

# **REAL RIGHT INSTITUTION REFORM TO MEET THE REQUIREMENTS OF VIETNAMESE MODERN SOCIAL LIFE\***

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## **Abstract**

The Constitution of 2013 which was adopted and promulgated opened the law reform process in Vietnam. However the result of that reform is causing the necessity of reforming the issues that have just reformed, especially in respect of the real right institution.

The Civil Code of 2015 (as a result of the recent reform) have repudiated un maturedly the utilization of term “real right” in order to build the title “Ownership and other rights over property” for the Second Part of this Code. It is not purely the utilization of terminology but is the problem of insufficient awareness and provoked the inward contradictions of this Code by itself. The Civil Code of 2015 provides the principle of definite real rights but does not provides relatively the sufficiency of real rights over another’s thing while these rights have tendency towards conflict with the rights of the owner. These shortcomings make the Civil Code of 2015 difficult to attain the goals of proposed regulation, and have three main causes: (1) the disconformity between the politico- legal idea of the Sovietique Law tradition and the requirements of regulating the relations of market economy is not yet settled; (2) the legal techniques that derived from the ancient Roman Law basing on the private property regime cannot conform itself to the entire people’s ownership regime of land; (3) drafters and lawmakers of the Civil Code of 2015 have not yet had the fundamental knowledges of civil law.

There are three biggest problems in the reform of real rights institution in Vietnam today, including: The Sovietique Law tradition’s conception of ownership; the regime of entire people’s ownership of land; and insufficiently conception of the legal techniques. The real rights institution is pressed to reform by the requirements of the modern social life such as the build of market economy under socialist orientation; the industrialization and modernization; the international integration; the privatization; the agglomeration of land plots; and the pursuit of the fourth industrial revolution;...

For the reform of that institution to meet the requirements of the modern social life, the following fundamental orientations and solutions cannot but are taken into consideration: reforming the regime of land ownership; perfecting the real rights institution as to legal technique.

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## Introduction

Constitution of 2013 which was adopted and promulgated opened the law reform process in Vietnam though there are many issues that still needs to be continuously researched. This Constitution recognizes respect for human rights; democracy; the rule of law, international integration; socialist centralization of power towards the legislative with the division and co-ordination of power branches; socialist – oriented market economy with multiform ownership; multi- sector economy; industrialization and modernization; sustainable development; entire people’s ownership regime of land and natural resources; and judicial independence<sup>835</sup>... Considering these as cornerstones, a series of the acts which appertain to public law area and also private law area were amended and supplemented or replaced by new ones under the new idea of this Constitution.

After the Civil Code of 2015 and other important acts had been promulgated, Vietnam commenced expressing the determination of pursuing the Fourth Industrial Revolution. It is proved clearly by activities of the National Assembly and the Government. The typical one therefrom is Resolution of Government number 01/NQ-CP dated 01 January 2018 on the main tasks, solutions for performing the Plan of Socio- economic Development and the Estimate of National Budget of 2018 which affirms that one step in the strategical breakthrough is “to perfect institutions of development, and providing science and technology, information and communication technology, education and training support in order to approach the Fourth Industrial Revolution, and to raise labour productivity, quality and competitiveness of the economy” (subparagraph 2.2).

Such change in the strategical thought in addition to the shortcomings arisen in the recent reform process makes Vietnamese laws generally speaking and the real rights institution especially speaking therein needs to be reviewed once more with reformed idea.

Property law reflecting important social values<sup>836</sup> and real rights being normally supposed traditional scope of this area of law<sup>837</sup> show the reform of real rights institution being of great significance for socio-economic development. When researching on the regime of land ownership (one real right issue) in China, there is a judgment on that this regime will play a key role in ongoing structural changes that are changing China from a pre-dominantly rural and agricultural society to one that is urban and industrial<sup>838</sup>.

In Vietnam the highlighted strategical significance of the industrialization and modernization process is the judicious resolution of the relationship between industry and

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<sup>835</sup> These principles are provided in corresponsive Articles of the Constitution of 2013 as follow: Article 14 and continual others of Chapter II; Article 2 (paragraph 1 & paragraph 2); Article 3; Article 12; Article 69 & Article 51 (paragraph 1); Article 2 (paragraph 3) & Article 50; Article 51 (paragraph 2); Article 53 & Article 54; Article 103 (paragraph 2).

<sup>836</sup> Bruce Ziff, *Principles of Property Law*, Second Edition, Carswell – Thomson Professional Publishing, Canada, 1996, p. 8.

<sup>837</sup> John E.C. Brierly, *Cases and Materials Relating to Civil Law Property IA*, Text Materials, McGill University, 1997, p. viii.

<sup>838</sup> Dwight H. Perkins, “China’s Land System: Past, Present, and Future”, *Property Rights and Land Policies*, Edited by Gregory K. Ingram and Yu-Hung Hong, Proceedings of the 2008 Land Policy Conference, The Lincoln Institute of Land Policy, 2009, p. 70.

agriculture, between workers and farmers, and between urban areas and rural areas<sup>839</sup>. Recently, Vietnam Communist Party expressed that “Industrializing and modernizing the agriculture and countryside are a leading important task in the industrialization and modernization process of our country”<sup>840</sup> and one principal solution therein is “to trace out the arrangement for population inhabitants in rural areas in association with the master plan of industrial build, services and urban development in regions”<sup>841</sup>. Consequently, real rights institution reform is a necessary consequence if seeing it in perspective of national administration.

This Article surveys the Vietnamese real rights institution in force to find shortcomings therein, analyses impediments in building and reforming it, highlight the social life’s requirements for its reform, and specify fundamental orientations and solutions of reforming it today through the methods of analysis, description, classification, comparison, and history...

### **I. Outline for real rights institution of Vietnamese laws and fundamental shortcomings concerned**

Before the settlement in and the imposition their laws upon whole country by French, Vietnam had not had the legal thinking type and the legal technique (especially in respect of the law classification) as those in the Civil Law tradition, and had followed the Far East legal tradition<sup>842</sup>. Therefore the institution of real rights is an institution imported at the same time with the civil law branch from France. The real right provisions are discovered evidently in Vietnamese old regimes’ French-model-followed Civil Codes such as Concise Civil Code of 1883 (applied in the South Region)<sup>843</sup>, the North Region Civil Code of 1931, the Middle Region Civil Code of 1936, and the Civil Code of 1972 (which promulgated by the South Region Government (Republic of Vietnam) applied in the South Region of Vietnam during the period of fighting for independence and reunification of the country from 1954 to 1975). For instance: Article 449 of the North Region Civil Code of 1931 provides that “Immovables include three categories, either by their nature, or by their destination, or by reason of the object to which they attach”. The above-mentioned third category of immovable imply the real rights including: ownership, usufruct, use and habitation, emphyteusis, predial servitude, pledge on immovable, mortgage on immovable and actions before the courts for recovery of immovable (Article 453). This Code provides that movables include “movable by nature” and “movable by law” (Article 454 and Article 455). The above-mentioned second category imply

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839 Do Muoi, *On Country’s Industrialization, Modernization*, National Political Publishing House, Hanoi, 1997, p. 110.

840 Vietnam Central Communist Party, the Ten Term Central Committee’s Seventh Conference Resolution of Agriculture, Peasantry and Countryside, Number 26- NQ/TW, 05 August 2008, Section II, paragraph 1.

841 Vietnam Central Communist Party, the Ten Term Central Committee’s Seventh Conference Resolution of Agriculture, Peasantry and Countryside, Number 26- NQ/TW, 05 August 2008, Section I, paragraph 2.

842 See further Ngo Huy Cuong, “The Impact of French Laws on Private Law in Vietnam” (pp. 95 – 115), *The Impact of French Legal Tradition on Vietnamese Laws*, Monograph Book, Co-Editors: Arnaud De Raulin, Jean-Paul Pastorel, Trinh Quoc Toan, Nguyen Hoang Anh, Hanoi National University Publishing House (VNU Press), Hanoi, 2016.

843 This Civil Code was just a French Civil Code pruned that suited the conditions of the South Region being the French colony at that time. According to Vu Van Mau, “... our new laws lost the Vietnamese character, changed entirely its shape, and was similar to French laws. That is a matter of many provisions of the Concise Civil Code promulgated in 1883” (Vu Van Mau, *General Theory of Civil Law*, National Ministry of Education, The Second Edition, Saigon, 1960, p. 277).

the real rights over movable, actions before courts for recovery of or pursuit of movable, claims, and intellectual property (Article 455). Closely following this conception and also rarely changing, the Middle Civil Code of 1936 divides properties into immovables and movables in the same way that the North Region Civil Code of 1931 does in the Article 460 and Article 465. Republic of Vietnam's Civil Code of 1972 is codified under that model but reformed some given legal terms which were utilized to describe categories of immovable and movable that clearly display in Article 363 and Article 370. The technique which was used in writing this Code made good progress in both its arrangement concerning legal technique and the style of displaying more shortly and clearly and still succeeded and respected for the past legislations.

After the reunification of the country (1975), Resolution of Fourth National Congress of Vietnam Communist Party instructed obviously as follows: "Building the Constitution of the Socialist Republic of Vietnam, institutionalizing by the basic law of the State, the socialist collective mastery right of labour people basing on the union between the working- class and the working peasant masses under the leadership of the Party". On account of this instruction, Vietnamese laws which was unified in whole territory<sup>844</sup> affirmed the pursuit of Sovietique Law tradition in which the civil law branch is trivialized in comparison with the traditional economic law branch of the socialist law system. In the previous half of the decade 90 after, the legislation of Vietnam which was heated up by "innovation policy", the build of market economy and "open door" policy for attracting foreign direct investment caused the requirement for building the suitable legal system basing on Sovietique Law tradition hastily in the war period and in the early period of reunification of the country<sup>845</sup>. In that circumstance, a series of acts in the private law area were promulgated that embraced the Civil Code of 1995 which changed entirely the type of codification and had a lot of different conceptions in comparison with the antecedent Civil Codes of Vietnam. Being the necessary effect of the disordered social foundation and the lack of basic research, every ten years afterwards Vietnam has a new Civil Code promulgated that succeeds to the big shortcomings of the Civil Code of 1995.

