts have inconsistent views on recognition and application of customs. In many cases, this Court said that certain rules of conduct as customs, but the other courts said that those rules of conduct that are not customs.

Moreover, although the customary law is not a new matter in Vietnam, the current research about customary law has not been significant and comprehensive. It is mentioned in some textbooks of law institutions in Vietnam as well as in a number of doctoral dissertations or master's thesis on customary law such as the

dissertation of Mr. Phan Nhat Thanh *“Recognizing Customary law in Vietnam: Legal pluralism and human rights – Wollongong University, Australia, 2011”*. Moreover, there are many topics research on traditions and customs, for example subject *“The relationship between customs and laws”* written by the Institute for Legal Scientific Research, the Ministry of Justice, 1999. Besides, there are many articles published such as: Tran The Linh *“The form of laws in some Vietnamese feudal dynasties”* - The People’s Delegates, 1998; Ngo Duc Thinh *“The values of customary law in Highland”* - Culture, 2008; Nguyen Chi Dung *“Customary law with the law enforcement”* – The Journal of legislative studies, 2005; Nguyen Thi Tuyet Mai *“Customary law and the application of customary law”* – The Journal of legislative studies, 2009; Phan Trung Hien *“Religious law of some countries and the concept on the form of laws in Vietnam”* – The Journal of legislative studies, 2011. Nonetheless, these current studies just approach and exploit customs, customary law in a narrow aspects or mention generally without comprehensively doing research, evaluation on the recognition and application of customary law in Vietnam through review of the law and judicial practice, and bases on that grounds to make recommendations to improve the effectiveness of the application of customary law in Vietnam. It can be said that the current study has not propose viable system to address the constraints of the legislation on customary laws and practical difficulties in the recognition and application of customary laws in Vietnam.

Thus, the study of customary laws in Vietnam and presenting some recommendations to improve the effectiveness of customary law in Vietnam has its theoretical and practical values.

## **2.Purposes, duties and scope of research.**

### **2.1 Research purposes**

The purpose of this research is to study the real situation of recognition and application of customary on Vietnam through the analysis and evaluation of the legal provisions and a number of specific civil cases. On that basis, the report presents a number of recommendations to improve the effectiveness of the application of customary laws in Vietnam.

## **2.2 Research tasks**

- The report must show some general theoretical issues on customary laws;
- The report must show the existing Vietnamese policies and laws relating to the recognition and application of customary law in civil area;
- The report studies some particular civil cases which applied customary laws to evaluate the success and limitations of this application in adjudicative practice;
- The report makes some recommendations to improve the effectiveness in the application of customary laws in Vietnam.

## **2.3 Scope of research**

Based on research purpose that is to study the current situation of the recognition and application customary laws in Vietnam, the report only analyses and evaluates Vietnamese policy and laws as well as some typical civil cases which were settled by Vietnamese courts. Simultaneously, the report also focuses on customary laws in civil field, namely the recognition and application customary law to govern civil, marriage and family, and commercial relation; of which, the application of customary laws in adjusting of civil relations is paid more attention.

## **3. Research methods and contributions of report.**

### **3.1 Research methods**



The report is drafted on the basis on the dialectical and historical materialism, using synthetic methods such as: analysis, synthesizing, comparison . . . to clarify the issues in the report's content. The report also uses case study method to analyze and evaluate the application of customary laws in Vietnam.

### **3.2 Contributions of the report**

The report has some theoretical and practical significance following:

- Showing an overall picture of the current situation of recognition and application of customary laws in Vietnam;
- Providing arguments and recommendations to improve the effectiveness of the application of customary laws in Vietnam, strengthening access to justice and protection of rights in Vietnam; contributing to the process of judicial reform in Vietnam.

The report consists of 5 parts:

3. Overview of customary laws.
4. Customary laws in the Vietnamese legal system.
5. Customary law in judicial practice in Vietnam.
6. Some recommendation on the recognition and application of customary laws in Vietnam
7. Conclusion

## CONTENTS

### 1. Overview

#### 1.1 Overview of customary law

##### *1.1.1 Definition of customs and customary laws*

###### *(a) Definition of customs*

Legal form is the method that the ruling class uses them as a way to realize their wills to become laws. There are three legal forms: customary laws, legal precedents and legal documents.<sup>1</sup>

Currently, there are many definitions of customs; we should therefore raise a number of definitions of customs:

According to the Simple Philosophy Dictionary, customs are "behavioral methods following available forms, being repeated in a social group, a certain society, in a long historical period, and become the familiar habits and traditions of members of that society. The custom is the oldest form to impart social experience (work experience, forms of social relationships, moral relations ..., which are all recognized by people) from generation to generation and from society to each individuals; the customs are also simplest forms to implement social control, to encourage or prohibit a certain behaviors. The relative sustainable customs of a certain society and have ethical meanings to become social tradition. In the course of historical development, the outdated customs are replaced by new ones, facilitate the formation of new and progressive social relations."<sup>2</sup>

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<sup>1</sup> Textbook on the theory on State and Laws, Ha Noi Law University, People's Police Publisher, 2008.

<sup>2</sup> Huu Ngoc, Duong Phu Hiep, Le Huu Tang, Dictionary on Simply Philosophy, University and Professional High School, Ha Noi, 1987, 427.

Resolution No.04/2005/NQ-HDTP of the Justice Council dated on 17<sup>th</sup> September 2005 of the Supreme People's Court guiding the implementation of some provisions of the Code of Civil Procedure on evidence and proof provide the definition of custom as follows: "The custom is a habit formed in social, production and daily life, is recognized and followed as a convention of community (Point b, c, d, Sub-section 2.7, paragraph 2, part II).

Thus, the customs are rules of conduct in society, were formed in social life or international exchanges, and being existed and recognized as the general rules of conduct.

*(b) The concept of customary laws*

Customary law is acknowledge as the oldest form of law, was born along with the disintegration of the primitive communist regime. Customary laws are the social norms, which are expressed in the form of customs or traditions, have been used to adjust the previous social relations, and continues to adjust in the current society, are to form the basis of the general rules of conduct and being ensured the implementation by the state.

According to the Encyclopedia of Vietnam 2005, customary laws are defined "as a system of rules of conduct based on customs recognized by the State to regulate social relations. Customary law is the earliest form of laws to be used in the slaveholders, feudal, and the bourgeois state similar to British and American legal system."<sup>3</sup>

With the same meaning, the textbook on theory on the Laws and State published by Hanoi Law University 2011 defines the "customary law is the legal form existed

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<sup>3</sup> See in Vietnamese Encyclopedia, <http://bachkhoatoanthu.vass.gov.vn/>

in the form of customs and traditions, which have been handed down in social life, and was admitted as binding rules of conduct."<sup>4</sup>

Thus, customary law is formed on the basis of custom, is recognized by the state to become rules of conduct with legal and mandatory nature. The custom is merely the rules of conduct in society that people in the community are guided to implement; it does not have the legal nor binding characteristic (can only be based on pressure from public or social opinion), applies only within small communities that do not have national scope.

For the countries under the civil law system such as Vietnam, when the State needs to adjust a social relation, the State shall normally issue legal documents. However, in many cases, social relations, which the State aims to adjust, is governed by the custom. So, if these customs are consistent with the State's goal to adjust social relations, the State shall use multiple methods of recognition; make it become binding customary rules of conduct and the State shall ensure for the implementation.

*(c) Customary law and indigenous law*

According to anthropological perspective, indigenous law (folk lore, traditional law, local law in English) is a set of customs and value system (social norms) are admitted by a community and take effect in regulating the behavior of community members.<sup>5</sup>

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<sup>4</sup> See Textbook on Theory on Laws and State, Hanoi Law University, Hanoi, 2011.

<sup>5</sup> Le Quang Binh, Indigenous law from anthropological perspective, Institute on researching society, economy and environment (ISEE), Seminar documents on applying customs in adjudicative activities, international experience and Vietnamese practice. SPP, Hanoi, 6<sup>th</sup> May 2013.

According to the Social Policy Ecological Research Institute (SPERI), indigenous law is the traditional rules, embodied in customs, and get community recognition and self-obeying.<sup>6</sup>

Besides, it has been suggested that indigenous law both bear some elements of the law, such as provisions for the offense, the crime, the evidence, the trial and punishment ..., and to have nature of the traditions, customs, such as the convention, teachings, moral injunctions, guiding individual behavior, and create public opinion to adjust some kinds of behavior. Thus, indigenous law as a kind of highly developed customs, traditions as of primitive, pre-law form.<sup>7</sup>

Thus, there is similarity between the concept of "customary law" and "indigenous law". Indigenous law and customary law are actually customs, traditions being recognized by the state to become legally valid.

In this report, we use the term "customary law" on the grounds of the original word "customs" (rather than " indigenous law") is used in the current legislation as the Civil Code 2005 (Article 3), Trade Act 2005 (Article 3), the Resolution No.04/2005/NQ-HDTP of the Justice Council of Supreme Court dated 17<sup>th</sup> September 2005. Furthermore, the term "customary law" is also relatively common in current legal research.

### ***1.1.2 The formation of customary law***

Customary law was formed with the collapse of primitive communism; it was used popularly in the slave and feudal states. In this first period of time, the States recognized the values of customary laws which existed very long time in the

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<sup>6</sup> SPERI, Culture and Indigenous, 2007.

<sup>7</sup> See in Value of Highland Indigenous Law, [my.opera.com/tourism2/blog/c](http://my.opera.com/tourism2/blog/c)

society but did not write down those customs into the law; but allowed the direct application of these customs.

Customary laws have many advantages. Because, it derives directly from social life, so it appears to be closed to the subject being regulated in daily basis. Nonetheless, most of traditions and customs are formed naturally, so it lacks of scientific grounds. In addition, customary laws have formed slowly, conservatively and hardly to change; that is reason why customary laws are not flexible to meet demands of the changing society. There are some opinions that customary laws were popular in the slave and feudal states because at that time the writing was not so popular. On the other hand, when the West has not invented paper yet, using writing document was also difficult. Furthermore, from early stage of formation of the State, the legislative technique was still primitive; therefore the ruling class often used customary laws as a source of law to manage society.

Currently, in some circumstances when there is absent of legal provisions, so customary laws have still been used to supplement for written legislation.

### ***1.1.3 Characteristics of customary laws***

From definition as mentioned above, there are some basic characteristics of customary law:

- They are general rules of conducts, which existed in the society and is recognized by the State to adjust social relations. In any society, in order to existed and developed, the relationship among individuals themselves and the society must follow general rules. Those rules have existed in all areas of social life. Customary laws are one of these general rules.
- The customary laws are recognized by the State. Traditions and customs are only considered as customary laws when they are recognized by the State by

two means: through a principle provision for all cases, or through a specific rule for each particular case.

- Customary laws govern social relations with the purpose to adjust misbehaviors, being contradict to social norms, in order to build a stable, developed, healthy society.
- Customary law has a large scope of adjustment; it consists of substantive law and procedural law. Rooting from the communities and society, customary law has been adjusting in various fields of the society.

#### ***1.1.4 The relationship between customary laws and laws***

The relationship between laws and customary laws is closed to each other. Customary laws has affected to the formation of laws themselves. It has been considered as an important source of laws in connection to some forms of State in the different historical period of times. There are many customs which have been transferred into laws which is suitable with the wills of the State and people. Therefore, it is closed with objects in which they govern and it is easier for individuals to implement. In contrast, the traditions and customs being conflict with the wills of the State shall be abolished by promulgating some legal provisions for this purpose.

However, customs could also cause some significant negative effects. In the process of laws implementation, customs with some backward contents may impede the law implementation. Customs are the convention of each community, so it is local; each area has different traditions and customs. In some circumstances, it is possible that the customs application make people into the psychological habits of following customs their local customs, and to disregard the law, and make negative effects to the law implementation and strengthen the socialist legality.

Formation and mode of existence of customs are diversified and rich. Apart from many customs which are suitable with legal provisions and reflecting national culture identity, there are some customs which became unsound or illegal customs. Therefore, on one side, the State need to record, promote and protect fine customs by different formations and measures. The State recognized customs and make them transferred into rules of conduct which are binding on people as legal provisions. These acts help customs being respected and protected and to bring its role into full play, partly contribute to preserve and bring into full play of positive traditions, customs when they are appropriate to the wills of the State.

On the other side, the State must restrict and exclude some negative customs which are not appropriate for community by promulgating some legal documents. By doing so, law does not permit or list of prohibited customs.

#### ***1.1.5 Advantages of the application of customary laws***

The benefit of the application of customary laws is presented in three aspects.

