

# The Development and Application of Customary Law in Vietnam: Perspectives and Challenges

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Customs have long been considered to be one of the main sources of law both domestically and internationally, even the earliest source recognized. Its validity and status derives from a prolonged, consistent, and stable usage and adherence of certain community, being local or professional one. In Vietnam, customs are of secondary importance only after written laws enacted by state authorities. Part of the reasons is attributable to the diversity of cultures and ethnic minorities who still respect and apply their own customs to the daily civil relations. Other reason is because of the deeper integration of Vietnam into international commerce where long upheld commercial customs play an important role. This leads to the codification of customs into a wide range of domestic statutes and delegated legislation. However, the development and codification of customs in Vietnam also faces a number of challenges which threaten a sound and meaningful application.

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The Civil Code of 2015 has undertaken a significant reform which is meaningful for both legal theories and practices—it widens the scope of application and further specifies types of legal sources, including customary law, case law, and equity. In the broad meaning of civil law, including all principles of private law, this code defines custom as a type of source that has a second priority, after legal documents. However, before this code was promulgated, customary law has had a long history of development and codification in Vietnam.

During the French colonial period, customary law was considered as an additional legal source to compensate for shortcomings of legislation. This source was only applied when there is no related provision provided and also it is not inconsistent with other provisions of written law. Customary law is perceived through two factors: (1) material factor or customary factor, which means that behavior is followed by many people over a certain period of time, as long as it does not affect rights of others; and (2) mental factor or awareness of the necessity of that custom (Cuong, 2010, p. 71). In specific, the Tonkin Civil Code of 1931 prescribed that:

“When there is no enacted law, judges shall follow customary law to adjudicate, and if there is no customary law then follow justice and equity, or particular customs, habits or intention of parties. Judges shall follow doctrine and precedent” (Article 4).

The above article indicates that customs were of importance after written law only. Although the types of legal sources were listed, judges had a great power in identifying and selecting legal sources in trial, including

the determination of the use of unwritten law. However, this determination and choice must be based on the basis of legal doctrines and precedent. This provision clearly demonstrated the flexibility in the choice and application of legal sources and the development of normative guidance through practical development.

Afterwards, the Annam Civil Code in 1936, or the Central Region Civil Code enacted in 1936, was also built on the basis of the Tonkin Civil Code in 1931. Therefore, the content of Article 4 of this code was exactly identical to Article 4 of the former one. However, in the part “Preliminary Provision” of the Civil Code of 1936, there was a passage as follows:

The intentions of this amendment are to revise the Code of Central Vietnam for clarity and suitability, provisions which can be followed by the Tonkin Civil Code shall be followed as such, but at first followed all opinions of people in the country to answer the questions about the customs and wishes of the people. There are a few articles that must be based on the current statutes edited into this code. Many articles are wordy in order to deliberately make clear that judges and parties can easy to understand and apply them.

This passage shows that the Annam Civil Code of 1936 was very attentive to legal practice and to the simplification of the expression of legal norms. The attention in customs and traditions is to preserve the traditions of the country even though at that period Vietnam was dominated by foreign invasions. Later on, the contents of Article 4 were reintroduced and incorporated into the civil code of the Republic of Vietnam in 1972.

In addition to these provisions on the recognition of customary law as an important supplementary source for written law, the civil code under the old regimes in Vietnam followed the model of the French Civil Code of 1804 which has the principle of forbidding judges to refuse to adjudicate with the reasons of the absence of particular provision or the obscurity of law. Therefore, in the cases where the written law contained such shortcomings, judges still had to find solutions to the disputes. The best way to get the most acceptable solution was looking for the rules of custom because these rules were closest to the people and to the communities where the disputes took place. This principle has also found its way to the Civil Code of 2015.

