The Development of Matrimonial Property Law in Vietnam in the Mirror of the Foreign Impacts

by

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DECLARATION

I, **Nguyen Thi My Linh,** do hereby declare that this dissertation is my original work compiled from field data and documentaries and that it has not been presented and will not be presented to any other learning institution for a similar or any other award.

I can confirm that my thesis was copy edited for conventions of language, spelling and grammar by Zsófia Zelnik and Klára Hőnig.

Signature

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ABBREVIATIONS

EU	European Union
CC	Civil Code
Art	Article
ECHR	The European Convention on Human Rights
UNICEF	United Nations Children's Fund

THE DEVELOPMENT OF MATRIMONIAL PROPERTY LAW IN VIETNAM IN THE MIRROR OF THE FOREIGN IMPACTS

Abstract

Family law has become, to an unexpected extent, at the core of comparative law studies aimed at achieving legal unity. By examining convergence and harmonization ideas in Vietnam to law and development programs around the world, comparative family law studies are diverse and crucial. Matrimonial law in Vietnam witnessed dramatic changes under the influence from east to west by the historical Chinese (178 BC-939) and French (1858-1954) conquests. Northern Vietnam was occupied by the Communist Party in 1945 and has since advanced toward a socialist vision. Following its reunification in 1975, Vietnam implemented a variety of civil codes that were heavily influenced by those of France, Germany, and Switzerland. This demonstrates that European civil and family law has had a substantial influence on Vietnamese law, both historically and currently. Studying European laws is very beneficial because the continental European legal system is regarded as the world's largest. As a result, the overall goal of this research was to compare the development of matrimonial property law in Vietnam to Chinese, French, Soviet, European, and Hungarian family laws. The dissertation is divided into five chapters that discuss marital property in Vietnam in comparison to Chinese, French, Soviet, EU, and Hungarian family laws. Chapter 1 provides insight into the historical history of marital property in Vietnam, from traditional society to feudalism to colonialism to independence and communist growth. Chapter 1 not only examines and studies Vietnamese marital property law, but also compares it to the laws of other countries having ties to Vietnam's history at the time, such as China, France, and the Soviet Union. In Chapter 2, the dissertation examines contemporary marital property legislation, covering basic concepts and foundations for the development of various categories of marital property. Chapter 3 focuses on the legal implications for marital property when the spouses separate or one party dies, or when the marriage is annulled. The property relationship between cohabiting couples is also a problem that arises in practice and necessitates suitable legal structures, thus Chapter 4 explores this subject. Finally, Chapter 5 concisely summarizes the entire thesis work, offering remedies to existing difficulties in Vietnam through the inclusion of EU and Hungarian laws into domestic legislation or amendments to present matrimonial property law.

Key Words: Comparative matrimonial property law; Vietnam v. EU; Hungarian family law; Vietnamese family law; women’s property rights in Vietnam.

CHAPTER 1. OBJECT AND METHOD OF RESEARCH

1.1 Literature review

The literature on matrimonial property law can be divided into three main categories: legal history and law in force in Vietnam and other foreign laws. Regarding Vietnamese legal history, Vu Van Hien (1960)[1] showed that the law on marital property in Vietnam began to be recognized during the French colonial period due to the influence of the French Civil Code in 1804. Feudal law in Vietnam did not recognize the right to own property of the wife, it only grants it the husband, who has full ownership. The author discusses the marriage contract (or so-called marriage contract) which allows husband and wife to agree on the property during the marriage period. Similarly, Ha Nhu Vinh (1967)[2] found that the matrimonial property law allows spouses to choose between two types of establishments, including the community marital property and the marriage contract. Forty years later, Nguyen Ngoc Dien (2006)[3] affirms the importance of matrimonial property to husband and wife and analyses changes in the marital property after the period of Vietnam's independence after 1975. This author discusses regulations on marital property in the Law 2000 on Marriage and Family and pointed out shortcomings to improve regulations such as the calculation of contributions to the common property of spouses.

As far as foreign laws are concerned, Mary Ann Glendon (1989)[4] addresses a comparative and historical analysis of rapid and profound changes in the legal system of family law beginning in the 1960s in England, France, West Germany, Sweden, and the United States. Later, Glendon (1974)[5] found that reforms were transiting from the traditional system of separate property for the propertyless housewife to recognize her contribution by giving her a share in the property acquired by the spouses during the marriage regardless of its source or of what title is held.[6] These goals are equality of the spouses and community of life and property in marriage. In another study in the same year, Glendon demonstrated the importance of equality of the spouses and community of life and property in marriage. She concluded that French favour a community regime and only a minor proportion of French couples opts for the separation of assets, while England and the United States bias to separate property. The balance of the competing values expressed in the traditional family structure and the official commitment to full equality of the sexes may be affected by a desire to augment certain sections of the labour force. Later,

[1] Hien, Vu Van, *Chế độ tài sản trong gia đình Việt Nam* 136-159.
[2] Vinh, Ha Nhu, "Che Do Hon San Phap Dinh Trong Luat Viet Nam" 120-202.
[3] Dien, Nguyen Ngoc, Giáo Trình Luật Hôn Nhân và Gia Đình Việt Nam 50-110.
[4] Glendon, Mary Ann, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* 15-50.
[5] Glendon, Mary Ann, Matrimonial Property: A Comparative Study of Law and Social Change 21-24.
[6] Glendon, Mary Ann, "Is There a Future for Separate Property" 315-336.

separation of assets is being advocated as the new system for Sweden, which has had a deferred community since the 1920s. Similarly, separation of assets is the most popular optional system in Germany. The present tendency of American law to introduce sharing devices will be another progress of equality arising for spouses as a considerable development of the women's role in society.[7]

Regarding basic issues of comparative family law, E. Nizsalovszky (1968)[8] cited that comparing laws across borders elucidates how they constrain political and societal players, as well as how actors might use law to achieve their objectives. The article examines how comparative law is currently used in political science and identifies areas where a more in-depth comparative study of law could help researchers better understand how law influences politics, particularly in the areas of governance, judicial behavior, rights protection, and democratic transitions and breakdowns. Understanding how laws differ between countries and what distinctions matter can help to create theories and explanations for the tremendous and sometimes subtle political shifts that have occurred in the twenty-first century. Müller-Freienfels (1968) [9] addressed the unification of substantive family law by reviewing family law concepts in the same year. Family law concepts are particularly susceptible to moral, religious, social, political, and psychological influences; family law has a tendency to become introverted as a result of historical, racial, social, and religious considerations differing by country, resulting in different family law systems.

Three years later, Susan Westerberg Prager (1977)[10] suggested that there were aspects of personal relationships which militated strongly toward sharing based principles regardless of whether equality was realized. The current drive for extension of sharing concepts and the prediction of a separate property future underscores the fundamental choice for marital property policy: whether individualistic or sharing principles should be given predominant status in determining the property rights of married people. The principal purpose of this study is to point out that the marital property policy debate has become distorted by the focus on equality, and to suggest that sharing behaviour in marital relationships operates independently of equality concerns. Similarly, Clarence Morrow (1954)[11] and Carmen Diana Deere et al. (2013)[12] published a paper in which they described the importance of legal equality of the spouses. Carmen Diana Deere et al. mentioned that the distribution of the form of ownership of major assets among husbands and wives suggested that the marital regime of separation of property in Ghana and Karnataka disadvantaged married women, concentrating major assets in men's hands. She supported

[7] Glendon, Mary Ann, "Matrimonial Property: A Comparative Study of Law and Social Change" 21-24.
[8] The importance of the book is also shown by its review as follows: Dominik Lasok, Order of the Family. Legal Analysis of Basic Concepts 134–135.
[9] Müller-Freienfels, W., The Unification of Family Law 175–218.
[10] Susan Westerberg Prager, "Sharing Principles and the Future of Marital Property Law" 1-3.
[11] Clarence J. Morrow, "Matrimonial Property in Louisiana" 3.
[12] Carmen Diana Deere et al., "Property Rights and the Gender Distribution of Wealth in Ecuador, Ghana and India" 249–265.

the regime of partial community property in Ecuador, which appears much more favourable for women since most major assets are owned jointly by the couple, partly explaining why in Ecuador married women's share of couple wealth is much higher.

With regard to the comparison with the hypothesis between property law and family law, Joanna Miles (2003)[13] mentioned that the differences between property and family approaches were highlighted by recent endeavours of the Law Commission of England and Wales to devise a specifical property law response to home-sharing, and those differences lied at the root of many of the difficulties that the Law Commission encountered in developing its abandoned scheme. In terms of marital property rights, Lawrence W. Waggoner (1994)[14] found that they covered a vast multitude of rights or interests conferred by law on persons who occupied the status of spouse and were in a state of transition.

In terms of community property and the common-law marital property systems, Lawrence Waggoner (1994) found that some general comparisons between the two systems could be made. He established that the philosophy surrounding the community property system was that the husband and wife were to be considered as a family unit or a conjugal partnership. The community property system recognizes in a quantifiable way the domestic and child-rearing contributions of the housewife and mother equal to the husband's outdoor labour. Unlikely, the common-law marital property emphasises individuality treating the spouses as strangers as regards property acquisition and ownership. Regarding the common-law one, the results differ depending on whether the marriage was dissolved by divorce or by death being entitled to receive a given amount fixed by statute.[15]

Thirty years later, Raymond O'Brien (2010)[16] also addresses the elective share theory as an approximation system that multiplies the sum of the augmented estate by a fixed percentage that is based on the length of the marriage as following requirements: the percentages range from three per cent for a marriage that is less than one year, to one hundred per cent for a marriage lasting fifteen years or longer.

As far as a valid agreement is concerned, Joan Krauskopf (1978)[17] showed that a valid agreement could be a separation agreement executed after the parties had separated in contemplation of marriage dissolution or legal separation. This study examines that an antenuptial contract in a community property jurisdiction usually governs the property throughout the marriage, at the time of divorce, and at the time of death. However, if it was designed to govern the division of property only for divorce or legal separation, it was held

[13] Joanna Miles, "Property Law v Family Law: Resolving the Problems of Family Property" 624–648.
[14] Lawrence W Waggoner, "Marital Property Rights in Transition" 21-30.
[15] Scott Greene, "Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women" 71-73.
[16] Raymond C. O'Brien, "Integrating Marital Property into a Spouse's Elective Share" 617–718.
[17] Joan M. Krauskopf, "Marital Property at Marriage Dissolution" 157-170.

invalid owing to encouraging divorce. The author demonstrated that "freedom to contract regarding the nature of the property in advance of marriage or at the time property is acquired during the marriage would encourage preplanning and would encourage the use of attorneys in the more productive role of prevention than in the role of scavenger over the broken pieces of marriage."

As regards feminist property rights in marriage life, Reva Siegel (1994)[18] argued about the ownership of wives' earnings who did not take the labour market as the central point of reference for understanding the value of work. She demonstrated that feminists demanding joint property rights analysed women's work from the standpoint of women's experience, defying conventional assumptions about the family form and challenging the law of marital property as it expropriated the value of women's household labour. She suggested that a joint property system should give wives equal control of marital assets, which had not been adopted in the nineteenth century. The author favours the changing perceptions of women's work in the emergent industrial order, with far-reaching practical and ideological consequences. She believed that the implementation of a joint property regime would have a variety of legal and extra-legal consequences for women.

1.2 The scope of the study

The term "matrimonial property" will refer to property owned or obtained by either or both married spouses before and during their marriage, which is called matrimonial assets. The matrimonial property regime is a collection of legal regulations governing the property ownership of spouses, including provisions on the grounds for establishing property ownership, rights and obligations of the spouses to the common property, separate property, and cases and principles of property division.

The different development of economic, cultural and social conditions as well as the diversity of married life in each country lead to differences in the organization of the legal matrimonial regime. However, there are two basic types of "statutory property systems" as follows: the community of acquisitions and participation in acquisitions. The "community of acquisitions" is formed by the theory of the communal nature of the spouses' relationship. This type of property exists in three forms as follows: 1/ The whole-property community system (husband and wife have no separate property; the husband and wife's common property consists of the property that the husband and wife have before the marriage and after the marriage); 2/ Communal system of movable and property acquisitions (the common property of husband and wife includes movable property that husband and wife have before marriage and properties after marriage); 3/ Community-

[18] Reva B Siegel, "Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880" 1073–1217.

acquired property (only properties created by husband and wife during the marriage are the common property of husband and wife). However, “the participation in acquisitions” is the notion that there is no obligation and no need to have a common property. This means that, under the estate, there is no unified governance and no community wealth. This type of property regime absolutely protects the separate ownership of the spouse's property, maintains the independence and separation of the spouse's property. This type was chosen with the desire to promote the independence of husband and wife in creating a property. This property regime has regulations on the contribution obligations of husband and wife on the basis of the principle of equality between husband and wife. However, the equality of contribution to maintaining the family is not equal in nature but depends on the ability of each spouse.[19]

Regarding the provisions of Vietnamese law[20], the legal matrimonial regime is organized according to the type of community of acquisitions system. All property that the husband and wife have before marriage and the property that the husband and wife are given or inherited during the marriage is the separate property of the husband and wife. The husband and wife's common property block includes all properties created by the husband and wife during the marriage; income of spouses; yields and profits arising from the separate property of husband and wife during the marriage period; properties that are donated to each other, inherited jointly during the marriage. If spouses are subject to the statutory property regime, their marital property includes both common and separate property.

The property agreement regime (also known as “a prenuptial agreement”) is a set of rules systematically built by the spouses themselves based on the permission of the law to replace the statutory property regime. This property regime is regulated as a very progressive new point in the 2014 Law on Marriage and Family.[21]

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[19] Ngo Thi Huong, Chế độ hôn sản pháp định: Một số bất cập và kiến nghị hoàn thiện 25-30.

[20] Vietnam's legal normative document system is complicated. This system is built on a foundation of multiple legal normative papers produced by various responsible bodies. For example, after the National Assembly has promulgated the Code/Law, the Government may issue a Decree to guide the Code/Law; then the relevant Ministry(s) may continue to issue Circulars to guide the Decree; and, during the implementation process, if several provisions are unclear, additional official letter(s) may be issued to guide each specific case. As a result, in practice, a legal matter will almost certainly be controlled multiple times in the Code/Law, Decree, Circular, Official Letter, and so on. Despite governing the same subject, the contents provided in these documents may sometimes contradict them other.

[21] Law 52/2014/QH13, dated June 19, 2014, of The National Assembly on Marriage and Family, Gazette. 52/2014/QH13. This law came into force on 1st January 2015 in Vietnam. The legal value of legal documents in Vietnam are different. In the Vietnamese legal system, the Constitution is the most effective document, while the Decision of the Commune People's Committee is the least effective. The National Assembly issues both the Code and the Law, which serve comparable purposes. The major distinction between Code and Law is that Code normally has a greater controlling scope. As a result, the Code encompasses the entirety of legal norms governing social relations in one or more domains, such as the Civil Code, Maritime Code, Labor Code, and so on.
The Code/Law must go through a rigorous process (outlined in the Law on Legal Document Promulgation); typically, this process entails formulating a law-making program, drafting laws, verifying the law project,

The term “matrimonial property law” can be referred to as the legal provisions governing the property relationship between spouses, including 1/ The application of the statutory or agreed upon matrimonial property regime; 2/ General principles of marital property; 3/ Rights and obligations of spouses about transactions of marital property; 4/ Grounds for establishment, possession, management, use and disposition of the spouses' common and separate property; 5/ Merger of separate property into common property and division of common property during the marriage period; 6/ Settlement of legal consequences for the marital property when spouses terminate their marital relationship due to divorce, death of one party, or illegal annulment of marriage; 7/ Marital property relationship between husband and wife with a third party and with other family members. The 2014 Law on Marriage and Family and its implementing guidelines do not provide specific definitions of matrimonial property and matrimonial property law. However, based on the above provisions, the concept of matrimonial property and matrimonial property law can be summed up and inferred.

The term “property law of cohabitation” can be understood as the legal provisions governing property between cohabitation. Cohabitation is defined in Article 3 (7) as the couple living together and treating each other as husband and wife. Cohabitation, however, is not recognized in Vietnam; there are also no regulations on civil union or registration of cohabitation like in other countries in the world. It is true in the case of Hungary that partners can register their cohabitation as proof of cohabitation to resolve disputes arising during the process of cohabitation or after the termination of cohabitation. Although not recognizing the cohabitation relationship, the Law 2014 on Marriage and Family and Circular[22] 01/2016[23] still provides the concept and grounds for settlement for cohabitation including the settlement of property relations between the partners. In addition, cohabitation established before January 3, 1987 is recognized as a registered marriage as an exception due to the influence of the economic and social difficulties of this historical period in Vietnam. Therefore, the analysis of the matrimonial property law in this thesis also refers to the property law of cohabitation by relevancy.

The scope of the study focuses on the development of regulations on marital property under Vietnamese law compared to Chinese, French, and Soviet, EU and Hungarian family laws. Marriage is the most common in legal relations arising in practice. The marital property relationship is considered fundamental between husband and wife because it involves individual ownership rights, and the fact shows that property disputes between

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public consultation, discussing, internalizing, revising, and approving the law program, and publishing the law.

[22] Ministers and heads of ministerial-level agencies typically issue circulars to spell out articles, clauses, and measures in the Code, Laws, and Decrees, as well as to execute the State management function of Ministers and heads of ministerial-level agencies (such as detailed regulations on procedures, forms).

[23] The Supreme People's Procuracy, Ministry of Justice, Supreme People's Court issued Joint Circular 01/2016/TTLT-TANDTC-VKSNDTC-BTP to guide the execution of a number of sections of the Marriage and Family Law on 6th January, 2016.

husband and wife are quite common. Vietnam is a country with a long history from east to west, including the influence of China under the feudal dynasty, of France during the colonial period, and of socialism during the period of Vietnam's independence to the present day. Therefore, the development of Vietnamese law is influenced by many different countries, which contributes to enriching the tools of the Vietnamese legal system. Therefore, it is extremely reasonable to choose Vietnam for the study of marital property law in combination with the laws of relevant countries.

The property regime of husband and wife is defined in the law to determine the types of property in the relationship between spouses and family. The identification of property types in the relationship between spouses is also intended to determine the rights and obligations of the spouses concerning the assets of the couple. The division of property types between spouses is also aimed at determining the rights and obligations of the couple towards property relations. Since then, it is a legal basis for competent state powers to settle matrimonial property disputes between spouses and with other people.

The matrimonial property regime is an institution in the law on marriage and family that is regulated by the state based on the development of economic and social conditions. It expresses the class character, the nature of the political and social regime. Looking at the matrimonial property regime prescribed in the state's laws, one can recognize the level of development of the economic and social conditions and the will of the state.