*Firstly*, customs can replace the law to govern in some certain scopes and in some certain fields of social relations. Unlike legal provisions, customary laws are more flexible and can highly adapt when applying in practice, especially in small communities where customs were formed. Given the level of development of communities is different, the legal documents with high-level of generalization appear to be difficult to penetrate some specific areas of community life. For instant, it is hard to bring to life of the law provisions on the ownership of natural resources toward people who shifting cultivation of wandering hill tribes. Thus, customary laws are quite meaningful in these circumstances to replace the laws.



*Secondly*, customary law has a supplement role for law in some certain conditions. Because, in reality, there are some issues which have not regulated by laws or not fully regulated. In these cases, other social norms can be used to supplement for laws to govern social behaviors.

*Thirdly*, in the implementation of legal provisions, appropriate customs partly contribute to implement laws in more strict and voluntary manners, which base on trust and believe of people with existing customs. Moreover, customary laws can help the law implementation in many areas especially in the application of legal provisions, to go on details and particulars.

## **1.2 Overview of customary laws in Vietnam**

### ***1.2.1 Recognition and application of customary laws in Vietnam***

Customary law can be recognized and ensured the implementation by written down in a legal document or/and in a judgment of the Court. In Vietnam, customary laws are recognized through the promulgation of legal documents. It is appropriate with principle of socialist legality which is the core principle in organizing the socialist State and laws. Many countries in the world empower the Courts to recognized customary law. In Vietnam, only legislature can involve in recognizing of customary law as a source of law. The National Assembly is only the body having the power to draft constitution and laws in Vietnam. The National Assembly has the competent to make regulations on the status and role of customary laws in the Constitution. These basic provisions are the grounds for applying the customary law in practice.

Recognizing customary laws through the enactment of appropriate legislation is most popular path in Vietnam. With this legislative function, the National Assembly has the authority to recognize customs. However, the recognition of customary law in Vietnam also has some certain standards. *Firstly*,

customary law must stem from the traditions existing in the community. *Secondly*, such customs have existed at the time to be recognized and applied. *Thirdly*, such customs must be consistent with the general interest of the community, to ensure the stability and development of the society. These are the basic elements to perform the recognition of customary law in Vietnam.

The Vietnamese Constitution 1992 (amended and supplemented in 2002) provides that the Court is the adjudicating body of Vietnam. However, unlike other countries in the world, the Vietnamese Court has no function to make laws, and so the Judge is not allowed to transform or recognize customs into customary laws. As provided with the adjudicative function, the Vietnamese Court only has power to apply the customary law directly via its adjudicative activities. The activities of customary law application of organization and individual takes place in every aspects of the social life.

### ***1.2.2 Customary law and the strengthening access to justice and protection of rights in Vietnam***

Located at the outer edge of the Indochinese peninsula, Vietnam has 54 ethnics and they are different languages, lifestyle and religions. Apart from the majority of King People, 53 ethnic minorities accounted for 14% population lives in remote areas where the condition of socio-economic are difficult. Vietnam is also an agricultural country with more than 75% population living in rural areas which is relatively isolated to other parts of the world; in those places they have specific rules of conduct to govern village's internal relations. Currently, in Vietnam, there still exists a big different level economic, social, cultural and educational development among regions and locals. In particular, many people who live in rural areas, highlanders or ethnic minority people do not only have low living standard, but also have low level of intellection and legal knowledge.

Vietnam is a crossing place in term of absorbing many foreign cultures as well as passing through a long history with the occupation, invasion of foreign countries. Vietnam also has many different religions co-existing in different areas in country.

With all of these reasons, legal documents of Vietnam are not easy to cover all sides of social relations in different parts of the country. The locals tents develop with its culture and customary laws. Therefore, customs is an important part in traditional culture; it is not only a tool to adjust social relations, but also to be hidden the underlying philosophy, human life, and source of origin. Apart from negative customs, there are many positive customs which has long existed until now. In this regard, we need to distinguish between customary laws that are recognized by state and have binding effect on the whole country and customary laws which is binding on a certain community only such as a village or commune. The Vietnamese government does not often interfere to these customs unless it is clearly contrary to the laws.<sup>8</sup> Becoming general rules of conduct for some communities, especially ethnic minorities, particularly remote areas or the places where the socio-economic condition is facing many difficulties, these customs or village's conventions play an important role to regulate relations between individuals with each other and with the community. In many cases, these general rules of conduct made a great effectiveness in solving internal disputes within the community.

However, the application of legal provisions, for the objective reasons as mentioned above, it is difficult to bring into full play of its effectiveness toward ethnic minorities, religious areas or some places where the socio-economic is still difficult. For example, the application of civil procedures in accordance with the

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<sup>8</sup> See Inter-Ministries Circular 03/2000/BTP-BVHTT-BTTUBTWMTTQVN dated 31<sup>st</sup> March 2000 on guiding the draft and implement village's convention, rules of village, commune, and residential area.

law to solve civil disputes is complex, costly and waste time with many different levels of trials, so it cannot be applied effectively in difficult areas. It is not mentioned to the fact of full application civil procedures, with the financial and legal knowledge shortage, the people in those regions cannot protect effectively their legitimate rights and interests in the civil proceedings. Regarding the substantive law, in many cases, during formulation and promulgation of law, lawmakers cannot cover and predict all legal events to adjust exactly, and in accordance with the distinctiveness of these special regions. Meanwhile, the application of customs (both of substantive and procedural) is not contradictory with common interests and other law regulation of the State. It will be able to deal with disputes effectively, fast and in timely manner; simultaneously, it can partly contribute to preserve of solidarity and stability within the community; protection of rights and interests of the stakeholders. Thus, people in remote, religious areas or in low socio-economic condition areas can access to justice and can be protected rights better. In summary, the application of customary laws helps strengthening access to justice and protection of rights for people.

## **2. Customary laws in the Vietnamese legal system**

### **2.1 Overview on the development of customary laws in the Vietnamese legal system**

Although the customary laws is not the main source within the legal system, but the customary laws has played an important role in governing variety of areas in the society. Because of the history of thousands years of country's establishment and development, together with the diversity of ethnic communities, the system of customs was established and developed in Vietnam right from the beginning. In different periods of social development, customary laws have its own distinctiveness, which reflecting ways of life, rules of conducts of people. The

development of the customary law in the Vietnamese legal system can be divided into three stage: (i) before 1945; (ii) 1945 to 1975; (iii) 1975 to now.

*i. Before 1945*

The recent studies show that customary laws was the main source of law in this period of time, right from the foundation of the Van Lang State – the first State of Vietnam.<sup>9</sup>

In the period of colonization by the Chinese (from 179 BC to 939 AD), the customary law was recognized as the main source of law, in co-existence with the Chinese legal system. Because of the language barriers, it is hard to apply Chinese laws to deal with issues within the countryside of Vietnam. Hence, the Chinese laws were applied for the urban areas, and customary laws were applied in countryside.<sup>10</sup>

From the end of the Chinese colonization, the Vietnamese society passed a number of feudal dynasties. Although having passed nearly a thousand years under the colonization of the Chinese feudal dynasties, “and these dynasties had made great efforts to assimilate the Viet ethics into Han ones, and the Vietnamese people were subject to great influence of Chinese in terms of politic, society, and culture; but the Vietnamese still kept for their owned the pure cultural distinctiveness after a nearly a thousand years of occupation.”<sup>11</sup> This was a period of time in which the culture in the village had existed and developed very strongly. In each village or commune, they had their owned village’s conventions, customs, and practices in parallel with the feudal State’s regulations. The development of customs and traditions in each locality had made them playing an important role in the society

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<sup>9</sup> Thuan Ngoc Nguyen, Anh Tuan Le, Anh Kim Thu Tran (2006), Some documents on restrictions of farms and Vietnamese laws from the XV century to XVIII century, The Social Scientific Publisher, page 9.

<sup>10</sup> John Gillespie, Transplanting Commercial Law Reform: Developing a “Rule of Law” in Vietnam, Ashgate, 2006.

<sup>11</sup> Anh Duy Dao, Vietnamese History of Culture, <[http://vi.wikipedia.org/wiki/Lịch\\_sử\\_Việt\\_Nam](http://vi.wikipedia.org/wiki/Lịch_sử_Việt_Nam)>.

and in maintaining the social orders, good conducts, the ways of life, or rules in the society. In this period of time, the system of customs, practices in each locality were recognized and applied more strictly as compared to the application of feudal State's laws. This recognition has not existed under any form of documents, but only reflected an aspect of the Vietnamese's people's culture at that time. It seems to be the practice in this period is that "the King's rule yields to the village convention".

The two most voluminous Codes in the legal system of the Vietnamese feudal dynasties, which are the Hong Duc Code enacted under the Le Dynasty and the Gia Long Code enacted under the Nguyen Dynasty. Both of these two Codes recognize the rules of conduct exist in the form of custom. Customary laws, which are mentioned in these two Codes are mainly the tradition of the village or village's convention. For example, in the Hong Duc Code, Article 314 (Article 31, Chapter on matrimonial) as follows: *"the engaged person who has not enough wedding presents to the parents (of the girl) if the parents die, they bring them to their head of a clan, or the village chief to ask, if he organized in a sloppy way, and depending on their rich or poor, they are forced to pay a quintal of coins for the parents (if the parents die shall be paid to their village chief or head of a clan), the daughter to a fine of fifty lashes."*<sup>12</sup> In the Gia Long Code, noting the customs, practices, and in the legal system exists mainly in the regulations on marriage, farming products, cult portion of entail, ... It can be seen that customary law, which were recognized in these two Codes had the characteristic of being listed. It means that the State acknowledges the customs, which is commonly applied, and writes down directly into the law. This way of record has advantages that ensure consistency, it is clear when applied, to enable the trial judge has a common legal basis and ensure

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<sup>12</sup> Ho Chi Minh city Publisher, National Criminal Code, March 2003, page 128.

consistency in the case. However, stipulating under of such listing characteristic has the disadvantage that is not fully cover all existing custom and tradition within the communities and ethnic peoples. Simultaneously, this will lead to miss some progressive customs, but these have not been known and transferred into the legal regulations. In addition, the provisions in such direction of listing also make the use customs be less flexible, in many cases reflects the rigidity of customary law.

Stepping into the end of the stage of feudalism, Vietnam once again passed a period under the French colonization. By this way or another, French must accept customs and traditions and upgraded them into rules, which were accepted by legal provisions. In the Northern Vietnam, Civil law of the North was promulgated in 1931, in the Middle of Vietnam, Civil Law of Middle part was promulgated in 1936, and the simple Civil law of the South was promulgated in 1883.

One big difference as compared to the previous period of feudalism existed in the past was that the customs or traditions were no longer listed in detailed, but being provided generally in the legal provisions. At the Article 4 of the Civil Law of the North, it is provides: “Whenever there exists no legal provisions, the trial judge shall hear according to the custom, if there exists no custom, the trial judge shall hear according to the rightness and equity; also pay attention to the habits, emotions of litigants”. Also, Article 4 of the Civil Law of the Middle part provides: “Whenever there exists no legal provisions, the trial judge shall hear according to the customs, if there exists no customs, he/she shall hear according to the rightness and equity; also pay attention to the habits, emotions of litigants”. Regarding these two provisions, the order of the applications of laws or customs is clearly identified. Accordingly, the custom is only applied when there is no legal provision applicable to the case. Although the customs and traditions are listed behind the legal provisions, but within the contents of these two laws, the value of the customs

and traditions were recognized similar to the value of the state legal provisions. At Article 10 of the Civil law of the North, it provides: “No one could take the individual interests in contradiction to the law, public order and general customs”. In Article 10 of Civil law of the Middle part provides: “Any transaction of citizens, which is in contradiction to the law, public orders and customs is invalid”. At the Chapter III of simplified Civil law of the South, on part on the reasons, provides that: “It is illegal when it is violate the law, in contradiction to the custom or public orders. The parties cannot make a private transaction to invalidate laws relating to fine customs and public orders”.

Apart from recognizing customs to become the general rule of conducts, customs have been written down as rules, which govern many different fields of the society (Article 42 of the Civil Law of the North, Article 102 of Civil Law of the Middle of Vietnam).

Notably, the French colonizers has establish custom tribunals (tribunal de village) for three ethnics, namely Bana, Sowdang, Jrai with the purpose of dealing with legal issues relating to these ethnic communities in conjunction with their customs.<sup>13</sup>

## *ii. From 1945 – 1975*

This is the period when Vietnam is divided into two parts, namely the North and the South. In this period of time, customary laws have been recognizing as an important source of law to govern some social relations.