Firstly, all the Civil Code of 1995, the Civil Code of 2005 and the Civil Code of 2015 are not codified under the French model any longer but follow the school of Pandectists. However such codification of Vietnamese Civil Codes are far from being on the level of codification of the German Civil Code of 1900 & 2002, Japanese Civil Code of 2005 and Taiwanese Civil Code of 1983 that each of them reserves one book for real rights which mentions the relations between people and things economically. All these Civil Codes even dodge the legal term "real rights" and reserve "the Second Part" for property as the French Civil Code of 1804. Such an unanticipated hybridity has possibly arisen from the lack of

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<sup>844</sup> Hanoi National University, Social Sciences and Humanities College, Law Faculty, Textbook on the State and Law History of Vietnam, Hanoi National University Publishing House (VNU Press), Hanoi, 1997, p. 307.

<sup>845</sup> Nguyen Nhu Phat, "Some Theoretical Issues of Economic Law" (pp. 9 – 34), Textbook on Vietnamese Economic Law, Co-Editors: Pham Duy Nghia and Nguyen Nhu Phat, Hanoi National University Publishing House (VNU Press), Hanoi, 2001, p. 11.

profoundly research. However when the Draft of the Civil Code of 2015 was submitted to the National Assembly, the Government petitioned for the name and the main contents of the Second Part of the future Civil Code as follows:

“The Second Part: Ownership and other real rights (from Article 178 to Article 301) provide the sources and the moment of creating ownership and other real rights and effect against third person; the protection and limitation of ownership and other real rights; ownership, predial servitude, usufruct, superficies, preferential rights”<sup>846</sup>.

Most regrettably, the National Assembly had not accepted those petitions and has adopted the Second Part of the Civil Code of 2015 which has been named “Ownership and other rights over property” and embraces general principles and four principal real rights such as ownership, predial servitude, usufruct and superficies. All accessory real rights which embrace pledge and mortgage are separated from the Second Part by both Draft and the Civil Code of 2015 in order to be provided in the Third Part regarding obligation and contract. In this Part, pledge and mortgage together with security devices such as guarantee, reservation of ownership, deposit,... are regulated by a lot of general provisions as well as some special provisions for each. The two big shortcomings of the above-mentioned contents of the Civil Code of 2015 can be realized easily.

*The first big shortcoming:* The Civil Code of 2015 carelessly declined the utilization of term “real rights” for building this Code’s Second Part of the name of “Ownership and other rights over property”. This is an issue that the Civil Code of 2015 causes conflicts in its interior by itself. Property is a legal term which expresses a concept wider than concept of “thing” if it is seen from the angle of German model Civil Code. Article 105, paragraph 1 of this Code defines: “Property includes things, money, valuable papers and property rights”, while the whole Code only provides real rights that things therein are merely objects (material things) though they can embrace electro-magnetic waves controlled for using by man. This Code where provides the classification of things from Article 110 to Article 114 always considers that things are merely objects.

*The second big shortcoming:* Following the Civil Law tradition, the Civil Code of 2015 builds the principle of definite real rights. Article 160, paragraph 1 of this Code declares “Ownership, other rights over property are created, performed in the cases provided by this Code and other relevant laws”. However this Code had not sufficiently specified real rights over things of another person while these rights always tend to be opposite to the rights of the owner. Article 159, paragraph 2 of this Code provides the rights over property of another person only includes: predial servitude; usufruct, and superficies. So this article does not suppose “land use right” which is created as a right different from usufruct is a real right, and does not suppose pledge, mortgage or several preferential rights have the nature of real rights too, without mentioning the right of inhabitation provided in Article 63 of Law on Marriage and Family 2014.

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<sup>846</sup> Government, *Statement of the Project for the Civil Code (Revised)*, Number 390/ TTTr- CP, 12 October 2014, p. 8.

Such shortcomings induce the Civil Code of 2015 has the great difficulties in attaining the regulating goals such as “Facilitating to impulse the development of production and business, utilizing efficiently every social resource, ensuring the easiness and stableness of civil transactions, contributing to the development of the socialist oriented market economy”<sup>847</sup>.

Nguyen Ngoc Dien argue about the economic significance of the real rights that in the process of the development of market economy, especially in the process of urbanization when population density growth causes the absolute ownership of immovable to become too expensive and very difficult to approach, the real right theory allows to divide the ownership into separate right to meet separate need at reasonable price<sup>848</sup>. If it is considered in the circumstance that the drafters of the Civil Code of 2015 did not want to accept the real right theory, those arguments were partly useful in persuading them. However if it is considered from the origin of the legal technique of real rights and the necessity of regulating the social relationships which are arisen objectively, such arguments have not yet had insufficient ability to cover all. In the ancient Roman age, people had had the conception of real rights and divided them into rights over things of the owner and rights over things of another person (*iura in re aliena* or *rights in rem* over other man’s property) which had been originated in the everyday events<sup>849</sup>, although land, immovable, urbanization or market economy had not been a pressure, not to mention movable and slave therein. In the Common Law tradition, when the servitude institution is researched, easements and covenants are mentioned, which are immovables by abstract destination (metaphysical fixtures) attached to and pass with realty<sup>850</sup>. In Common Law, predial servitude (easements) is a right over a plot of land seemed as servient tenement which is created for the benefit of other plot of land known as dominant tenement<sup>851</sup>. Common Law categorizes immovables by destination (fixtures), land and chattels basing on their separate characteristics and notices the nature of the objects and the rights over these objects<sup>852</sup>. Civil Law tradition categorizes real rights basing on the manner of classification originated from the Roman age. Rights over things of another person (*iura in re aliena*) is called “servitude”, then in its turn the servitudes are divided into two categories which are predial servitudes and personal servitudes<sup>853</sup>. Therefore the building and inserting in the Civil Code of 2015 the term “right over adjacent immovable”<sup>854</sup> instead of the term “predial servitude”<sup>855</sup> have not yet reflected the origin of the relating legal technique, without mentioning the unsuitability with public servitudes.

Still following the thought of the Sovietique Law tradition about ownership, Constitution

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847 Government, Statement of the Project for the Civil Code (Revised), Number 390/ TTr- CP, 12 October 2014, p. 7.

848 Nguyen Ngoc Dien, Textbook on Civil Law – Volume 1, Ho Chi Minh City National University Publishing House, Ho Chi Minh City, 2017, p. 176.

849 Barry Nicholas, Ernest Metzger, An Introduction to Roman Law, Clarendon Law Series, Oxford University Press, 2008, pp. 140 – 141.

850 Bruce Ziff, Principles of Property Law, Second Edition, Carswell – Thomson Professional Publishing, Canada, 1996, p. 327.

851 Bronwen Jackman, Kip Werren, Property Law, LexisNexis Butterworth, Australia, 2011, p. 194.

852 Bronwen Jackman, Kip Werren, Property Law, LexisNexis Butterworth, Australia, 2011, p. 12.

<sup>853</sup> Barry Nicholas, Ernest Metzger, *An Introduction to Roman Law*, Clarendon Law Series, Oxford University Press, 2008, pp. 141.

<sup>854</sup> Verbatim word is “quyền đối với bất động sản liền kề”.

<sup>855</sup> This term is called “địa dịch” in Vietnamese and had been used in the French model Civil Codes.

of 2013 provides that “The land, water resources, mineral resources, resources in the sea and airspace, other natural resources and property invested and managed by the State are public properties, coming under ownership of the entire people represented and uniformly managed by the State”<sup>856</sup>. With the conception that everything under sovereignty or jurisdiction is public property, the Civil Code of 2015, Article 197 copies verbatim the above-mentioned provisions of Constitution of 2013 for assigning them to belong the form of the entire people ownership. The ancient Roman Law based on whether property belongs private ownership or not to divide all wealth into common property (*res communes*) including the air, the running water, the sea... which could not be owned and everyone could enjoy them, and public property (*res publicae*) which belonged to the State and included public roads, bridges and harbours...<sup>857</sup>. On this base, the civil law of Quebec (Canada) considers objects that are public property are not subject to occupation although laws could provide the use of such property<sup>858</sup>. The Louisiana Civil Code divides properties into common things, public things, and private things before dividing properties into corporeals, incorporeals, immovables and movables<sup>859</sup>. The drafters of the Civil Code of 1995 (the first Civil Code of the Socialist Republic of Vietnam) cognized as follows:

“However, researching Civil Codes of capitalist countries, we see that the issues of ownership regime and forms do not provide obviously but only the institutions for implementing the principle of private ownership are sacred and inviolable, which is for essentially protecting the bourgeoisie’s ownership over means of production”<sup>860</sup>.

Ultimately thinking, the essence of the socialist revolution is a revolution of ownership. According to Marxists, the socialist revolution occurs by the reason of antagonistic contradiction between the productive force with the high socialized quality and the capitalist private nature of the means of production in the capitalism<sup>861</sup>. Ho Chi Minh acquired that idea and expressed it simply in the class for guiding the teachers of level II and level III secondary general school as follows: “Socialism means the dispossession of factories, trains, banks,... for changing them to be common property”<sup>862</sup>. It is the reason why the Civil Code of 1995, the Civil Code of 2005 and the Civil Code of 2015 attach special importance to and argue uninterruptedly for the so-called the forms of ownership while for building the institution of real rights perhaps the drafters have to begin at some important questions that: What rights can we create on one thing which is immovable or movable? Who can be limited, and How to limit and What conditions?...

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<sup>856</sup> Constitution of 2013, Article 53.

<sup>857</sup> See Andrew Borkowski & Paul du Lessis, *Textbook on Roman Law*, Third Edition, Oxford University Press, New York, 2005, tr. 154.

<sup>858</sup> John E. C. Brierley, Roderick A. Macdonald, *Quebec Civil Law – An Introduction to Quebec Private Law*, Edmond Montgomery Publications Limited, Toronto, Canada, 1993, p. 278.

<sup>859</sup> Louisiana Civil Code, Article 448.

<sup>860</sup> Ministry of Justice, Institute of Juristic Science, Scientific Comments on Some Fundamental Issues of the Civil Code, National Political Publishing House, Hanoi, 1997, p. 82.