The husband and wife's property regime is used as a legal basis to settle property disputes between husband and wife with each other or with other people to protect their main rights and the property value for the spouses or a third party involved in transactions related to the property of the spouses. The recognition that husband and wife have the right to have their property creates a legal basis for spouses to actively participate in civil and economic transactions. The recognition of the marital agreement aims to facilitate the spouses to implement a matrimonial regime suitable to their economic circumstances. Therefore, the married person has the right to enter into the marriage contract such provisions as it deems necessary to regulate property relations during the marriage period. The marriage contract is made through the intervention of a notary, so the parties will receive legal support to establish a complete agreement on a property regime. In a marriage contract, the parties to the marriage declare a matrimonial regime that will apply to them. Most countries in the world regulate two ways of establishing property relations, either by law or by agreement. In the absence of an agreement between the husband and wife, the settlement of their property relations shall comply with the law. Thus, if there is no agreement between spouses, their property regime will be governed by the law ensuring the right of individuals to self-determination over their property and preserving their assets to avoid property conflicts after separation.

1.3 Objectives of the study and research questions

1.3.1 Objectives of the study

Vietnam is a Southeast Asian country that has been affected by imperial countries such as China (178 BC-939), France (1858-1954), and the United States (1954-1975). To maintain the colonial system, the empire countries used rules and administrative models from their own countries. As a result, the laws of the imperialists conquering Vietnam influenced Vietnamese law during these historical periods.[24] The North was liberated and earned independence following the triumph of the August Revolution in 1945. Under the leadership of Ho Chi Minh, who also founded the Democratic Republic of Vietnam on September 2nd, 1945, the Northern area became independent in 1945. Northern Vietnam was placed under the Communist Party's control and has subsequently progressed toward a socialist perspective. Following the 1975 reunification, Vietnam enacted a number of civil codes that substantially borrowed from the civil codes of France, Germany, and Switzerland. The first chapter of the Vietnamese Civil Code 2015,[25] for example, governs broad provisions similar to those found in the German Civil Code. Similar to the French Civil Code, the Vietnamese Civil Code still has rules on civil relations containing foreign elements. These documents demonstrate that European civil and family law has had a significant impact on Vietnamese law, not only in the past but also in the present.[26]

Furthermore, understanding Hungarian family law is vital because it is a part of continental European law. [27] Since the continental European legal system is regarded as the world's largest, studying European and Hungarian laws is particularly useful. Hungary's historical history is similar to that of Vietnam in that it went through a period of socialist development from 1949 to 1989. Vietnam and Hungary also signed an agreement on mutual legal assistance in civil, family, and criminal situations on January 18, 1985.[28]

Thus, the general objective of this study was to investigate the development of matrimonial property law in Vietnam compared to Chinese, French, Soviet, European and Hungarian family laws. However, during the period when the United States dominated South Vietnam from 1954 to 1975, the thesis does not examine the impact of American law on Vietnam. In actuality, the legal impacts of the United States in Vietnam are

[24] Linh, Nguyen Thi My, The Development of Matrimonial Property Law in Vietnam 66–74.
[25] Civil Code 91/2015/QH13 was issued by the 13th Vietnamese National Assembly on November 24, 2015.
[26] Ibid.
[27] The studies below demonstrate the tight connection between Hungarian civil law and European private law as follows: Benke, József, *The Fundamentals of Hungarian Private Law* 484-489; Hamza, Gábor, "Codification of Hungarian Private (Civil) Law in a Domestic and International Comparison" 443-450.
[28] The full text of the Mutual Legal Assistance Agreement can be accessed on the following site: https://thuvienphapluat.vn/van-ban/Trach-nhiem-hinh-su/Hiep-dinh-tuong-tro-tu-phap-van-de-dan-su-gia-dinh-hinh-su-Viet-Nam-Hunggari-153643.aspx.

minimal due to its short existence and limited impact on South Vietnam. During the historical period, the US issued few regulations in South Vietnam, and most continued to follow the regulations established by France. The study was guided by the following specific objectives:

(1) To examine the role of matrimonial property toward the couple throughout marriage life in Vietnam.

(2) To study the provisions related to the matrimonial property law based on comparison with the regulations of Chinese, French, Soviet countries, EU, and Hungarian family laws.

(3) To find out the shortcomings and limitations and make suggestions for improving the matrimonial property law in Vietnam.

1.3.2 The research questions

This study focuses on finding answers to the following questions:

(1) What is the role of matrimonial property law in marriage and family law?

(2) How has the regulation of matrimonial property law changed over the historical periods in Vietnam?

(3) Is the regulation on marital property law complete and reasonable?

(4) What are the characteristics of the wife's property status? And how is gender equality protected?

(5) How does the family law ensure the protection of the weaker party in marital property relations?

(6) What are the differences in regulations on matrimonial property in Vietnam and China, France, Soviet countries, EU and Hungary? What can Vietnam learn from regulations in these countries for the relevant issue?

(7) Are there any regulations that protect creditors' and third parties' interests toward transactions with spouses?

(8) In which cases is the interest of the spouses protected against the creditor, the third parties?

Researching on the role of marital property law will make it realise the importance of recognizing ownership between couples, thereby making recommendations to better protect property rights in marriage.

1.3.3 Methodology and research sources

The methodology adopted in this dissertation is based on analysing methodology adapted in the earlier studies regarding matrimonial property law in Vietnam. At the same

time, a comparison between Vietnam and other foreign law, including China, France, Hungary and other European Member States can determine the comprehensive theoretical framework of marital property.

This study has also collected data, legal history resources, cases about the matrimonial property law in Vietnam since September 2018. These activities have been taking much time and faced certain obstacles because of changes in political institutions in Vietnam. This is true in the cases of access to Vietnamese-era documents that were invaded by China, France, and the United States, which encountered many difficulties because this was classified as a document group before 1975, the reunification of the country. Since the reunification, these materials have been classified as limited readings and only have been accessible with authorized permission. Those methods focus on Chapter 2 on the historical development of matrimonial property law.

The comparative method is used in most chapters of the thesis, including the comparison of the differences in regulations on matrimonial property law over historical periods in Vietnam in Chapter 2. Regarding the comparison method, it can be referred to as a consideration or estimate of the similarities or dissimilarities between two things or people based on the Oxford language definition. The comparative method is also used to analyse the differences in the financial regime between Vietnam and other countries, such as the analysis of the difference between the marital agreement between Vietnam and Hungary in Chapter 3 on the settlement of property relations in case of divorce or death of husband and wife.

The method of case analysis through court judgments brings certain effectiveness in finding difficulties and limitations in practical application. The analysis of case precedents and judgments of the Vietnamese courts is sourced from www.congbobanan.toaan.gov.vn, which is the official website of the Supreme People's Court. Regarding judgments before 1975, which are difficult to collect, I received support to provide documents from Court officials in some provinces such as Can Tho, Vinh Long and Ho Chi Minh City, the High Court of Ho Chi Minh. Chapters 3 and 4 are the ones that use this method, which relates both laws in force and legal history. In particular, some data were collected at the Notaries, the Courts that are not publicity, so it is hard to get the necessary information. This is true in the case of the data about marriage and family disputes at the first instance settled by The Can Tho City Court from 2017 to 2020, which was provided by the administrative staff of this court and is not shown to the public.

The comparative approach in this dissertation faces some challenges in family law terminology due to unparalleled upheaval in the family law systems between nations. Vietnamese law has witnessed the introduction of family legal terms from East to West in Vietnamese law, it can be difficult for the author to locate the correct term to explain when using the comparative technique, especially prior to the year 1954.

The dissertation has 5 chapters that addresses issues from theory to practice about marital property in Vietnam compared to Chinese, French, Soviet, EU and Hungarian family laws. It is reasonable that Chapter 1 begins by studying the historical development of marital property from the traditional society, feudal period, colonial empire, to the independent stage and socialist development in Vietnam. Chapter 1 not only focuses on analysing and studying Vietnamese law on the marital property but also compares it with the laws of other countries related to Vietnam's history at that time, including China, France, and the Soviet Union.

The dissertation focuses on analysing the current law on marital property in Chapter 2, including basic principles and bases for the formation of various types of marital property. Couples can choose between two matrimonial property systems, the legal matrimonial property regime and the prenuptial agreement regime. In the process of cohabitation, it may lead to the change or termination of marital property relations, so that the study of the legal consequences for the marital property once the spouses' divorce or one party dies, or the annulment of marriage are analysed in Chapter 3. The property relationship between cohabitation is also a problem arising in practice and requires appropriate legal mechanisms, so Chapter 4 is an analysis to clarify this issue. Finally, Chapter 5 clearly summarizes the entire thesis work, proposing solutions to current problems in Vietnam by incorporating EU laws into domestic legislation or amending existing marriage property law.

CHAPTER 2. DEVELOPMENT OF MATRIMONIAL PROPERTY LAW IN VIETNAM

The development of legal history in Vietnam can be divided into four main stages, including the formation of the state to the feudal period in Vietnam under the influence of China (178 BC–1858), the French (1858–1954) colonial period, after independence time under socialism (1975–until now). It is no doubt that the development of Vietnam's legal system has been heavily influenced by invasions from China, France and the Soviet Union (the 1940s). This chapter aims to describe the significant formative influences that those countries had on the Vietnamese legal system and marital property law throughout historical development.

2.1 The matrimonial property law from the formation of the state to the feudal period in Vietnam (around 258 BC to 1858)

2.1.1 Family institutions in the early stages of the state's formation

Since the sources of information in the early stages of state formation were sought, the search for the origin of the family organization was mainly based on legends, folklore stories passed on from Vietnam's ancestors to descendants. The descendants later reproduced the narratives through archaeological evidence, both domestically and internationally (mainly from China).

So far, researchers have not found traces to confirm that the Hung Vuong era had written sources and "the source of law was mostly customary."[29] In terms of family origins, "Van Lang was referred to as the first state in Vietnam. Although the organizational model was still simple, Van Lang was divided into 15 sets."[30] In general, patriarchal traditions were established in the Hung Kings. A typical example was King Hung's succession of the king to the son of the country after marriage. (See Figure 1).

[29] Dinh Gia Trinh, *Sơ Thảo Lịch Sử Nhà Nước và Pháp Quyền Việt Nam* 50-87.
[30] Chu, Phan Huy, Lịch Triều Hiến Chương Đại Chí 20-45.

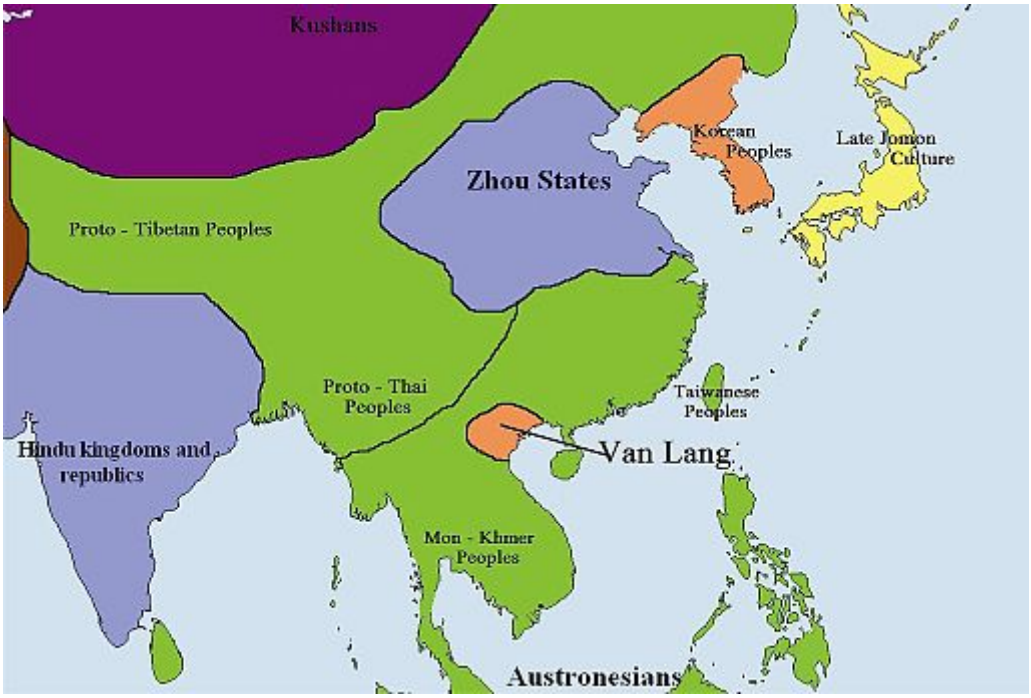


Figure 1. Van Lang – the first state of Vietnam[31]

Society recognized the monogamous marriage and the patriarchal form of marriage through the wife moving to her husband's home after marriage.[32] However, there was still equality between husband and wife, because private ownership, though born, was not strong enough to impact family and society. "The land in this period remained in the public domain."[33] Thus, this shows that the wife was still equal to her husband rather than in the feudal period.

According to the general development trend of world history, after the primitive communal system, slavery appeared. In Vietnam, after the Van Lang state was established by the Hung kings, the feudal system appeared. It is possible that Vietnam did not go through the period of slavery.[34] The marriage relationship formed in Van Lang state was not bought by the woman as in a slave-owning society. After Vietnam had developed under the feudal system, the role of women was no longer guaranteed as in the Van Lang society – Vietnam's first primitive society as a state.

2.1.2 Regulations on matrimonial property under the Hong Duc Code (1470-1497)

[31] Wikimedia Commons contributors, File: Van Lang accessed on 25th January 2022.
[32] Mau, Vu Van, Cổ Luật Việt Nam Lược Khảo 200-210.
[33] Tan, Van, Thoi Dai Hung Vuong 23-45.
[34] Tran, Q. V and Chu, T., *Xã hội Việt Nam có trải qua một thời kỳ của chế độ chiếm hữu nô lệ hay không* 10-36.

From 179 BC to 938,[35] Vietnam was invaded and colonized by the Chinese feudal dynasties. Thus, Vietnamese law at this time was greatly affected by Chinese feudal law through the dynasties they ruled and colonized. The Hong Duc Code (1470-1497) and the Gia Long Code (1812) were the two most frequently mentioned laws in this period. The Hong Duc Code (also known as the Penal Code of the Le Dynasty) was compiled several times in the years 1470 - 1497 under King Le Thanh Tong of the Le Dynasty. It can be said that the Hong Duc Code[36] was the first law to set the law of Vietnam in general, as well as the matrimonial property relationship between husband and wife.

Although there were many limitations, the Hong Duc Code was still appreciated for the progressive ideals of the matrimonial property relationship between spouses. The Hong Duc Code specifically stipulates in Articles 374, 375 and 376 that husband and wife's property is formed from three sources, including husband's property inherited from the husband's family; the property of the wife inherited from the wife's family, and property created by the couple during the marriage (common property). When the family exists, all property is considered common property. When they divorce, spouses' property will be received separately and divide the common property of two people. If one party dies first, the property given by the parents is divided into two equal parts, including one part for the family of the deceased spouse to take care of the funeral. The rest is for the surviving spouse to take care of for a lifetime. Generally, *this law stipulated the composition of the common property of husband and wife, which consists of three types: husband's property inherited from the family of the husband, the property of the wife inherited from the wife's family and spouses worked out during the marriage period. All these assets are under the control of the husband and the head of the family.*[37]

The family model in this period is usually a large family with four to three generations living under the same roof because according to Confucian thought, a woman, when getting married, must adhere to the principle of three subordinations and four virtues. Once a woman gets married, she has to stay with her husband and her husband's family. If her husband dies, she is subordinated to, or follows her son. Confucianism is one of the major schools of Chinese philosophy in ancient times that includes philosophical, moral, and institutional ideologies that has a basis in China from the West Chu period to the end of the Spring and Autumn period. After that, Mr. Confucius (551-479 BC) and his disciples, Manh Tu (372-289 BC) and Tuan Tu (313 -238 BC) systematized and stabilized the two classic sets including the Four Letters and Pentateuch. These volumes were then compiled by the Confucian students, who composed the teachings of Confucius. Confucianism absolutizes the King’s right in society and the rights of the father in the family. From the point of view of the patriarchal lineage and the attitude of women's neglect, Confucian

[35] Thanh, Phan Dang and Truong Thi Hoa, Các Chế Độ Hôn Nhân và Gia Đình Việt Nam Xưa và Nay 36-40.
[36] Mau, Vu Van, Cổ Luật Việt Nam và Tư Pháp Sử 170-186.
[37] Vinh, Ha Nhu, “Che Do Hon San Phap Dinh Trong Luat Viet Nam” 210-230.

philosophy puts the brotherhood higher than the spouse relationship. Women are the ones who suffer the most disadvantage due to harsh regimes, injustice and inequality in society as well as in families. According to the morality of "virtue", a man can have many wives, but women cannot have many husbands.[38] In traditional Vietnamese society people were divided into four classes, including scholars, landlords, farmers, craftsmen and merchants. Peasants were the largest part of feudal society but were subjected to oppression and exploitation by landlords. In the feudal society, a part of the farmers depended only on the feudal landlords and paid rent.

In general, the farmers were only economically dependent on the feudal landlords, but they were heavily exploited by the landlords. Therefore, there are many differences in the ownership of property of men in the family who are farmers compared with other classes. The Hong Duc Code stipulates many conditions that both men and women must follow when getting married to protect the rights of women, in which Article 338 stipulates that "the powerful who bully to marry a woman, then he will be punished, degrade his status, put to imprisonment, or force him to do hard labour." If a woman marries someone else and is already married, she will be sentenced to prison or forced to do hard labour. The latter, knowing this, will also be sentenced to prison or forced to do hard labour. That woman must marry the person asking first, if that person does not marry anymore, the woman's family must compensate the man for the wedding favours twice as much.

In contrast, the Hong Duc Code also stipulates that a husband must not leave his wife in three cases:

- The wife has been in mourning for her husband's family for 3 years;
- When married poor but rich later;
- When he got married, his wife had relatives, but when he left, he had no relatives to return to.

At the same time, when both spouses are mourning their parents, the issue of divorce is not raised. In divorce, the children usually belong to the husband, but if the wife wants to keep the children, the wife has the right to claim half of the children. Article 167 stipulates the form of consent divorce whereby the divorce papers are made in the form of a contract, the wife and husband each keep a copy. Thereby, it shows that in addition to the consent of parents or other relatives, which is very important, the consent of both men and women is also a factor that the legislator pays attention to. After the divorce is completely terminated, both parties have the right to marry another person without being prohibited by law.