Customs and traditions are recognized in the Constitution 1959. Article 3 of the Constitution 1959 provides that: “the ethnic communities have the right to preserve

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<sup>13</sup> The Justice Department of Lam Dong Province, the paper presented at the Conference on Custom, Village Convention and the Laws, Dak Lak, 1997.



or change its traditions and customs, the use of their language and writing and to nurture the culture of their ethnic communities”.

On 29<sup>th</sup> December 1959, the first Law on Marriage and Family was promulgated. Apart from the provision to prohibit marriage according to depraved customs, the Law on Marriage and Family still recognize the application of traditions and customs in dealing with matters relating to marriage. Article 9 of this Law provides: “It is prohibited toward marriage partners who are directly related by blood, between parents and their adopted child, brother and sister with the same parents, half-brother and half-sister. Regarding relatives within five generations or having relation by marriage, the marriage shall be deal with by customs.”

In the South of Vietnam, the civil relations were governed by the Civil Code of Saigon regime 1972. In this Code, apart from providing general rule of conducts, the Saigon regimes also recognized and permitted the application of customs and traditions whenever there is no law governed. For example, Article 9 of this Civil Code provides: “Whenever there is no legal provision applicable, the Judge shall decide according to the custom; if there is no custom, he/she must follow equity and rightness for the adjudicative activities and must pay great attention to the opinions of the litigants.” Notably, in many cases, despite of having applicable legal provisions, but the customs and traditions were still recognized as rule of conducts, which play a decisive role to the validation of many legal relations. Accordingly, article 13 of this Code provides: “In case of marriage, it is not allowed to violate public order or fine customs”.

In 23<sup>rd</sup> March 1972, the Justice Council of the Supreme People’s Court promulgated Circular 173-TANDTC on guiding the adjudication on compensation in case of tort (non-contractual compensation). At the end of this Circular, it give the explanation as followed: “Regarding tort in case of hunting which

unintentionally causing death or hurts for other people, we find that it is not possible to base on the custom of sharing hunting benefits, so to make hunter group to share their jointly responsibility. These two issues are completely different: The sharing the animal as the results of the hunting among hunters is a custom of ethnic communities. It is only the hunter causing the accident must pay the compensation. It is the good practice if they voluntarily contribute to pay for the compensations, the Court does not have to interfere.” Although the circular did not provide directly, but under this explanation, in the process of hearing civil disputes, the Court accepted that it had recognized the custom of sharing animal meat from forest among hunters within the ethnic communities to deal with disputes.

Thus, customs and traditions have not been provided in some legal provision as they were but being reflected under the kind of general principles. This model of provisions guarantee to cover all modern customs and traditions and at the same time to partly abolish bad customs which has long been existed in the ethnic communities, enhancing the flexibility in the application process. The provision on applying customs in this period of time also appears that the main area of application is field of marriage and family. Besides, there are some custom governing civil disputes.

### *iii. From 1975 – now*

#### *a. From 1975 to 1995*

During this period, besides the legal systems which were more complete and developed, customary law still existed. But from 1975 until now, customary law has been no longer a formal source of law in Vietnam.

In the Constitution 1980, customs are still be recognized (Article 5). On 29<sup>th</sup> December 1986, the National Assembly of the Socialist Republic of Vietnam promulgated the Law on Marriage and Family in 1986. Right in the head of this

Law, it expressed *"inherit and develop the Law on Marriage and Family 1959, to continue to build and strengthen the socialist family, to preserve and promote the traditions and good consistency of the nation, to remove the obsolete customs, preserve fine customs of the nation, eliminate backward customs, the remnants of the feudal regime of marriage and family, against the influence of the bourgeois marriage and family."* Thus, the construction of the Law on Marriage and Family in 1986 was also thought to preserve and promote fine customs of the nation, and eliminate backward customs and the remnant of old society.

On 15<sup>th</sup> April 1992, the National Assembly promulgated the Constitution 1992. In Article 5 of the Constitution, it provides: *"Every ethnic nations has the right to use its own language and writing, to preserve national identity and promote their customs, practices, traditions and cultural good. State implements the policy to develop in all aspects, gradually improve the material and spiritual life of ethnic minorities."* This provision is essentially the successive provisions of the Constitution 1980. Accordingly, the recognition and allow the application to customs as a principle of the Constitution to ensure equitable development among ethnic communities, while maintaining the tradition and culture of ethnic diversity groups throughout Vietnam.

On the basis of the Constitution 1992, a number of legal documents related to customary laws were issued as Directive 24/1998/CT-TTg of the Prime Minister dated 19/6/1998 on the development and implementation of conventions and rules of the villages, hamlets, residential area and Circular No. 03/2000/TTLT/BTP-BVHTT-BTTUBTUMTTQVN dated 31/03/2000 guiding the construction and implementation of conventions and rules of the villages, hamlets of villages, hamlets and residential area.

During this period, the custom is not considered an important source to regulate social relations but only recognized as general principles. This also shows that, in the early stages of the process to build a unified Vietnam, the legal provisions issued by the State prevailed.

*b. From 1995 till now*

In the period from 1995 till now, we only go through the current legislation relating to customary laws; these legal documents are reviewed in more detail in section 2.2. of the Report.

During this period, the application of customs is recognized in many legal documents but the most typical is the Civil Code 1995 and the Civil Code in 2005. In the Civil Code 1995, customary laws as rules of conduct being recognized in many areas. In this Code, the custom are set out in a fairly detailed way, from the principles on applying custom to the rules of conducts in the specific regulations: (i) customs apply only to adjust the civil legal relations when not prescribed by law, and the parties have no agreement (Article 4); (ii) customs are applied to regulate personal relationships (section1, Article 30; section 1, Article 55 ); (iii) application of custom in a number of issues relating to civil transactions (paragraph 2 of Article 135); (iv) apply to adjust the relations of property and ownership ( Article 230, Article 234, Article 250, Article 270); (v) applied to adjust the relations of contract (Clause 4, Article 408, Clause 1, Article 482, Clause 1, Article 486; (vi) apply important to adjust the relations of non-contractual damages (paragraph 4 of Article 629); (vii) applies to adjust the relations of inheritance (Item 1 of Article 686); (viii) apply to adjust civil relations involving foreign elements (section 4, Article 827, Article 828).

Besides civil relations, customary law is applied to adjust the trade relations. This is confirmed in the Commercial Law 1997 (in particular the provisions of

section 3, Article 4 and Article 133). For marriage and family relations, applied custom is specified in the Marriage and Family Law 2000 and Decree No. 32/2002/ND-CP of the Government on the application of the Law on Marriage and Family regarding ethnic minorities.

In 2005 there are three important documents admits application of custom and a number of detailed provisions on applying customs. These are: (i) Resolution No. 48-NQ/TW of the Political Bureau dated 24<sup>th</sup> May, 2005 on the strategy to develop and improve the legal system of Vietnam up to 2010 with the orientations to 2020; (ii ) the Civil Code 2005; (iii) the Commercial Law 2005.

Essential research on the development history of customary laws in the Vietnamese legal system shows that *Firstly*, customary laws formed early in our country in the sense that the rules of conduct formed naturally from social life. From the text of the law from feudal period, customs were respected by the State and to ensure for the application in practice. *Secondly*, in different historical periods, customs have different positions and roles in the legal system. The customary laws can be a source of law or not, but it has legal meanings in adjusting civil relations

## **2.2 Customary law in the current Vietnamese legislation**

### ***2.2.1 The legal provisions***

As stated above, the customs are recognized in Article 5 of the Constitution 1992. In addition to the Constitution 1992, Resolution No. 48-NQ/TW of the Polibureau dated 24<sup>th</sup> May, 2005 plays a fundamental role in directing for the legal provisions on customary law. According to Part III, Section 1, "*Research on the ability to exploit, using case laws and customs (including custom, international trade customs) and the rules of professional associations, contribute to supplement and improving the law.*" In addition, Part II, Section 3 - Developing and improving

civil law, economics, the focus is on improving the market economy with socialist oriented it provides: *"... improve laws of contract in the direction of respecting the agreement of the contracting parties, not contrary to morals, does not violate public order, in accordance with custom, international trade customs ... "*; Part II, Section 6 - Developing and improving the law of international integration : *"... improve the law on economic dispute resolution (arbitration and mediation) in accordance with international trade customs ..."*

Thus, according to this Resolution, exploitation and usage of customs is one of the solutions to help improving the laws. Moreover, the custom is only considered to be the source "supplement" to the legal system in our country, it is not a main source of law. Respecting customs is considered to be one of the basic principles in the improving of the provisions of the civil law as well as legislation on trade dispute settlement. It can be seen that this is the guiding ideology in the construction and completion of contract law and the law on the settlement of trade disputes. This reflects the policy of the Party and State to preserve, develop and apply the custom in adjusting civil and trade relations.

As pointed out in section 2.1.3, the current law on customs mainly included in the Civil Code 2005, the Commercial Law 2005 and the Law on Marriage and Family 2000. The Civil Code 2005 includes provisions on applicable customs adjusting civil relations; the Commercial Law 2005 includes provisions on applicable customs adjusting trade relations, the Law on Marriage and family, including the provisions on applying customs to govern marriage and family relations. The following part refers to the provisions of existing laws on customs in the field of civil law.

*a. Regulations on applying customs to govern civil relations*

Similar to the Civil Code 1995, in the Code 2005 the custom is provided in quite detailed, from principles applying to custom to the rules of conduct in specific institutions. Specifically:

*Firstly, on principle to apply customs. Article 3 provides: "In cases where the law is not specified and there is no agreement, the parties may apply customs; without custom it shall be governed by the similar provisions of law. Customs and similar provisions of the law is not contrary to the principles provided in this Code" and Article 8 provides: "The establishment and implementation of civil rights obligations to ensure the preservation of the national identity, respect and promote the customs, fine habits and tradition, solidarity, mutual love, each one for the community, community for each individuals, and lofty moral values of the peoples living on the territory of Vietnam."*

*Secondly, the provision on applying custom to regulate personal relationships. In section 1, Article 28 provides: "Child when was born can choose their ethnic according to the ethnicity of the father or mother. In the case of the father and mother of two different ethnic groups, person is defined as father's ethnicity or ethnicity of mother according to custom or as agreed upon by the father or mother."*

*Thirdly, the provisions on applying custom in a number of issues relating to civil transactions. In section 1, Article 126 states: "In the case of civil transactions can be interpreted in many different meanings, the interpretation of civil transactions were made in the following order: c) The custom of place where transaction is established. "*

*Fourthly, provision on applying custom to regulate the relations of property and ownership. Article 215 stipulates: "the common ownership shall be established by the agreement of the owner, as prescribed by laws or by customs"; Section 1 of*

Article 220 stipulates: *"Common ownership of the community is owned by clans, villages, hamlets of the villages, hamlets, religious communities and other communities to which the property is formed by custom, property given by members of the community together with the contribution, donation, giving to them or from other sources in accordance with the provisions of the law in order to satisfy the legitimate interests of the whole community "*; Article 242 stipulates: *" ... After six months from the date of public announcement but without the receiver, the animal is belong to who caught them, if animal is caught by grazing practices, the time limit is one year "*; Section 1, Article 265 stipulates that *"The boundary also be determined by the custom or the boundaries that existed thirty years without dispute."*

*Fifthly*, provision on applying customs to regulate the contractual relationship. In section 4 and 5 of Article 409, it stipulates: *"When a contract contains confusing terms or language, it must be interpreted based on customs in place of signing contracts. When the contract is missing some terms, it is possible to supplement according to customs for the contract in place of signing contracts "*; Section 1, Article 479 stipulates: *" Tontine is a form of property transaction, which is carried out according to customs and on the basis of agreement of a group of people rallying together to determine the number of people, time, money amounts or other property, mode of contributing and receiving annuities and the rights and obligations of members. "*; section 1, Article 485 stipulates: *"The lesser must ensure that the leased property is in the condition as agreed upon, in accordance with the leasing purpose throughout the leasing term; and must repair all damage and defects of the leased property, except for minor damage which must, according to customs, be fixed by the lessee himself/herself/itself; Section 1, Article 489 stipulates: "The lessee must pay in full the rent within the time limit as agreed upon;*



*where there is no agreement on the time limit for rent payment, the time limit for rent payment shall be determined according to customs at the place of payment; if the time limit for payment cannot be determined according to customs, the lessee must pay the money when he/she/it returns the leased property."*

*Sixthly, the provisions regulate applying customs to regulate the relations practices on non-contractual damages. In section 4, Article 625 states: "In cases where the animal is allowed to range freely according to customs and causes damage, the owner of such animal shall have to compensate according to customs but not in contravention of law and/or social ethics ".*

*Seventhly, provisions regulate applying customs to regulate the relations of inheritance. In Clause 1, Article 683 stipulates: "the priority order of payment is first identified is customary reasonable expenses for burial."*

*Eighthly, provisions on applying custom to regulate civil relations involving foreign elements. In Section 4, Article 759 states: "In cases where the civil relations involving foreign elements are not governed by this Code and other legal documents of the Socialist Republic of Vietnam, the treaties to which the Socialist Republic of Vietnam is a contracting party or civil contracts between the parties, the international customs shall apply, provided that such application or the consequence thereof is not contrary to the basic principles of the law of the Socialist Republic of Vietnam ".*

Thus, the legal provisions on customs application in the Civil Code in 2005 were divided into three groups:<sup>14</sup>

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<sup>14</sup> See Ngo Cuong, Some opinions on custom application to deal with civil disputes. Seminar's documents on custom application in adjudicative activities – International experience and Vietnamese practice. Supreme People's Court, Ha Noi, 06/05/2013.