<sup>861</sup> Ministry of Education and Training, Textbook on Main Principles of Marxism- Leninism (For Students of the Marxist- Leninist Unspecialized Universities and Colleges), Su that Truth National Political Publishing House, Hanoi, 2014, p. 379.

<sup>862</sup> Ministry of Education and Training, Textbook on Ho Chi Minh Ideology (For Students of the Marxist- Leninist Unspecialized Universities and Colleges), Su that Truth National Political Publishing House, Hanoi, 2016, p. 100.

On this base, the Civil Code has the function to build the legal rules for each type of common property, public property, private property, ownerless property (*res nullius*)...

The content of ownership under the Civil Code of 2015 is a big problem causing so much arguments and in fact the most tensely contradictions among real right provisions of Vietnamese laws today. This Code provides in Article 158 as follows: “Ownership includes possession, use and disposition of the owner according to provisions of law”. Under this conception of ownership, the rights which are provided by simple cognition as follows: the possession is the right to control and own a definite thing belonging to a owner; the use is the right to operate the material benefits of property; and the disposition is the right of the owner in determining the destiny of thing<sup>863</sup>. However this conception under the Sovietique Law tradition causes the conflict between the content of ownership and the usufruct, and the conflict between the usufruct and the land use right in Vietnamese laws today. The usufruct provided in the Civil Code of 2015 is the right to operate the use and enjoy the fruit of the property belonging to ownership of another person in a definite period<sup>864</sup>. The usufruct is a new right that the Civil Code of 1995 and the Civil Code of 2005 had no any provision for it. These provisions lack a integration between the usufruct and the ownership by the reason of the provisions of ownership content deviating from the Civil Law tradition while the usufruct is inherited from this tradition. According to Civil Law succeeding the ancient Roman Law, ownership includes three rights such as *usus*, *fructus* and *abusus*<sup>865</sup>. The usufruct is a biggest right that one person has on the property of another person in the period lasting not over one’s lifetime. This right includes *usus* and *fructus*<sup>866</sup>. The above-mentioned content of the ownership under the Civil Code of 2015 does not detach *fructus* from it to be a separate branch. The use which is in the content of the ownership under Vietnamese laws includes *usus* and *fructus*<sup>867</sup>. For settling the conflicts between the conception of the ownership content under Sovietique Law and the necessity for building the institution of usufruct required by market economy, perhaps Chinese Law on Real Rights 2007 provides the content of ownership including four rights such as possession, use, fruit and disposition<sup>868</sup>. Still being loyal to the conceptions of the Sovietique Law tradition, Vietnamese Law on Land 2013 has the essence of the act establishing and protecting the entire people ownership regime and designing the grant of land use right for land users. Article 4 of this Law provides that “Land belongs to the entire people with the State acting as the owner’s representative and uniformly managing land. The State shall hand over land use rights to land users in accordance with this Law”. Land use right in Vietnam has the essence of usufruct over particular plots of land if

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863 Hanoi Law University, Textbook on Vietnamese Civil Law, Hanoi, 1995, pp. 125 – 128.

864 The Civil Code of 2015, Article 257.

865 John E. C. Brierley, Roderick A. Macdonald, Quebec Civil Law – An Introduction to Quebec Private Law, Edmond Montgomery Publications Limited, Toronto, Canada, 1993, p. 272; Vũ Văn Mẫu, Dân luật khái luận, Bộ Quốc gia Giáo dục, In lần thứ hai, Sài Gòn, 1960, tr. 336 – 337.

866 David Johnston, Roman Law in Context, Cambridge University Press, UK, 1999, p. 67.

867 Academy of Justice, *Textbook on Civil Law*, People’s Public Security Publishing House, 2007, p. 229.

868 Real Right Law of the People's Republic of China (Adopted at the 5th session of the Tenth National People's Congress on March 16, 2007) Article 39.



we see it in the angle of the Civil Law tradition's concept of ownership content. In summary, with the same legal issue, Vietnamese law system utilizes two legal term for expressing two concept which seem to be one. Even in the Civil Code of 2015 utilizes both of them: The Second Part, Chapter XIV, Section 2 utilizes the term "usufruct", while the Third Part, Chapter XVI, Section 7 utilizes the term "use" with meaning said above. Superficies under the Civil Code of 2015 is "Right of superficies mean the right of an entity over the ground, water surface, space above the ground or water surface, and the underground space of the land whose use rights belong to another entity"<sup>869</sup>. This right had not yet provided in all the Vietnamese Civil Codes before inclusive those in the old regimes. Japanese Civil Code provides the content of this right as follows: "A superficies shall have the right to use the land of others in order to own structures, or tress or bamboo, on that land."<sup>870</sup>. In comparison with provisions of the Japanese Civil Code, the concept of the superficies mentioned in the Vietnamese Civil Code of 2015 has two issues which are very worrying by some reasons as follows: *firstly*, the purpose of the holder of superficies is not mentioned; and *secondly*, the grantor of the superficies is not the owner of the plot of land but is merely the land user. When mentioning superficies, John E. C. Brierley and Roderick A. Macdonald considered that superficies will result from an act of alienation by which the ownership of land is separated from the ownership of structures in existence or to be constructed by superficies<sup>871</sup>.

Pledges and mortgages in the Civil Code of 2015 are not considered as real rights and they are different with each other in that secured property for the performance of civil obligation whether are handed over actually or not. In the pledge, pledgor has to hand over the property belonging to his ownership to pledgee for securing the performance of obligation<sup>872</sup>. For the mortgage, the mortgagor has not to hand over the secured property belonging his or her ownership to the mortgagee<sup>873</sup>. These provisions do not allow transferring the possession of secured property to any third party. Although the secured property is not necessary to be transferred the possession to mortgagee, but Article 320, paragraph 1 of the Civil Code of 2015 has provision that if the parties agreed with one another, the mortgagor shall deliver papers or documents concerning secured property to mortgagee. In fact creditors or mortgagees always have advantages in the relations, almost cases therefore they ask mortgagors about delivery of such papers or documents. Therefore the pledges and the mortgages are very difficult for being able to separate because all of them can be created on immovables and movables<sup>874</sup>. Provisions have the nature of suggestion about the above-mentioned delivery of the papers and documents concerning the secured property to creditor or mortgagee causes principle that one property shall be able to secure some obligations

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<sup>869</sup> The Civil Code of 2015, Article 267.

<sup>870</sup> Japanese Civil Code of 2006, Article 265.

<sup>871</sup> John E. C. Brierley, Roderick A. Macdonald, *Quebec Civil Law – An Introduction to Quebec Private Law*, Edmond Montgomery Publications Limited, Toronto, Canada, 1993, p. 297.

<sup>872</sup> The Civil Code of 2015, Article 309

<sup>873</sup> The Civil Code of 2015, Article 317.

<sup>874</sup> Bộ luật Dân sự năm 2015, Điều 310, khoản 2; Điều 318.

provided by the Civil Code of 2015<sup>875</sup> to become difficult. This Code displays the contradict in providing the principle of the value of the secured property that can be higher, equal or smaller the value of the obligation secured<sup>876</sup>, but provides when one property secures several debts, the value of the secured property shall be higher than the total debts secured at the time that secured transaction is concluded<sup>877</sup>. While this Code has the provision that an obligation shall be able to secure all or part of it according to the agreement by parties<sup>878</sup>.

These big shortcomings can be derived from three main causes. *The first cause* is the contradiction between the politico- legal idea of the Sovietique Law tradition and the requirement of regulating the relationships having not yet settled in the market economy. *The second cause* is the contradiction between the legal technique derived from the ancient Roman Law basing on private property regime and the entire people ownership regime of land. *The third cause* is the drafters and legislators of the Civil Code of 2015 have not yet understood thoroughly the basic knowledges of the civil law.

## **II. The main difficulties of the construction of the real right institution reforms in Vietnamese law today**

In Vietnam, the socialist scholars of Marxist-Leninist think ownership is a social relationship that always moves and develops historically, and is both an economic category and a legal category<sup>879</sup>. Perhaps so when prescribing the property in general and the real right in particular, the Civil Code 1995, the Civil Code 2005, even the Civil Code 2015 (hereinafter referred to as the Civil Codes of socialism) comes from the perspective of Marx - Lenin's political economy. Scholars of the Ministry of Justice (the drafting agency of the Socialist Civil Code) are based on their in-depth arguments on the issue of ownership as follows to develop these Codes:

"Ownership relations include not only the relationship between people and things, but first of all the relationship between people in the possession of material wealth in society. When researching on ownership, we cannot ignore the object of ownership, this object of ownership does not stand alone and is not affected by an owner, but it is subject to human influence with the others around the object of ownership. Nor is it merely a person to hold material possessions (whose object of ownership belongs to), but the problem is the movement of these objects in the hands of the people who possess (how to use or dispose it ...) so that it benefits the owner. This means that it is impossible to regulate ownership relations in a static state, but it is possible to adjust ownership relations in dynamic state"<sup>880</sup>.

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<sup>875</sup> The Civil Code of 2015, Article 296, paragraph 1.

<sup>876</sup> The Civil Code of 2015, Article 295, paragraph 4.

<sup>877</sup> The Civil Code of 2015, Article 296, paragraph 1.

<sup>878</sup> The Civil Code of 2015, Article 293, paragraph 1.

<sup>879</sup> See Ministry of Justice, Institute of Juristic Science, *Scientific Comments on the Civil Code of 2005 (Volume I) – The First Part: General Provisions; The Second Part: Property and Ownership*, Edited by Hoang The Lien, National Political Publishing House, Hanoi, 2008, p. 349; See Hanoi Law University, *Textbook on Vietnamese Civil Law*, Hanoi, 1995, p. 116 – 119.

<sup>880</sup> Ministry of Justice, Institute of Juristic Science, *Scientific Comments on the Civil Code of 2005 (Volume I) – The First Part: General Provisions; The Second Part: Property and Ownership*, Edited by Hoang The Lien, National Political Publishing House, Hanoi, 2008. p.349 - 350.