Especially in the right to inherit property left by parents, the Le Dynasty's law did not distinguish between sons and daughters. If the parents lose both, then they take 1/20 of the

[38] Van, Vo Thi Cam, 'Sự Du Nhập và Ảnh Hưởng Của Nho Giáo Đến Giá Trị Truyền Thống Văn Hóa Việt Nam' accessed 22 February 2019.

land as incense and give it to the eldest son/daughter to keep, while the rest is divided equally among the children (Article 388). If the deceased has the eldest son, this person will keep the incense; if there is no eldest son, the eldest daughter will keep the property (Article 391).[39]

2.1.3 Regulations on matrimonial property under Gia Long Law 1812

The Gia Long Code (commonly known as the Hoang Viet Luat Le) was a written law of the Nguyen Dynasty – the last monarchy in Vietnam. This code was composed in the 1811s and issued in 1812 and was initially made from wood.[40] In 2009, UNESCO recognized the Nguyen Dynasty's wooden books as the first world heritage document of Vietnam (see Figure 3 below). In the late 19th and early 20th centuries, Vietnamese feudal dynasties came into mass publishing by using these wooden stamps. The Gia Long Code was a combination between Chinese characters and *Nom* characters. Nom characters were used in the official Vietnamese language between 939 and 1858. This had similarities in comparison with the Chinese. When France invaded Vietnam, it was replaced by the Vietnamese Roman alphabet which has been the official language until now. It is said that the Gia Long Code has many similarities with China's Qing Law.[41]

The Gia Long Code, however, was supposed to have a setback in terms of the matrimonial property relationship between spouses, which "almost copied the full text of the Manchu Law of China".[42] By the time Vietnam was measured by the Chinese, Vietnam had to apply the feudal laws of the Chinese dynasties. The Chinese dynasty at that time promoted patriarchalism and Confucianism as preparation for behaviour in social and family relations. From the time of the Van Lang state formation to the Feudal period, religion and belief in Vietnam were not formed clearly. Most Vietnamese people worship animals such as To-Tem birds to pray for good agricultural activities. Regrettably, the Gia Long Code, which copied almost the original text of China's Qing Law, did not reflect the Vietnamese tradition and customs[43].

The Gia Long Code had 22 volumes and 398 articles. The issue of civil status and marriage was adjusted from volume 6th to 8th and had all 66 articles. This was essentially a penal code, so its marriage provisions only set penalties. In the conjugal relationship, the Code only mentions the penalty when the husband and wife violate the principles of moral standard such as the crime of murder to the wife (Article 332), the crime of violence against the husband (Article 281), the crime of violence against the wife (Article 284). Neither the Gia Long Law nor China's Qing Law stipulated a marital property law because

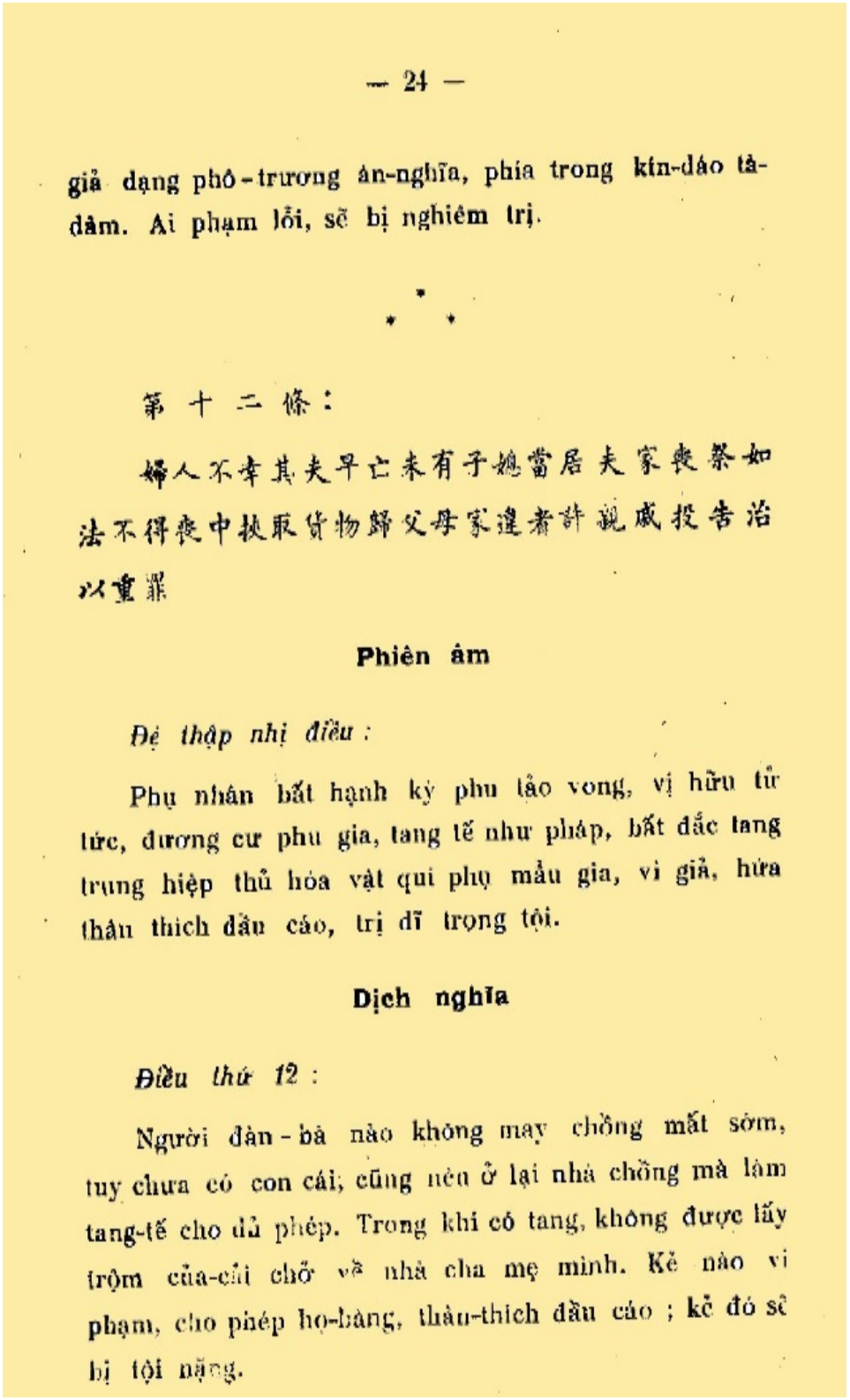
[39] Duong, Van Cham "Luật Hồng Đức Với Vấn Đề Bình Đẳng Giới" accessed 21 January 2022.
[40] Thang, Nguyen Quyet, Tìm Hiểu Luật Gia Long 20-50.
[41] Thuy, Nguyen Thi Thu, "Về Mối Quan Hệ Giữa Hoàng Việt Luật Lệ và Đại Thanh Luật Lệ" 69–80.
[42] Vinh, Ha Nhu, "Che Do Hon San Phap Dinh Trong Luat Viet Nam" 124.
[43] Vinh, Ha Nhu, "Che Do Hon San Phap Dinh Trong Luat Viet Nam" 75.

marriage only led a woman to merge into her husband's family community. In addition, the Gia Long Code tended to implement the complete dependence of the wife on her husband's family.

Thus, regardless of the point of view, the nature of Feudalism reflects the feudal society, where the law is too backward, with customs and practices. Poorly developed centuries ago, it was gradually ingrained into the subconscious of each person, and the legal documents promulgated by the state were based on those customs. Therefore, the law of marriage and family under Feudalism was a protection tool for the feudal landlord and always protected the interests of the husband. Ownership of the common property of husband and wife, first focused on the husband and the head of the husband's family. There was no real equality between wife and husband in personal and property law relations.

Specifically, Figure 1 is taken from Article 12 of the 47 Regulations of Laws educating residents under the Le Dynasty and the date of application of these laws was July 1663 to 1760.[44] Based on Article 12 and Article 13 of the 47 Regulations of Laws educating residents under the Le Dynasty, we find that a woman depended almost entirely on her husband's family. For example, even when the husband dies, they should stay with their husband's family, take care of their children (including husband's own children) and not bring any husband's property to their parents' home. This law shows that women at this stage had no property of their own. The property that they had during the marriage belonged to the husband. When the husband died, the property belonged to the husband's family (see Figure 2).

[44] Khai, Tran Van, Lê Triều Giáo Hóa Điều Luật 5.



— 24 —

giả dạng phô-trương ân-nghĩa, phía trong kín-đáo tà-dâm. Ai phạm lỗi, sẽ bị nghiêm trị.

* * *

第十二條：

婦人不幸其夫早亡未有子媳當居夫家喪祭如法不得喪中挾取貨物歸父母家違者許親戚投告治以重罪

Phiên âm

Đệ thập nhị điều :

Phụ nhân bất hạnh kỳ phu tảo vong, vị hữu tử tức, đương cư phu gia, tang tế như pháp, bất đắc tang trung hiệp thủ hóa vật qui phụ mẫu gia, vi giả, hứa thân thích đầu cáo, trị dĩ trọng tội.

Dịch nghĩa

Điều thứ 12 :

Người đàn-bà nào không may chồng mất sớm, tuy chưa có con cái, cũng nên ở lại nhà chồng mà làm tang-tế cho đủ phép. Trong khi có tang, không được lấy trộm của-cải chở về nhà cha mẹ mình. Kẻ nào vi phạm, cho phép họ-hàng, thân-thích đầu cáo ; kẻ đó sẽ bị tội nặng.

Figure 2. Le Trieu's the Law – 47 Regulations of Laws educating residents under The Le Dynasty from 1663 to 1760[45]

[45] Khai, Tran Van, Lê Triều Giáo Hóa Điều Luật 31.

Figure 3. The wooden Gia Long Code[46]

[46] The Nguyen Dynasty's wooden books are currently stored at the State Bureau of Archives belonging to the Ministry of Home Affairs of Vietnam.

Regarding property rights of women during marriage under the Gia Long Code, due to the absence of regulatory principles on matrimonial property law within the Gia Long Code, the King issued Directives[47] and applied the fine customs resolving family disputes. According to the provisions of Articles 37 and 83 of the Gia Long Code, if the father was deceased, the child would inherit his estate. Neither of these terms illustrates clearly whether a daughter can inherit her father's legacy or not. The fact that feudal society considered women to be incompetent, so that the daughter's right to inherit seemed impossible. The feudal society of the Nguyen Dynasty valued the dominant position of the father and the eldest son in the family (see Articles 108 and 76). Therefore, it seems reasonable that only a son was entitled to his father's legacy. If the legacy did not have a son to inherit, it was impossible that a daughter was entitled to inheritance. According to the hierarchical principle among family members, it would be much more reasonable that the heritage was put under the control of the grandparents when no son enjoyed his father's legacy. This assumption was proved by Article 2, which stipulated that children and grandchildren were obliged to respect grandparents and parents (Article 2). Therefore, *"it is unlikely that a daughter has her separate property through her father's inheritance."*[48] Moreover, it is also a question whether a woman could have her separate property thanks to her dowry.[49] There were no documents to illustrate this case because the woman in Nguyen Dynasty was powerless. Therefore, it is limited to recognize the private possession of women.

Supposedly, even if there was a separate property before marriage, this also merged into the husband's property during the marriage period. This was considered an asset consolidation, so there was no private and common property. All assets including movable and immovable ones were under the management and ownership of the husband. According to the King's Directive, No. 2 Guiding Article 69 of the Gia Long Code, transactions (such as real estate purchase or donation) had to be made in writing. The establishment of written transactions guaranteed ownership and recourse rights of new owners (Articles 87 and 89).

It can be said that the society of Gia Long's king highly praised the absolute role of husband and father in the family. Article 96 of the Gia Long Code showed that the husband was allowed to be polygamous, and there was a hierarchy among wives. The first wife had a higher position than the second wife, who was considered a member of the whole family. These wives had to respect and obey their husbands.

As regards to wife's property rights upon divorce under the Gia Long Code, the husband was entitled to divorce the wife when the wife committed faults such as adultery,

[47] Author Ha Nhu Vinh in the book Legislative Marriage Mode, mentions King and Directive No. 1. However, these Directives are hardly mentioned the time of issuance in every detail.
[48] Vinh, Ha Nhu, "Che Do Hon San Phap Dinh Trong Luat Viet Nam" 115.
[49] Vinh, Ha Nhu, "Che Do Hon San Phap Dinh Trong Luat Viet Nam"79.

murder of the husband or improper behaviour toward the husband's parents (Article 103). Specifically, divorcing for an adulterous reason, the wife was not allowed to take any property and was convicted of exile (Article 332). If the divorce was not the wife's fault or the consensual divorce, the law did not mention the consequences of the property[50]. If the two parties divorced without going through the competent authorities, the husband did not share the property with the wife. *"If the divorce was settled by a competent authority, the wife shall require the husband to support and compensate.*"[51] According to historical documents, if the divorce was due to childless reasons, the wife was considered non-faulty. Hence, she could bring her own belongings to the family such as clothes and personal attire. It is said that the wife was allowed to take personal jewellery because it had little value and only the land was considered valuable.

However, some obligations were imposed on husbands in marriage. Specifically, Article 284 stipulated that husbands were not allowed to commit acts of violence against their wives. The wife was entitled to a divorce if the husband threatened. However, divorce was only possible when the husband agreed.

With regard to property rights of the widow under the Gia Long Code, Article 37 of Gia Long's Law showed that a son was entitled to inherit his father's legacy. If the father had other sons as well, the legacy would belong to the eldest son. Article 83 stipulated that children and grandchildren were not allowed to divide the family's assets arbitrarily. Family assets were a unified family and were called the family community property. Therefore, the custom showed that the eldest son would inherit the estate when the father deceased. *"If the mother had not remarried yet, she would be entitled to usufruct her husband's property"*[52]. However, the wife would be deprived of this right, if she remarried or acted as immoral as disrespectful to parents-in-law.

The Gia Long Code provided many forms of punishment: death penalty, imprisonment, border hard labour, fine, whip punishment. The wife was not entitled to remarry when the husband demised, the person who forced the wife to remarry was considered guilty (Article 98). This regulation has two meanings: 1) encouraging the widow's dignity; 2) limiting parents-in-law, and the eldest son depriving the widow's usufruct.

In addition, Article 76 and Directive 2 prescribed that the widow was still allowed to remarry after having mourned for three years, but she was to refund the husband's property, which was assigned to the husband's family.

Nevertheless, the Gia Long Code did not prescribe the existence of a wife's legacy when she deceased. It is said that the wife was not acknowledged to have private property, so there was no wife's inheritance.

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[50] Mau, Vu Van, Cổ Luật Việt Nam và Tư Pháp Sử 78.
[51] Mau, Vu Van, Cổ Luật Việt Nam và Tư Pháp Sử 95.
[52] P. Pompci, *Le Droit Familial et Matrimonial Au Viet Nam* 1.

In short, the provisions in the Gia Long Code entered responsibilities and duties between husband and wife, but there was an absolute lack of property regulations. Indeed, feudal society considered the family to be a unified association under the leadership of the husband. Therefore, property issues were managed and controlled by the husband.

2.2 The matrimonial property regime during the French colonial period (from 1858 to 1945)

In 1858, the French empire initially invaded Vietnam, which was ruled under the Nguyen Dynasty. The invasion took place step by step throughout the major provinces and cities of Vietnam. In 1858, France firstly invaded Da Nang province,[53] then conquested provinces in Southern Vietnam. Under the increasing pressure of French colonialism, the Nguyen Dynasty, which governed the territory of Vietnam from 1802 to 1945, accepted the signing of the Treaty of Saigon in 1962. Accordingly, the South of Vietnam became a territory of France and was set under full control of the French government. The feudal government of the Nguyen Dynasty only ruled the North and Central regions afterwards.[54]

Through the Treaty of Saigon, France established a government system in Southern Vietnam (also known as Cochinchine). To ensure loyalty and unification, management and rule in the South were all assigned to French naval officers. Vietnamese people only participated in the management system in the positions of maids and assistants. The management system was ruled by the French, so they needed to build legislation and execution in South Vietnam as in a French territory. France developed legal regulations for the unified and stable management of the Southern territory. Therefore, the Civil Code in the South was issued in 1883 and written completely in French.

In 1883, France, in turn, increased the expansion of invasion to the North and Central of Vietnam. Due to the weakness of the Nguyen Dynasty, France forced King Nguyen to hand over the North and the Central to France for protection. The protection meant that the North and Central regions were not only subject to the management of the Nguyen Dynasty but also under the control of the French colonialists. In the North, the Nguyen Dynasty no longer managed the government system, but the French held the main management position. In the Central region, the Nguyen dynasty was placed in Hue,[55] so its control was still recognized in this place. Therefore, France maintained parallel management with the Nguyen Dynasty in the Central region.

When France invaded Vietnam, they applied the provisions of the Civil Code of France – the Napoleonic Code in 1804 to Vietnam to manage and easily govern their own. France divided Vietnam into three regions for easy governance and management. So, at

[53] Da Nang is the largest developing province in Central Vietnam today.
[54] Taylor, K.W, A History of the Vietnamese 305.
[55] Hue is a city in Central Vietnam and used to be the feudal capital of Vietnam under the Nguyen Dynasty (1802-1945).

this moment, Vietnam had three sets of laws in the north, middle and south. In the south, France introduced the Civil Code in 1883 (known as Précis de 1883) applied in the south and the three big cities of Hanoi, Hai Phong and Da Nang. In addition, France issued the Northern Civil Code in 1931 in the north, which was issued on March 30th, 1931. The Civil Code of 1936 was issued on July 13th, 1936 and applied to the Centre of Vietnam and was applied in the Centre.

Property regimes between spouses defined in the Civil Code of the North and the Civil Code of the Middle were community property regimes, but the patriarchal authority was assigned to the husband in the family. In addition, according to the Civil Code of the North of 1931, there was a progressive regulation on the contractual property between husband and wife. In terms of property, the law only interfered with the property of husband and wife when husband and wife had no marriage contract. If the marriage contract was not contrary to the fine customs and not contrary to the interests of the husband, it was advocated in the union (Article 104).[56] These regulations had many similarities in the French Civil Code 1804. The French Civil Code – Napoleon Code of 1804[57] was issued on February 10th, 1804 and promulgated on the 20th of the same month in France. This law was affected greatly by the legislative experience of several countries all over the world. [58]Specifically, the French matrimonial property law[59] was defined from Articles 1389 to 1421 in Title V of the contract of marriage and the respective rights of married persons. Accordingly, the couple had two property regimes to choose from: *a community property* (including movable and immovable properties which were acquired during the marriage – Article 1401) *or dowry property* (can be understood as a separate property regime). However, the dowry property only applies when the couple has an agreement before marriage. Thus, the community property law will automatically apply if the couple has no property agreement. In addition, Articles 1421 and 1428 on the French Civil Code stipulated that only the husband had the right to manage the community property of the spouses and even the separate property of the wife.