(i) The legal provisions on custom application in the sense that they are additional sources of law in cases where the law does not specify. It is defined in Article 3, 759 (paragraph 4);

(ii) The legal provisions on custom application as part of the application of customs. It is defined in the: 126, 215, 220, 265, 409, 489, 625, 683.

(iii) The legal provision on custom application and content of such customs. It is specified in the following articles: 28, 242, 485.

It should be noted that custom on tontine has been legislated by the provisions of Article 479 of the Civil Code 2005, and specific guidelines in Decree No. 144/2006/ND-CP of the Government dated 27/11/2006.

*b. Provision on applying custom regulates marriage and family relations*

Law on Marriage and Family 2000 on provision on applying customs in adjustment of marriage and family relations. Section 1, Article 3 provides: *"The State shall adopt policies and measures to create conditions for the men and women established a voluntary marriage, family progress and fulfill their functions; strengthen propagation on law marriage and family; encourage people to eliminate backward customs and habits of marriage and family and promote the fine traditions, customs and practices reflecting identity of each ethnic nation; building progressive relationships of marriage and family. "* Article 6 provides: *"In marriage and family relations, customs and practices embodying the identity of each ethnic group that is not contrary to the principles stipulated in this Law shall be respected and promoted".* Article 20 stipulates: *"the place of residence of husband and wife is totally of their choice, not bound by traditions and practices, administrative boundaries."* Section 3, Article 100 stipulates: *"The State of the Socialist Republic of Vietnam shall protect the rights and legitimate interests of*

*Vietnamese citizens abroad in marriage and family relations in accordance with the laws of Vietnam and laws of the host countries, and international custom and laws. "*

On 27<sup>th</sup> March 2002, the Government issued Decree No. 32/2002/ND-CP on the application of the Marriage and family law for ethnic minorities. In this Decree customs are mentioned quite comprehensively with two contents: (i) encourage the promotion of the cultural identity of the nation, maintaining the progressive customs; (ii) the elimination of the obsolete customs having existed for a long time in the communities of the ethnic minorities. The advantage of this Decree is to list the customs and good practices of marriage and family which encourage to promote fine ones and list of outdated traditions and customs of marriage and family, which is strictly prohibited or to persuade to remove from practice.

Provisions related to the preservation and promotion of the cultural identity of the peoples in marriage and family relations: general principles, good custom are encouraged to develop, in Section 1, Article 2 stipulates: *"fine custom and tradition on marriage and families of ethnic minorities (listed in Appendix A attached to this Decree) represents the identity of each nation, not contradict to the principles of the Law on Marriage and Family in 2000 shall be respected and promoted "*; regarding the implementation of wedding rituals prescribed in Section 1, Article 9: *"The wedding rituals should be saving, healthy expressing their ethnic identity which are not inconsistent with the provisions of the Law on Marriage and Family 2000 shall be respected, promoted "*; on the solidarity and support among members family lineage, Article 14 stipulates: *"The fine customs and practices of ethnic solidarity, mutual support, mutual help among family members and family , shall be respected and promoted "*; applying fine customs in the field of adoption, Section 1, Article 15 stipulates: *"The State shall encourage and promote customs of*

*ethnic ones to receive their relatives and orphans who being without support for adoption, if the adoption is eligible under the provisions of the law"; addition to many other provisions to encourage promote and create conditions for the people to preserve and promote the cultural identity, advanced customs of their ethnic nation.*

The regulations eliminate backward customs and tradition: in principle, in Section 2, Article 2 it provides: *"backward customs and traditions of marriage and family of the ethnic minorities (included in Appendix B attached to this Decree) contrary to the principles of the Law on Marriage and Family 2000, are prohibited or encourage to eliminate";* regard the elimination tradition of under aged marriage, Article 4 stipulates: *"... People's Committees of communes, wards and town (hereinafter referred to as the commune-level People's Committees), the Fatherland Front and its member organizations, the village's chiefs and religious leaders encourage people advocating elimination of customs and practices of under aged marriage prescribed by the Law on Marriage and Family in 2000 (marriage) ";* ensure freedom by marriage, in section 2, Article 5 provides: *"It is strictly forbidden robs his wife to force a woman to marry"* or in section 2 of Article 6 it provides: *"It is strictly forbidden customs forced the widow, widower husband get married to someone else in the family ex-husband or ex-wife's family without the consent of that person";* prohibiting marriage of outdated customs, Article 7 provides: *" It is strictly forbidden the marriage partners are directly related by blood: brother and sister with the same parents, half-brother and half-sister, or relatives within three generations, encourage to remove customs and practices prohibiting marriage between persons related within the family four generations or more ";* equality between husband and wife, section 2, Article 10 stipulates: *"The ethnic minorities have family ties to patriarchy or matriarchy within their customs, which do not ensure equality between husband and wife, the*

*commune-level People's Committee, the Fatherland Front of the same level and the organization members, village chiefs, religious dignitaries encourage and persuade people to gradually eliminate the inequality between husband and wife in family relationships, to ensure spouses have rights and obligations equal in all respects in accordance with the Law on Marriage and Family in 2000 "*; inheritance rights between husband and wife, Section 1, Article 12 stipulates:*"The customs and practices to ensure the excess accounting of assets between husband and wife when one party dies, the movement to remove customs and practices to ensure the rights and lawful interests of the alive"*; relations between parents and children, Article 13 stipulates: *"Encourage to remove customs and practices demonstrate discrimination between sons and daughters in the family of ethnic nation by patriarchy or matriarchy"*; divorce, section 1 of Article 18 provides: *"Encourage to remove customary divorce by village chiefs or religious dignitaries settlement"*; couple's property division upon divorce, Section 2, Article 19 provides : *"Prohibition of customs, practices reclaim the wealth, fined when spouses divorce"*.

In studying legal provisions on applying customs to govern relations of marriage and family to show that:

*Firstly*, customs on marriage and family exist quite commonly in every ethnic nations. Each ethnic nation has its own traditions; of which there are progressive traditions and outdated customs and no longer relevant to real life.

*Secondly*, to preserve and promote the cultural identity of the peoples in the field of marriage and family in particular, in the areas of social life in general is essential and must pay attention properly, make sure to preserve the cultural tradition of the people, and aims to recognize the value of cultural traditions written down in law and expand the scope of application of the whole territory of the country.

*c. Provision on applying customs to regulate the commercial relations*

On 14<sup>th</sup> June 2005, National Assembly promulgated the Commercial Law 2005. The Civil Code as well as the Laws of Marriage and Family do not introduce the concept of 'custom' 'civil custom' or 'custom on marriage and family', the concept of 'commercial custom' is specified in the Commercial Law. According to section 4, Article 3: *"The commercial customs is widely accepted in routine commercial operation on a region, area or a commercial field, with clear content in which parties have admitted to identify the right and obligations of the parties to the commercial activities."*

Similar to Article 3 of the Civil Code 2005, Commercial Law provides to apply custom. Accordingly, *"Where there is no law, the parties have no agreement and do not have the customs has been established between the parties, it is allowed to apply commercial custom which are not contrary to the principles stipulated in the Law and in the Civil Code"*(Section 4, Article 3).

One notable point is that the Commercial Law allows *"the parties to commercial transactions involving foreign elements ... are agreeable to apply international commercial custom if ... international commercial custom is not contrary to the principles basic principles of Vietnamese law"* (section 1, Article 5). By enabling the application of customs agreeable by the parties, the provision is an expansion as compared with the provisions of section 4 of Article 3 of the Commercial Law and the provisions of Article 3 of the Civil Code 2005.

In addition, the Commercial Law provides application of customs in specific cases. That is *"in carrying out the transport of goods, traders providing logistic services shall comply with the provisions of law and transportation custom"* (section 2 of Article 235).

### ***2.2.2 Evaluating the current law on customary laws***

By studying the current laws relating to customary law, one can draw a number of advantages and limitations as followed:

#### *a. Advantages*

*Firstly*, the custom being recognized in a legal documents has the highest effectiveness is the Constitution, and applying customs to regulate social relations is one of the guiding directions of the Party and State. This is an important foundation for the legal provisions on customary law and improves the legal regulations on customary law.

*Secondly*, the law provisions on customs and adopting of custom to regulate social relations is a fairly comprehensive and being regulated in the areas of civil, marriage and family, business. However, customary law cannot be recognized and applied in the areas of criminal, administrative and other fields. The law provisions permitting the application of custom in adjustment social relation represents the recognition of the State for the rules of conduct formed spontaneously in social life. The custom has become one of the most important laws to regulate social relations. This recognition is consistent with the practice in Vietnam and the trend of the world's legal systems.

*Thirdly*, the regulations on the applying custom are prescribed in a relatively detailed way. The provisions on the application of specific customs prescribed in the Articles, sections, etc. It is easier to be aware of method and order to apply customs in governing relations as compared to relevant rules.

*Fourthly*, concept of custom and related concepts has been initially provided in the law. Although the concept of custom and related concepts are not defined in the Civil Code 2005, as well as the Laws of marriage and family, but the concept of

trade custom provided in provisions of the Commercial Law as stated above. Besides, the concept of 'custom', 'commercial custom',<sup>15</sup> 'international commercial custom' is defined in Resolution no.04/2005/NQ-HDTP September 17, 2005 of the Justice Council of the Supreme People's Court guiding the implementation of some provisions of the Civil Procedure Code on proof and evidence (points b, c, d Subsection 2.7, Section 2, Part II). Specifically:

*b) The custom is a habit folds in social life, in production and daily life, the community where the custom existed acknowledge and follow as a general convention of the community;*

*c) The commercial custom is a habit widely accepted in routine commercial operation on a region or a commercial area, with content clearly acknowledged by the parties to determine the rights and obligations of the parties in commercial activities;*

*d) International commercial customs are the norm, do it again, and repeat several times in international trade and is admitted by international organizations;*

*Fifthly*, there are regulations on the system of list of progressive customs are encouraged to develop and the list of backward custom and practices need to be removed. This list has been addressed in some detail in Decree No. 32/2002/ND-CP of the Government on the application of the Law on Marriage and Family for ethnic minorities. This shows the attention of the Party and State to preserve and promote the cultural identity of the ethnic nation, and the elimination and removal of the backward process, the remnants of feudal society existed in modern society.

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<sup>15</sup> The definition of customary law is provided in Resolution No 04/2005/NQ-HDTP completely compatible to the its definition provided in Article 3, section 4 of the Commercial Law.



*Sixthly*, the content of some customs have been clearly defined in a highly effective law - the Civil Code 2005. That is, the custom of ethnicity identification by ethnicity of the father or mother (Article 28 paragraph 1); the custom to establish ownership of cattle being lost after 01 years from the date of publicly informing but without the recipient (Article 242), the custom that the lessee must self-repair for the leased properties regarding small failure (paragraph 1 of Article 485). These provisions make them easier to apply customs in resolution of civil disputes.

*b. Limitations*

In addition to these advantages, the current provisions relating to customary law also have some significant limitations: (i) lack of necessary regulations; (ii) many unclear provisions; (iii) some unreasonable regulations. Here are some evidences:

*Firstly*, there is no well-defined demarcation between the concept of 'custom' and 'customary law'. 'The customary law has not been defined in any written law. In common sense, the customary law is interpreted as the customs exists in relevant and popular manner, which has been recognized by the State and converted into law, become the general rules of conducts. The question, as a recognized custom and transferred into law, how its scope of application is determined? It applies only to solve social relationships arising in a local, a business, a field where such custom are formed or is widely applied throughout the territory of a nation? In fact, according to the current regulations, the custom existing in the legislation is only the custom applied in a narrow range. It is just the rules of conduct recognized to apply to a group of social relations in the same geographical area, in the same industry, a field of activity.