Since then, they have given an academic definition of ownership that: "Ownership is understood as the basic element that spreads across the entire production relationship, including not only the relationship between people and things, but also the relationship between people in production - business, or dominant in economic benefits due to the possession of property"<sup>881</sup>, or expressed in another way: "Ownership is understood that it is the possession of natural products, the fruits of labor (today also includes the means of production) of human society"<sup>882</sup>. Ownership right is even perceived as a certain form of possession of the means of production and material wealth created by the means of production<sup>883</sup>.

From the arguments about the dynamic state of ownership relation, the crucial role of property possession and beneficiaries of the benefits from property, ownership right institution in the Civil Code of 1995, the Code Civil of 2005 and even part of the Civil Code of 2015 "have provisions on the rights of non-owners of property in the possession, use and disposal of property"<sup>884</sup>.

Thus, the Socialist Civil Codes of Vietnam has gone beyond the legal framework, which means not to solve economic problems with legal solutions, but directly to issues economics in the form of laws. Legislative technique is ignored, in other words, not respected, so it leads to serious technical defects. This is the biggest difference between the Socialist Civil Codes of Vietnam and the others under the Civil Law tradition which built under the old regimes in Vietnam.

The results on legislative technique from these perceptions are always considered that the possession is an important and indispensable content of ownership right. This concept still governs the Civil Code of the Federal Republic of Russia in 1994. Article 209 talks about the content of ownership of this Code with paragraph 1 stipulating that "The Owner will be called to have rights of possession, use and disposal of property". This is a model to design the rules about the content of ownership right in the Socialist Civil Codes in Vietnam.

Such a conception of ownership right and the absence of a full conception of other real right may stem from the promotion of the extremely socialist ownership to most important material wealth in society - that is the means of production. Currently, the Property Law of the People's Republic of China in 2007 still governs the dominance of state ownership in Article 3. Vietnam's Constitution 2013 considers the state economy to play a key role in the market economy with Socialist orientation in Article 51, paragraph 1. State ownership is conceived as an economic category, a form of ownership for means of production and is defined as a form

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<sup>881</sup> Ministry of Justice, Institute of Juristic Science, *Scientific Comments on the Civil Code of 2005 (Volume I) – The First Part: General Provisions; The Second Part: Property and Ownership*, Edited by Hoang The Lien, National Political Publishing House, Hanoi, 2008, p. 350.

<sup>882</sup> Hanoi Law University, *Textbook on Vietnamese Civil Law (Volume I)*, Hanoi, People's Public Security Publishing House, 2006, p. 173.

<sup>883</sup> Luong Minh Cu, Vu Van Thu, *Private Ownership and Economy in Vietnam Today – Some Awarenesses of Theory and Practice*, Su that Truth National Political Publishing House, Hanoi, 2011, p. 121.

<sup>884</sup> Ministry of Justice, Institute of Juristic Science, *Scientific Comments on the Civil Code of 2005 (Volume I) – The First Part: General Provisions; The Second Part: Property and Ownership*, Edited by Hoang The Lien, National Political Publishing House, Hanoi, 2008, p. 350.

of socialist ownership which is more radical meaning than all other forms of ownership such as private ownership and collective ownership<sup>885</sup>. In the socialist traditional economy, the merchant class was abolished because of the regime of fully privatizing the means of production. State-owned industrial enterprises, which are the basic economic units of socialism, only have the right to manage operations (the right of operating management of socialist property) with socialist property. This professional management right is considered an almost real right<sup>886</sup> that is unique on socialist property. In order to protect this type of property, Vietnam's criminal law previously distinguished the group of crimes against socialist property and the group of crimes of infringing upon private property. On October 21, 1970, the Standing Committee of the National Assembly promulgated two ordinances: the Ordinance on the punishment of crimes against socialist property and the Ordinance on punishing crimes of infringing upon private property of citizens. In 1985, the Criminal Code was passed, but there were still two separate chapters for these two groups of crimes - the chapter on the infringement of socialist ownership and the chapter on the infringement of property ownership of citizen. The group of crimes against socialist property has a more stringent criminal policy and aims to protect socialist production relations. Therefore, the concept of socialist property is opened to include the property of the legal organizations of the people, and even foreign assets in the Vietnamese territory with the concept that the property has significance for the construction of socialism. Later, due to economic hardship and the lack of professionalism in effectively exploiting socialist property, the real right on socialist property were gradually expanded in relation to giving hiring businesses, allocating land, lending land ... These conceptions still influence to some extent the current legal thinking in Vietnam.

2. Scientific awareness of the ownership of the entire people on land by many Vietnamese researchers (which some of them have participated in drafting the Civil Code 2005) has mostly difficult to understand contents such as below:

“Entire-people ownership means the possession of the entire people in the socialist society, which also means the possession of a socialist state. This regime was born with the establishment of the Socialist State. In the multi-component economic structure, socialist ownership is expressed in two forms: State ownership and collective ownership. In these two forms of ownership, State ownership is a high form, because it fully represents the principle of socialist socialization”<sup>887</sup>.

The Civil Code 2015 cannot be different from that ideological continuum that is stipulated by the Constitution 2013. Drafting together with the Constitution 2013, in the proposal of the Land Law Project to the National Assembly in 2012, the Government of Vietnam has seen clearly that "Land is a big, complicated and sensitive problem that directly

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<sup>885</sup> Hanoi Law University, *Textbook on Vietnamese Civil Law*, Hanoi, 1995, P. 140.

<sup>886</sup> Katlijn Malfliet, “La Propriété c’est le vol: “Property is Theft” Revised” (pp. 297 – 326), *Private and Civil Law in Russia Federation*, edited by William Simons, Martinus Nijhoff Publishers, Leiden, Boston, 2009, p. 300

<sup>887</sup> Nguyen Manh Hung, *Understanding The New Land Law – New Arable Land Policy*, National Political Publishing House, Hanoi, 1993, p. 9 – 10

impacts on the economy, politics, society, stability and development of the country” and emphasize the viewpoint “continue to affirm the land belongs to the entire people with the State acting as the owner’s representative and uniformly managing land”<sup>888</sup>.

Such scientific awareness and regulations constitute a situation that makes difficult to build or reform real right institution that is truly in line with the requirements of modern social life and is based on traditional legislative techniques related to real right are based on a private ownership regime. In fact, despite many efforts, many concepts in the system of real right in Vietnam cannot be harmonized with the world, such as the concept of surface rights in Vietnam today is different from this concept in the other countries in the world which above sections mentioned.

3. The process of developing the Civil Code in 2015 caused a great split among researchers and drafters of the concept that whether or not to use the term "real right" in the Civil Code. Using this term or not using this term is not simply a consideration of using this term or another to express a concept, but a concentrated expression of understanding and redundancy whether or not to accept the objective existence of real right relations. Many scholars vigorously protect not only the use of the term “real right” in the Civil Code 2015, but also require a clear and complete set of real right in the code<sup>889</sup>. At the same time, many scholars oppose the use of this term, and even intend to deny the objective existence of real right relations<sup>890</sup>.

The textbooks on Vietnamese civil law of different training institutions at the same time (before the Constitution 2013 was adopted) has different conceptions of real right, while the principle of the socialism legislation is highly demanded that the law must be recognized and implemented uniformly throughout the country<sup>891</sup>, It means the law must be interpreted in the same way. The Constitution 1992 requires: "The State administers society by rule of law and constantly strengthens the socialist legislation" (Article 12). So far, many different perceptions of real right have been expressed in different works, which have caused many scholars to be confused. Some books explain the concept of real right in the Civil Law tradition, such as: "The right to things is the right to behave directly on physical property or things"<sup>892</sup>; or "... the real right opposes the personal right (jus ad personam), is a right to be exercised against a person, not a direct right on a thing"<sup>893</sup>; or "... Real rights are the rights to allow a person to enjoy immediate and direct power over a thing without the role of another"<sup>894</sup>. In the meantime, an article on the term "foreigner" and "Vietnamese" do not understand the

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<sup>888</sup> Government, *Statement of the Project for Land Law (Revised)*, Number 222/ TT- CP, 06 September 2012, p. 4

<sup>889</sup> Typical of these scholars is Assoc Prof. Dr. Nguyen Ngoc Dien, Assoc Prof. Dr. Ngo Huy Cuong, Assoc Prof. Dr. Duong Dang Hue ...

<sup>890</sup> Typical of these scholars is Assoc Prof. Dr. Do Van Dai; Prof. Dr. Le Hong Hanh...

<sup>891</sup> Hanoi Law University, *Textbook on Marx – Lenin Theory of State and Law*, Hanoi, 1989, p. 324; Hanoi National University, Social Sciences and Humanities College, Law Faculty, *Textbook on General Theory of State and Law*, The Second Edition, Hanoi National University Publishing House (VNU Press), Hanoi, 1998, p. 357

<sup>892</sup> Trieu Quoc Manh, *Overview of Law and Civil Law*, Ho Chi Minh City’s Publishing House, 2000, p. 227

<sup>893</sup> Nguyen Ngoc Dien, *Textbook on Civil Law – Volume 1*, Ho Chi Minh City National University Publishing House, Ho Chi Minh City, 2017, p. 174

<sup>894</sup> Academy of Justice, *Textbook on Civil Law*, People’s Public Security Publishing House, 2007, p. 225

term "real right" and "... in the "real right " as well as in the draft that ownership right is a "core" right while the object of current ownership right is not only "thing" but "property"<sup>895</sup>". There is even a professor of the ASEAN Institute of Law and Economics, writes:

“In modern legal science in countries around the world, the concept of real right is no longer used but instead the concept of property rights with broad, complete and more accurate internal concepts of real right. In the laws of nations, it is difficult to find the concept of "things right", which means real right is "things" and property are basically the same meaning. In English, the concept of things is broader and more complete. In Vietnamese, the "thing" is understood as something that is cubical, recognizable. In English, ‘things" are understood as objects of possession or understood as property. The concept of "things" or "property" in English is almost synonymous and so the classification is similar"<sup>896</sup>.

These citations show the weakness on legislative techniques of many Vietnamese scholars today, but actually govern the development of the Civil Code 2015. Their weakness forced the requirement to reform the real right institution. And these perceptions are a difficulty in building and reforming this institution in Vietnam.