From 1883 to 1936, in Vietnam there existed three separate Civil Codes in the North, Central and South regions. Why did they have three Civil Codes on the same territory? Why did not the French issue a unified Civil Code applying to all regions in Vietnam? It is necessary to consider the political context in Vietnam in the past. In 1883, the South was considered a French territory, so they managed and built the South in their own demand. In contrast, the North and Central regions were still under the management of the Nguyen

[56] Hong, Bui Minh, "Chế Độ Tài Sản Theo Thỏa Thuận Của vợ Chồng Liên Hệ Từ Pháp Luật Nước Ngoài Đến Pháp Luật Việt Nam" 36-46.
[57] Luce, Marie and Paris Dobozy, "Still Alive: Some Observations about the Two-Hundred Years of Existence of the French Code Civil 1804" 91. See also Charles, Napoleon and his Code 117.
[58] Linh, Nguyen Thi My, "The Impact of the French Colonial Law on the Development of Matrimonial Property Law in Vietnam" 65–82.
[59] Decree dated February 10th, 1804 and promulgated the 20th of the same Month in France.

Dynasty, although they were under French protection at the same time. Why did not France enact a civil code that applied generally to the North and Central regions? The reason is that the influence of France in the North and Central region was different. The Nguyen Dynasty was still highly influential in the Central region because its government system was placed in this area. France's management dominated in the North more than that in the Central region, because the power of the Nguyen Dynasty was still concentrated in the latter. In addition, the French invasion policy was to divide the Vietnamese territory into separate parts to rule and undermine the independent revolts of the Vietnamese. Therefore, the alienated territory into three regions with three different legal systems was France's main demand.

However, having three civil laws in three regions on the same territory seemed to be a French temporary measurement. In fact, the contents of the three Civil Codes were different and caused conflicts of law in practice. Specifically, the marital age in the North was 18 for men and 16 for women (Article 73). In contrast, 16 and 14 were the age of marriage in the South for men and women, respectively. If the husband, who came from the North, got married in the South, he had to satisfy the condition of being 18-year-old under the former law.[60] Hence, the lawmakers themselves also wanted to have a unified law for the whole territory. However, the construction of a civil law that applied to the whole territory of Vietnam seems to have been beyond the capabilities of France after the 1930s-1940s inspiring the success of communism in China. In 1945 the territory of Vietnam was divided into the North and the South because the uprising of politician Ho Chi Minh resulted in the independence of the North. Since then, Northern Vietnam has been under the leadership of the Communist Party and developed in a socialist orientation. Ho Chi Minh, a communist leader, called for the implementation of equality between men and women. *"Hence, expectation grew among women that independence from colonial oppression and the beginning of communist governance would bring about a new and better role for women in Vietnamese society."*[61] On the contrary, France only had influence on South Vietnam. By 1954, France had withdrawn its troops from the territory of Vietnam. From 1954 to 1975, the US, which was an ally of France, replaced France to rule the Southern Vietnam under the President Republic system.

At this stage, the law of marriage and family in Vietnam was heavily influenced by French law and conceded the regime of property under the marriage (agreement). However, at that time, people were poor, underdeveloped, and under the oppression and exploitation of French colonialism. The idea of taking out the property to agree before the end was not of interest for couples. There might have been some Frenchmen who married Vietnamese women to think of the property regime under the agreement to protect their

[60] Mau, Vu van, Dân Luật Khái Luận 34.
[61] Walsh, Thomas, The Law of the Family in Vietnam: Assessing the Marriage and Family Law of Vietnam 61.

interests when they divorced. In general, the property regime between husband and wife under the agreement in this period was not the lawmakers' interest, so there were no specific regulations or guidelines, but only such in a general sense. The husband was still legally protected in the family property.

In general, the matrimonial property regime in this period was a mixture of feudal law and French law. By combining paternal legal thinking with the ideas of Western jurisprudence, colonial lawmakers built the concept of the couple's property regime using terms borrowed from French law namely community property, separate property, asset management. It should be noted that property relations between spouses were governed by French legal norms in the legal systems in the north and the centre of Vietnam. In the south of Vietnam, there was no system of rules governing the relations of matrimonial property between husband and wife.

2.2.1 General principles of the family law and their impact on the marital property legislation

2.2.1.1 Principles of the feudal marriage law before French colonial time in Vietnam

As regards to the principle of absolute worship on paternal right in feudal society, the law seems to merchandise explicitly to protect or practice full patriarchal rights. In the marital sphere, the wife depends on the husband in all aspects, both personal and property relations. The matrimonial property law between husband and wife under the feudal period lasted for thousands of years. This law was influenced by many philosophical, Confucian, and Buddhist ideologies with the concept of female disdain.[62] Besides, the laws on Marriage and Family had several connections with customs, practices, and morals. Many written rules were derived from Vietnamese customs and practices. The most advanced is the Quoc Trieu Law (known as Hong Duc Code) of the Le Dynasty that emphasized the role of the wife in the family. The wife is involved in the management of the family's common property. This code stipulated the composition of community property and included three types as follows: 1) The husband's estate was inherited from the husband's family; 2) The wife's property was inherited from the wife's family; 3) The common property during the marriage period. All these assets were put under the management of a husband – the head of the family.

Thus, legal regulations which were issued by the State were based on customs and practices. Family law under the feudal period adequately protected the interests of the husband. There could not be true equality between husband and wife in their relationships

[62] Dung, Tran Quoc, Tìm Hiểu Luật Hôn Nhân và Gia Đình 30.

and property. The Decree[63] of October 3, 1883, recognized polygamy just for the husband and considered adultery only as a reason for divorce if the adulteress was the wife. The husband was the legal representative of the whole family, while the main wife and the concubine wife had to get permission from the husband to file a lawsuit with a covenant. The husband had the right to sign any contract relating to the spouses' property, and the wife could only sign an agreement regarding essential family needs in cases her husband allowed (Article 96 of the Northern Civil Code of 1931).

2.2.1.2 Principles of family law during the French colonial period

In 1858, the French conquered Vietnam and the Nguyen dynasty underwent concession and eventually surrendered unconditionally. French split Vietnam's territory into three regions that had different laws, including marriage and family regulations. Vietnam has three civil codes in three different areas as follows: The Northern Civil Code of 1931, the Central Civil Code of 1936, and the Southern Civil Code of 1883.

This principle represented an old traditional value that existed from the feudal regime. According to Confucian thought, children had to obey and be respectful to their grandparents and parents. In terms of parents' consent, the father was an essential element when children got married. Indeed, if the father consented while the mother did not agree, the son / daughter could still get married. On the contrary, if the father did not give consent that was the opposite for the mother, he/she could not get married (Article 77-88 of the Northern Civil Code).

When getting married, the age of marriage is mentioned in all three Civil Codes that was quite different compared to the ancient marriage and family law. For example, neither the Hong Duc Code[64] nor the Gia Long Code addressed the age of marriage. According to Article 73 of the Southern Civil Code of 1883, the minimum marriage age for men was 18 years, and 15 years for women, and the Centre and the North required also 18 and 15, respectively (Art. 73 of the Northern Civil Code and Art. 73 of the Central Civil Code).

All three civil codes stipulated that the wife was to be faithful to her husband, but it did compel the husband to be loyal to his wife. If the wife violated this obligation, the husband was allowed to file for a divorce. Maintaining a polygamous marriage, Article 92 of the Northern and the Central Civil Code also stipulated that the concubine was to respect the main wife.

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[63] Government decrees frequently detail the articles, clauses, and points designated in the Code and Law, as well as precise steps to arrange the Code and Law's implementation.
In some cases, the Government promulgates decrees to regulate issues within the competence of the National Assembly or the National Assembly Standing Committee, but they have not met the conditions of formulating a Code/Law to meet the requirements of State management or socio-economic management, if the National Assembly Standing Committee approves.

[64] Mau, Vu Van, Cổ Luật Việt Nam và Tư Pháp Sử 23.

In general, the Southern Civil Code did not recognize the existence of the matrimonial property regime at that time. Accordingly, the husband was enabled to polygamy during the period of Chinese invasion and domination. The husband was the owner and manager of the family's property. Therefore, the wife did not have her property and was not allowed to participate in the family's property management.[65] Also, the husband was the legal representative of the wife, and the wife could only participate in legal proceedings herself having the husband's consent and permission.

The principle of the patriarchal right continued to uphold that had less power than that in the past.[66] The marital property belongs to the husband, but the wife had separate property in limited cases. The marital property prescribed in the Northern Civil Code of 1931 and the Central Civil Code of 1936 included the communist property and marital agreement property. According to the Northern Civil Code, the marriage agreement property shall be applied if the couple had a covenant before marriage (Article 104 of the Northern Civil Code). This agreement, however, must be in writing and comply with fine customs without contrary to the interests of the husband. That meant the husband was still patriarchal and had the right to decide all matrimonial property even though the couple consented to a marital agreement property.

Second, the Southern Civil Code of 1883 stated that the husband or the couple could file for divorce. The wife was able to get back some personal belongings and require maintenance from her husband depending on his financial situation when they divorced.[67] However, according to Part VI of the Southern Civil Code, the wife could not receive any property and support, if she had a fault.[68] If the husband died, the widow had the right to use and manage the property left by the husband in case she was not digamous. However, if she remarried, her husband's assets would be handed over to his eldest son. In the case of a polygamous husband, the eldest son of the main wife is the heir.

Finally, the main principle in the marriage law in this period still mainly emphasized the patriarchal right for the husband. The husband remained the decisive person and was respected by family members in all aspects of family life, such as property ownership and family representation rights. The polygamy principle also allowed the husband to have the main wife and the concubine. The wife had to be faithful to the husband, and there was a hierarchical division among wives in the family. Unlike feudal time and the Southern Civil Code, a woman was able to claim a divorce and the right to own property according to the Northern Civil Code of 1931 and the Central Civil Code of 1936. This showed that family and matrimonial property law seemed to progress more in terms of protecting women's rights in French colonial time than in the feudal period.

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[65] Vinh, Ha Nhu, "Che Do Hon San Phap Dinh Trong Luat Viet Nam" 128.
[66] Thanh and Hoa, Các Chế Độ Hôn Nhân và Gia Đình Việt Nam 30.
[67] Thanh, Phan Dang and Truong Thi Hoa, Các Chế Độ Hôn Nhân và Gia Đình Việt Nam Xưa và Nay 5.
[68] Mau, Vu van, Dân Luật Lược Khảo 89.

With respect to wedding money and dowry regarding legal history in the Hong Duc Code, they are deduced to be the common property of husband and wife. However, the Gia Long Code is said to have setbacks in the regulation of property between husband and wife, because it almost copies the full text of the Manchu Code of China. The Chinese dynasty at that time emphasized patriarchy and used Confucius' Confucianism as a preparation to behave in social and family relations. Neither the Gia Long Code nor the Old Chinese Law provided for the matrimonial regime because marriage only had the effect of causing a woman to be incorporated into the husband's family community.

Due to the absence of governing principles on property relations in marriage, the Nguyen court also issued more Directives of the King and the application of customs. Based on the analysis of the laws, it is shown that a woman can have her own property before returning to her husband's house. According to the provisions of Articles 37 and 83 of the Gia Long Code, if the father dies, the children inherit that estate. Neither of these laws makes it clear whether a daughter inherits her father's estate. The fact that the feudal society considers the woman to be incompetent, the right of the daughter to inherit seems impossible because the feudal society of the Nguyen Dynasty is a society that upholds the position of the father and the eldest son in the family.[69] Furthermore, another issue is whether a woman can have her own property before marriage due to being given as a dowry. There is no documentation to support this case because the woman in the period under King Gia Long was incompetent. Therefore, the recognition of a woman's right to own property before marriage seems to be very limited.

However, even if there is separate property before marriage, that property will also be merged into the husband's property when the woman marries. This is considered a property consolidation regime, so there is no separate property and no common property. All property is under the management and ownership of the husband. In addition, the part of the property owned by the husband includes both movable and immovable property. Based on these analyses, both the wedding gold and the dowry as stipulated in the Gia Long Code belong to the husband's property.

2.2.2 The marital property regulations in Vietnam between 1858 and 1954

2.2.2.1 Provisions on matrimonial property law under the Southern Civil Code

Based on the treaty of 1862 and 1874, the Nguyen Dynasty accepted the South and three major cities of Hai Phong, Da Nang and Hanoi to become French colonies. France had built a separate legal system in these colonies. The Directive dated May 25th, 1881 was issued by the French government, which stipulated that issues disputed in the South would

[69] Articles 108 and 76 of the Gia Long Code.

be arbitrated by French judges. Therefore, building legitimate in this region became necessary. The original rules of law were enacted in three categories: Volume 1st: nationality; Volume 2nd: civil status; Volume 3rd: residence. Volume 1st and 3rd were structured in the same way as volume 1st in the French Civil Code.

Volume 2nd dated 3rd October, 1883, which was issued by the French President. This book had seven chapters including from chapter IV to chapter X, which stipulated on marriage and family law. These chapters were issued on March 26, 1984. This second volume was commonly known as the simplified Civil Code of the South. Chapter IV-X in turn regulated the issues of missing, marriage, divorce, parent-child relationship, foster relationship, personal rights, juvenile and guardian.

The Civil Code of 1883 was applied in the South and three major cities[70] of Hanoi, Hai Phong,[71] and Da Nang. This civil law was quite sketchy, especially not regulating the aspects of marriage and inheritance. Legislators argued that there was a big difference in marriage and family laws between Vietnamese and French at that time, because Vietnamese feudal law emphasized the patriarchal value of a man. Therefore, they could not copy the provisions of the French Civil Code of 1804 on matrimonial property law into the Southern Civil Code of 1883. This explains why the latter lacked regulations on marital property. In fact, the judges dealing with matrimonial property disputes had to comply with the provisions of the Gia Long Code and the traditional custom of the Vietnamese. *"In addition, if the above two laws did not anticipate all property disputes between husband and wife in South Vietnam, the Judge shall apply case laws to settlement."*[72] Case laws were derived from domestic and French legal cases (mainly civil obligations) that were all applied in Vietnam. In fact, French judges initially applied French case laws[73] into settlement between Vietnamese litigates. However, several legal French cases could not be adhered to in Vietnam due to differences between legal regulations. Specifically, the laws on marriage between France and the South were completely different, so it was impossible to manipulate the former's family case laws into the latter one. From 1895 onwards, case laws in the South were formed and collected into monographs as *"Journal judiciaire de La Conchinchine et du Cambodge"*[74]

[70] Three major cities, which are not in the South but still under French control, are large cities and hold important sea trade positions.
[71] Hai Phong is a port city in the Northeast of Vietnam.
[72] Thong, Vu Quoc, *Pháp Chế Sử* 213.
[73] The French's case law was later translated into Vietnamese by two Vietnamese judges through the book Important case law. See Tran and Nguyen, Những Án Lệ Quan Trọng 35.
[74] République Française published the Journal judiciaire de La Conchinchine et du Cambodge, which was the collection of civil and criminal case laws in Vietnam and Cambodia during the year 1895.

2.2.2.1.1 Property rights of the wife during the marriage period

In general, the marriage and family law in the South did not acknowledge the marital community property. Accordingly, the wife was completely incompetent when she got married. The husband, however, was entitled to polygamy due to the influence of Confucianism through the period of Chinese invasion and previous domination. The husband was the owner and the property manager of the whole family. *"Therefore, the wife had no separate property and was not involved in the administration of the family's production"*[75]. In addition, the husband was the legal representative for the wife and the lawsuit had to be represented by the husband. The wife could only participate in the legal proceedings when her husband agreed (Chapter X relating to guardian).

2.2.2.1.2 The wife's property rights regarding divorce

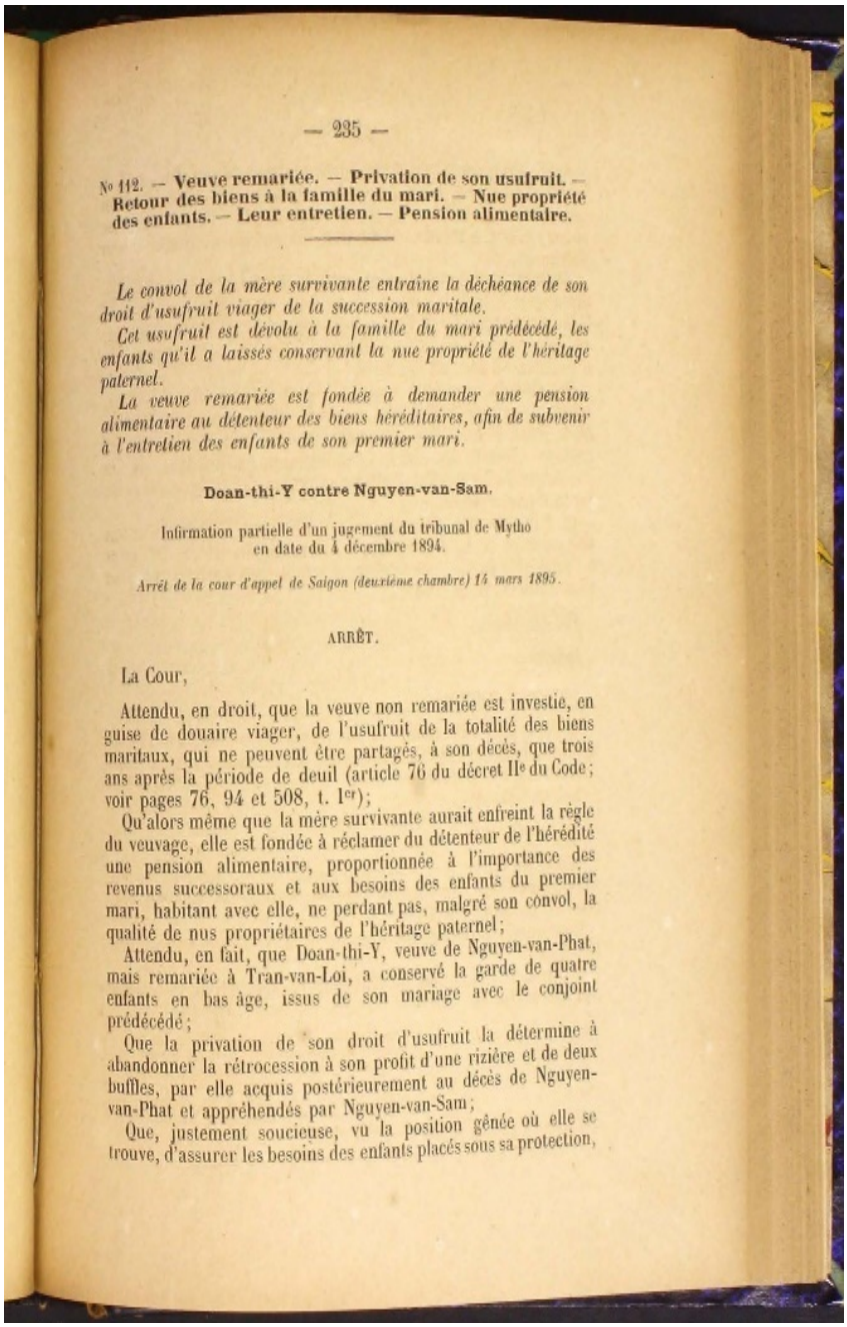
The husband or the two parties were enabled to file for divorce. The husband shall file for divorce due to the wife's faults, but the wife's divorce right was limited (Article 108)[76]. In addition, case laws also seemed to acknowledge the wife's right to receive certain personal properties if there was no fault. Specifically, the wife was entitled to receive property which was personal belonging (Manh Nhu Thien vs Thi Diep, case on November 22, 1898) or donated property separately (Nguyen Huu Nga vs Nguyen Thi Sang, case dated October 14,1898,). The wife was also entitled to ask the husband to support depending on the actual ability of the husband.[77] However, according to chapter VI, the wife was not able to assign any property and support if she had fault causing for divorce.[78]

2.2.2.1.3 Property rights of the widow

If the husband was demised, the widow was privileged to usufruct and administer without inheritance the husband's legacy. However, if the widow remarried, the husband's property would be returned to the eldest son for inheritance. In the case of a polygamous husband, the wife's eldest son was the heir. For example, the first-instance verdict, which was at My Tho Court[79] dated December 4th, 1894 between Doan Thi Y and her son – Nguyen Van Sam, settled that the eldest son would be the father's heir. Mrs. Doan Thi Y was Nguyen Van Phat's wife. After Mr. Phat deceased, Mrs. Y remarried Mr. Tran Van

[75] Vinh, Ha Nhu, "Che Do Hon San Phap Dinh Trong Luat Viet Nam" 45.
[76] Mau, Vu van, Dân Luật Lược Khảo 65.
[77] Thiet, Phan Van, Phụ Nữ Việt Nam Trước Pháp Luật 47.
[78] Mau, Vu van, Dân Luật Lược Khảo 89.
[79] My Tho is a district of Tien Giang province – Southeastern Vietnam.