*Secondly*, most of the current regulations only recognize the application of custom without providing the contents of the customs. As stated in section 2.2.1., most of the provisions of the Civil Code 2005 only admit to apply some customs without specifying the content of such customs. That is: to explain the civil transactions where trading practices established (Article 126); joint ownership is established by customs (Article 215); management, use and disposition of the common properties of the community according to customs (Article 220), to determine the boundaries between adjacent properties according to customs (Article 265); explain the contract in place of making contract (Article 409); to determine the time period to pay rent according to the custom in place of payment (Article 489); damages caused by the animal according to custom (Article 625); determine the cost of burial customs (Article 683). The absence of regulations on the content of customs causes difficulties and inconsistency for the Court in the application process. This requires us to soon to issue List of Customs. In French colonial times, in 1927 the Survey Council has collected more than 300 matters relating to customs. This paper has important value, as a basis for the Court to apply custom if there is no law.

*Thirdly*, most of the new laws just stop in showing in which case that the application of new customs is permitted and determine the order of priority in applying custom in the settlement of raising legal issues but it does not have any legal provision to determine condition to apply customary law. On the conditions for the application of customs, it seems unnecessary to consider. But in fact, the selection and application of a custom to resolve a dispute arising is not easy. These practitioners often encounter difficulties in determining the necessary and sufficient conditions for the application of certain customs.

Article 3 of the Civil Code 2005 was only given some conditions to apply custom rather than laws regulating the conditions applied custom. Therefore, Article 3 essential contents include: the case of application of customs and conditions apply custom. Customs are applied to satisfy the following conditions: (i) any dispute arising out of or related fields need to be adjusted with the existing customs; (ii) there is no law and the parties do not have agreement to resolve the dispute or relationship; (iii) long-standing custom exist and has been recognized at a local, a business, a specific area as a general rule of conduct ; (iv) the application is not contrary to the fundamental principles of laws, not violate the rights and lawful interests of the State, the public interest, the legitimate rights and interests of organizations and individuals.

*Fourthly*, the text is often give principles to apply the custom *"to preserve national identity and promote the customs, practices, traditions and cultural good of each nation"* but not inconsistent with the fundamental principles of law, but does not provide what is considered to preserve the cultural identity of each nation and the basic principles of law be considered as criteria for evaluating the correctness or fitness of the customs. It is also difficult to apply custom to address the relations arising in practice.

*Fifthly*, regulations are not clear about the order in case of defining of the ethnicity. Regarding the right to identify the national, Article 28 of the Civil Code 2005 provides: *"Individuals are born is identified by ethnicity of the father or mother. In the case of the father and mother of two different ethnic nationals the son/daughter are defined as peoples of the father or of the mother according to custom as agreed upon by the father or mother. "* In studying this provision it is difficult to determine the order of priority in apply customs, and custom will be applied first or agreement applied first?

*Sixthly*, unclear provisions on the order of application of customs in the circumstance to determine the boundary between the properties. Section 1, Article 265 of the Civil Code 2005 provides: *"The line can also be determined according to the custom or the boundaries that existed thirty years without dispute."* If at the same time there is custom, while also having the boundaries that existed thirty years that the parties have a dispute over the boundary between the real estate, when addressing the Court will prevail custom or boundaries which has existed for over 30 years? Without solving this problem, it is difficult to ensure effective application of customs in the settlement of disputes arising in life.

*Seventhly*, unreasonable regulations on case/conditions applying customs. According to Article 3 of the Civil Code 2005, applies only when customs: (i) are not prescribed by law, and the parties have not agreed upon; and (ii) they are not contrary to the principles set out in the Civil Code 2005. According to this provision it can be understood that the civil parties in the transaction has not agreed on the application of the custom. That is, when a dispute arises that parties to reach an agreement on the application of custom to solve and the application of the custom which are not inconsistent with the provisions of the law so it shall not be accepted. In our opinion, the current regulations are not consistent with reality, does not guarantee the legitimate rights and interests of the parties in dispute. We should consider expanding the scope of applying customs by allowing and accepting agreements applying custom of the parties provided that the application is not contrary to the fundamental principles of law, not infringe upon the rights and legitimate interests of the State, the public interest, the legitimate rights and interests of organizations and individuals. Accept the agreement applied customs of the parties has been noted in paragraph 2 of section 5 of the Commercial Act 2005

and in accordance with the laws of other countries in the world such as Japanese law.

### **3. Customary Laws in Judicial Practice in Vietnam**

As stated in Section 2.3 of the Opening part, when discussing on custom through trial practice in Vietnam, this report focuses on a number of civil cases typically applying customs and makes some initial comments, do not generalize to the entire practice of custom application in trial operation in our country. This stems from a number of the following reasons:

First, although customs have been applied in some courts at all levels so far, we do not have any statistics about the application of customs at the court at different levels in order to analyze and infer overview conclusion. This comes from the fact that, the statistics of civil court decisions applied customs require to study these decisions very carefully. By doing that, accurate conclusions may be obtained.

Second, stem from the inadequacies, limitations of the current laws on customary law (as described in section 2.2.2) and the lack of consistency among the courts recognize and apply customs so that the courts seem to fear the application of customs although realizing the value of customary laws in trial practice.<sup>16</sup> So far in our country there have not many cases being tried based on the application of customs.

#### **3.1 Case "Palm Trees 19 hours" - Ba Ria-Vung Tau province**

In the case of "Palm trees 19 hours," the plaintiff is Chiem Thi My Loan (hereinafter referred to as the "Loan") and the defendant that he is Van Thanh

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<sup>16</sup> This confirmation is presented based on opinions of Judge in the Seminar on applying customary laws – International experience and Vietnamese real practice. SPP, Hanoi 6<sup>th</sup> May 2013.

(hereinafter referred to as the "City"). Loan claims to ask Mr. Thanh to return palm trees and fishing rights at the location of palm trees.

Ms. Loan is an owner of fishing ship hired Mr. Trang Van Huong (hereinafter referred to as the Mr. Huong) in a fishing ship. Mr Huong has made a "Palm tree" in materials such as coconut, stone, bamboo baskets and plastic wire off the coast of Long Hai (the town of Long Hai Long Dat District, Ba Ria - Vung Tau) 19 hours; so-called "rub tree 19 hours". He enjoyed fishing in this area since 1992. After termination of the contract with Mr Hung, Loan hired Mr. Tran Van Hung (hereinafter referred to as "Hung") replacing Mr. Huong. In 1999, she found that Mr. Huong have given thi palm tree to Mr Thanh. Thus, Loan sued Thanh and asked him to return the Palm trees and fishing rights set at locations of palm tree. In this case there are two basic legal issues is: (i) Ms. Loan has the right to ask him to return Palm tree or not; and (ii) should apply customary law in this case or not?

At the Judgment of the first instance No. 94 13rd October, 2000, Long Dat District People's Court ruled that the Loan does not have the right to reclaim the Palm trees from Mr. Thanh. However, the appellate judgment No. 46 dated 14<sup>th</sup> December, 2000 of the People's Court of Ba Ria - Vung Tau, decide that he must return the palm trees to the Loan. Civil Court of the Supreme People's Court, in the cassational decision No 93/GDT-DS-May 27, 2002, "Annul of civil appeal judgment No. 46 dated 14/12/2000 of the People's Court Ba Ria-Vung Tau, keep the Judgment Civil Court of First Instance No. 94 of 13/10/2000 of Long Dat District People's Court in dealing with fishing dispute between plaintiff Tran Thi My Loan, and the defendant La Van Thanh ".<sup>17</sup> According to the Civil Court of the Supreme People's Court: "Loan demands Thanh returned palm trees, but cannot prove that he is occupying property owned by the Loan. Mr. Hung laid down palm

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<sup>17</sup> Cassational decision No 93/GDT-DS-May 27, 2002, Cassation Council – Supereme People’s Court.

tree and harvest palm tree, when he sells his fishing location for Mr. Thanh, the tree was disappeared. Loan admitted to costs of palm trees have been deducted from the cost of each voyage. Therefore, though palm trees exist when he continue to use the fishing location, it is not owned by the Loan. Priority fishing rights: This is off-shore, law regulations has not provided, priority of exploitation should be the priority must be determined by custom. As verified in the local authorities and professional bodies (the town of Long Hai Seafood Board), who has the right to choose and give to others fishing rights; site was abandoned for more than three months without any exploitation that they have the right to exploit. As such, the fact that Mr. Thanh use the current fishing point(dispute locations) is consistent with the custom, not contrary to law, does not violate the legal rights of the Ms. Loan.”

In case of "Palm Tree 19 hours", the Court used the custom in settling down civil disputes. In our opinion, this is a typical case for the application of customs. In particular, some customs are applied. *Firstly*, the custom that the driver has the right to choose a fishing location. Specifically, Mr. Huong has selected the location of palm trees and then Hung continues to choose that location. *Secondly*, the driver has the right to dispose of the fishing area; owners do not have the right to choose fishing locations that just may decide to work on the bank, so owners do not have the right to reclaim the site fishing. *Thirdly*, if the fishing place was abandoned for more than three months which has no exploitation, other people have the right to use that location. In this case, there is evidence that Mr. Hung did not exploit fishing locations in more than three months, so he has the right to exploit fishing locations.

Besides, the condition on applying of custom is also mentioned in the process that the court handling the case. Accordingly, customary law is applied to

satisfy three conditions. First, the legal text is not specified priority fishing in offshore waters. Second, the parties have not agreed otherwise. Third, they are not contrary to law and morality.

In the case of "palm tree 19 hours" raises a number of issues related to the application of customary law that the court has not satisfactorily resolved and it is necessary to clarify. These are: (i) which the subject is obliged to prove the applicability of customary law; (ii) how to resolve in the case of different subjects demonstrate differently the applicability of customary law.<sup>18</sup>

*Regarding the subject has the obligation to prove the ability to apply custom:* According to the Vietnamese civil procedural law, the burden of proof belongs to the applicant making requests (section 1, Article 6 and section 1 of Article 79 of the law Civil Procedure 2004 as amended and supplemented in 2011). As such, the cited party who requires for the application of customary law has obligation to prove the applicability of customary law. In this case, the Court accepted the applicability of customary opinions of the officials of the town of Long Hai Seafood, Long Dat District, Ba Ria-Vung Tau), namely Pham Thanh Ha. However, the court did not adequately consider the proven customs against the plaintiff. "Verification Minutes" to be established between the Prosecutor Tran Thi Kim Cuong Pham Cong Thanh Ha on October 14, 2000 show a in fishing customs by local grid drawn in the boat fishing have the right to choose the location of palm trees and dispose of the fishing, boat owners only right to dispose of the job on the coast, such as the sale of fish, but do not have the authority to finance caught at one point or another.

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<sup>18</sup> Ngô Huy Cương, *Concretizing the view of customary law under Resolution No 48-NQ/TW of the Political Bureau*, Electronic Legislative Studies Journal, <[http://www.nclp.org.vn/nha\\_nuoc\\_va\\_phap\\_luat/phap-luat/cu-the-hoa-quan-111iem-ve-tap-quan-phap-theo-nghi-quyet-so-48-nq-tw-cua-bo-chinh-tri](http://www.nclp.org.vn/nha_nuoc_va_phap_luat/phap-luat/cu-the-hoa-quan-111iem-ve-tap-quan-phap-theo-nghi-quyet-so-48-nq-tw-cua-bo-chinh-tri)>



*Regarding the settlement in the case of subjects demonstrate differently on the ability to apply customary law:* In this case, the application for retrial after cassational decision supervision No. 93/GDT-DS-27/5/2002, Loan said that court applied improper customs with the following arguments:

"No local customs" in which the driver has the right to choose and to others fishing "that only profit-sharing customs, the investment method of boat owners, forming a routine relationship between (investment boat owners) driver and fishermen (boat). Because if there is a custom that the boat driver wants to sell for anyone fishing locations ... there would be no investment any boat, no one dared to hire talent. Assume that a person has five boats, hire 5 people then by conflict, 5 give away or sell for five fishing locations, boat owners only wait to be collapse ... social relations, trade relations from constant conflicts, especially later create a dangerous precedent. "Under the provisions of the Code of Civil Procedure, "The party opposed the request of others for his/her must prove that the opposition is grounded and must provide evidence to prove" (section 2 of Article 79). In case the applicant oppose customary law but on the other side refer to or ask to apply to different custom used by other side, the courts need to clarify verification. Clearly, in this case the role of the Court is of utmost importance.