When coming to real right institution, it is about civil law. After many years of minimizing its role, this law has been given more attention and has been determined to a certain extent at the beginning of the renovation period, building a market economy. Report to the National Assembly on the reception of people's opinions, branches, levels and deputies, revising the draft Civil Code in 1995 to determine "... Civil Code, an important Code after the Constitution..."<sup>897</sup>. However, in general awareness is still a significant influence of Sovietique tradition and still plays a fundamental role in the legal system of Vietnam – a mix legal system.

Sovietique Law tradition has no distinction between public law and private law, public law almost plays a decisive role (if viewed from the law classification according to Civil Law)<sup>898</sup>, and upholds the law of economics, lowers the role of civil law by the traditional socialist economy is built on the foundation of privatizing production materials and planning the national economy. According to René David, in socialist law, it means "socialist ownership" is more important than "personal ownership"<sup>899</sup>. The Marx- Lenin's historical materialism said that superstructure was built on infrastructure, so building socialist production relations played a key role. These are the main reasons for increasing the role of economic law in the tradition of socialism (to establish socialist relations) compared to civil law. Therefore, legislative techniques on civil law have not been adequately noticed. For

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<sup>895</sup> Do Van Dai (Editor), *Scientific Comments on Certain New Points of The Civil Code 2015 (Monograph Book)*, Hong Duc Publishing House – Vietnam Lawyers Association, 2016, p. 11

<sup>896</sup> Le Hong Hanh, "Using concept of property right replacing real right on the Draft of Civil Code (revised)" (pp. 3 – 10), *State and Law Review*, No. 4(324)/2015, Vietnam Academy of Social Sciences, Institute of State and Law, p. 7

<sup>897</sup> Government, *Statement Before National Assembly for Accepting the Views of People, Branches, Levels and Deputies, Correcting and Editing the Draft of the Civil Code (Revised)*, Number 5529/CP, 30 September 1995

<sup>898</sup> René David and John E. C. Brierley, *Major Legal Systems in the World Today – An Introduction to the Comparative Study of Law*, Second Edition, The Free Press, New York – London – Toronto – Sydney – Tokyo – Singapore, 1978, p. 265

<sup>899</sup> René David and John E. C. Brierley, *Major Legal Systems in the World Today – An Introduction to the Comparative Study of Law*, Second Edition, The Free Press, New York – London – Toronto – Sydney – Tokyo – Singapore, 1978, p. 262.

example: patrimony rights are rarely mentioned in the legal science of Vietnam in the North after the French colonial period and in nationwide after 1975. However, when coming to civil law science, very few scholars still consider patrimony rights is different from moral rights and include rights that tend to predominantly give those rights holder physical benefits that can be worth in money<sup>900</sup>. Such lack of knowledge on civil law is also a resistance to reforming and improving the law in general and real right institution in particular.

### **III. Demands by Modern Social Life Necessitate the Reform of Real Rights Institution**

Vietnam is an agricultural country on the way of industrialization and modernization. In Vietnam, rural areas and agriculture have commenced the innovation process, saving modern and industrial urban areas, but peasants have to leave their villages to work as hired laborers at low price due to the lack of land...<sup>901</sup>. Recognizing the inseparable connection between agriculture, rural areas and peasants with the issues of land, environment, industrialization, modernization and international integration, the Communist Party and the State of Vietnam have promulgated different guidelines, policies and legal documents interconnectedly regulating these issues. In Vietnam, about 80% of the population live in villages, thus if they live in sustainable welfare and development, they will create a solid foundation for the industrialization and modernization of the country.<sup>902</sup>

The village is a traditional feature of organizing the social life of Vietnamese people, which is closely associated with agriculture, forestry and fisheries, and sometimes with handicrafts. Studies in Vietnamese culture, economy and society must seriously take into account villages, agriculture and land. Village, in the Vietnamese definition, unlike an administrative unit, is simply a natural entity and is considered as a settlement unit, a traditional cultural unit of Vietnamese peasants with relatively stable geographical area, organizational structure, infrastructure and customary practices.<sup>903</sup> However, villages are currently in crisis for numerous reasons. The major cause is that the issues of land - the foundation of agriculture and rural areas - have not been adequately handled, despite the perception that "in agricultural production, land is the most important production material, a special type of production material, which cannot be replaced, and peasants play the decisive role in the production process."<sup>904</sup> Until recently, about 80% of the voters' complaints and denunciations is related to the issues of land.<sup>905</sup> There have been many prolonged cases involving a great number of people which have shocked the political system. There are even

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<sup>900</sup> Trieu Quoc Manh, *Overview of Law and Civil Law*, Ho Chi Minh City's Publishing House, 2000, p. 226

<sup>901</sup> Tuong Lai, "On Countryside and Peasantry" (pp. 9 – 12), *Peasantry, Countryside & Agriculture- Issues Being Arisen*, Knowledge Publishing House, Hanoi, 2008, p.13.

<sup>902</sup> Ho Chi Minh National Academy of Politics, *Village Communities of Vietnam Nowadays*, National Political Publishing House, Hanoi, 2001, p. 25.

<sup>903</sup> Mai Van Hai, Nguyen Tuan Anh, Nguyen Duc Chien, Ngo Thi Thanh Quy, *Viet Villages Colour in the Process of Globalization Nowadays (Through Documentations of Some Villages in Northern and Northern Central Region)*, National Foundation for Science and Technology Development, Social Science Publishing House, Hanoi, 2013, pp. 21 & 23.

<sup>904</sup> Lam Quang Huyen, *Arable Issues in Vietnam*, Social Science Publishing House, Hanoi, 2007, p.14.

<sup>905</sup> Pham Duy Nghia, "Countryside and Peasantry from Angle of View of Ownership" (pp. 129 – 135), *Peasantry, Countryside & Agriculture- Issues Being Arisen*, Knowledge Publishing House, Hanoi, 2008, p. 130.

seriously violent cases against the government, for example the case of farmer Doan Van Vuon (Hai Phong) farmer Dang Van Hien (Dac Lac) using the weapon to kill the public executive agents. Currently most of the agricultural land is inefficiently used, especially with the trend of peasants leaving the land to go to the big cities to earn a living, while the land is left with those who do not know how to effectively utilize it for economic purposes.<sup>906</sup> The fact that villages suffer from crises in remote areas does have a significant impact on sustainable development because when it comes to sustainable development, it is impossible not to mention the protection and development of forest. In the past, although the forest in the Central Highlands was so vast, land and forest were not *terra nullius* as they were already assigned to villages.<sup>907</sup> It is now difficult to protect forests because the land policies are fairly incompatible with local cultures. The forest without ownership is highly likely subject to destruction.

Currently, Vietnamese villages have approached towards forming farms.<sup>908</sup> The need for land concentration is an economic issue as well as a major legal issue. The Government affirmed: “Encouraging land concentration, farm development, agricultural enterprises should be suitable with the conditions of each region”<sup>909</sup>. This is seen as an important solution meeting the requirement that agriculture, peasants and rural areas are associated with the socialist-oriented market economy, industrialization, modernization, international integration and in pursuit of the fourth industrial revolution. The Ministry of Natural Resources and Environment affirmed:

“The accumulation and concentration of land is a necessary step, meeting the requirement of efficiency in agricultural production, creating the conditions for the successful implementation of agricultural and rural industrialization and modernization. This is a consistent view of our Party and State”<sup>910</sup>

However, stabilizing the lives of peasants across the country cannot be fully integrated with “farminization”. Farminization itself must depend on the land policies, the spirit and culture of peasants, and the individual conditions of each region. Vietnamese peasants need certainty in the land policies.

Because the land is owned by the entire people, represented and uniformly managed by the State, the State can take back the land at any time and the value of compensation for such land is also decided by the State, which results in the increase in the number of land cases and in the corruption.<sup>911</sup> It is said that in order to protect peasants, it is necessary to

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<sup>906</sup>Tuong Lai, “On Countryside and Peasantry” (pp. 9 – 12), Peasantry, Countryside & Agriculture- Issues Being Arisen, Knowledge Publishing House, Hanoi, 2008, p. 93.

<sup>907</sup>Nguyen Ngoc, “Sustainable Development in Western Highlands” (pp. 137 – 184), Peasantry, Countryside & Agriculture- Issues Being Arisen, Knowledge Publishing House, Hanoi, 2008, p. 155.

<sup>908</sup>Ho Chi Minh National Academy of Politics, *Village Communities of Vietnam Nowadays*, National Political Publishing House, Hanoi, 2001, p.51.

<sup>909</sup>Government, Submission Report No. 222/TTr-CP dated 6 September 2012 on the draft Land Law (Amendment), p.4.

<sup>910</sup>Ministry of Natural Resources and Environment, *The Pilot Project for agglomeration and Concentration of Land Plots Serving the Investment into Concentratedly Agricultural Production*, 2018, p. 1.

<sup>911</sup>Consultancy Centre of Agricultural Policy (CAP), *Policy on Land for Development in Vietnam: Opportunities and Challenges*, Funded by Institute of Policy and Strategy for Agriculture and Rural Development (IPSARD) and United Nations Development Programme (UNDP), Hanoi, 2011, p. 53.



protect their private property rights, to help them enjoy such rights in accordance with national and local planning.<sup>912</sup> However, the issue of ownership, especially land ownership is a complex issue not only in Vietnam, but also in Russia. The future of property ownership in Russian law after the dissolution of the Soviet Union encounters a major challenge, which is the increase of the tension between the individual and the social function of private property ownership in the course of privatization.<sup>913</sup>

In order to facilitate a developed market economy, respecting free will is a prerequisite. This doctrine, simply understood, has two important theoretical bases: people are only bound by their own will and people have the right to decide all that belong to them. On this account, the constitutional principles protecting the private ownership, business freedom, and the principle of freedom of contract and self-determination in private law<sup>914</sup> are set at top priority in Vietnam today. If doing business is seen as a process of increasing existing properties by utilizing such properties or other people's properties, then ownership and other real rights must be clearly defined. This is the most important element of the legal framework for doing business.