Loi. This trial defined Mrs. Y as having an obligation to deliver all her husband's legacy to her eldest son, Nguyen Van Sam. However, the appellate judgment dated 14th March, 1895 of the Saigon Supreme Court modified that Nguyen Van Sam, who was Mr. Phat's heir had an obligation to subsidize Mrs. Y for 4$/month.[80] Thus, the widow was responsible for handing over the husband's property to the eldest son and was entitled to claim benefits from her husband's legacy. (See Figure 4)



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N° 112. — Veuve remariée. — Privation de son usufruit. — Retour des biens à la famille du mari. — Nue propriété des enfants. — Leur entretien. — Pension alimentaire.

Le convol de la mère survivante entraîne la déchéance de son droit d'usufruit viager de la succession maritale.

Cet usufruit est dévolu à la famille du mari prédécédé, les enfants qu'il a laissés conservant la nue propriété de l'héritage paternel.

La veuve remariée est fondée à demander une pension alimentaire au détenteur des biens héréditaires, afin de subvenir à l'entretien des enfants de son premier mari.

Doan-thi-Y contre Nguyen-van-Sam.

Infirmation partielle d'un jugement du tribunal de Mytho en date du 4 décembre 1894.

Arrêt de la cour d'appel de Saigon (deuxième chambre) 14 mars 1895.

ARRÊT.

La Cour,

Attendu, en droit, que la veuve non remariée est investie, en guise de douaire viager, de l'usufruit de la totalité des biens maritaux, qui ne peuvent être partagés, à son décès, que trois ans après la période de deuil (article 76 du décret IIe du Code; voir pages 76, 94 et 508, t. Ier);

Qu'alors même que la mère survivante aurait enfreint la règle du veuvage, elle est fondée à réclamer du détenteur de l'hérédité une pension alimentaire, proportionnée à l'importance des revenus successoraux et aux besoins des enfants du premier mari, habitant avec elle, ne perdant pas, malgré son convol, la qualité de nus propriétaires de l'héritage paternel;

Attendu, en fait, que Doan-thi-Y, veuve de Nguyen-van-Phat, mais remariée à Tran-van-Loi, a conservé la garde de quatre enfants en bas âge, issus de son mariage avec le conjoint prédécédé;

Que la privation de son droit d'usufruit la détermine à abandonner la rétrocession à son profit d'une rizière et de deux buffles, par elle acquis postérieurement au décès de Nguyen-van-Phat et appréhendés par Nguyen-van-Sam;

Que, justement soucieuse, vu la position gênée où elle se trouve, d'assurer les besoins des enfants placés sous sa protection,

Figure 4. A case law between Vietnamese litigants (Doan Thi Y vs Nguyen Van Sam) settled by a French judge in the South of Vietnam[81]

[80] République Française, "Case Law Conchinchine" 237.
[81] République Française, "Case Law Conchinchine" 237.

In general, case laws recognized that the wife had no separate property and the husband was the head of the family. However, there were few judgments that went against the principles mentioned. There was a trail dated December 30th, 1889 recorded by the Civil Court in Long Xuyen.[82] However, this verdict was finally canceled by the Saigon Supreme Court[83] dated April 30th, 1908 due to the inconsistency with the contents of the Southern Civil Code of 1883.[84] Saigon City was the largest city in South Vietnam at that time. After 1975, the South was completely liberated and unified, the city was renamed as Ho Chi Minh City. Hồ Chí Minh (1898 - 1969) is the name of the leader of Vietnam, who made great contributions to the resistance against the French and the Americans.

It seems that the judges were aware of the limitations of the Southern Civil Code regarding the rights of the wife. Meanwhile, the French society allowed the wife to have separate property. The Decree dated December 5th 1935 was issued by the Governor-General of Indochina forming a committee for drafting the new Civil Code. A Bill was established and referenced the progress ideas of the French Civil Code on marital property law. However, this Bill was not adopted during the French colonial time, because France was weakened by the successive defeats by the Vietnamese. From 1954 to 1975, the USA was an ally of France and replaced it to colonize this area. In 1959, under American rule, this region had a Family Law issued by the President Republican. Family Law No. 1/59 dated January 1st, 1959, was enacted by the President (Ngô Đình Diệm) of the Democratic Republic in the South of Vietnam. *"Many of the contents of the Bill of the Southern Civil Code were consulted to build this Family Law."* [85]

2.2.2.2 Provisions on matrimonial property under the Northern Civil Code 1931

The Northern Civil Code was issued on 30th March, 1931 and promulgated on 1st July, 1931. The Gia Long Code had been terminated in the North from this time point onwards. *"The law on marriage and family stipulated in the first volume (focusing from Article 68 to Article 461)."*[86] It referred to almost all the French Civil Code. It can be concluded that the concept of community property began formation since then. Moreover, the law on the matrimonial property allowed couples to choose an agreed property or a statutory one. In addition, the separate property was admitted to the wife (Article 113).

Unlike the South, the Northern Civil Code was built on the legal principle of writing, so the judges mainly based regulations prescribing within this. The application of the case laws was not used in trial since the Northern Civil Code of 1931 was issued. It prescribed almost the same detailed civil laws as the Gia Long Code.

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[82] Long Xuyen is a city at An Giang province in the Southwest region of Vietnam today.
[83] Vietnam News Agency, Chính Phủ Việt Nam Năm 1945 -1998, accessed February 20, 2019.
[84] Vinh, Ha Nhu, "Che Do Hon San Phap Dinh Trong Luat Viet Nam" 158.
[85] Vinh, Ha Nhu, "Che Do Hon San Phap Dinh Trong Luat Viet Nam"99.
[86] Thanh, Phan Dang and Truong Thi Hoa, Các Chế Độ Hôn Nhân và Gia Đình Việt Nam Xưa và Nay 35.

2.2.2.2.1 The wife's property rights during the marriage period

According to Article 106 of the Northern Civil Code and in case the husband and wife did not establish an agreement (which can be interpreted as a type of property law as agreed in contemporary law), the community property, which was the statutory, was to be applied automatically. The concept of a community property was originally presented in Article 1041 of the French Civil Code.

If the husband and wife did not have an agreement on property, the community property was applied. All assets during marriage time belonged to the community property including the estate or real estate that the couple was donated and inherited (Article 106). This showed that separate property could be formed under the agreed one.

2.2.2.2.2 The property rights of the wife after divorce

The rule of divorce laws had changed positively for the wife. They could file for divorce as nonmutual or mutual consent divorce. In contrast, the Gia Long Code only allowed the husband to divorce his wives. There were differences in property interests between the first wife and second wife after divorce. The second wife was not allowed to share the community property. The entire community property was only recognized between the husband and the first wife (Article 119). If the second wife did not have the same domicile with her husband and established her property separately, she was entitled to retain those assets (Article 148).

If the divorce did not have the wife's fault and any other agreements, the first wife was entitled to divide the community property (Article 112 and 147). *"In addition, according to Article 112 of the Northern Civil Code, it was possible for the husband and wife to receive personal property supporting personal needs such as clothes, books and personal work- tools."*[87] In particular, the husband had responsibility to support the wife as a reward for her dedication during the marriage period.

On the contrary, if the divorce was due to the wife's fault, the wife was forced to return the valuable jewelry which was donated by the husband's family on their wedding day. However, the community property was still divided for each party in this case. This showed that even if the wife was at fault, the community property was still divided in two. This was a progressive regulation recognizing the different aspects between property ownership and divorce.

[87] Mau, Vu van, Dân Luật Lược Khảo 91.

2.2.2.2.3 Property rights of the widow

The rights of the widow did not seem to be guaranteed. Article 113 stipulated that the widow was entitled to administer and usufruct community property if she did not rewed. If the eldest son was mature, he and the mother could agree to divide the legacy.

If the widow remarried, she was entitled to take her personal belongings with her. The husband's property including community one was handed over to his heirs as follow parents-in-law and the mature son. The second wife did not receive these privileges as the first wife. The second wife did not enjoy her husband's heritage as the first wife. However, the second wife had the right to usufruct when the legacy was not divided, if she did not remarry and obey the first wife (Articles 340-365). On the other hand, if the wife demised, the husband was entitled to possess the entire community property and separate belongings of the wife (Article 368).

In general, the provisions of the Northern Civil Code had made significant progress compared to the Gia Long Code. It acknowledged the wife's right to separate property and allowed the agreement on property between the couple. When the couple divorced, the wife was entitled to request support and divided community property. The wife was entitled to get back her separate property when the couple divorced. However, it is undeniable that there were still many drawbacks. Equity in property ownership had not been recognized. For example, the right to manage community property remained by the husband. When the wife deceased, the husband continued to own the community property and his wife's separate property. The succession of the wife's estate was not considered.

2.2.2.3 Provisions on matrimonial property under the Central Civil Code 1936

The Northern Code of Law was used as a template for the Central Civil Code. It had 5 volumes and was issued in the period from 1936 to 1939. The marital property regulations were issued in 1936 and focused mainly on Articles 104 - 114. *"This law had several similarities in comparison with to the Central Civil Code and only a few changes."*[88] The fundamental difference was the layout. Specifically, chapters 11 and 12 relating to inheritance, which were prescribed in the first volume of the Northern Civil Code, were in the second volume of the Central Civil Code. The latter exceeded the former by 245 articles that referred to contract's regulations.[89] Therefore, the law on matrimonial property had almost no difference between the two laws.

[88] Thanh, Phan Dang and Truong Thi Hoa, Các Chế Độ Hôn Nhân và Gia Đình Việt Nam Xưa và Nay 40.
[89] Mau, Vu van, Dân Luật Khái Luận 129.

2.2.2.3.1 The property rights of the wife during the marriage period

Like feudal regulations, Article 79 recognized the husband to polygamy. The second wife could live with an extended family including the first wife. In this case, the second wife did not have her own property and depended on both the first wife and the husband's patriarchal rights (Article 114 of the Central Civil Code).

If the husband accepted that the second wife could live separately from the first wife and her husband, she had to establish a separate property. *"If the husband owed a debt, the second wife had no obligation to pay the debt on behalf of her husband. When the husband was deceased, she still retained her own assets (Article 223 of the Central Civil Code). This part of the property was not merged into the whole community property managed by the first wife when the husband demised."*[90]

However, the couples formed community property when they created a separate family and did not live together with their parents. According to Article 206 of the Central Civil Code, the matrimonial property only applied when the husband was the head of the family and had full authority to represent the members living together in the family. The patriarchal right of a husband was meant to be the head of the family. Therefore, children and grandchildren, even if they got married, were still dependent on the patriarchal rights of their father. If the parents were still alive, children had to depend on the father and did not have their separate belongings. If a child was mature and married, he had the right to leave in terms of his father's consent. When the son established his own family, matrimonial property was formed. Like the Northern Civil Code, the Central Civil Code prescribed that there were two types of marital properties, which were the agreed property and the community one. The agreed property model enabled the couple to agree on the ownership, while the entire community property only recognized the existence of common property. The form of an agreed property would only be valid after it had been expressed in writing and legalized by a competent authority. This agreement could not be modified when the parties had established it. When the marriage dissolved, this agreement was automatically terminated. It would be noted in marriage certificates to inform and protect the third person in established transactions with spouses.[91] This term had similarities in comparison with Article 1393, 1394, 1945 of the Napoleon Code 1804.

[90] Mau, Vu van, Dân Luật Khái Luận 110.
[91] Thiet, Phan Van, Phụ Nữ Việt Nam Trước Pháp Luật 20.

2.2.2.3.2 The property rights of the wife regarding divorce

According to paragraph 2 of Article 104 of the Central Civil Code, estate and real estate, which were sometimes formed before marriage, or inherited or created during the marriage period, belonged to the community property as statutory law. The husband and wife would not have their separate ownership. If the couple divorced due to being childless, the whole community property would be paid and divided. The wife was entitled to ask for one-third of the community property.

If the wife was in adultery, she would not receive anything from the community property. This was considered a difference compared to the Northern Civil Code. According to the Northern Civil Code, the wife was still assigned half of the community assets, although she had fault. In addition, Article 110 (5) of the Central Civil Code stipulated that the husband and wife could request to receive their separate properties for personal needs such as clothes, books, and personal work tools.

2.2.2.3.3 Property rights of the widow

According to Article 58, when a spouse was missing, asset management was allocated to the other partner. Specifically, if the husband was missing, the property was assigned to his wife to manage and usufruct. If there was no wife in advance, the property was appointed to the parent or child (mainly as the eldest son) for management. However, this property was not allowed to be sold by the law to predict the possibility of the missing person returning, but the first wife was entitled to dispose of her separate property (Article 67). If the missing person had not returned after 20 years, the property was considered a legacy and inherited (Article 65). In addition, there was a difference in the management of the missing husband's assets between the first wife and the second wife. The second wife did not take advantage of the husband's property. If she did not remarry, she could stay in the husband's house and be supported.

In the case of a husband's death, the first wife could manage the community assets (Article 222 of the Central Civil Code). Unless she remarried or was disqualified from the husband’s legacy, she was entitled to take back personal possession. The husband's property would be assigned to parents-in-law and children (Article 227 of the Central Civil Code). In contrast, if the wife demised, the husband had full power to possess the whole community assets including the wife's personal property even if the husband remarried (Paragraph 3 Article 111 of the Central Civil Code).

In general, there were few differences between the Central and Northern Civil Codes on marital property law. The Central Civil Code recognized the formation of the matrimonial property and was entitled parties to agree on property. The role of the wife was increasingly recognized through the wife's separate property and the right to share community assets. However, the Central Civil Code was somewhat more restrictive than the Northern Code relating to the provisions of community possession, when the couple divorced. The wife in the Central region only received one-third of the common property, if she did not have any fault. On the contrary, she would be deprived of anything to common property, if she had a fault. Generally, the copying of the Napoleon Code encouraged the Central and Northern Civil Codes to have several progressive legal ideas. However, these two laws still valued the role of the husband and the son as the head of the whole family.

2.2.2.4 Vietnam's matrimonial property law in comparison with the French Civil Code 1804

Napoleon Bonaparte was a man with great merit in building the French Civil Code. He himself proposed to establish the Commission for the Drafting of the Napoleon Code on August 13, 1800.[92] The French Civil Code was enacted on 21st March 1804 and is known as the Napoleon Code. It had an influence both in France and outside it. Indeed, the impact of the French Civil Code goes beyond its territory including not only European countries (Belgium, the Netherlands, Monaco) but also other parts of the world (Asia, Africa, Quebec, Louisiana). It cannot be denied that it has outstanding features such as clear structures and styles and a symbolic point of view. Thus, several parts of this have been still valid for more than two hundred years. *"Although it has remained in force retaining a majority of its original provisions, it has undergone considerable transformations making its evolution a fascinating focal point for continental lawyers.*"[93] Therefore, there are major modifications that were issued throughout the 19th and 20th centuries. For instance, the reestablishment of divorce (1884), the reform of the law of marriage (1896, 1907), the inheritance rights of natural children (1896) and the admission of paternity search (1912), the law on the respect of human integrity (1994), the law on the electronic signature (2000), the law on the reform of successions (2001) and a French Revolution for Construction Contracts (2016)[94] to the Napoleonic Civil Code were among these amendments. Over time, the French civil law system was subject to the common law system. Therefore, the French Civil Code nowadays not only applies narrowly in the

[92] Lobingier and Charles Summer, "Napoleon and His Code" 117.
[93] Luce, Marie and Paris Dobozy, "Still Alive: Some Observations about the Two-Hundred Years of Existence of the French Code Civil 1804" 91. (See also Jean-Louis Halpérin)
[94] The French Civil Code of 1804 and other amendments are accessible on the following site: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721/.

prescribed provisions but also recognizes the participation of judges in creating case laws in practice.[95]

Vietnam is considered one of the Asian countries affected by the French Empire's regulations. In fact, the Southern Civil Code 1883, the Northern Civil Code 1931 and the Central Civil Code are among typical examples that had several similarities in comparison with the French Civil Code 1804.

2.2.2.4.1 The right of the wife during the marriage period

The French matrimonial property law was defined from Articles 1389 to 1421 in Title V of the contract of marriage and the respective rights of married persons. This title was issued by a Decree dated February 10th, 1804 and promulgated the 20th of the same month in France. Accordingly, the couple had two matrimonial property laws to choose from: *a community property* (including movable and immovable properties which were acquired during the marriage – Article 1401) *or dowry property* (can be understood as a wife's separate property). The dowry regulation was understood as the wife's separate property, but she still ensures the marital common obligation.[96]

However, the dowry property only applied when the couple had an agreement before marriage. Thus, the community property law would automatically apply, if the couple had no property agreement. However, setting dowry property law must comply with certain forms. Specifically, according to Articles 1394, 1395 and 1396, the French Civil Code stipulated that *"All matrimonial agreement shall be reduced to writing before the marriage by act before the notary. They cannot receive any alteration after the celebration of marriage."* When the dowry law was established, the wife had ability to full control over her separate property and real estate.[97] However, the husband properly had the right to use the wife's estate during the marriage.[98] Although it is regulated in current law, the prenuptial agreement is rarely chosen by couples to be established in Vietnam and around the world. For example, according to a 1993 US survey, *"legal commentators and practitioners estimate that only 5-10% of the population enter into prenuptial agreements, and one study suggests that only 1.5% of marriage license applicants would consider entering into such agreements."*[99] This section suggests that the relative scarcity of prenuptial agreements might be explained by two phenomena: *"1) couples may systematically underestimate the expected benefits of premarital agreements; and 2) couples may be hesitant to discuss a prenuptial agreement because each person might*

[95] Luce, Marie and Paris Dobozy, "Still Alive: Some Observations about the Two-Hundred Years of Existence of the French Code Civil 1804" 97. (See also Basil Markesinis).
[96] Pintens, Water, France and Belgium – Marital Agreement and Private Autonomy Perspective 5.
[97] Article 1536 of French Civil Code 1804.
[98] Article 1533 of French Civil Code 1804.
[99] Mahar, Heather, "Why Are There so Few Prenuptial Agreements?" 1–38.

believe that initiating the conversation would signal uncertainty about the success of the marriage and would conflict with the romance of courtship."