In Vietnam, demonstrating the applicability of customary law is not simply because this country has not the relatively completed and careful research on custom. If the study of custom that it seem to be relating to history or ethnography, not towards customary law.<sup>19</sup> By foreign judicial customs, the proof can be based on the retention customs of documents witness or expert or experts.<sup>20</sup> The owner

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<sup>19</sup> Ngô Huy Cương, *Concretizing the view of customary law under Resolution No 48- NQ/TW of the Political Bureau*, Electronic Legislative Studies Journal, <[http://www.nclp.org.vn/nha\\_nuoc\\_va\\_phap\\_luat/phap-luat/cu-the-hoa-quan-11-liem-ve-tap-quan-phap-theo-nghi-quyet-so-48-nq-tw-cua-bo-chinh-tri](http://www.nclp.org.vn/nha_nuoc_va_phap_luat/phap-luat/cu-the-hoa-quan-11-liem-ve-tap-quan-phap-theo-nghi-quyet-so-48-nq-tw-cua-bo-chinh-tri)>

<sup>20</sup> Manh Quoc Trieu, *Law and civil law – an overview*, 2003 Ho Chi Minh city publisher, 162

need to clarify the following: (i) the existence continuously for a certain period of time; (ii) is established on the basis of consent; (iii) a specific community recognized; iv) the ability to determine the rights and obligations between the parties in certain circumstances; (v) reasonable; (vi) in accordance with the other customs; and (vii) not against the provisions of the legislation. On the application of commercial customs, the French law is divided into two cases: First, if the two parties on the contractual relationship, do the same trade, but then they cannot quote a custom, it is based on that, and second, if they do not make the same trades, the arguments of parties that do not know the custom of the other side may be accepted, unless the other party produce before the court a certificate of the Chamber of Commerce or union on related behavior, conduct and habits.<sup>21</sup>

### **3.2 Disputes on land use rights and the house of worship - Hung Yen**

Nguyen Duc family ancestors have lived in Tra Bo village of Phan Sao Nam, Phu Cu district, Hung Yen province since the post-Le Dynasty; it has been here for 09 generations. In the living process, Nguyen Duc family has established a property including 02 houses of worship. According to local customs, the house of worship are given to the head of a clan to look after, which is transmitted from generation to generation their land, and the land declaration of the head of clan is the declaration on the users and the user is not the owner. The house for worship is assigned to Nguyen Duc Sung – head of clan, he died in the Vietnam War, then his wife, Nguyen Thi That for looking after. Ms. That has locked, preventing members to burn incense to worship their ancestors. Nguyen family make a lawsuit to ask the Court to determine Nguyen Duc family's land and house and gave Ms. That and her son Mr. Khanh to manage according to local customs.

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<sup>21</sup> Francis Lemeunier, *Theory and practice the Commercial law, Business law*, National Politic Publisher, Hà Nội, 1993.

Court of First Instance and the Court of Appeal is based on local customs to determine total area of 280,18 m<sup>2</sup> and 02 houses of worship on land owned and used by the family Nguyen Duc and gave them to Ms. Nguyen Thi That and her son Mr. Nguyen Duc Khanh to take care, management and use of property, which is the assets of Nguyen Duc's family.<sup>22</sup> "Ms. That and Mr. Khanh are responsible for supervision, management, use of assets to ensure that the common use of the family's community, ensuring that customs and worship according to cultural life, civilization and in accordance with traditional social ethics."<sup>23</sup>

However, the Cassation Council of the Civil Court of the Supreme People's Court said that: "the Courts need to clarify the origin of the land and the house to determine the land use rights and house ownership ... the Court of First Instance and the Court of Appeal did not verify these issues, but based on the testimony of the plaintiff to identify the entire house and land is the Nguyen Duc's assets, and assigned to the Ms. That and her son for the management of worship is not sufficiently grounded."<sup>24</sup> Civil Appeal and First Instance judgments are annulled by decision of cassation decision of the Civil Court of the Supreme People's Court. As such, the Cassation Council is not based on custom to automatically recognize the right of land use and ownership of the family Nguyen Duc. According to the Council of cassation, it is necessary to based on the law to identify the source of land, and on that basis determine legal ownership and right to use these assets. We agree with the decision of the Cassation. Because, as defined in Article 3 of the

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<sup>22</sup> Civil judgment of Trial court No 07/2007/DSST dated July 04, 2007, The People's Court at Phu Cu, Hung Yen province, and Civil judgment of Appeal court No 40/2007/DSPT dated September 24, 2007, The People's Court at Hung Yen province.

<sup>23</sup> Civil judgment of Trial court No 07/2007/DSST dated July 04, 2007, The People's Court at Phu Cu, Hung Yen province,

<sup>24</sup> Cassational decisions No 200/2011/DS-GĐT dated March 19, 2011, Civil Court- The Supreme People's Court.

Civil Code in 2005, the custom only applies when not prescribed by law and the parties do not agree. In this case, the Court of First Instance and the Court of Appeal has applied the custom before applying the relevant law to determine the land use rights and house ownership, namely their house of worship.

### **3.3 Dispute on Contract on bailment of property in Dak Lak province (1)**

On 07/02/2001, Le Van Dung (hereinafter referred to Mr. Dung) has sent to agents - Ms. Nguyen Thi Thuy My (hereinafter referred to Ms. My) 3.225kg coffee, Ms. My wrote receipts to Mr. Dung. The two sides agreed that whenever the price of coffee raise up, then closing price for money. On 07/2004, when price up 9.700d/kg coffee Mr. Dung calling Ms. My for closing price, provided the money is 31.282.000d. Because Ms. My did not pay, he sue her to the Dak Lak Provincial Court to ask Ms. My and her husband to pay him the amount of money which has been subject of closing price, the interest rate from the date of closing price or return coffee to him.

In the judgment of the first instance No. 02/2009/DSST 01/10/2009, Dak Lak Provincial People's Court decide to force Ms. My to pay for Mr. Dung the amount that have been the subject of closing price and half damage according to coffee prices at the date of first-instance trial. Dung has made an appeal request to reconsider the entire contents of the case in order to ensure his legitimate rights and interests.

In civil judgments of appeal No. 22/2009/DSPT dated 11/03/2010, the Court of Appeal of the Supreme People's Court in Da Nang finds that, due to fluctuating of coffee prices, it is necessary to accept the petition of Mr. Dung in the direction of force Ms. My to give to Mr. Dung the amount of coffee that Mr. Dung has sent. Accordingly, the Court of Appeal decided to change a part of the judgment of first instance for the payment of the applicant and force Ms. My give to Mr. Dung

3.225kg coffee. In the case that Ms. My cannot afford to return the amount of coffee, it must be paid in cash at the coffee prices at the time of judgment execution.

In civil cases related to the dispute on "contract of bailment property" above, the Court of First Instance has used custom in resolving civil disputes. The custom of payment based on the "closing price" is recognized at local communities of coffee growing regions of Viet Nam reflecting by the fact that the two parties can agree on bailment and made closing price of coffee on a unspecified time to implement the remaining contractual obligations; in this particular case it is when the price of coffee going up, they shall make an closing price for payment. However, as discussed above, the Court of Appeal did not accept and modify the judgment of the first instance related to this payment method.

From such specific case as mentioned above, a comment can be drawn relating to the hearing of the Court relating to customary law that is the criteria to determine the conditions for the application of custom and assessment whether to meets the applicable conditions to apply custom or not is hard to achieve absolute consensus. In fact, the Court of Appeal has ruled out the use of customary law of the Court of First Instance for the only reason for considering the price fluctuations for commodities subject to the dispute. As mentioned on a number of conditions to apply the customs<sup>25</sup> outlined in the case of "Palm trees 19 hours" in section 3.1 on the conditions of the "reasonable" related to the issue price fluctuations in this case is more applicable. It can be argued that, for the Court of Appeal, it cannot determine the exact amount to be paid and the relevant obligations arising under a

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<sup>25</sup> Ngô Huy Cương, *Concretizing the view of customary law under Resolution No 48- NQ/TW of the Political Bureau*, Electronic Legislative Studies Journal, <[http://www.nclp.org.vn/nha\\_nuoc\\_va\\_phap\\_luat/phap-luat/cu-the-hoa-quan-111iem-ve-tap-quan-phap-theo-nghi-quyet-so-48-nq-tw-cua-bo-chinh-tri](http://www.nclp.org.vn/nha_nuoc_va_phap_luat/phap-luat/cu-the-hoa-quan-111iem-ve-tap-quan-phap-theo-nghi-quyet-so-48-nq-tw-cua-bo-chinh-tri)>

contract of property bailment (on the basis of a comparison between the price of coffee on review process instance and appellate trial), this does not only causing difficulties for an civil transaction of this type (for safety or stability), but also caused significant difficulties for enforcement of the Court in the future.

Court of Appeal chose to correct the judgment of first instance towards accepting one of the initial requirements of Mr. Dung in the court of first instance to force Ms. My to pay for Mr. Dung 3.225kg bucket coffee. In case that Ms. My cannot afford to give such quantity, she must be paid in cash equivalent to the coffee prices at the time of judgment execution. In this respect, it can be found that the discretionary power of the Court in using of customary law in Vietnam are more likely to cause significant difficulties for the application of customary law in practice.

### **3.4 Dispute on Contract on bailment of property in Dak Lak Province**

**(2)**

Just another case of dispute on "contract of bailment of property" with the object of coffee in Dak Lak province, but at a higher level trial, the Judicial Council of the Supreme People's Court has found in the direction of respecting for the time of "closing price"; that is the case between Vo Tien Dung (hereinafter referred to Mr. Dung) Buon Ho Coffee Company by Mr. Tran Xuan Binh, who is the legal representative. On 15/01/2000, Dung has given to the Buon Ho Company 2494.8kg bucket coffee and agreed upon when he needs to sell for the Company at the closing price at the time of sale, and at the same time he borrow from Buon Ho Company 19.000.000dong, agreed interest rate of 1% / month. In late 2005, he went to Buon Ho Company to sell cafe to get to know that the company has made an closing price for all of his coffee price to pay his debt (principal and interest), so he sue the Company to ask them to pay him 44.258.000dong.

The Buon Ho Coffee Company said that after Mr. Dung gave the coffee and borrow some money, company had to withdraw the load and it has inform on the mass media regarding the recovering the debt. However, Mr. Dung did not come up, Director of the Company has decided to make a closing price for the whole of Dung's coffee stocked in the warehouse of the Company to pay for his debts.

The Judgment of Civil Court of First Instance No. 13/2008/DSST 22/05/2008 Krong Buk district People's Court decided to accept his request forcing the company to pay him 82,302,000 VND (equivalent quantity of coffee at the current prices is 33.000.000dong/kg), he must pay to the Company the principal and interest; deducted from process from the sale of coffee with the money he owed the company.

The Judgment of Civil Appeal No. 123/2008/DSPT judgment dated 24/09/2008 of the Dak Lak provincial People's Court accepted the appeal of Buon Ho Coffee Company and rejected the petition of Mr. Vo Tien Dung, and correct the Judgement of the Court of First Instance.

The cassational decision No. 94/2012/DS-GDT dated 24/02/2012, cassation Council found that in the process of settling the case, the testimony of the parties regarding the information on announcement of closing price for the coffee stocked in Company's warehouse of the Coffee Company is not uniform. Therefore, it is necessary to verify and clarify the company announcement on radio and television on the closing price of coffee; there are those to come up for the closing price of coffee after notification. In case the company does not have any documentation for proof, the Company cannot make a closing price. Council decided to annul the appellate civil judgments and assign the case to the People's Court of Krong Buk-first instance for re-trial.

Thus, in reviewing a similar case, the Council of Cassation of the Supreme People's Court has decided based on grounds on the recognition of the right to closing price of plaintiff stated in the agreement, unless he/she otherwise has the obligation to notify in accordance with the law, but the plaintiff has not exercised. This is consistent with the custom of payment methods of the community, which are widely accepted in the local coffee growing area in Vietnam. However, in reference to the dispute on bailment of property in Dak Lak province (1), again this shows the conditions for the use of customary law in practice is very difficult to agree except upon review and draw on the experience of adjudication in the court system.

### **3.5 Overall Assessment**

On the basis of reviewing above cases, we have made some following assessment of the custom applied in judicial practice of Vietnamese courts:

*Firstly*, the customs applied in the settlement of civil cases in the courts (first instance, appeal and cassation) and in many different locations throughout the country.

*Secondly*, customary laws being applied to solve a variety of civil disputes, such as disputes over inheritance (disputes on land use and their churches in Hung Yen province), contract (two disputes concerning contracts coffee deposited in the province of Dak Lak), ownership (case "19 hour palm trees"), or the priority to exploit fishing locations (case "19 hour palm trees").