Taking a closer look at the legal issue around these terms, the term “custom” (*tap quan*) differs from the term “customary law” (*luat tục* or *tục lệ*). According to one study, “custom” implies “behavioral habits” including the rights and obligations of concerned parties, and only becomes “customary law” if it is mandatory in terms of intention (Mau, 1961, pp. 295-296). Before the Civil Code of 2015 was enacted, the Civil Code of 2005 at Article 3 and the Commercial Law of 2005 at Article 13 had laid down the principle of customary law in the adjudication of civil and commercial disputes. The term “custom” in these laws referred to a narrower concept than the term “habit” (*thói quen*). The Commercial Law of 2005 provided the following definition: “Commercial custom is a widely accepted habit in commercial activity in a region, country or a trade domain with clear content recognized by the parties to determine the rights and obligations of parties in commercial activities”. Leaving aside its academic accuracy question for a time, this definition shows the logical connection between the concept of “custom” and the concept of “habit”, which means that “habit” is the family concept (*khái niệm loại*), and “custom” is the genus one (*khái niệm giống*).

There is also a perception that it has a distinction between “custom” and “customary law”, which should be written that “rules are respected by the community for generations, when recognized and enforced by the state authority, then these customs become customary law” (Nghĩa, 2004, p. 7). In fact, customary rules can be of various kinds. The customary rules of trade in the world are the rules of the businessmen formed in the professional community and applied in a particular mechanism at the fair. Likewise, Tay Nguyen’s customary

law is voluntarily followed by any member of their community. Therefore, the Civil Code of 2015 has the following definition of “custom”:

Custom is a code of conduct that clearly defines rights and obligations of individuals and legal entities in a particular civil relationship, formed and repeated many times over a long period of time, widely recognized and applied in an area or a region, ethnic group, population community or in a civil domain.

This is a well-defined definition of the basic characteristics of customary law that distinguishes it from behavioral habit, but it still does not clarify its mental factor. When researching about customary law in Vietnam, it is only argued that:

“The state chooses, recognizes the universal norms of the customary law, and gives them a binding authority. This is a legal way to turn social norms into legal norms” (Son, 2001).

In their view, the norms of customary law are considered as simple social norms, but they have a role in the development of legal rules by their generality and universality. In addition, there is a more sufficient and more coherent view of the relationship between customary law and the source of legal normative documents, as follows:

The customary law is not pure “law”, and of course not strict “custom”, but rather an intermediate form of law and custom; in other words, it is a highly developed form of custom and an initial form, or pre-legal form. Consequently, this form of customary law is consistent with pre-industrial societies, in accordance with the small communities associated with each specific ethnic group and locality. This characteristic of customary law provides not only practical material for legal historical researchers, but also a practical basis for the inheritance of customary law in the development of legal system and on the contrary, “legalize custom” as some people think. (Thin, 2001)

Although it can be said that these perceptions of customary law in relation to the law derive from the concept of legal extremist positivism, which acknowledges that the only accepted legal source is legal documents issued by the state, it however still shows a remarkable way of looking at the role of custom or customary law in the development of legal documents. In addition to this, one lawyer’s point of view is that “Laws are generally rules of conduct that are generalized from customs and habits of human communities, but further develop until the state intervenes, customs are turned into ‘customary law’” (Nghia, 2004, p. 7).

### **The Nature and the Role of Customary Law**

In countries with Soviet legal tradition, they generally consider legal documents as the only source of law. Therefore, jurists of these countries sometimes distinguish between legal documents and customary law. Moreover, there are opinions that in the transition to socialism, there are progressive customs expressing Vietnamese tradition and moral which are respected and provided with conditions for them to take real effects (Hanoi Law University, 2009, p. 354). Jurists in Vietnam therefore often define: “Law is a system of rules of conduct promulgated or recognized and guaranteed to implement by the government, demonstrates the will of the ruling class, and also is element that regulates social relationships to create order and stability in society” (Faculty of Law, Hanoi National University, 1993, p. 26). The rules of customary law are legal rules that are recognized by the state to regulate social relations. Hence, customary legal rules can still be applied as a supplementary source of law in Vietnam. In fact, some acts of private law now include principles of application of customary law for adjudicating disputes. And in judicial activities, courts have accepted and applied a number of customs in many disputes, particularly foreign trade ones. The Soviet law tradition only considers

custom as a useful role in interpretation or application of written law or, in very rare cases, customs or behavioral habits mentioned in enacted law (David & Brierley, 1975, p. 254).