As far as a marital contract in France from 1855 to 2010 is concerned, approximately *"40% of newlywed couples signed a prenuptial agreement in 1855, but this share dropped to less than 10% after the reform of marital property regimes in 1965."* It witnessed a recovery after the formation of a norm "no-fault divorce" in 1975, and nearly 18% of newlywed spouses signed a prenuptial agreement in 2010. These number showed that marriage contracts and dowries were common in France in the 1855-1975 period having 40% off.[100] This proves that the number of marriage contracts established in France and in the US is relatively low which had just 18% in 2010 and 5-10% in 1993, respectively.

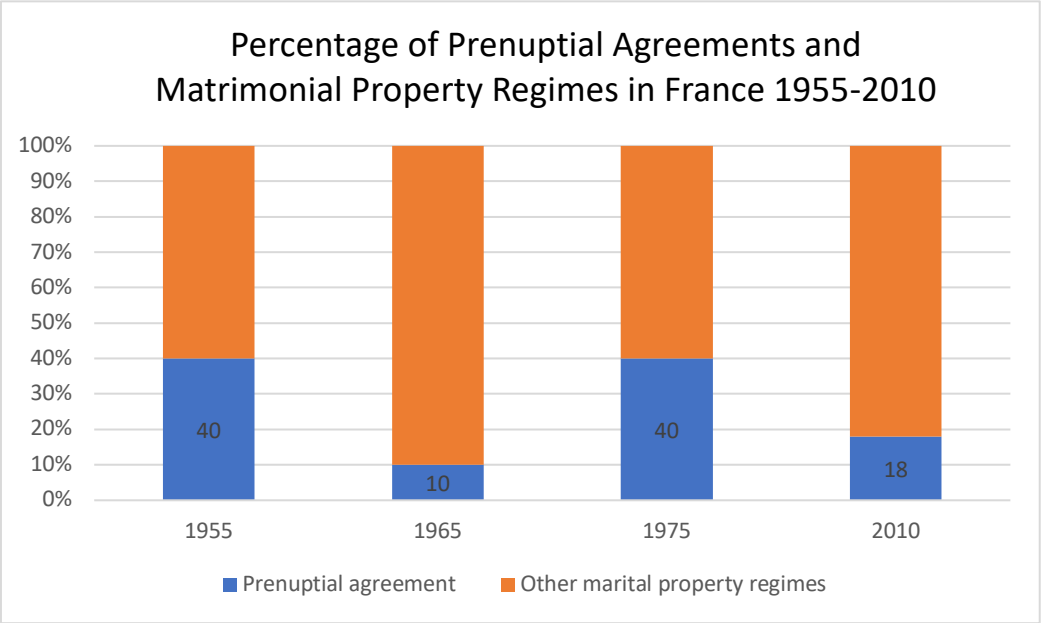

Figure 5. Prenuptial Agreements and Matrimonial Property Regimes in France 1955-2010[101]

Regarding statutory property, according to Article 1401, the community property consisted of all movable properties (including properties possessed before and during the marriage, even though succession or donation if the donor had not expressed himself/herself to the contract) and immovables acquired during the marriage. There was also the excluding community property that was considered as the spouse's separate propertiy. These were established through their agreements such as personal goods or immovables derived from inheritance, donations or having before marriage.[102]

[100] Frémeaux, Nicolas and Marion Leturcq, "Prenuptial Agreements and Matrimonial Property Regimes in France, 1855-2010," 132–142.
[101] Frémeaux, Nicolas and Marion Leturcq, "Prenuptial Agreements and Matrimonial Property Regimes in France, 1855-2010," 132–142.
[102] Article 1432 of the French Civil Code 1804.

Nevertheless, articles 1421 and 1428 of the French Civil Code stipulated that only the husband had the right to manage the community property and even the separate property of the wife. The man still played the most important role in the family.

Thus, this law noted that in the case where the husband and wife chose the community property law, they still had the right to possess separate property. Meanwhile, civil laws in the North and the Central only recognized one type of property within the couple's community property. However, these laws had progressed more than the Southern ones by acknowledging the existence of the couple's community property law during the marriage period. In contrast, the Southern Civil Code did not recognize the existence of the community property law and entitled the husband to possess the entire property of the whole family.

However, it must be admitted that the different aspects of French law during this period enabled Vietnamese law to be aware the community property. Indeed, from the historical point of view, Vietnam was greatly influenced by Chinese Confucian during the period of the Chinese conquest (from 179 BC to 939). Therefore, the husband was considered the head of the family and the holder of all family assets. The wife was virtually unprotected and actually a member of the proletariat. Therefore, the ideology of the property community law in French law brought a progressive idea to Vietnamese law. Vietnam eventually acknowledged the existence of a community property law in which the wife was a companion to her husband in the possession of community property during the marriage period. However, there were still several obstacles within the French Civil Code that the husband was the head of the family and had the supreme right to manage the community asset including the wife's property.

2.2.2.4.2 The wife's property right after divorce

According to the community property law, when the couples agreed to divorce, they were entitled to split their community property.[103] The wife could ask to be supported after a divorce if she was in need.[104] Accordingly, *"case law dated June 25, 1855 recognized that the wife was entitled to ask the husband to support upon divorce (Mrs. Guillemant vs Mr. Hanot)."*[105] The French Court determined that if the husband did not fulfil this obligation, the wife was entitled to ask for Mr. Hanot's assets to be distrained to enforce his support obligation.

If the wife had established a dowry law, she would be able to take back all her possessions including estate and real estate. If the husband caused damage to his wife's

[103] Article 305 of French Civil Code 1804.
[104] Article 280 of French Civil Code 1804.
[105] Linh, Tran Thuc and Nguyen van Tho, Những Án Lệ Quan Trọng 12-50. This consisted of a collection of important legal cases of the French translated by two Vietnamese judges in order to learn and apply in trials by Vietnam courts.

property, he had to compensate.[106] The detailed rule of dowry law guaranteed the ownership of the wife's private property upon divorce.

2.2.2.4.3 The rights of a widow

"Under the dowry law, when the wife deceased, the legacy belonged to the wife's heirs. The husband and his heirs were entitled to use this property. However, if the husband deceased, the wife was entitled to continue to maintain dowry law along with her husband's heritage to ensure daily life but to implement every year."[107]

According to the community property law, when the wife demised, the husband regained his own property and a part of the community property. His wife's estate would include the wife's private property and a part of community property. Similarly, when the husband demised, the widow was entitled to consolidate her own property and wife's share of a community asset. The spouse's legacy would be divided among his/her heirs (Article 1478).

The beneficiary of the wife's and husband's inheritance were *"natural children[108], afterwards to the spouse surviving, and if it was not of those, to the state."*[109] Different from feudal law, the widow would receive her husband's legacy, if there was no natural children's inheritance.

In conclusion, the French invasion of Vietnamese territory was a wrongful act and caused much damage to both the Vietnamese and the French. However, it is hard to deny that Vietnam's culture and legislature adsorbed achievements of the French civilization. In marriage and family fields, France replaced the feudal ideology which despised the position of women in the family and upheld the absolute position of the man. There was a huge difference in women's property ownership in the Gia Long Code compared to the Northern and Central Civil Codes. The Gia Long law prescribed women as incompetent, so they had almost no asset in the family. In marriage, family asset belonged to the husband and would be assigned to the eldest son when the father was deceased. The wife could only benefit as she did not remarry. This was the result of copying the Chinese's Qing Law. In contrast, the acquisition of the contents of the Napoleon Code encouraged the Northern Civil Code and the Central Civil Code connecting closer to contemporary legislative civilization. Indeed, these laws recognized the wife achieving a higher position, even though there was not complete equality between both sexes. In terms of scale, the Southern Civil Code was sketchier than the two mentioned laws. Provisions on matrimonial property law were not mentioned in the Southern Civil Code. The copying of the general provisions

[106] Article 1564, 1565 of French Civil Code 1804.
[107] Article 1570 of French Civil Code 1804.
[108] Article 334 of French Civil Code 1804.
[109] Article 734 of French Civil Code 1804.

of the French Civil Code did not provide the necessary laws to resolve social relations arising in Vietnam. Hence, French judges would apply the Gia Long Code and case law in the South. The judges had realized that the law should recognize and respect the ownership of women related to divorce and inheritance aspects. It is possible to say that the law of matrimonial property at this stage is a mix of western and feudal ideas where the rationality in Western law seems to prevail.

Nevertheless, the matrimonial property law in the Napoleon Code 1804 still had inequal regulations which biased to the husband. The wife was not quite equal as the husband in all aspects. Thus, the matrimonial property regulations in the French Civil Code had undergone several amendments afterwards.

2.3 Marital property law after the August Revolution (1945)

2.3.1 Basic principles of family law in North Vietnam after the independence (1945–1975) and the reunification

The principles of Vietnamese Acts on marriage and family are different depending on three main historical periods. Indeed, these were the rules prescribed during the French colonial time, North Vietnam's independence from 1945 to 1975, and in recent years.

After the success of the August Revolution in 1945, the North was liberated and gained independence. From 1945 on, the Northern territory was independent under the leadership of Ho Chi Minh, who also declared the foundation of the Democratic Republic of Vietnam on September 2nd, 1945. Northern Vietnam was placed under the direction of the Communist Party and has developed towards a socialist orientation since then. In 1954, the Geneva Agreement (Geneva) was signed to terminate the French colony in Indochina, and Vietnam's territory was divided into two parts being the South and the North. The United States, which was an ally of France, replaced the French to rule the South under the monarchy of the presidential republic. In the meantime, North Vietnam issued the first Constitution on November 9th, 1945, and Article 1 of the 1946 Constitution affirmed: *"All domestic rights belong to the entire Vietnamese people, regardless of race, gender, rich, poor, class and religion."*

To realize the provisions of the Constitution and abolish the outdated regulations of the previous period, Ho Chi Minh issued Ordinance No. 97-SL on May 22nd, 1950, which had 15 articles related to marriage and family law. Also, Article 2 of Ordinance 97-SL acknowledged that men and women, who had equal rights in all aspects, were free to marry at will and did not require the consent of their parents. Subsequently, Ordinance 159-SL was issued on November 17th, 1950, to regulate the divorce issue.

The 11th session of the First National Assembly passed the 1959 Law on Marriage and Family on December 29th, 1995,[110] which consisted of 6 chapters and 35 articles. Initially, the Marriage and Family Law of 1959 was just applied in the North. Then it has been used to the whole territorial Vietnam since the South was completely liberated and unified on April 30th, 1975, onwards.

Article 1 of the Law on Marriage and Family of 1959 stipulated that *"The State guarantees the full implementation of a free and progressive marriage regime, for monogamy and equality between men and women, to protect the rights of women and children. Thereby, the State desires to build a happy, democratic, and harmonious family, united family institution, to love and help each other to progress."* The age of marriage was set to 18 years for women and 20 years for men. Besides, to be eligible to get married, both men and women cannot belong to the cases in which marriage was prohibited, such as cousinhood (Article 9). Also, Article 10 of the 1959 Act stipulated that *"The following persons must be interfered form marriage were the one had impotent completely physiological, suffering from one of leprosy, venereal diseases, cerebral palsy, which has not been cured."*

On December 29th, 1986, the Marriage and Family Act of 1986, which had ten chapters and 57 articles was passed by the 7th National Assembly and took effect from January 3rd, 1987. The 1986 Act on Marriage and Family recognized that the couple had their common property and their separate property. The common property included "property created by husband and wife, occupational income and other lawful incomes of the couple during the marriage period; property inherited by the couple or jointly" (Article 15). The separate property was the ones had before marriage, inherited separately or given separately during the marriage period" (Article 16). At this time, separate property can be merged into a common feature according to the will of the spouse. Although the marital agreement regime was not prescribed in this law, there was a foundation of agreement between husband and wife on their properties. When the spouse divorces, they might compromise the marital estate. If the two parties had property disputes, the Court would decide on the couple's marital property. The division of ownership of the divorcees shall be the following: 1) The owner shall keep personal property; 2) Common property of the couple shall be divided into two parts, taking into consideration of the specific situation of the family and contributions by each party; 3) The rights of the wife and under-age children, and production and professional interests shall be protected in the division of

[110] On 13th January, 1960, the Law on Marriage and Family in 1959 took effect only in the Northern Vietnam. In 1954, signing the Geneva Agreement, Vietnam was divided into two parts, South and North. In the South of Vietnam, under the Republic of Vietnam regime, there is also a law on marriage and family called the Family Law issued on January 2nd, 1959. After the reunification of the country, the Marriage and Family Law of 1959 was applied nationwide officially from March 25th, 1977 in which the Government Council promulgated of Resolution 76-CP announcing the list of documents. Legislative documents were uniformly applied throughout the country.

property (Article 42). This provision shows that the law prioritizes the protection of disadvantaged women and children when the spouses divorced.

The Marriage and Family Law of 2000, which was enacted on June 9th, 2000, and took effect on January 1st, 2001, had 13 chapters and 110 articles. This law eliminated the ban on people getting married in the case of venereal disease. However, it prohibited marriages between same-sex couples; a foster parent and adopted child; father-in-law and daughter-in-law; mother-in-law and son-in-law; stepfather and stepchild; stepmother and stepchild. It continued to recognize the common property and the separate property of the spouse. The 2000 Law noted that *"common property was required by law to be registered for ownership, the names of both husband and wife must be inscribed in the ownership certificate thereof"* (Article 27(2)). The couple had *"equal obligations and rights in possession, use, and disposition of their common property. The common property was used only to ensure the family's needs and their regular obligations. The establishment, performance or termination of civil transactions related to common property which is of great value or the family's sole means of livelihood, the use of the common property for business investment must be discussed and agreed upon by husband and wife, except where such common property has been divided for his/her business investment (Article 29 (1))."* The 2000 Law had contributed to building, perfecting, and protecting the progressive, prosperous, and happy marriage and the family regime in Vietnam. It protected better human rights, civil rights, especially the rights of women and children in the field of marriage and family. It created a legal corridor to contribute to establishing and ensuring the safety of property relations arising among family members as well as transactions between family members and other entities in the commune festival. This law also recognized the legitimate rights and interests of the parties in the marriage and family relations involving foreign elements. The Marriage and Family Law of 2000 was suitable for reality, meeting the needs and the psychology of husband and wife in society. It had contributed to the removal of backward customs and practices of Vietnamese feudal society, and to the elimination of parental rights. It recognized the equality of husband and wife in the division of assets in the current economic integration period.

In general, from 1945 to 1975, the principles in the laws on marriage and family of Vietnam have the following characteristics: 1/ They admitted the principle of monogamy which was shown in the Marriage and Family Laws of 1959, 1986, and 2000; 2/ The principle of equality, non-discrimination plays an essential role by gradually recognizing the ownership of the wife and the women in the family; 3/ The principle of priority to protect women, children, and the weak. This is true in the case of the Marriage and Family Law limits to a husband's divorce right when the wife is pregnant or raising children under 12 months according to Article 27 of the 1959 Law on Marriage and Family); 4/ The principle of respect for free will to decide on marriage without anyone being allowed to

interfere. However, the 1986 Law on Marriage and Family had a restriction on people with venereal disease from getting married[111], while this provision was abolished and let people with sexually transmitted diseases marry voluntarily freely in the 2000 Law. The principles had also been developed more progressive and fuller arising in the mobilization of society and the transformation of family models. The above principles increasingly promote advanced equality between men and women in society.

Regarding the European counterpart on family aspect, it strongly concerned the protection of the institution of marriage and family. At the end of the 18th century, a criticism of enlightened reason and rebellion against the principles of traditional morality and ecclesiastical law liberalized a significant proportion of family law norms. After 1815, the conservative turn in the post-Napoleonic era emphasized the importance of the institution of marriage and family and the responsibility of the state protection. Legal protection had become multilevel through constitutional documents containing the principle itself and providing criminal protection. The western and the eastern part of Europe moved away from each other. The number of divorces was increasing citing conservative (primarily Catholic) jurists in the West, while feminism was highly concerned in the East under Soviet's rule, which emphasized gender equality and the upbringing and protection of children. Discrimination on grounds of origin had to be abolished in family law, while maintaining positive legal institutions for the protection of mothers, children and young people especially after 1968. At the turn of the millennium, the same-sex coexistence was typical of the western half of Europe, citing human dignity, a cohabiting relationship and the principle of equality[112] and it was intended to be legally regulated as a marriage, emptying the notion of the natural law of marriage.[113]

2.3.2. Fundamental family policies of Soviet bloc countries during the period 1920s and their impacts on Vietnamese matrimonial property law

2.3.2.1 The Soviet Union: marriage policies and their effects on the socialist countries

Communism and social democracy played a fundamental role in the international socialist movement and became the most influential secular movement of the 20th century. *"Socialist parties and ideologies remain a political force of varying degrees of power and control on all continents, with many countries around the world heading national*

[111] Article 7 of the 1986 Law on Marriage and Family Law.
[112] Hungary is among countries that highly raise awereness to women's right and equality. See Kinga, Csaszar, "Márkus Dezső a Nőkérdésről Megtekintése" 137–150.
[113] Csabáné, Herger, "A házasság és a család védelme a modern magyar magánjogban" 3–15.

governments. There have historically been systems of state socialism commonly known as communist states such as the Soviet Union, China, Vietnam, and Cuba."[114]

With respect to the socialist regime, "many philosophic scholars have raised the issue of the family from different angles. In this regime, society, the interests of each person, family and society are fundamentally unified. Socialism also creates favourable conditions for each family to fulfil its social tasks, thereby promoting the active role of the family in the development of society and promoting feminist protection."[115]

"Several contemporary theorists have defended the significant role of the family and the rights of two persons, such as Lenin, Marx, and Engels."[116] According to a work of Friedrich Engels "The Origin of the Family, Private Property and the State"[117], he clearly analyses "the social cell role of the family, and the dialectical relationship between the family and the state. In addition to the theoretical connections between private property, capitalism, and the subordination of women, Engels raised awareness about women's liberation and equality."[118]

Regarding Marx's and Engels's family approach, Soviet Union family law - the Family Law Code of 1918 made sweeping changes from the old imperial laws, which declared men and women legally equal. It did not mention the form of interpersonal relationships in the new society and mainly focused on instating practices consistent with Marxist philosophy.[119] The first efforts undertaken in the realm of this law were remarkably progressive, namely the simplification of the procedures of marriage and divorce, providing women with many rights that were non-existent before the October of 1917, elimination of the concept of illegitimacy, and granting the children of unmarried couples rights equal to those of children of officially married parents. Three years later, Soviet Russia became the first state to legalize abortions in 1920.[120] In the philosophy of Marx and Engels, the family is a historical institution whose development is to be explained in terms of economic forces rather than of divine ordinances. In a Communist society there would not be the slightest need for the state to mix into marital affairs. The abolition of marriage would not be a matter of decree; rather, in time, it would simply become a reality.[121]

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[114] Linh, Nguyen Thi My, "Impact of the Family Policy of the Soviet Bloc Countries on the Codification of Vietnamese Family Law in 1959" 111–122.
[115] Ibid.
[116] Ibid.
[117] Engels, Friedrich, The Origin of the Family, Private Property and the State 1.
[118] Linh, Nguyen Thi My, "Impact of the Family Policy of the Soviet Bloc Countries on the Codification of Vietnamese Family Law in 1959" 120.
[119] Glass, Becky L. and Margaret K. Stolee, "Family Law in Soviet Russia, 1917-1945" 893–902.
[120] Mishina, Ekaterina, "Soviet Family Law: Women and Childcare (From 1917 to the 1940s)" 69–92.
[121] Berman, Harold J., "Soviet Family Law in the Light of Russian History and Marxist Theory" 46.