The previous centrally planned economy had brought to the people of Vietnam a period of famine after the reunification of the country in 1975. The reform policy has gradually eradicated that hunger. The essence of this policy is to follow what has happened in history in the past regimes such as: peasants mastering their land in agricultural production, developing the class of businessmen, breaking the monopoly of the State in many fields (foreign trade, foreign exchange, banking, insurance, maritime, aviation ...), limiting the State's intervention into the production and business activities. ... But the most important point of this innovation policy is the issue of the means of production ownership. The 1992 Constitution (the Constitution of the Doi Moi period) provides for a series of principles and the highest rules of the economic regime: The multi-sectoral structure of the economy with diversified types of production and business organisation is based on the ownership of the entire people along with collective and private ownership<sup>915</sup>; production and business establishments of the various economic sectors are equal before the law; their legal capital and property shall be protected by the State<sup>916</sup>; the legal property of individuals or organisations shall not be nationalized.<sup>917</sup>

The break-out of this self-contained rope has brought about remarkable economic and social achievements. Summarizing the experiences of 20 years of renovation (1986 - 2006), the Communist Party of Vietnam has emphasized the innovation of thinking, including “the

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<sup>912</sup>Pham Duy Nghia, “Countryside and Peasantry from Angle of View of Ownership” (pp. 129 – 135), *Peasantry, Countryside & Agriculture- Issues Being Arisen*, Knowledge Publishing House, Hanoi, 2008, p. 130.

<sup>913</sup> Katlijn Malfliet, “La Propriété c’est le vol: “Property is Theft” Revised” (pp. 297 – 326), *Private and Civil Law in Russia Federation*, edited by William Simons, Martinus Nijhoff Publishers, Leiden, Boston, 2009, p. 298.

<sup>914</sup>See Article 32, Article 33 of the 2013 Constitution; Article 3 of the 2015 Civil Code

<sup>915</sup>Article 15 of the 1992 Constitution

<sup>916</sup>Article 22 of the 1992 Constitution

<sup>917</sup>Article 23 of the 1992 Constitution

innovation from singular form of ownership thinking to multi-ownership and multi-component thinking.”<sup>918</sup>

So far, the Communist Party of Vietnam has become fairly advanced in promoting the development of the private economy by affirming: “The socialist-oriented market economy of Vietnam has many forms of ownership, many economic sectors, among which the state economy plays a key role and the private economy is an important driving force of the economy; Subjects of the economic sectors are equal, cooperative and competitive in accordance with the law.”<sup>919</sup>

In order for the private economy to develop as a driving force of the entire economy, private property rights must be adequately and appropriately protected by law.

Recently, the fourth industrial revolution has been repeatedly mentioned in Vietnam. The government has been very enthusiastic to show its determination not to miss this “4.0 train”. Many books and newspapers as well as seminars discuss this revolution in the specific context of Vietnam. The fourth industrial revolution is seen as an indispensable trend with the miraculous progress and development of science, technique and technology that have brought profound and comprehensive changes in the people’s way of life.<sup>920</sup> This transformation is predicted to fundamentally alter the way we live, work, and relate to one another, the scale, scope, and complexity of which will be unlike anything humankind has experienced before.<sup>921</sup> The UK government considers that the Fourth Industrial Revolution is of a scale, speed and complexity that is unprecedented. It is characterised by a fusion of technologies—such as artificial intelligence, gene editing and advanced robotics – that is blurring the lines between the physical, digital and biological worlds. It will disrupt nearly every industry in every country, creating new opportunities and challenges for people, places and businesses to which we must respond.<sup>922</sup>

Although there are still many questions as to the emergence of the Fourth Industrial Revolution, but the breakthroughs in the area of digital technology together with scientific and technological achievements in the areas of physics, biology and energy such as 3D printing, new generation genetic technology, new material technology, nanotechnology, renewable

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<sup>918</sup>Vietnam Communist Party, The Central Committee, Committee for Directing the Theoretical Summarization, *Report of Certain Theoretical and Practical Issues Summarization Through 20 Years of Innovation (1986 – 2006)*, National Political Publishing House, Hanoi, 2005, p. 142.

<sup>919</sup>Communist Journal (The Theoretical and Political Organ of The Communist Party’s Central Committee), The Party’s Point of View of Private Economy through its National Congresses in 30 Years of Innovation, 1265 ISSN0866-7276, [<http://www.tapchicongsan.org.vn/Home/Nghiencuu-Traodoi/2016/41886/Quan-diem-cua-Dang-ve-kinh-te-tu-nhan-qua-cac-ky.aspx>], 8/11/2016 21:33’.

<sup>920</sup>School of Law, Hanoi National University, *The Fourth Industrial Revolution and Certain Issues Setting for Vietnamese Laws Reform (Monograph Book)*, Co-Editors: Nguyen Thi Que Anh and Ngo Huy Cuong, Su that Truth National Political Publishing House, Hanoi, 2018, p.7.

<sup>921</sup>Klaus Schwab, “The Fourth Industrial Revolution: what it means, how to respond”, World Economic Forum, [<https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-The-Fourth-Industrial-Revolution-what-it-means-and-how-to-respond-means-and-how-to-respond/qua@wef>], 14 Jan 2016.

<sup>922</sup>HM Government, Regulation for the Fourth Industrial Revolution, White Paper, Industrial Strategy, Presented to Parliament by the Secretary of State for Business, Energy and Industrial Strategy by Command of Her Majesty, June 2019, UK, p.7.

energy technology ... are changing the appearance of production and business in a manner that can hardly be visualized.<sup>923</sup> Therefore, in order to respond with and keep up with the Fourth Industrial Revolution, Vietnam must have a comprehensive strategy and orientation.

The participation of different technologies to create a product and the use of special assets or the combination of many assets to create other assets (such as in robotics, 3D printing, smart factory ...) require that the legal issues related to property rights, including real rights must be clear. The lack of clarity in this situation is a huge barrier to the development.

#### **IV. Major reform orientations and solutions**

The above analysis has shown that the real rights institution under Vietnamese law must be re-assessed in the spirit of reform in order to meet the urgent requirements of Vietnamese society in the new context of the development of private economy, industrialization, agricultural and rural modernization, sustainable development, response with and pursuit of the Fourth Industrial Revolution...

The foundation of the real rights institution is the issue of land and private ownership. The juridical technique regarding the real rights institution is concerned firstly with land and immovable property. Likewise, in the Common Law tradition, the property law in the United State originating from the feudal land law in the United Kingdom has so far mainly dealt with immovable property, especially with the kinds of interests in and types of ownership of property.<sup>924</sup> Real rights institution can only be complete when the private ownership is recognized, especially including the private ownership of land.

On the other end of the spectrum, the full recognition of the real rights institution is the most important guarantee for the private ownership. Such guarantee for the private ownership can be expressed in two aspects, which are the protection against the violation by other private parties and against the abuse or nationalization by the State over the private property. Studying the classic work by Adam Smith “An Inquiry into the Nature and Causes of the Wealth of Nations”, Guangdong Xu (China University of Political Science and Law) has explained that

“According to Adam Smith, security of property rights against expropriation by fellow citizens or the state is an important condition for encouraging individuals to invest and accumulate capital, which, in turn, would boost economic growth”.<sup>925</sup>

Accordingly, the reform of the institution of real rights under the Vietnamese law must follow two essential orientations. *The first orientation* is the reform of the regime of landownership, according to which private parties are entitled to limited land ownership. *The*

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<sup>923</sup>Ministry of Science and Technology, “Understanding the Main Technologies of the Fourth Industrial Revolution and Forecasting the Impacts on Policies and Laws” (pp. 5 - 21), Scientific Seminar at National Level on The Fourth Industrial Revolution and Certain Legal Issues Setting for the Build and Perfection of Vietnamese Legal System, Organized by Ministry of Justice, 24June 2019, Hanoi, 2019, p.6.

<sup>924</sup> Allan Farnsworth, *An Introduction to the Legal System of the United States*, Second Edition, Oceana Publications, INC., London, Rome, New York, 1991, p. 116.

<sup>925</sup> Guangdong Xu, “Property Rights, Law, and Economic Development”, *De Gruyter*, doi 10.1515/ldr-2013-0004 LDR 2013; 6(1): 117–142, p. 117.

*second orientation* is to improve the juridical technique relating to real rights institution. If these orientations are not followed, the reform of the institution of real rights cannot be succeeded.

### *1. Reforming the regime of land ownership*

As early as the 90s of the 20<sup>th</sup> century, the 1993 land law provided that the State allocated land to the land users in a stable manner accompanied with a bundle of rights (such as to exchange, to assign, to lease, to bequeath, to mortgage the land use right) in order to create favorable conditions for the peasants to be more attached to land and for the land users to feel more secure to invest in the production.<sup>926</sup> This indicates that Vietnamese legislators were well aware that a clear legal framework regulating the property rights in general and real rights in particular would have an important role to play in facilitating the social and economic development. It also reveals that “stability” (a core issue) could not be reached if the provision on real rights lacked clarity from the perspective of juridical technique.

Then the question is how to reach a real stability or durable stability? That question has probably not been answered by Vietnamese legislators. This is the reason why after the 1993 Land Law, Viet Nam promulgated two other Land Law in 2003 and 2013 without any substantive change. No one could say for sure that there is a legal stability in the regulation of citizen’s property if the law is changed every 10 years!?

Throughout its history, Vietnam is an agricultural country tied to the rural areas. Therefore, land and peasants are the basic elements of agriculture and rural areas<sup>927</sup> and are also the national identity of Vietnam. The Vietnamese people used to have a few acres of land to cultivate<sup>928</sup> which were all their assets,<sup>929</sup> meaning that before the entire people’s land ownership regime, private land ownership regime was the foundation of society. On this foundation, self-governing village regime became specially developed in Vietnam since ancient times<sup>930</sup>. The motto “*the king’s law gives way to the village’s customs*” (“*Phép vua thua lệ làng*”) rightly reflects the legal situation in Vietnam in the past regimes, which still have considerable influence on the current Vietnamese society. This self-governing regime led to the fact that every village had its own property, including the immovable property such as land and movable property such as objects and money,<sup>931</sup> which indicates the existence of a public property regime at that time. The redistribution of the village’s public land about every three years became a key issue in the unity of Vietnamese villages.<sup>932</sup> Until before the success of the socialist revolution, in Vietnam, there were three concurrent land regimes: the state’s

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<sup>926</sup> Nguyen Manh Hung, *Understanding The New Land Law – New Arable Land Policy*, National Political Publishing House, Hanoi, 1993, p. 8.