However, there exists quite contrasting opinions. The textbook *Theories on State and Law* of the Hanoi Law University on the one hand admits that “the basis of legal formation is customs” in many countries, but still claims that “these customs, if considering their origin, generally formed spontaneously, slowly and often locally (in a narrow range)”, as follows: “Therefore, in principle, customary law is not possible in demonstrating the nature of socialist law, can not become a basic form of socialist law” (Hanoi Law University, 2009, p. 354).

Comparative jurists argue that Soviet jurists follow legal positivist school. In legal science, it is understood that this school strives to eliminate the role of customs, and that the concept of customs now occupies only a minimal place in codified law so that in the future they are only recognized through the will of legislators (David & Brierley, 1975, p. 118). However, there are comments by Vietnamese jurists about the perception of law that derives from the class nature who do not completely agree with the legal positivist school. In the monograph on *Essential Theories on State and Law* of the Institute of State and Law, there is a comment that: “Such perception of law is intrinsically linked with perceptions of legal positivism according to which law must be the expression of the will of the ruling class”; and “There are also different opinions on legal phenomena” (Institute of State and Law, 1995, p. 121). As a matter of fact, cultural and ethnic researchers in Vietnam now have a different view: “The experience of previous generations shows that community management regulations can only be accepted and seriously implemented by the community, if they become culture, customary rules” (Quy, 2000, p. 15).

Many Vietnamese jurists who analyze the rules of customary law claim that: (1) Habits or custom have to be general and long-term, meaning that the community has recognized and used such customs as rules of conduct to resolve disputes, and they have been gradually formed over a repetitive time; and (2) all members in this community are aware of the indispensable necessity of those customs (Manh, 2000, pp. 153-154).

From the international point of view, Article 38 of the Statute of the International Court of Justice prescribes that “international custom, as evidence of a general practice is accepted as law”. In international law, the term “custom” and the term “usage” are sometimes used interchangeably but with different meanings. Ian Brownlie argues that “usage” is a general practice that does not carry a legal obligation, such as ceremonial greetings on the sea and the habit of exemption for diplomatic vehicles in “no parking” place (Brownlie, 1999, pp. 4-5). In Vietnam, there is a similar perception, for example, paying tip to a taxi driver can not be considered as a custom even though it is a habit (Mau, 1961, p. 296). These notions show that the general habits of a community do not provide a legal solution to the disputes or, in other words, create no rights nor obligations for the parties. However, in private law, the behavioral habits of the parties can sometimes provide legal solutions to the disputes, for example in a contractual relationship, behavioral habit could supplement what the contract does not provide (Cuong, 2012). Thus, not every rule of conduct can be applied to the settlement of legal disputes between the parties. Only habits and customs that are recognized as customary practices can provide a source of legal solutions.

### **Classification and Application of Customary Law**

In the field of law, customs can be divided into different categories. For example, in private law, customs are classified into civil customs and commercial customs. Therefore, when studying the application of

customary law, such classification cannot be ignored, especially in those countries which have a legal system classified into civil and commercial law. Mentioning the application of customs to adjudicate commercial disputes means the distinction between civil law and commercial law. It is therefore impossible to disregard commercial practice because the first legal rules to consider in applying trade disputes are commercial rules. At present, the Civil Code of 2015 indirectly refers to the distinction between civil and commercial law, for example, Article 75 of the Civil Code 2015, which deals with commercial entities and Article 76 of this law on non-commercial entities. However, in addition to the Civil Code, there are still Commercial Act in 2005 and many other commercial laws, such as the Maritime Code of 2015, Law on Insurance Business of 2011, Law on Credit Institutions of 2010, Law on Negotiable Instrument of 2005, etc. The Civil Procedure Code of 2015 distinguishes between civil and commercial law through regulations on the distinction between civil and commercial disputes. Thus, the distinction between civil law and commercial law in enacted law is still in place. From the academic aspect, there is no faculty, college, or university of law in Vietnam today that does not teach civil and commercial law separately. Therefore, the classification of customs into civil and commercial practices is not only academic but also significant and practical in the practical application of the law to adjudicate disputes. However, civil and commercial practices do have common features of private law customs, which means that they regulate private relations between parties in a simple way. Commercial custom can be divided into two categories:

(1) The first type is pure or original commercial custom, which means the custom arises from the relationship between merchants or from their professional activities or from pure commercial activities. Such commercial customs are often found in a series of commercial practices, such as Incoterms (International Commercial Terms), which are collected and explained by the International Chamber of Commerce (ICC);

(2) The second one is derivative customs applied in commerce, which means that these customs are not pure commercial customs but are applied in commercial relations or commercial disputes adduced by parties and accepted by courts.

Those commercial customs are applied to commercial disputes. Commercial dispute is a type of legal dispute in the commercial domain. Simply, it is a dispute relating to rights and obligations that are regulated by commercial law. In other words, this kind of dispute arises from commercial undertakings. The Civil Procedure Code of 2004, in Article 29, provides two indications for identifying a main type of business and commercial disputes, including: First, parties are merchants; and second, their target is profit. At the same time, this article separates the following disputes into other types of business and commercial disputes, namely: disputes over intellectual property rights, technology transfer between individuals and organizations and with profit purposes; and disputes between the company and the members of the company, among the members of the company, related to the establishment, operation, dissolution, mergence, consolidation, separation, or change of the form of company. Signs of subject matter as merchants and profit targets of the dispute are also reproduced in the Civil Procedure Code of 2015 at Article 30. This article however redefines some types of commercial disputes, including: disputes over intellectual property rights, technology transfer between individuals and organizations and all for profit purposes; disputes between persons who are not yet members of the company but have transactions of capital contribution to the company or members of the company; disputes between the company and its members; and disputes between company and manager in a limited liability company or a member of director board, a director, or a general director in a shareholding company, among the members of the company

related to the establishment, operation, dissolution, mergence, consolidation, separation, or change of the form of company or handover of the company's assets.

It is possible to understand the disputes specified in the civil procedure codes mentioned above which are disputes arising from natural commercial behaviours, formal commercial behaviours, and dependent commercial behaviours. The identification of the distinctive signs of commercial behaviours by their nature is an important suggestion for the theoretical study of the distinction between civil and commercial law or between civil and commercial undertaking. Such study also has significant implications for determining the scope of impact of the principles and application of commercial practices as stated in Articles 12 and 13 of the Commercial Law of 2005, not just meaningful in distinguishing between civil and commercial disputes.

To take an example, in international trade practice, merchants can not ignore the Incoterms, or Uniform Customs and Practice for Commercial Documentary Credits—UCP, which include rules of international commercial customs developed by ICC in order to develop international trades. Recently in Vietnam, many commercial disputes have been resolved by the courts through solutions taken from commercial practices, for example: Judgment No. 1034/DSST dated 8th July 2002 by the People's Court of Ho Chi Minh City used discounting practices at Vietnamese commercial banks; Judgment No. 2392/DSPT dated 30th December 2002 of the People's Court of Ho Chi Minh City used the custom of buying and selling gold at private gold shops; and Judgment No. 02/2009/DSST dated 1st October 2009 of the People's Court in Daklak Province used custom of pricing coffee (Mai, 2014, pp. 96-97). It has not been considered yet this application's procedural aspect, but it can be judged that the courts in Vietnam are aware of the role and significance of custom in rendering fair judgments among disputants. That would require more in-depth research in the application of customs, especially in the commercial domain where the rules governing them are largely derived from the habits of merchants from the Middle Ages.

### **The Role of Customary Law in the Current Vietnamese Law**

From all the above research, it is obvious that custom in general and commercial custom in particular is the basis of society. First, social relations are adjusted by customary law as people voluntarily abide by it. Custom is widely accepted since it could guide appropriate behaviors among members of the community; and each member acknowledges that it would bring benefits for him based on the reciprocity principle (Cuong, 2010, p. 76). Thus, custom is ingrained in human mind at subconscious level and it influences people's way of thinking as well as the legal culture.