Later, the 1926 Code[122] relegated both marriage and divorce to the sphere of private agreement, with the control of the courts and of the state reduced to a minimum. In particular, judicial practice points to a different approach to the division of property. Since the wife, traditionally, played the leading domestic role and was often not engaged in paid work outside the home (fulfilling the role of housewife, and not working for a living), a working husband would obviously hold a big advantage in the event of a divorce.[123] The 1926 Code reinstated these concepts with the aim of restoring property rights to the millions of Soviet women still at home. From then on in the Soviet Union, property acquired during the marriage would belong to both spouses, whereas property acquired prior to marriage would remain separate property. It cannot be denied that the 1926 Family Code maintained the 1918 freedom of divorce provision and continued to allow women to obtain abortions on demand.[124]

The reform in Soviet jurisprudence in 1936 and 1937 was preceded by new legislation on the family. The 1936 Law on Family was passed by The Central Executive Committee and The Council of People's Commissars of the U.S.S.R on June 27th, 1936. The Law of 1936 ruled out provisions that protect mothers and children of large families, eliminate abortions, and place financial and procedural restrictions on divorce with a new attitude[125]. As far as women's rights are concerned, they highly valued the women's role in the family, which were increasingly seen as inextricably bound with those of children and families.[126]

Regarding the new 1944 Code on Soviet Family[127], "legal family relationships no longer existed concerning the de facto marriage, which was based on a registered marriage or on common descent from an unmarried mother since then. This was a major departure from all previous Soviet law, which defined legal family relationships only based on biological relationships. For the first time, fatherhood outside wedlock created neither rights nor obligations."[128] "This law restored to Soviet society the distinction between children born in and out of wedlock that had been abolished"[129] with the first Soviet law of 1918 on Family Code.[130] It continued to stress the importance of good parent-child relationships. Children were advised by the state to respect their parents, and a new inheritance law was instituted that permitted up to 10,000 rubles worth of private property

[122] The Code of Laws on Marriage and Divorce, the Family, and Guardianship was passed by a decree of the All-Russian Central Executive Committee on November 19th,1926.
[123] Tarusina, Nadezhda and Elena isaeva, "Russian Family Law Legislation: Revolution, Counter-Revolution" 65–92.
[124] Bazyler, Michael J., "Soviet Family Law" 125.
[125] Berman, Harold J., "Soviet Family Law in the Light of Russian History and Marxist Theory"46-48.
[126] Kaminsky, Lauren, "Utopian Visions of Family Life in the Stalin-Era Soviet Union" 63–91.
[127] It was passed by The Presidium of the Supreme Soviet of the U.S.S.R on July 8th, 1944.
[128] Linh, Nguyen Thi My, "Impact of the Family Policy of the Soviet Bloc Countries on the Codification of Vietnamese Family Law in 1959" 119.
[129] Ibid.
[130] Kaminsky, Lauren, "Utopian Visions of Family Life in the Stalin-Era Soviet Union" 63-91.

to be inherited, with the possibility of greater amounts in special instances.[131] In June 1940, the Soviet women's magazine, The Woman Worker, published an article entitled "Legal Consultation (Alimony)" by Maria Grechukha, Head of the People's Court Department of the Commissariat of Justice of the Union of Soviet Socialist Republics. The article began by citing the June 1936 decree, which "clearly emphasizes what enormous care and love surrounds mothers and children in our country."

It is believed that the Soviet Union underwent major legal reforms that were witnessed significant after Stalin's death in 1953,[132] for example that The Supreme Soviet of the Union of Soviet Socialist Republics had enacted fundamental principles on June 27th, 1968. After the dissolution of the Union of Soviet Socialist Republics, Russia declared that it assumed the rights and obligations of the dissolved central Soviet government, including UN membership and permanent membership of the Security Council. With respect to Substantial changes in Soviet family policy in 1918, 1926, 1936, 1944 and 1968, it demonstrated that the new role of the family under socialism had significant changes relating to sex equality, children's rights, and unmarried women's rights. As far as the property relationships between the spouses are concerned, they had become of constantly increasing importance, such as Decrees of the early days of the revolution abolishing private property in land and forbidding the private ownership of the means of production and they did not concern private ownership of consumption goods. Division of property between the spouses had undergone a radical change since the 1918 Code, which declared that there should be no joint property of the spouses. However, the Code of 1927 reintroduced joint property in so far as the property acquired during marriage was concerned, while that owned by each spouse before marriage could be held severally or distributed according to a contract which did not look to the exploitation of the rights of the other spouse.[133] *"These progressive ideas were not only confined to the territory of this country but also wandered to other countries under the socialist system at that time such as China, Vietnam developing under the model of the Socialist Republic to this day."*[134]

2.3.2.2 Family laws in Asia and other countries under the orientation of Socialism in the first half of the 20th century

The Communist States from over the word had also introduced egalitarian family laws namely the North Korean Act of 1946, the Chinese Act of 1950, the Northern Vietnam's Act of 1959, the South Yemen's Act of 1974 and the Cuba's Act of 1975 owing to the success of the Soviet Union in terms of individual rights and gender equality. They all

[131] Glass, Becky L. and Margaret K. Stolee, "Family Law in Soviet Russia, 1917-1945" 893-902.
[132] Stone, O. M., "The New Fundamental Principles of Soviet Family Law and Their Social" 392–423.
[133] Hazard, John N., "Law and the Soviet Family" 224-230.
[134] Linh, Nguyen Thi My, "Impact of the Family Policy of the Soviet Bloc Countries on the Codification of Vietnamese Family Law in 1959" 115-120.

shared common characteristics which implemented the concept of formal legal equality between partners.[135] China and Vietnam developed under the heavy influence of the Soviet Union and the East Asian Confucian cultural sphere. This is true in the case of The Chinese Communist Party and Government developing socialism with Chinese characteristics[136] which began as an epistemically open concept among public intellectuals during the early part of the twentieth century.[137] In terms of the Chinese Marriage Act of 1959[138], it was a combination of socialist demands and Confucian family traditions under the Chinese Marxist–Leninist view of the balance of global forces by leaders of revolutionary movements in Southeast Asia."[139] A new orthodoxy had to be learnt and repeated, but it worked in a similar fashion to Confucianism in that it excluded not only all other viewpoints but also those who had not been indoctrinated into it.[140] Many of the customs of the old feudal society were intended to be corrected by the 1950 Act. It outlawed concubinage, child betrothal, and interfering with widows' remarriage, while promoting monogamy, equal rights for both sexes, respect for the elderly, and care for the young.[141] In any case, Confucian culture was still a basic portion of Chinese society that clarifies why it did not lead to Western-style sexual opportunities in China. With sexual education constrained to official government flyers, prophylactic data confined to hitched ladies, and standard party proclamations on profound quality, all things sexual were seen as freely unthinkable.[142] This law, the first piece of social legislation following the establishment of the People's Republic set the legal minimum age for marriage at 18 and 20 for women and men, respectively. The aim was to rid the country of the suffocating constraints of age-old customs of early and arranged marriages.[143] By the 1980s, socialist ideals of liberated marriage were becoming interlaced with a discourse of marital desires and intimacy influenced by the rapidly commodified and individualistic environment of the market-reform era. The post-Mao regime's emphasis on progress and openness was inspiring not only for the economic development and international trade but also for the flowering of personal needs and desires in emerging patterns of courtship and marriage.[144] The law gave the partners the same rights in marriage, namely, the right to work and to

[135] Molyneux, Maxine, "Family Reform in Socialist States: The Hidden Agenda" 70-90.
[136] Gillespie, John, and Albert H. Y. Chen, eds, *Legal Reforms in China and Vietnam Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* 66 -70.
[137] Ibid.
[138] It was promulgated on 1st May, 1950.
[139] Linh, Nguyen Thi My, "Impact of the Family Policy of the Soviet Bloc Countries on the Codification of Vietnamese Family Law in 1959," 115-122.
[140] Stuart-Fox, Martin, A Short History of China and Southeast Asia: Tribute, Trade and Influence 200-210.
[141] Hare-Mustin RT, "China's Marriage Law: A Model for Family Responsibilities and Relationships" 477–481.
[142] Higgins, Louise T. et al., "Attitudes to Marriage and Sexual Behaviors : A Survey of Gender And " 75–89.
[143] H. Yuan Tien, "Age at Marriage in the People's Republic of China" 90–107.
[144] Friedman, Sara L., The intimacy of state power: Marriage, liberation, and socialist subjects in southeastern China 312-327.

engage in social exercises exterior the domestic, protection of ownership and administration of family property, priority to utilise their possess title, and to acquire (Article 9-12).[145]

By examining the case of socialist Cuba – in particular its early campaigns of revolutionary puritanism, the Family Code of 1975, and recent effort to address women's rights, – it showed the importance of the interventionist qualities of socialist policy toward family and sexuality.[146] Prior to its becoming law, the Family Code was printed in cheap tabloid form and circulated widely for comments and criticisms. Virtually every woman, man, young person in Cuba had access to it, and opportunities for debate were provided at union meetings, in schools and places of work, and several other public places.[147] This law encouraged women's participation in voluntary organizations requiring their liberation from the patriarchal norms that had traditionally confined them to the home.[148] It is a clear reflection of the change the Revolution underwent in the 1970s that women continued entry into the workforce resulting in Cuba's return to a more traditional path to socialism, in which money again had value and goods were available for purchase.[149] Consequently, the provision of free health care and education as well as increasing educational and occupational opportunities for women made it easier for women to have children on their own.[150]

Soviet bloc countries in Eastern Europe, which hold an opposite trend, had their unique demise of communism. This is true in the cases of Poland and Hungary that communism ended through a negotiated process, while the transfer of power occurred through coups or revolutions in other countries. The specific features of the end of communism in each country were to assume great importance for their future reform strategies.[151] However, the ideas of gender equality still played an important role during the period that the Eastern European countries had pursued under socialist development. Although the socialist regime ended later, the countries of Eastern Europe still took the idea of equality, protecting the family institution, and ensuring women and children's rights. By examining family policies under communist rule – in particular in the Czech Republic, Hungary and Poland, they had all generously paid maternity leaves, allowing mothers to stay at home for three years and having a large portion of preschool children.[152]

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[145] Htun, Mala, and Laurel Weldon, *Sex Equality in Family Law: Historical Legacies, Feminist Activism, and Religious Power in 70 Countries* 87.
[146] Gotkowitz, Laura and Richard Turits, "Socialist Morality: Sexual Preference, Family, and State Intervention in Cuba" 7–29.
[147] Allahar, Anton L., "Women and the Family in Cuba: A Study across Time" 87-120.
[148] Nazzari, Muriel, "The 'Woman Question' in Cuba: An Analysis of Material Constraints on Its Solution" 246–263.
[149] Beneglsdorf, Carollee, "On the Problem of Studying Women in Cuba" 35-50.
[150] Safa, Helen, "The Matrifocal Family and Patriarchal Ideology in Cuba and the Caribbean" 314–338.
[151] Ander, Aslund, Building Capitalism: The Transformation of the Former Soviet Bloc 1-20.
[152] Hašková, Hana and Steven Saxonberg, "The Revenge of History – The Institutional Roots of Post-Communist Family Policy in the Czech Republic, Hungary and Poland" 559–579.

The progressive ideal of gender equality from the Soviet Union spread in Eastern Europe, Asia, and other countries around the world and had an impact on several socialist countries. Although the role of socialism has changed over time, its positive thought about feminism and the role of the family still remains as the leading force for social development.[153]

2.3.2.3 The 1959 Law on Marriage and Family of Vietnam based on the influence of the Socialist theory

The Soviet movement originated in Eastern Europe in 1922, and gradually spread to China and Vietnam leading to the women's movement for freedom and equality in socialist countries having a great impact on Vietnam as a counterpart. This is true in the case of the 1959 Law on Marriage and Family issued by the State, which had acknowledged the women's possessive rights. The 1959 Law "consisted of 35 articles, divided into six chapters: general principles, marriage, rights, and duties of husband and wife, relations between parents and children, divorce and enforcing provisions." The 1959 Law stipulated that spouses had the "equal right to own, enjoy, and use common property. This law was founded on the ideological views of Marx, Lenin, and Engels." "The latter had strong viewpoints on family law, private property, and the State. In April 1975, as the world watched, the last American helicopters escaped from the roof of the American Embassy in Saigon. The Communists who entered Saigon had begun their struggle as the Chinese pattern, but they had ended it as a conventional war based on Soviet operational doctrine and powered by Soviet equipment."[154]

The 1959 Law on Marriage and Family stipulated that spouses owned common property and encouraged progressive and monogamous families, supported gender equality, and valued the rights of both women and children regarding Article 1 and 15. In terms of Article 1, it stipulated that "The State guarantees the full implementation of a free and progressive marriage regime, for monogamy and equality between men and women, to protect the rights of women and children. Thereby, the State desires to build a happy, democratic, and harmonious family, united family institution, to love and help each other to progress."[155] Similarly, Article 10 of the 1959 Law stated that "The following persons must be interfered from marriage were the ones who were completely impotent physiologically, suffering from leprosy, venereal diseases, cerebral palsy, which has not been cured."[156] With respect to protect for equality and discrimination, the 1959 Law

[153] Linh, Nguyen Thi My, "Impact of the Family Policy of the Soviet Bloc Countries on the Codification of Vietnamese Family Law in 1959" 115-122.
[154] Legvold, Robert and Ronald Grigor Suny, The Soviet Experiment: Russia, the U.S.S.R 12.
[155] Linh, Nguyen Thi My, "Impact of the Family Policy of the Soviet Bloc Countries on the Codification of Vietnamese Family Law in 1959" 115-122.
[156] Ibid.

mentioned that the couple was equal in all aspects according to Article 12. As far as the marital property is concerned, the spouses only had common property and did not recognize separate property. Both parties had the right to request a divorce in case of irreversible separation based on Article 26, except for the cases the wife was pregnant (Article 27). "There is no doubt that a perusal of the text of the North Vietnamese statute reveals that the Marriage Law of the People's Republic of China of May 1, 1950, had strongly influenced the final version of the North Vietnamese law. Since the Chinese civilisation became instilled in the Vietnamese society from the ancient, Middle Ages and eventually nowadays, thus the North Vietnamese effort to codify its family law materialised almost ten years after Socialist China codified its marriage law. Therefore, Vietnam's Marriage and Family Law of 1959 had similar features with a Chinese counterpart. It banned forced marriages, child marriages, and polygamy and introduced equality between men and women in rights, obligations, property, and parenting. The law also recognised household labour as productive labour relevant to the division of property in the event of divorce (Article 29). In a precocious move for a socialist society, Article 3 also banned wife-beating and abuse, while China's marriage laws did not recognise[157] the problem of domestic violence until 2001."[158]

One of explanations for the codification in North Vietnam is that it reflected desired changes which had taken place or would take place in the social structure of the Vietnam Democratic Republic because of the socialist transformation of society. The New Socialist Russian Act, which adopted the Russian Soviet Federative Socialist Republic Act on Marriage and the Family of 1969[159] "properly offered a reasonable comparative basis for its counterpart in Socialist Vietnam." "It would be informative for the North Vietnamese to notice that the Union of Soviet Socialist Republics took the principle of sexual equality in family relations seriously." "As a result, Vietnam had fully and flexibly assimilated these ideas under the historical context with influences of Confucian and Western European ideas under the French colonial time."[160]

The 1959 Law showed that it had similarly fundamental principles on marriage and family compared to Soviet Union ideals and China counterpart as follows: *"1) It admitted the principle of monogamy. This is a principle consistent with the general trend of the world; the pursuit of this principle was entirely appropriate in Vietnam. Even when Vietnamese territory was divided, Vietnam had approached this progressive ideology. 2) The principle of equality, non-discrimination plays an essential role. This was clearly*

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[157] Htun, Mala, and Weldon, *Sex Equality in Family Law: Historical Legacies, Feminist Activism, and Religious Power in 70 Countries*. 80.

[158] Linh, Nguyen Thi My, "Impact of the Family Policy of the Soviet Bloc Countries on the Codification of Vietnamese Family Law in 1959" 115-122.