<sup>927</sup> Lam Quang Huyen, *Arable Issues in Vietnam*, Social Science Publishing House, Hanoi, 2007, p. 14.

<sup>928</sup> Tran Trong Kim, *Vietnam’s Sketchy History*, Volume II, Education Ministry’s Learning Material Centre Publishing, The First Edition, Saigon, 1971, p. 248.

<sup>929</sup> Vu Van Mau, *General Theory of Civil Law*, National Ministry of Education, The Second Edition, Saigon, 1960, p. 206.

<sup>930</sup> Vu Quoc Thong, *Vietnam’s Legislation History*, University Bookcase, Saigon, 1973, p.157.

<sup>931</sup> Vu Quoc Thong, *Vietnam’s Legislation History*, University Bookcase, Saigon, 1973, p.157.

<sup>932</sup> Mai Van Hai, Nguyen Tuan Anh, Nguyen Duc Chien, Ngo Thi Thanh Quy, *Viet Villages Colour in the Process of Globalization Nowadays (Through Documentations of Some Villages in Northern and Northern Central Region)*, National Foundation for Science and Technology Development, Social Science Publishing House, Hanoi, 2013, p.26.

public land regime, the village public land regime and the private land regime.<sup>933</sup> Perhaps the village public land regime played an important role in the self-governing village regime, but the village land was mostly transformed into private land just before the August Revolution of 1945.<sup>934</sup> In this regard, Phan Ke Binh (1875 - 1921) (a Vietnamese cultural researcher) talked about the use of village public land as a good custom of Vietnam since ancient times in that any village that had public land and public income would spend such income on public affairs or paying village guards by way of assigning land to them.<sup>935</sup>

After the August Revolution, the policy of “*All ploughmen must be given land*” (“*Người cày có ruộng*”) contributed to developing the regime of land private ownership in Vietnam. Under the 1980 Constitution, the regime of the entire people’s land ownership was established. Since then, under the three following Constitutions, the idea of the regime of the entire people’s land ownership has dug deep into the argumentation of many socialist lawyers, causing significant effects on the entire legal system. However, basically, Vietnam is still the country of peasants who are attached to land. The psychology of private land ownership is difficult to change. This mentality is evident through the immovable property purchase, land disputes and major land scandals.

In the search for solutions to the problems of agriculture, rural areas and peasants, an expert is of the view that Vietnam needs to boldly change land policies, encourage the transfer and lease of land to focus on developing large-scale farms.<sup>936</sup> This solution is only partly effective as it is still based on the regime of entire people’s land ownership represented and uniformly managed by the State. A solution that brings the best and lasting results must be designed on the basis of reforming the land ownership regime.

The regime of ownership is considered to be the most fundamental issue of a certain socio-economic regime.<sup>937</sup> This means that it is impossible to develop a private economy on the basis of the public ownership of all means of production. Accordingly, the current policy of adhering to the regime of the entire people’s land ownership seems to conflict with the policy of private economic development.

As a secondary landlord, the State still has unfinished works related to the administration of this property and thereby causing social anger. Thu Thiem case is one of the typical examples. The Committee on Economy and Budget in its verification report acknowledges:

“In fact, many households and individuals currently have one of the legitimate documents, but have not been issued an official certificate due to the slow implementation by the state management agency. Therefore, it is necessary to inherit the provisions of the current

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<sup>933</sup>Lam Quang Huyen, *Arable Issues in Vietnam*, Social Science Publishing House, Hanoi, 2007, pp. 33 – 34.

<sup>934</sup>Mai Van Hai, Nguyen Tuan Anh, Nguyen Duc Chien, Ngo Thi Thanh Quy, *Viet Villages Colour in the Process of Globalization Nowadays (Through Documentations of Some Villages in Northern and Northern Central Region)*, National Foundation for Science and Technology Development, Social Science Publishing House, Hanoi, 2013, p.26.

<sup>935</sup>Phan Ke Binh (1875 – 1921), *Vietnam Customs and Habits*, Culture – Information Publishing House, Hanoi, 2005, p.219.

<sup>936</sup>Dang Kim Son, “Agriculture and Countryside Development in the Process of Industrialization” (pp. 185 – 253), *Peasantry, Countryside & Agriculture- Issues Being Arisen*, Knowledge Publishing House, Hanoi, 2008, p. 228.

<sup>937</sup>Luong Minh Cu, Vu Van Thu, *Private Ownership and Economy in Vietnam Today – Some Awarenesses of Theory and Practice*, Su that Truth National Political Publishing House, Hanoi, 2011, p. 120.

land law and continue to allow land users to have one of the legitimate documents on land use rights to conduct land use right transactions.”<sup>938</sup>

In response to this situation, the Resolution of the 11th Party Congress sets out the orientations relating to the ownership, use and management of production materials, including the land owned by the entire people as follows: “Clearly defining the rights of the owners, the rights of the users of the means of production and the management rights of the State in the economic field, ensuring that all means of production have a master, all economic units are self-reliant and self-responsible about their business results”. Many people believe that this is a pioneering step to pave the way for the recognition of other forms of land ownership in Vietnam in the coming time.<sup>939</sup> However, this is only a dream when reading the above paragraph of the Resolution of the 11th Party Congress. Denying such understanding, both the 2013 Constitution and 2013 Land Law affirmed, sure as eggs is eggs, about the entire people’s land ownership regime that is represented and uniformly managed by the State in Vietnam. The term “a master” in the paragraph “ensures that all means of production have a master” as quoted above aimed only at clearly defining the powers and responsibilities related to the materials of production in general and must be interpreted in accordance with “the theory of collective mastery” (“Học thuyết làm chủ tập thể”) as developed by the late General Secretary Le Duan in Vietnam after the reunification of the country in 1975, which requires everyone to have the spirit of socialistic collective mastery.

Based on the understanding that ownership rights include the right to possession, the right to use, and the right to disposition in accordance with the socialist law traditions, different researchers criticized that the State has not fully implemented the right to land possession (while the right to land possession is the basis and the prerequisite for the parties to exercise the right to use and the right to disposition) as evidenced in the lack of data over the land plots, the ill-planning of the investigation, survey, measurement, mapping and preparing of cadastral files as well as the shortcomings existed in the land planning.<sup>940</sup> In fact, most of the residential and agricultural land are possessed by private parties although such parcels of land have not been allocated, leased or recognized by the State. However, the State is admittedly ineffective in the administrative management of land, which cannot be overlooked regardless of whether it is the public or private land ownership regime.

The current regime of land ownership in Vietnam has implications not only on the economy, sustainable development, but also on the traditional culture that needs to be

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<sup>938</sup>National Assembly, the Committee on Economy and Budget, A Verification Report on Draft of Land Law (Amendment), 735/BC-UBKT13 dated 26 October 2012, pp. 5 – 6.

<sup>939</sup>Consultancy Centre of Agricultural Policy (CAP), Policy on Land for Development in Vietnam: Opportunities and Challenges, Funded by Institute of Policy and Strategy for Agriculture and Rural Development (IPSARD) and United Nations Development Programme (UNDP), Hanoi, 2011, p. 56.

<sup>940</sup>Consultancy Centre of Agricultural Policy (CAP), Policy on Land for Development in Vietnam: Opportunities and Challenges, Funded by Institute of Policy and Strategy for Agriculture and Rural Development (IPSARD) and United Nations Development Programme (UNDP), Hanoi, 2011, pp. 57 – 58.

preserved. It is complained that village culture is dying.<sup>941</sup> It is undeniable that the ability to adapt is an essential part of the Vietnamese village culture,<sup>942</sup> the change over the land mentality, however, is unlikely to happen as every inch of land is considered by the Vietnamese people to be attached to their homeland and country, and the patriotic love for the country is a typical personality, which cannot be changed by Vietnamese people. The huge amount of remittance flown to Vietnam every year is a sure testament to that love.

It could be noted that the change is one of the characteristics which makes its own features of the Vietnamese village<sup>943</sup>. However, the psychological change about land could be happened because each piece of land is considered motherland, country of Vietnamese while the love for country is one of the biggest and unchangeable characteristics of Vietnamese. The huge amount of money from Vietnamese ressorissants to Vietnam is the good evidence of this love.

Study on the policies of countries with economy in transition and the actual land matters in Vietnam, Martin Ravallion and Dominique van de Walle conclude: “Standard policy transforming from planned economy into market economy is to privatize production assets, then to change the laws in order to allow the free exchange of these assets”<sup>944</sup>. Returning forest to village<sup>945</sup> is a must to maintain village culture in Tay Nguyen and to ensure durable development. However, they are important suggestions to come to solutions returning to land possession regime including private and public land.

In the land ownership regime, it is important to note:(1) common property including sea zone, sky zone, rivers, protection forest, prime source forest; (2) public property includes: lands belong to National property, bridges, roads,...; (3) collective property includes: lands belong to these institutions and other assets; (4) private property includes: lands belong to private possession and other assets; (5) *res nullius* is heritage for praying, wide animals and plants, other *res nullius* things. These types of assets which have their own legal rules. Private rights encourage individuals to save natural resources because the users have to pay for their actions<sup>946</sup>.

Private property provides for incentives for individuals to economize on resource use because user bears the cost of their actions<sup>947</sup>.

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941 Tuong Lai, “On Countryside and Peasantry” (pp. 9 – 12), Peasantry, Countryside & Agriculture- Issues Being Arisen, Knowledge Publishing House, Hanoi, 2008, p.100.

942 Mai Van Hai, Nguyen Tuan Anh, Nguyen Duc Chien, Ngo Thi Thanh Quy, Viet Villages Colour in the Process of Globalization Nowadays (Through Documnetations of Some Villages in Northern and Northern Central Region), National Foundation for Science and Technology Development, Social Science Publishing House, Hanoi, 2013, p.133.