Understanding the importance of customary law in social life in general and in the process of building a market economy in particular, the Communist Party of Vietnam directs:

“Complete the contract law based on the respect of contractual parties' agreements which do not contradict the social ethics, do not infringe upon public order, and are in conformity with international commercial customs and practices”.

As can be seen, custom serves the role of ensuring social stability, creating cultural identities in general and legal culture in particular, and affecting the way of thinking; and it is one of the factors that contribute to a national spirit. This has been proved by practices. Moreover, custom also has an undeniable role in the development of legal normative documents, especially commercial laws. The customary norms of traders have been codified into commercial laws in most countries.

In fact, in international commerce, the role of customary norms is of significance. Therefore, it also occupies a much bigger role in the legal documents making process. As a result, the Commercial Law of Vietnam of 2005 emphasizes the principle of applying customary practice. Without this promotion, it would be difficult to develop the international trade; but if the rules of commercial practice are entirely contrary to those of written law, that promotion does not work in practice. It is therefore necessary to harmonize the rules of customary norms and rules of written law. In other words, it is necessary to consider the customary norms in legal normative documents making procedure.

Custom in general and commercial practices in particular also play an important role in promoting the development of the *stare decisis*. In the studying of English law, it is noticed that commercial practices have the notable role in judicial decisions formulation. It is also recognized as a common source in the United Kingdom and in other common law countries. In a study on customary law, Ngo Huy Cuong states:

When applying custom, practice could be generated. For example, the court decision in “19-hour date palm” case could set the precedent for representation—an important regulation in private law, in which Vietnamese lawmakers tend to be tightly controlled by the legal documents. This aims to protect the rights of the represented. Therefore, when applying custom, there is a need for the judge to have a broad vision to link it to other legal regulations. (Cuong, 2010, p. 74)

Custom, or customary law, also influences legal doctrines, one of the sources of law. When studying the customary law, many legal doctrines are formed and they exert influences on the legal field. Some examples are the doctrines of grassroots democracy, reconciliation groups, new rural conventions, and the doctrine of using commercial practice.

On the other hand, custom affects the perception and the explanation of justice as a source of law, which is applied when there is no solution from other legal sources. This is considered as a source of law at the deepest level related to legal perceptions and outlooks generally (Cuong, 2012). And in a sense, these perceptions and outlooks are governed by customs.

In summary, customary law not only compensates for the shortcomings of written law in regulating commercial relations, but also performs a substantial role in the development of other types of legal sources such as legal documents, *stare decisis*, legal doctrine, and justice. However, it should be noticed that there are different viewpoints towards justice all over the world. A cause of this might be the difference in customs of different societies.

### **The Challenges in Developing and Applying Customary Law in Vietnam**

In spite of its significant role in reforming the legal system, developing and applying customary law in Vietnam also faces many challenges. These challenges arise from applying, identifying, and classifying customs to apply in specific disputes as well as the priority order among sources of law and different types of customs.

Firstly, evidence is considered as the “soul” of civil procedure, and proof is the process of finding and identifying sufficient evidence (Judicial Academy, 2007, p. 65). In this process, if deconstructed, two stages can be found: evidence searching, identifying, or studying; and evidence evaluating. However, in essence, the study of evidence can alternate with the evaluation of evidence, which is a continuous process of thinking (Luong, 2009, p. 189). This process is critical to the trial procedure. The Civil Procedure Code of 2004 (amended and supplemented in 2011) includes the principles and rules of procedure that is applied to all the civil, marriage and family, business, and trade and labor affairs; it is generally agreed that custom is a source of evidence and a

custom could also be considered as an evidence if it is recognized by the community where that custom is established. However, in order for it to be recognized as evidence, the custom must be established before the court due to its lack of clarity and its relevance to the interpretation of the parties' rights or obligations. The 2004 Civil Procedure Code does not specify who is supposed to prove the custom and how to prove it. In the effort to reform, there are regulations in the Civil Procedure Code of 2015 on the person involved right to quote a custom and the conditions to apply customary practice. However, this code does not mention the techniques of applying customary law.