*Thirdly*, the application of customs appears to be an effective way to solving civil disputes, especially in the absence of legal provisions and the agreement of the parties. In case "19 hour palm trees" customs have been applied to solve disputes over the ownership determined to identify the right palms and exploit fishing



locations where law does not prescribe and related parties cannot reach agreement on these issues. For the second case, the Hung Yen provincial court has adopted customs to determine the land use rights and their churches when the Civil Code 2005 provides that this matter is determined by the members of the family agreement (Article 220) or determine according to customs, while family members Nguyen Duc did not reach an agreement. For two cases of coffee bailment contracts in Dak Lak, the custom to help resolve disputes related to the closing price of coffee in coffee bailment contracts - contracts are relatively common in the Central Highlands.

*Fourthly*, the court has been inconsistent in the recognition and application of customs. Courts system have not uniformly applied customs of the superior courts (especially the Supreme People's Court) toward the lower Court or the matter of similar customs application by the Courts at the same level. In addition, the modification of customs applied in the judicial activities of the Court because of changing circumstances has not been taken into account. These are real difficulti so that the recognition and application of customs within adjudicative system of people's courts at all levels are not high efficiency.

*Fifthly*, most courts still face obstacles in the process of applying customs, particularly relating to two issues: (i) identifying customs that recognize and apply, (ii) conditions to apply customs. A number of different conditions have been used to deny the use in Court's actual practice. In addition, the recognition and application of customs in judicial activities also have problems is that which subject is obliged to prove the applicability of customary laws; how to resolve in the case that different subject prove differently on the capabilities to apply customs. These are very important issues to be addressed in order to properly recognize and apply customs in the judicial activities of the Court in a very effective way.

Thus, there are still many practical problems in applying and recognizing customs in Vietnam. This shows the closed relationship between laws and customs. The underlying causes of these problems, which arise in practice of applying recognizing customs, are the current laws about customary law are inadequate and shortcomings. Meanwhile, the Supreme People's Court has not issued any guidance on the recognition and application of customs at trial. In addition, we have a list of country practices. Moreover, the Court at all levels have not had a closed cooperation or shared of information, experience to apply custom in order to achieve consensus on this issue. To improve the efficiency of application of customary law in Vietnam, these problems need to be addressed, including enhancing of the system of legal provisions on customary laws, which should be a priority to be implemented.

#### **4. Some recommendations on the recognition and application of customary law in Vietnam**

##### **4.1 Objectives, principles and orientation of the recommendations**

The recommendations in this report aims at improving the Vietnamese legislations on customary laws; resolving shortcoming of the application of customary laws in Vietnam; ensure human rights, freedom, democracy of citizenship, fairness society; enhance access to justice and protecting the rights of ethnic minority communities; maintain social stability, economic development and social welfare. The ultimate goal of proposal in this report is intended to improve the effectiveness of application of customary law in Vietnam.

Regarding principles and orientations:

*Firstly*, the recommendation on recognition and application of customary laws in Vietnam is based on the directions to develop and improve the legal system of Vietnam drawn in the Resolution No 48-NQ/TW of the Political Bureau

(Politburo) on the strategy for develop and improving the legal system of Viet Nam through 2010, and orientations towards 2020<sup>26</sup>. That is:

- (i) The custom, “contributing to supplement and improve the law”<sup>27</sup>. That is, in the process of recognition and application customary law, it should be noted that customary law is just additional resource for the legal system but not the primary source of the law of Viet Nam. The Vietnamese legal system is the written one, thus, legal documents are primary legal forms<sup>28</sup>.
- (ii) Recognition and application of customary law must "ensure human rights, the freedom, democracy right of citizen"<sup>29</sup>. In our country, at the present, the gap between urban and rural, mountainous and remote areas; and between the rich and the poor are becoming more wider. The economic development in major cities is relatively quickly whereas it develops slowly in the rural, mountainous, and remote areas; with poor social conditions; the high poverty rate; while the social welfare has not been fully guaranteed. This situation limits the ability to access the justice and the protected rights of organizations and individuals in these areas. Recognition and application of customary laws is widely acknowledged as one of the effective tools to enhance the ability to access the justice, ensure the social equality,

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<sup>26</sup> The Political Bureau, The Central Committee Communist Party of Viet Nam at the 9<sup>th</sup> National Congress (2005), Resolution No 48-NQ/TW about *The strategy for building and improving the law of Vietnam through 2010, and orientations towards 2020*, Ha Noi.

<sup>27</sup> Part 1.7. Section III Resolution No 48-NQ/TW of The Political Bureau about The strategy for building and improving the law of Vietnam through 2010, and orientations towards 2020.

<sup>28</sup> In Viet Nam, at the present, two legal forms that are recognised officially and are considered as the source of law are customary law and legal documents. In particular, the legal documents is primary form.. Views: Bùi Xuân Phái (2008), “Socialist Law”, *The basic content of theoretical of state and law*, Transport Publisher, Hà Nội, pg. 233-234; Nguyễn Ngọc Điện, *Some theoretical issues of the written law analysis methods*, Legal Publisher, 2006, pg. 10-11.

<sup>29</sup> Part 2.1. Section I Resolution No 48-NQ/TW of The Political Bureau about The strategy for building and improving the law of Vietnam through 2010, and orientations towards 2020.

and protect the human rights, in particular, rights and legitimate interests of minority communities<sup>30</sup>.

- (iii) Recognition and application of customary laws must "derived from reality in Vietnam, simultaneously selectively acquire international experiences about building and organizing law enforcement"<sup>31</sup>. Although customary laws have existed for a long time in many countries around the world being at high level of development that is worthy of for Viet Nam to apply, the application must be done in careful, selective and suitable manner, taken into account the conditions of Viet Nam.
- (iv) The proposals for the recognition and application of customary law must "harmonious combine of cultural identity, tradition and modernity of the legal system"<sup>32</sup>. "Each ethnic group has its own customs and traditions that are diverse and plentiful, deeply and wholly stay in life and soul of the people. Therefore, it should have a proper orientation, with the appropriate steps and measures, that can overcome the drawbacks and promote the good traditional or values of the nation."<sup>33</sup>.

*Secondly*, customary laws should not considered as being an independent legal issue, it must be put in overall relation with economic, political, cultural, social factors. Being derived from the characteristics of customs, which are the rules

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<sup>30</sup> Phan, Nhat Thanh, *Recognizing Customary Law in Vietnam: Legal pluralism and human rights*, Doctor of Philosophy Thesis, Faculty of Law, University of Wollongong, 2011, tr. 295-296

<sup>31</sup> Part 2.3. Section I Resolution No 48-NQ/TW of The Political Bureau about The strategy for building and improving the law of Vietnam through 2010, and orientations towards 2020.

<sup>32</sup> Part 2.3. Section I Resolution No 48-NQ/TW of The Political Bureau about The strategy for building and improving the law of Vietnam through 2010, and orientations towards 2020.

<sup>33</sup> The Ministry of Justice, Institute of Jurisprudence (1997), *Topic about customary law*, pg.22.

of conduct existed long time in the community, in association with the moral norm and religious, hence, the customary law could not be improved unless we place them within the relationship with these factors. Moreover, in our country, the customs, traditions are used popularly in rural areas, mountainous and remote areas - where existing typical natural distinctiveness and undeveloped socio-economic. Therefore, these factors should also be considered when making the proposals for recognition and application of customary law. To conclude, within framework of this report, economic development - the content of the infrastructure - is firstly mentioned as a crucial factor for the development of the law - the content of the superstructure.

*Thirdly*, one of the targets of recognition and application of customary law is to ensure the human rights, the freedom, democracy rights of citizen, social equality for ethnic minorities but not grant autonomy or protect the interests of some specific groups.

Applying customary law might create the conflict between the State and minority groups, between common interests and interests of group, between interests of minority groups together. Hence, it needs to ensure that harmonious interests, to prevent the conflicts and discrimination. Customary law is applied to reflect the desire of the State in promoting and protecting human rights, improving the lives of ethnic minorities, but not to give an opportunity to establish autonomy or avoid the administration of state and appropriating the benefit of others<sup>34</sup>.

## **4.2 Specific Recommendations**

As stated above, customary law is not a legal issue existed independently but are always associated with other factors such as the economy, society, culture,

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<sup>34</sup> Phan, Nhat Thanh, *Recognizing Customary Law in Vietnam: Legal pluralism and human rights*, Doctor of Philosophy Thesis, Faculty of Law, University of Wollongong, 2011, tr. 298.

traditions, perceptions ... Therefore, recommendations to improve the effectiveness of application of customary laws must be linked with these factors. The recommendations in this report are divided into three groups: (i) the improvement of legislation on customary laws, (ii) the proposals for a reasonable investment for economic development in rural, mountainous and remote areas, and (iii) a number of other proposals.

#### ***4.2.1 To improve legislations on customary laws***

***Firstly, identify form of legal documents on customary law and the content of each document.***

In our country today, as analyzed in section 2 of this report, the matter related to customs is governed in so many different legal documents such as the Constitution, Laws, Decrees, Circulars and Resolutions. However, the legal provisions relating to customary law in current legal documents does not provide in a systematic and uniformed manner. To improve the legislation on customary law, it must firstly determine: matters related to the law is specified in which legal documents, which is the content of such legal documents, the relations between the provisions in such legal documents. This is important for a country with the civil legal system as Vietnam, in order to minimize the problems arising in the application of customary law. In this regard, we propose some concrete suggestions as follows:

(i) Issues relating to customs need to be specified in the legal documents and documents with its value similar to legal documents. For example, collecting and publishing a list of customs in Vietnam is necessary. However, rooted from the nature of the customs being regularly change and abundance, the issuance of a legal document, which includes list of entire customs across the whole territory of the country in a specific time, appears not to be suitable. In other words, this list is only

as valuable as writing legal documents, not legal documents (see below third recommendations)

(ii) the Constitution should include a more clearly defined provisions of Article 5 of the Constitution 1992 on recognition and application of customs. This is the fact also existed in many other countries. For countries being considered customary law as a formal source of law, the Constitution states clearly this matter. For example, section 2 (1) of Singapore Constitution provides that: "law" includes written laws and English laws, or other tools used in Singapore and common law being still used in Singapore so far and customs still in force in Singapore. Similarly, section 160 (2) Malaysian Constitution prescribes: "Law" includes written laws or precedent, which is still in Federal or any locality of the Federal, and any customs . . . still in force in Federal or any locality of Federal.

(iii) the Civil Code should have be a separate legal provision on customary law. This provision includes part on customary definition (given the criteria to define custom) defines customary law (given the criteria to become a customary law); forms to recognize customs; conditions apply custom.

(iv) Law on Marriage and Family, Commercial Law should includes specific regulations on customs to governs family and marital and trade relations. These rules must be derived from and consistent with legal provisions on customary laws as provided in the Civil Code.

(v) Summation of court's annual adjudicative experiences, includes, comments and evaluations on the application of customary law in the whole country.

(vi) Resolution of the Justice Council of the Supreme People's Court to determine which custom being recognized as customary law. This resolution is

essentially a "codification" of content of customs in the annual summation of court's adjudicative experience.

***Secondly, it is necessary to define 'custom' and 'customary law' in the legislation.***

This is an important issue, which should be taken at first, because many people still wrongly understand between the 'custom' and 'customary law'. This affects to the effectiveness and accuracy of the application of customary law. It is necessary to have a clear definition of customary law that is the custom having been used for a long time, been recognized voluntarily and binding toward a certain communities being recognized by the State.

***Thirdly, compilation and collection of custom or the list of customs***

Resolution 48-NQ/TW of the Politburo dated 05.24.2005 indicated orientation: study on the ability to exploit and use customs. Therefore, in order to use the customs it must firstly exploit customs, in other words, to collect and compile the customs of the country into "The list of customs."<sup>35</sup> "The list of customs" is the basis for the Court to consider choosing custom applicable to each particular case.

Vietnam has 54 ethnic groups of people, including 53 ethnic minorities with rich, diverse customs but very few customs have been collected and stored. Therefore, it is necessary to review the whole of the common customs and traditions existing in the lives of ethnic minorities. We should gather customs,

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<sup>35</sup> Cuong Ngo, Some opinions on applying custom to solve civil disputes. Seminar documentation on applying custom on adjudicative activities. International experiences and practical reality in Vietnam. SPP, Hanoi, 6<sup>th</sup> May 2013



determine the scope of adjustment, the value of custom to avoid arbitrary application or omissions.<sup>36</sup>

“The custom” should not be a legal document or the content of a legal document. Because customs can be changed, very rich and diverse while legal provision is stable (in certain stages), generalized and unified.

For the effective collection and compilation of "the list of custom", there should be a cooperation of at least the following agencies: the Supreme People's Court, Ministry of Culture, Sports and Tourism Committee nation, the Ministry of Justice. "The list of customs" should be widely disseminated to organizations, individuals, and should be supplemented periodically.