943 Mai Van Hai, Nguyen Tuan Anh, Nguyen Duc Chien, Ngo Thi Thanh Quy, Viet Villages Colour in the Process of Globalization Nowadays (Through Documnetations of Some Villages in Northern and Northern Central Region), National Foundation for Science and Technology Development, Social Science Publishing House, Hanoi, 2013, page 133.

944 Martin Ravallion, Dominique van de Walle, Land in the Period of Transition – Reform and Indigence in Rural Areas of Vietnam Nowaday, Culture – Information Publishing House, Hanoi, 2008, page 202.

945 Tuong Lai, “About countryside and farmers” (pp. 9 – 127), Farmer, countryside & agriculture, problems are posing, Publishing House Tri Thuc, Hanoi, 2008, page 115.

946 Benjamin Powell, “Private Property Rights, Economic Freedom, and Well Being”, Mercatus Center at George Mason University, Working Paper 19, 2002, p. 1.

947 Benjamin Powell, “Private Property Rights, Economic Freedom, and Well Being”, Mercatus Center at George Mason University, Working Paper 19, 2002, p. 1.

However, this solution accounts for that: private entity only possesses some piece of land in some areas with using purpose only. The difference of land regulations from regions is from their specific conditions and does not violate the constitutionality principle. The Constitution of 2013 cuts off the legal principle of socialism and only asks the State and institutions and individuals for abiding by the Constitution and laws<sup>948</sup>. This is the important start for the expansion of the usage of legal sources and for the construction of multi legal rules in Vietnam at present.

Private lands could be equitized in some special cases because the Laws stipule clearly with one coherent and strict procedure. Land is owned by the State to balance commonly in specific context (i.e. compensation for the Revolution 4.0 for social fairness...) and could be withdrawn easier.

Based on the principle of common property about land, Ministry for Natural Ressources and Environment, Vietnam, says that users of argricultural lands have the rights to transform, assign, rent, re-rent, herit, donate, contribute and mortgate land use rights, which is the legal important key to implement the accumulation, concentration of argricultural lands for agricultural production at larger scale<sup>949</sup>. In fact, the land use right at present of private sector has not much limitations but triggers really difficulty for social stability at the psychological aspect, for the management and for the policy of concentration, accumulation of lands, for effective economically exploitation and durable development ...The Government, when submitting Draft Law on Land of 2013 has to acknowledge:

“...the policy of land changes from period to period; the management of land is implemented with market mechanism with socialism orientation, the land belong to all people, the State is representative owner and manages in uniform manner, the land user is granted with rights, land use right is special assets, which poses new problems while we lack experiences”<sup>950</sup>.

In society of people, private right is one key factor which encourages people to cooperate each other to co-exploit assets to satisfy living demands including spirit and material. In comparison with planed economy based on making nearly all production tools public in Vietnam, the need for cooperation for co-exploitation of common and public assets is not met though there are a big request. In agricultural cooperatives, farming lands are uninhibited or exhausted, the management of these lands is not effective. The State can not control all assets they represent as owner for all people. In national industrial factories, workers exploit machinery, equipment which belong to socialist possession. These factories have the right to manage professionally these assets while the State hardly manages them effectivelly and do not have continued and appropriate reform ideas... With the property possession regime, for people,

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<sup>948</sup> Constitution of 2013, Article 8.

<sup>949</sup> Ministry of Natural Resources and Environment, The Pilot Project for agglomeration and Concentration of Land Plots Serving the Investment into Concentratedly Agricultural Production, 2018, page 5.

<sup>950</sup> Government, Statement of the Project for the Law on Land (Revised), Number 222/ TTr- CP, 06 September 2012, page 3.



everyone has the right to exploit common property, public property (on theoretic aspect). Therefore, in industrial work, labor recruitment regime is applied; while in agricultural work, anyone has the right to participate in cooperatives. The State, in this property regime, becomes the boss of a collective group which is decentralized with the management of the most important assets for society (production tools) but does not possess at national scale and directs the whole society to exploit all different assets. Under this context, it is difficult to have the real cooperation in exploiting assets and to manage effectively assets.

In order not to go so further from the entire people land possession regime but let people to have the psychology as land possession, the Government confirms in the Submission of Land Law Project (revised) that: “the State does not acknowledge the request for returning the land which is delivered to institutions, households, individuals in the process to implement land policy. It does not pose problems regulating agricultural land which is delivered to households and individuals”<sup>951</sup>.

Law on Land of 2013, Article 13 stipulates that the representative right of land owner (the State) includes: Decision on land use plan, Decision on land use purpose, stipulating land use duration, Decision on land use revocation and expropriation, Decision on land price, Decision on delivering land use right to user, Decision on financial policy of land, stipulating rights and duties of land user.

Among these rights, it is divided relatively into two groups of right including (1) rights relating to land administration, and (2) rights relating to private assets (rights to land use of land users in Vietnam at present). The second group of rights includes: right to deliver the land use right according to three modes of land delivery, land rental, and land use right acknowledgment; right to control the land use right such as land use limitation, duration and purpose; right to control land use right such as decision on land price; and right to control comprehensively rights of land user and right to cancel land use right such as right and duties of land user and land return and expropriation. With these rights, land user can not have stability in land usage.

## *2. Perfection of Real Right regime on legal skills*

Real right is one of important legal regime to ensure the stability of private right. The destruction of these rights is the destruction of normal development of people society because each person does not have driving force behind implementing for this development. This statement is evidenced the most clearly via the period of planed economy in socialist countries including Vietnam earlier.

When the revolutionary enthusiastic is faded due to equality system, public property system of production tools is hinderance for labor productivity increase – what is the decision matter according to Marx system, and is a bait for corruption. This history is a an actual presence at the socialist countries who do not make renovation such as Cuba, North Korea,

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951 Government, Submission of Project of *Law on Land (revised) number 222/ TT- CP* dated on 06 September 2012, page 4.

Venezuela. The rapid renovation of Vietnam is one important experience that these socialist countries could not ignore if they want to find the way to develop economy.

When studying about real right at countries in transition, some scholars confirm that real right on land plays a key role for economic development, is one important secured asset and helps to reduce the transaction cost in credit, in particular in the developing countries and post socialist countries<sup>952</sup>. Overall, in any legal system, real right is crucial regime although its real name is used or not because it reflects an objective relationship which is relationship between one person (subject of the relationship) with one specific thing (object of the relationship) so that this person has the direct rights, not via intermediary persons, on this thing. Every right in this system can be not concentrated because there is the difference from modes of law classification and lack of one or some specific real rights in different legal systems with the view from Roman Law. However, there is no legal system that does not stipulate property rights.

Every real right is about and from property right-dominant real right. Ownership is the fullest title a person can have to a physical object while other real rights are lesser rights seemed dismemberments of ownership<sup>953</sup>. Therefore, it could not improve real right regime without reviewing ownership.

According to Civil Law, ownership includes: *usus* (usage right), *fructus* (right to receive income) and *abusus* (decision right)<sup>954</sup>. Opinion about ownership of Vietnam at present is according to Sovietique Law. Therefore, contents of ownership include holding right, usage right and decision right as above mentioned. The reason for this opinion is explained as follows: “According to tradition, socialist ownership is public holding of production tools (machinery, facilities, equipment, labor force...) to produce material assets for society”<sup>955</sup>. When all rights on thing concentrate in hands of owner-the State, these rights are protected the most solidely and the State has full material force to implement pletarial regime (one mode and also one important purpose of socialist revolution).

From this opinion, it is noted that the first step to improve real right regime in socialist countries in transition is the reform of notion and contents of ownership to ensure the set up of other real rights from dismemberments of ownership which could be splited effectively. This reform is focused on the split of holding right from contents of ownership. Possession under Civil Law is a state of fact which consist in holding a thing in an exclusive

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<sup>952</sup> Benito Arruñada, *The Enforcement of Property Rights: Comparative Analysis of Institutions Reducing Transaction Costs in Real Estate*, Department of Economics and Business, Universitat Pompeu Fabra, Financially Supported by the CICYT, an agency of the Spanish Government, through grant SEC99-1191, <http://www.econ.upf.es/~arrunada>, p. 3.

<sup>953</sup> John E. C. Brierley, Roderick A. Macdonald, *Quebec Civil Law – An Introduction to Quebec Private Law*, Edmond Montgomery Publications Limited, Toronto, Canada, 1993, p. 287.

<sup>954</sup> Vu Van Mau, *General Theory of Civil Law*, National Ministry of Education, The Second Edition, Saigon, 1960, pp. 336 – 337; John E. C. Brierley, Roderick A. Macdonald, *Quebec Civil Law – An Introduction to Quebec Private Law*, Edmond Montgomery Publications Limited, Toronto, Canada, 1993, p. 272.

<sup>955</sup> Hanoi National University, *Social Sciences and Humanities College, Law Faculty, Textbook on Vietnamese Penal Law (The Part of Criminals)*, Hanoi National University Publishing House (VNU Press), Hanoi, 1997, page 151.

manner and in carrying out on it the same material acts of use and of enjoyment as if its possessor were its owner<sup>956</sup>.

Based on the reform of legal rules of ownership according to the mentioned above direction, Vietnam should build other real rights that have had been built in Civil Laws of former systems, and should mix dependent real rights of Third Part and Second Part of of Civil Law in 2015 with other crucial real rights.

### **Conclusion**

Real right is an important regime of civil law that studies assets at quiet state. Real right has the significant meaning in protecting private rights, in enhancing civil exchange and in developing market economy.

Being influenced mainly from traditional Sovietique Law, real right regime in Vietnam at present has many insufficiencies which affect strongly economic, social, traditional, cultural development. Foundation to set up real right is private ownership of land but Vietnam is implementing the common property system for land which is represented as owner and managed by the State.

Vietnam's social life poses many problems relating to the construction of market economy, industrialization, modernization, international integration, durable development, accumulation, concentration of land, the Fourth Revolution...Thus, the reform of real right is undeniable and must be implemented according to the reform of land ownership system, the reform of legal skills relating to real right regime.

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<sup>956</sup> A. N. Yiannopoulos, *Civil Law Property Cousebook – Louisiana Legislation, Jurisprudence and Doctrine*, Eight Edition, Claitor's Publishing Division, 2003, p. 187.

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