In dispute, the person who wants to protect his interests is obliged to prove. Concerning this matter, former senior judge Tuong Duy Luong argued:

Why does the civil procedure set the burden of proof on the part of the claimant? This is because civil relations are personal relations, which are decided and handled by the parties on their own; and only if the parties cannot resolve the problem by themselves, it is also their decision to ask for the state's support. Moreover, the parties are the ones who understand their case the most. They usually know what and where the documents and evidence related to their case are. Therefore, when the parties have brought their dispute to the court, the court only acts as the arbitrator to help them resolve the dispute objectively and lawfully. The court cannot do nor prove on behalf of the parties. (Luong, 2009, pp. 190-191)

From this principle, it can be deduced that the duty to prove the custom lies with the claimant, as he has to rely on that custom to protect his interests. In contrast, the defendant is obliged to prove to protect his or her interests which are related to the objection. However, the right to appraise such a custom and whether or not it could be applied is of the judge or of the person who is responsible for settling the disputes. The actions of the defendants and of the custom-appraisers must be based on an analysis of the elements of the custom or the circumstances that need to be proved.

In Vietnam today, commercial customs can be interpreted as the practices applied to the settlement of trade disputes; this arises from the distinction between civil and commercial conduct, as well as the distinction between civil and commercial disputes as discussed above. The 2005 Commercial Law of Vietnam establishes an overall definition of commercial activities as follows: Commercial activities mean activities for the purpose of generating profits, including sale and purchase of goods, provision of services, investment, commercial promotion, and other profit-making activities. In the 2015 Civil Procedure Code, it is stated that: Commercial or business disputes mean disputes arising from business and commercial activities between individuals and organizations having business registrations and for profit purposes; disputes on intellectual property rights, technology transfer and disputes relating to the company are all for profit purposes. This article classifies business and commercial disputes based on the aforementioned classification of commercial and civil conduct. As stated elsewhere, when commercial practices are used, they can be divided into two types: (1) The first is a pure commercial custom i.e. custom arising from the relations between traders or from the professional activity of the traders or from pure commercial behavior; (2) the latter is a customary practice in commerce, which means that the custom is not a pure commercial custom but is applied in commercial relations or commercial litigation, quoted by the parties involved and accepted by the court.

In addition to the custom-identifying based on the general principles of proof, it is necessary to determine the commercial nature within the custom to ensure the principle of applying commercial practice as provided in Article 13, the 2005 Commercial Law. If the custom is identified as pure commercial practice, its application is a rule stated by law. If custom is the one that can be applied in a commercial litigation, it must be proven that its application does not oppose or undermine the commercial nature of the dispute. The nature of the trade here



needs to be explained by the demands of the marketplace, such as capital rotation, short notice periods, credit enhancement, consumer rights protection, and the sincerity of the trader.

With the aforementioned general principles of customary law in the civil code, it is unnecessary to reiterate the principles of applying customary practices in the commercial law as the civil code is the basis of private law (Cuong, 2006, pp. 324-325). The commercial laws of the old regimes in Vietnam all clearly state the relationship between civil code and commercial law, and therefore, only the specific customs (if any) in separated regulations are stated.

The issue of prioritizing the application of legal sources, as well as the principles related to the application of customary law in these regulations, is inherited and developed by the Civil Code of 2015. More clearly and specifically on the application of customary law, the Civil Code of 2015 stipulates in Article 5:

1. Practices mean rules of conduct obvious to define rights and obligations of persons in specific civil relations, forming and repeating in a long time, recognized and applying generally in a region, race, or a community or a field of civil.
2. In cases where it is neither provided by law nor agreed upon by the parties, practices may apply but they must not contravene the principles provided in Article 3 of this code.

These regulations offer new features compared to Article 3 of the 2005 Civil Code as follows:

Firstly, this article defines the practice by introducing its elements. This clear identification of the elements of such custom facilitates the proving of custom and constitutes a systematic indication, particularly with the respect to procedure law. Therefore, perhaps, the Civil Procedure Code of 2015 offers an article on the custom providing that: "Courts shall verify the applicability of the customs, ensuring the compliance with provisions of Article 5 of the Civil Code". These instructions suggest a technique to prove a custom i.e. when demonstrating, the prover must make the elements of custom clear as it is defined in Article 5, Clause 1 of the 2015 Civil Code. Only when these elements are clarified then that custom will be valid for the case being heard.