***Fourthly, it should regulate criteria/conditions for the custom to become customary law***

As regulations on customary condition to become customary law, should consider some of the following requirements:

- (i) Being derived from practice to adjust practices to treat the behavior of the 54 members of the ethnic community in Vietnam. It should be noted that the customs of Vietnamese peoples, including the rules of ethics and religious norms. Thus the source of customary law includes not only customs but also includes the ethics and religious beliefs.
- (ii) Customs must exist at the time of application and continuity. If the habits and behaviors experience exists for a long time, but if not used, shall not be recognized as customary law and not applied. So customary law should be applicable at the time the transaction is

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<sup>36</sup> Phan, Nhat Thanh, *Recognizing Customary Law in Vietnam: Legal pluralism and human rights*, Doctor of Philosophy Thesis, Faculty of Law, University of Wollongong, 2011, tr. 303-305.

established and the time the dispute arises? In our view, we should apply customary law at the time of the transaction set. If at the time the dispute arises, the customary law is no longer existed or has been amended, we should apply the law.

- (iii) Customs must be regulatory. Customs, being rules of conduct to bring the general pattern, the criteria to define limits and assess behavior, is applicable to all organizations and individuals involved in social relations and practices and that adjustment is applied repeatedly.
- (iv) Customs must be consistent with the policy of the Party and the State: When the recognition and application of customary law, it must comply with the general policy because this policy to ensure stability and social development of the country. In other words, public interest must take precedence over the interests of a group of people.

***Fifthly, regarding form of customary law recognition***

As mentioned in the first part of the report and customary law is recognized through two forms: legislative activities and judicial decisions. In other words, these bodies have authority to transfer customs into customary laws. For Vietnam, form of customary law recognition through legislative activity is more appropriate because: our country under the civil law legal system and the courts have no legislative powers.<sup>37</sup> Regarding legislative process, customary law specified in the text of the Constitution and other legal documents. This recognition has created a legal status to customary law at the national level rather than just locally as it was.

Besides, it is necessary to combine role of the Court in recognizing customary law in our country. The court is the body to apply the customs in its

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<sup>37</sup> Law on organizing of People's Court, Article 1.

judicial activities, the Court should understand what customs should be recognized and annulled, what is necessary and suitable customs.

To perform the role of the Court in customary law recognition, the issue of customary law application should be supplemented and focused in the Court's summarization on adjudicative activities every year. Specifically, in this text, it is necessary to indicate that a custom applied in a specific case is necessary; the State should recognize and ensure the implementation of customs with significant meanings of a customary law. When considering these issues, the Court should consider the specific customs that have been shown in "The list of customs" or not. If a custom has been listed it should be considered as one of the valuable basis for recognizing such custom become customary law.

In Vietnam, even though the text of the Court's annual summarization on adjudicative activities by the Supreme People's Court is not a legal document, but its guiding value is quite significant for adjudicative activities by the local courts. Therefore, the content of the customary law in the Court's annual summarization on adjudicative activities of the Supreme People's Court will contribute to removing obstacles in adopting custom in order to address specific cases in the local courts. Moreover, the Justice Council of the Supreme Court should base on the Court's annual summarization on adjudicative activities of the Supreme People's Court to officially recognize custom to become customary law. That is, by the provisions of the Resolution promulgated by the Justice Council of the Supreme People's Court, some custom can be recognized by the State.

Thus, it can be summarized the method to recognize customary law in our country through the following steps: (i) the Court at all level apply customs in its adjudicative activity based "the List of Customs" (ii) the Supreme People's Court review of the ability to recognize customary law, in particular customary law,

through the Court's annual summarization on adjudicative activities of the Supreme People's customs in its the Resolution on the basis of considering the Court's annual summarization on adjudicative activities of the Supreme People's. Besides, some specific customary laws are also stipulated in the Civil Code, the Laws of marriage and family and Commercial Laws.

In the long term, we should also consider the simultaneous recognition of customary law through judicial decisions similar to many countries around the world, such as USA, UK, Australia, Ethiopia, some countries in Africa and Latin America.<sup>38</sup> In this circumstance, customary laws selected and applied by judges. As a general rule, only new customary laws are applied. By this method, customary laws have state power and become legal regulations.

***Sixthly, regarding the scope of application of customary law.***

Regarding the application of customary law: according to research group, the customary laws should only be applied in civil areas. Specifically, the customary law applies only to adjust civil, marital and family, commercial relations, not applicable to criminal and administrative. Civil areas including relationships arise frequently in everyday life, most associated with the different subject and communities, and different localities may have different rules of conduct.

Regarding geographical affect, although specific customs are recognized by the state and become a customary law, but in principle, it should consider such customary law only applies to region/part/administrative areas forming and applying similar customary laws. That is, should not be applied customary law in A

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<sup>38</sup> See: Leila Chirayath, Caroline Sage and Michael Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*, July 2005, <<https://openknowledge.worldbank.org/handle/10986/9075>>.

region/part/administrative areas to regulate social relations arising in B region/part/administrative areas - and where there exists no corresponding customary law. Because, customary law actually is custom recognized by the State and the custom associated with each particular locality. Furthermore, the application of customary law to address the specific issues of the local, it should not be taken to settle for other localities.

***Seventhly, regarding conditions to apply customary laws.***

It is necessary to amend Article 3 of the Civil Code 2005 to allow the parties towards agreement on custom applied, but with the conditions that the customs are not contrary to the fundamental principles of law, not violate rights and the legitimate interests of the State and public interests, rights and legitimate interests of organizations and individuals. Regulating according to this direction rooted from the characteristics of civil relations that they are the voluntary agreement between the parties and for the purpose to solve quickly, efficiently and civil cases.

***Eighthly, clearly defining priority order to apply customs in respecting the agreement of the parties, then apply customs and then apply other grounds, finally.***

Because of the characteristics of civil relations is the voluntary agreement between the parties, should only apply customs and other bases in the event that parties cannot reach agreement on the issues to be addressed. According to this principle, Article 28 of the Civil Code 2005 should be defined as follows: *"Individuals when was born defined by ethnicity of the father or mother. In the case of the father and mother belong to two different ethnicity, the ethnicity of the child is determined by the agreement of the father or mother. If the father or mother cannot reach agreement, the ethnicity of the child defined by the father's or the mother's ethnic according to customs. "* Paragraph 1 of Article 265 of the Civil

Code of 2005 shall be provided as follows: *"The boundaries can also be determined according to custom. If there is no custom of determining boundaries, boundaries, having existed over thirty years without dispute, is recognized. "*

***Ninthly, to resolve conflicts between customary law.***

Conflicts on customary laws may occur in the case of the parties belong to different locals and/or different communities, having different custom on the same transaction. In this case, it should be specified in the direction that: firstly to encourage the parties agree to selected customary law applied. In the event parties cannot reach agreement, the Court resolved on the basis of balancing interests when choosing the customary law applied.

***4.2.2 Reasonable investment for socio-economic development in rural, mountainous, and remote areas.***

As mentioned above, custom is used more popular in rural, mountainous, and remote areas- where has undeveloped socio-economic conditions. This is one of the causes of cognitive limitation, limited ability to access and implementation of the law, maintain the application of the customs and habits which include outdated traditions of people living in these areas. Therefore, The State should have policies, plans and conducting reasonable investment for socio-economic development in these areas.

***4.2.3 Other recommendations***

*Firstly*, promoting the propagation, dissemination and legal education to increase educational level, improve legal awareness for rural people and ethnic minorities. Under Resolution No 48-NQ/TW dated May 24, 2005 of the Polibureau about the strategy for developing and improving the Vietnamese legal system through 2010, and orientations towards 2020, one of effective law enforcement solutions is the development of the information systems and dissemination of

education: “Developing information systems and dissemination of legal education, building and implementing the National Program on dissemination and long-term legal education. Establishing the National Legal Information Center, developing legal information network. Encourage organizations and individuals to investment to develop information services, counseling, legal assistance, satisfy with diverse demands of the people and accordance with the law. Promoting legal aid for the poor and the people in difficult circumstances in direction of socialization.”

*Secondly*, enhancing training and retraining for judges, court staff about the role of customs in adjudicative activities, the issues involved in the recognition and application of customary law. At the same time, among the Courts should closely coordinate and share information with each other in order to minimize the differences in the recognition and application of customary law.

*Thirdly*, enhancing training and fostering legal level for staffs in rural, mountainous and remote areas. The State should invest funds for staff training in these areas. Because the local staffs who are daily exposed to ethnic minorities and the majority of staff are local people who live there, so there are many advantages for them to disseminate the law to community. Moreover, the composition and quality of local staff in these areas is still limited. Therefore, “it must be improved the quality of staffs, including education level, management skill, general work operating capacity, organizational structure, essentially the arrange personnel structure, quantity and quality of staffs in the mountainous and highland areas, ethnic minority areas before requiring the implementation of basis democracy

regulation which set out series of problems that all sectors at all levels must resolve not only immediately but also for a long-term”<sup>39</sup>.

In order to create favorable condition for ethnic minorities to understand and implement eliminate backward customs and habits and promote the good customs and habits in accordance with the provisions of the law, it requires officials teams must understand the law, savvy the characteristics of the nation. To build synchronous officials team at the commune level, we need to implement the survey, review the structure, the composition of staffs, especially pay attention to staffs who come from ethnic minorities about qualification, capacity, and quality. Thereby, setting up a training plan, building officials team at the commune level in general, and Justice-Civil status officials in particular, have the capacity and quality. At the same time, it needs to have the regime, preferential policies, a reasonable allowance for staff working in law enforcement. Besides, it needs to have programs, plans to recruit staffs who have qualifications, capacity and quality for training in the legal profession. Renewal, rejuvenation of officials team, combination of ages to ensure the continuity, inheritance and development.

*Fouthly*, promoting the role of key individuals and organizations in the recognition and application of customary.

The village patriarchs and chiefs who are reputable, have an important role in maintaining the traditions and practices of the village rules and decided to solve the problems arising in the village. The village patriarchs who accumulated a lot of experience, having a deep understanding of how to make foods, customs, habits,

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<sup>39</sup> Nguyễn Quốc Phâm (editor), *Basis political system and democratization of social life of rural, mountainous, and ethnic minority areas( the Northern areas of our country)*, National politic Publisher, Hà Nội, 2000. pg 21-22.



internal and external relations, all disputes over land, water... The village patriarch is the highest adviser on customs, habits, production experiences, well behaved for the individuals and for the whole community. The village patriarch plays a leader role of his compatriots<sup>40</sup>. However, the "village elders and chiefs, the patriarch still have strictly feudal- patriarchal ideology, convincing them is not simple; need patience, understanding psychology, respect and encouragement satisfactory"<sup>41</sup>. The problems which the village elders, chiefs, the patriarchs resolve almost based on experiences, ethics, customs and practices that exist for long-term, thus, some problems were not resolved in accordance with the law. Therefore, the State should have specific policies and plans for the training, the law education to the village patriarchs and chiefs. The village elders and chiefs will be an important connection that bring the laws and policies of the Party and State to ethnic groups<sup>42</sup>. They help choosing good habits, eliminating outdated customs; creating trust and promoting customs enforcement effectively. In our opinion, we should have specific provisions on the legal status (rights, duties and scope of authority) of village patriarchs and chiefs in the recognition and application of customary law in legal documents.

## 5. Conclusion

In Vietnam, the customary law is not an entirely new one, but it still is a complex issue. The experience of other countries and the reality practice in Vietnam show that the value of customary laws in adjusting social relations in the

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<sup>40</sup> Ministry of Justice, *Some problems of legal education in mountainous and ethnic minority areas*, National politic Publisher, Hà Nội, 1996.pg. 116

<sup>41</sup> Ministry of Justice, *Some problems of legal education in mountainous and ethnic minority areas*, National politic Publisher, Hà Nội, 1996.pg. 146.

<sup>42</sup> Ministry of Justice, Institute of Jurisprudence, Topic: *The relationship between custom and law*, Hà Nội, 1999. pg74.

field of civil protection, and to protect the legitimate rights and interests of the subject. However, the laws on customary law has formed very long ago, but so far there are not less shortcoming, and at the same time, adjudicative activities also exposes problems in the recognition and application of customary laws. To improve the efficiency of application of customary law, it should be made more comprehensive solutions, not only improve the legal framework, but also implement comprehensive solutions for the recognition and application of customary law. Furthermore, to achieve this goal, there should have more efforts of other entities, not just the judiciary. In particular, clear policy and guidance of the Party and State on this issue and the closed coordination between relevant sector should play very important role. /.

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