Secondly, these rules specify the conditions of customary application, including the following: (1) The related parties have no agreement on the governing rules of the relation in specific litigation; (2) there is no law to regulate that relationship between the parties in that particular dispute; and (3) the application of customary law is not contrary to the fundamental principles of the civil law in Article 3, the 2015 Civil Code. These principles include: equality in civil relations, no unequal treatment to others; establishment, exercise, and terminations of his/her civil rights and obligations on the basis of freely and voluntarily entering into commitments which cannot violate regulations of law and are not contrary to social ethics; establishment, exercise, and terminations of his/her civil rights and/or obligations in the principle of goodwill and honesty; establishment, exercise, and termination of civil rights and/or obligations may not infringe national interests, public interests, lawful rights, and interests of other persons; and self-liability for his/her failure to fulfill or the incorrect fulfillment of any such civil obligations. Whereas the Civil Code of 2005 stipulates in general that the applied practices cannot be contrary to the principles stated in the civil code.

The above analysis shows that the current Vietnamese law places great emphasis on the application of customary law to resolve the disputes between the parties. The customary law has priority only after the agreement between the parties and legal normative documents which are called statutes. This idea in the 2015 Civil Code is quite close to the general notion in the traditional civil law. However, in academia, when referring to these norms in common speech, some Vietnamese lawyers said:

The custom can be applied as a source of civil law when it meets the following criteria: (1) It has become popular and is recognized by the most of people who live in the same area or work in the same field; (2) it is not contrary to the principles set forth in the civil code; and (3) it is only applicable if that legal relation is not regulated by any law or the parties involved have no agreement. (Quang, Net, & Hang, 2007, p. 28)

The second criterion is a rather difficult condition as the 2015 Civil Code states different principles and sometimes it is difficult to explain them in the relation with each other. Previously, some articles in the Civil Code in 2005 are much more difficult to explain. For example, Article 4 of this code states the principles of freedom, voluntary commitment, and agreement which have the following contents: “The right to freely undertake or agree on the establishment of civil rights and obligations shall be guaranteed by law, if such undertaking or agreement is not banned by law and not contrary to social ethics”. However, Article 11 of this Code states the principle of compliance with law as follows: “The establishment and performance of civil rights and obligations must comply with the provisions of this Code and other provisions of law.” Whereas most lawyers understand it in the following way: “Compliance with law is a form of law enforcement in which legal subjects refrain from conducting activities prohibited by law” (Doan, 2009, p. 15). Freedom of contract means that the parties have the freedom in choosing partners, and the freedom in expressing the willingness and agreeing to establish mutual rights and obligations. This issue is referred in Article 4 of the above 2005 Civil Code. Freedom of contract is only hindered by the prohibitions of law and social ethics. In addition, the parties may agree on different provisions compared to those of law. According to the rationale and the understanding of most Vietnamese lawyers, the principle of compliance with law is enshrined in Article 4 of the 2005 Civil Code; however, Article 11 of this code limits the freedom of contract improperly. In other words, Articles 4 and 11 of this code are inconsistent.

### Conclusions

Vietnamese conventional wisdom has it that local customs prevail over King’s laws. This long upheld attitude reflects the importance of customs in general and customary law in particular in Vietnam. This tradition has been translated into law-making practice by acknowledging customs as a source of law, thus making customary law second only after legislation in terms of its position and authority. Customs will be applied in case there is no piece of provision in effect. However, the role, importance, and authority of customary law are hindered due to the conflicts between different statutes and acts as well as because of the academic and scholarly misunderstandings. This is especially true when it comes to commercial customs, one of the most important and dynamic fields of customary law given the fact that Vietnam is integrating deeper and broader into international commercial practices where commercial usages play a very important role. It thus requires a reconsideration of the laws regulating customs in Vietnam as well as a more thorough research about the issue.

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