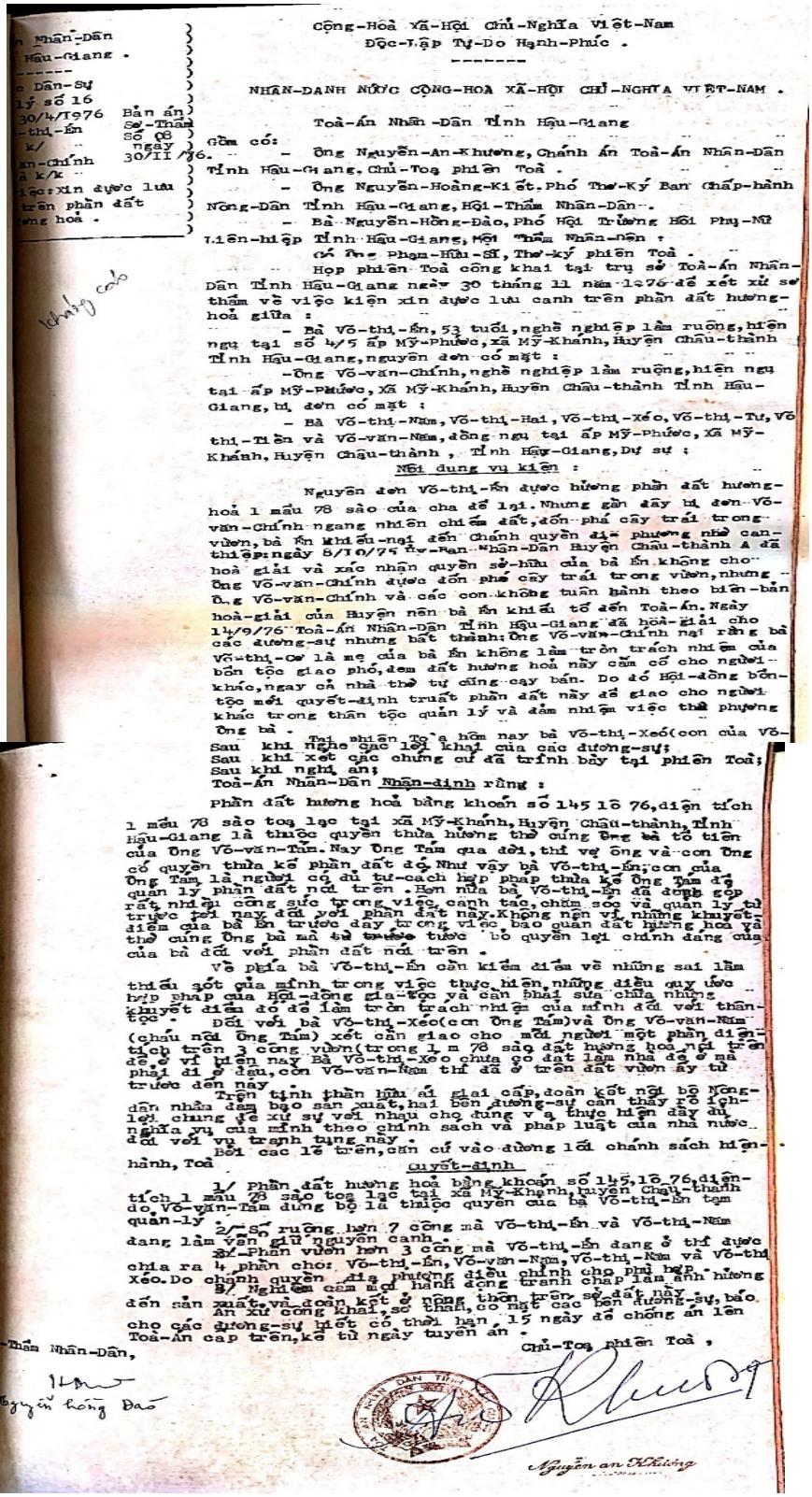
[159] It came into force on November 1, 1969.

[160] Linh, Nguyen Thi My, "Impact of the Family Policy of the Soviet Bloc Countries on the Codification of Vietnamese Family Law in 1959" 115-122.

shown by gradually recognising the ownership of the wife and the women in the family. It was also the recognition of equality between the opposite sexes in the family. 3) The principle of priority to protect women, children, and the weak set out in these laws. This was clearly shown by the regulations to protect the wife and children when the spouse divorces. For example, it limited a husband's divorce right when the wife is pregnant or raising children less than 12 months (Article 27). 4) The principle of respect for free will when the parties got married and divorced. Men and women were free to decide on marriage without anyone being allowed to interfere."[161] Nevertheless, the 1959 Law just offered only one article (Article 15) to stipulate about the marital property relationship of the spouse, which led to many difficulties when resolving property disputes between spouses and resulted in inadequate regulations to handle marital property's disputes causing inequality in marital property's distribution.

Regarding inheritance rights of surviving spouses, The Hau Giang Provincial Court heard the case of inheriting property from the deceased father. Accordingly, the Court held that when the father died, the mother and children were entitled to manage the worshipping estate. However, in this case, the wife did not fulfil the responsibility of managing the estate left by her husband but voluntarily pledged the property to another person. Therefore, the Court disqualified the wife's inheritance and handed over the inheritance to the daughter to manage. Thus, this judgment partly shows the mutual inheritance relationship between husband and wife in trial practice. In addition, the inheritance of husband and wife may be forfeited if they violate the rights and interests of other co-heirs, who are the father, mother or children of the deceased spouse.

[161] Linh, Nguyen Thi My, "Impact of the Family Policy of the Soviet Bloc Countries on the Codification of Vietnamese Family Law in 1959" 115-122.



Cộng-Hoà Xã-Hội Chủ-Nghĩa Việt-Nam
Độc-Lập Tự-Do Hạnh-Phúc .

NHÂN-DANH NƯỚC CỘNG-HOÀ XÃ-HỘI CHỦ-NGHĨA VIỆT-NAM .

Toà-Án Nhân-Dân Tỉnh Hậu-Giang

Gồm có:
- Ông Nguyễn-An-Khương, Chánh Án Toà-Án Nhân-Dân Tỉnh Hậu-Giang, Chủ-Toạ phiên Toà .
- Ông Nguyễn-Hoàng-Kiệt, Phó Thư-Ký Ban Chấp-hành Nông-Dân Tỉnh Hậu-Giang, Hội-Thẩm Nhân-Dân .
- Bà Nguyễn-Hồng-Đào, Phó Hội Trưởng Hội Phụ-Nữ Liên-hiệp Tỉnh Hậu-Giang, Hội Thẩm Nhân-Dân :

Có ông Phạm-Hữu-Sĩ, Thư-ký phiên Toà .

Họp phiên Toà công khai tại trụ sở Toà-Án Nhân-Dân Tỉnh Hậu-Giang ngày 30 tháng 11 năm 1976 để xét xử sơ thẩm về việc kiện xin được lưu canh trên phần đất hương-hoả giữa :

- Bà Võ-thị-Ấn, 53 tuổi, nghề nghiệp làm ruộng, hiện ngụ tại số 4/5 ấp Mỹ-Phước, xã Mỹ-Khánh, Huyện Châu-thành Tỉnh Hậu-Giang, nguyên đơn có mặt :

-Ông Võ-văn-Chính, nghề nghiệp làm ruộng, hiện ngụ tại ấp Mỹ-Phước, Xã Mỹ-Khánh, Huyện Châu-thành Tỉnh Hậu-Giang, bị đơn có mặt :

- Bà Võ-thị-Năm, Võ-thị-Hai, Võ-thị-Xẻo, Võ-thị-Tư, Võ-thị-Tiền và Võ-văn-Năm, đồng ngụ tại ấp Mỹ-Phước, Xã Mỹ-Khánh, Huyện Châu-thành , Tỉnh Hậu-Giang, Dự sự :

Nội dung vụ kiện :

Nguyên đơn Võ-thị-Ấn được hưởng phần đất hương-hoả 1 mẫu 78 sào của cha để lại. Nhưng gần đây bị đơn Võ-văn-Chính ngang nhiên chiếm đất, đốn phá cây trái trong vườn, bà Ấn khiếu-nại đến Chánh quyền địa-phương nhờ can-thiệp: ngày 8/10/75 Ấy-Ban Nhân-Dân Huyện Châu-thành A đã hoà giải và xác nhận quyền sở-hữu của bà Ấn không cho Ông Võ-văn-Chính được đốn phá cây trái trong vườn, nhưng Ông Võ-văn-Chính và các con không tuân hành theo biên-bản hoà-giải của Huyện nên bà Ấn khiếu tố đến Toà-Án. Ngày 14/9/76 Toà-Án Nhân-Dân Tỉnh Hậu-Giang đã hoà-giải cho các đương-sự nhưng bất thành: Ông Võ-văn-Chính nại rằng bà Võ-thị-Cơ là mẹ của bà Ấn không làm tròn trách nhiệm của bổn tộc giao phó, đem đất hương hoả này cầm cố cho người khác, ngay cả nhà thờ tự cũng cạy bán. Do đó Hội-đồng bổn-tộc mới quyết-định truất phần đất này để giao cho người khác trong thân tộc quản lý và đảm nhiệm việc thờ phượng ông bà .

Tại phiên Toà hôm nay bà Võ-thị-Xẻo(con của Võ-

Sau khi nghe các lời khai của các đương-sự;
Sau khi xét các chứng cứ đã trình bày tại phiên Toà;
Sau khi nghị án;
Toà-Án Nhân-Dân Nhận-định rằng :

Phần đất hương hoả bằng khoán số 145 tờ 76, diện tích 1 mẫu 78 sào toạ lạc tại xã Mỹ-Khánh, Huyện Châu-thành, Tỉnh Hậu-Giang là thuộc quyền thừa hưởng thờ cúng ông bà tổ tiên của ông Võ-văn-Tám. Nay Ông Tám qua đời, thì vợ ông và con ông có quyền thừa kế phần đất đó. Như vậy bà Võ-thị-Ấn; con của Ông Tám là người có đủ tư-cách hợp pháp thừa kế ông Tám để quản lý phần đất nói trên. Hơn nữa bà Võ-thị-Ấn đã đóng góp rất nhiều công sức trong việc canh tác, chăm sóc và quản lý từ trước tới nay đối với phần đất này. Không nên vì những khuyết-điểm của bà Ấn trước đây trong việc bảo quản đất hương hoả và thờ cúng ông bà mà tước bỏ quyền lợi chính đáng của bà đối với phần đất nói trên .

Về phía bà Võ-thị-Ấn cần kiểm điểm về những sai lầm thiếu sót của mình trong việc thực hiện những điều quy ước hợp pháp của Hội-đồng gia-tộc và cần phải sửa chữa những khuyết điểm đó để làm tròn trách nhiệm của mình đối với thân-tộc .

Đối với bà Võ-thị-Xẻo(con ông Tám)và ông Võ-văn-Năm (cháu nội ông Tám) xét cần giao cho mỗi người một phần diện-tích trên 3 công vườn(trong 1 m 78 sào đất hương hoả nói trên để ở vì hiện nay Bà Võ-thị-Xẻo chưa có đất làm nhà để ở mà phải đi ở đậu, còn Võ-văn-Năm thì đã ở trên đất vườn ấy từ trước đến này .

Trên tinh thần hữu ái giai cấp, đoàn kết nội bộ Nông-dân nhằm đảm bảo sản xuất, hai bên đương-sự cần thấy rõ lợi-lợi chung để xử sự với nhau cho đúng và thực hiện đầy đủ nghĩa vụ của mình theo chính sách và pháp luật của nhà nước đối với vụ tranh tụng này .

Bởi các lẽ trên, căn cứ vào đường lối chánh sách hiện-hành, Toà

Quyết-định

1/ Phần đất hương hoả bằng khoán số 145, tờ 76, diện-tích 1 mẫu 78 sào toạ lạc tại xã Mỹ-Khánh, huyện Châu-thành do Võ-văn-Tám đứng bộ là thuộc quyền của bà Võ-thị-Ấn tạm quản-lý .

2/- Số ruộng hơn 7 công mà Võ-thị-Ấn và Võ-thị-Năm đang làm vẫn giữ nguyên canh .

3/- Phần vườn hơn 3 công mà Võ-thị-Ấn đang ở thì được chia ra 4 phần cho: Võ-thị-Ấn, Võ-văn-Năm, Võ-thị-Năm và Võ-thị Xẻo. Do chánh quyền địa phương điều chỉnh cho phù hợp .

4/- Nghiêm cấm mọi hành động tranh chấp làm ảnh hưởng đến sản xuất và đoàn kết ở nông thôn trên sở đất này .

5/- Án Xử công khai, sơ thẩm, có mặt các bên đương-sự, báo cho các đương-sự biết có thời hạn 15 ngày để chống án lên Toà-Án cấp trên, kể từ ngày tuyên án .

Chủ-Toạ phiên Toà ,

Thẩm Nhân-Dân,

Nguyễn Hồng Đào

Nguyễn an Khương

Figure 6. A case law settled by The Hau Giang's Court – One of a provincial Court in the Southern Vietnam in 1976 about a surviving spouse's inheritance.[162]

[162] Verdict 16/1976 of the People's Court of Tran De District, Soc Trang.

Thirty years later, in 1945, Vietnam's territory was reunified by the Socialist Republic of Vietnam, which is still the political system in the present day. Vietnam has undergone three major regulatory changes insofar as gender equality is concerned since 1975, including 1986, 2000 and 2014 Laws on Marriage and Family. Generally speaking, equality, progressive marriage, monogamy, and the interest of women, children, and the elderly and disabled people are among fundamental principles that have been mentioned in these family laws. Although Vietnam gains significant achievements in promoting gender equality and women's empowerment, the gap between the goals and expectations mentioned in government documents with actual numbers of facts, women's participation is still far more different. For example, the percentage of female party members had increased slowly and reached 33% in 2010 within the Communist Party of Vietnam.[163] "Thus, practical implementation of equality in the marital property face challenges in some points regardless of women awareness that may be solved by propagandizing activities on policies and laws to raise awareness."[164]

Finally, "the Soviet Union, in its pioneering role, has had far-reaching influences in ideology in socialist countries regarding gender equality, women's liberation, and women and children's rights. The significant function of Marxist and Leninists building the doctrines of the family and the emancipation of women contributed to the spread of these progressive ideas. Specifically, these ideas had spread to socialist countries in Eastern Europe, China, North Korea, Vietnam, Cuba, and Yemen, where the marriage and family laws had changed drastically at that time. Despite a dramatic change in the political system happening in the Soviet Union and Eastern Europe, gender equality and feminism are still firmly maintained in their family policies. On the other hand, China and Vietnam continue to develop under the socialism ideal, thereby protecting gender equality and promoting the role of women in society as a guideline in their family policies. This has shown that different political systems do not affect the idea of gender equality severing as the target of countries all over the world."[165]

In the period of 1945, Vietnam was divided into northern and southern parts. In the North, the success of the August Revolution in 1945 enabled the north of Vietnam to achieve independence and socialist development under the influence of Marxism-Leninism.[166] In the North, the Family Law of 1959 regulated the matrimonial relationship of property between husband and wife. In contrast, in the south of Vietnam, laws developed under the influence of the Democratic Republic and Family Law dated in

[163] United Nations Viet Nam, Participation of Women in Leadership accessed July 8, 2020.
[164] Linh, Nguyen Thi My, "Impact of the Family Policy of the Soviet Bloc Countries on the Codification of Vietnamese Family Law in 1959" 115-122.
[165] Ibid.
[166] Giang, Ha Hoang, "Quan Điểm Của Chủ Nghĩa Mác - Lênin về Gia Đình và Vận Dụng Xây Dựng Gia Đình Văn Hóa ở Việt Nam (The Marxism-Leninism View of Family and the Use of Cultural Families in Vietnam)" 10.

January 1959 and they were applied in the South to regulate matrimonial property relations between husband and wife.

In the North, the Law of Marriage and Family in 1959 issued by the State, had confirmed the nature of socialist law. Remarkably, on July 10, 1959 the Supreme Court issued Directive No.772/TACD to suspend the application of colonial and feudal law. From that point on, the North lacked a Civil Code. Therefore, the regulation of property relations between husband and wife was only recognized in the Family Law 1959. In 1995, Vietnam promulgated the new Civil Code after the independence and unification of the nation since 1975. The 1959 Law on Marriage and Family only provided for common property between husband and wife, which was the statutory property law. The law stipulated that spouses had the right to own, enjoy, and use the same property before and after marriage.[167] This stipulated that all the property of husband and wife before or after marriage was in the community property. Whenever a spouse had a personal or inherited estate, all the properties were in the property of both spouses, irrespective of the source of the property and the contribution. The law did not recognize spouses having separate property. Specifically, Article 28 on Family Law 1959 provided that "when a husband and wife divorced, they forbad the reclaim of their private property." It could be said that the legislative level in this period was sketchy due to the wars and the idea of abolishing regulations built by the French and Feudal colonies. Therefore, it was not possible to find the concept of marital property regime that was used to regulate in the Civil Code in the North and in the Middle previously.

In the South, after 1954, the USA replaced the French colonialists in the war of aggression. During this period, legal issues regulating marriage and family relations under the Democratic Republic politics were reflected in three legal documents: Family Law (dated January 2nd, 1959), Law No. 15/1964 (dated July 23rd, 1964) and the Civil Code 1972, which envisaged that the community of movable and immovable property would be the legal property regime applicable to spouses. Specifically, the Civil Code of 1972[168] stipulated: Spouses can freely make marriage contracts at their will, but not against the public order and fine customs.[169] In addition, the law provided that statutory property regimes were applicable only when spouses had no agreement to establish a marriage contract.[170]

Thus, under the socialist regime in North Vietnam, the husband and wife only had common property, and they had an equal share in this community property. Under the Democratic Republic in South Vietnam, there were two models of property regime, namely the community property regime and the contract of marriage.

[167] Article 15 in The Marriage and Family Law of 1959.
[168] Pursuant to Law 028 TT/SLU dated December 20, 1972 by the President of the Democratic Republic of Vietnam.
[169] Article 144 the Civil Code of 1972.
[170] Article 45 The Family Law in the South and Article 145 the Civil Code of 1972.

In April 1975, South Vietnam was completely liberated, and the country was united from North to South.[171] The political system from this time onwards is the Socialist Republic of Vietnam. From 1975 to 2018, Vietnam underwent three major regulations on property regime between husband and wife namely the 1986, 2000 and 2014 Laws on Marriage and Family.

However, there was a major limitation in the 1959, 1986 and 2000 Family Marriage Law that they did not regulate the property regime under the marriage contract. Specifically, these laws only recognized the statutory property regime. In the statutory property regimes, spouses have both common property and separate property. According to Article 27 of Marriage and Family Law 2000, common properties of husband and wife were as follows *"1) property created by husband and wife, incomes generated from labor, production and business activities and other lawful incomes of husband and wife during the marriage period; property jointly inherited or given to both, and other property agreed upon by husband and wife as common property. 2) The land use right obtained by husband and wife after their marriage is their common property. The land use right obtained before the marriage or personally inherited by husband or wife shall be common property only if so agreed upon by husband and wife. 3) Where there was no evidence proving that property being in dispute between husband and wife is his/her personal property, such property was common property. According to Article 32 of Marriage and Family Law 2000, separate properties of husband and wife were as follow property owned by each person before their marriage; property inherited/or given separately during the marriage period; property separately divided to husband or wife under the division of common property during the marriage period; personal belongings and jewellery."*

The Marriage and Family Law of 2014 stipulates that spouses have the right to choose a statutory property regime or agreed property regime (also known as a marriage contract) at the time of their marriage. "If married couples do not have an agreement on the marriage contract, the statutory property regime will automatically be applied."[172] However, the establishment of a marriage contract must be established prior to marriage and shall not be established after marriage. During the marriage period, couples are entitled to switch from a marriage contract to a statutory marriage. Conversely, couples who are applying a statutory property regime cannot transfer it to a marriage contract after marriage. Explaining this rule, lawmakers argued that the choice of the statutory property regime was that spouses could still agree to split their common property and convert it into their separate property. In contrast, they may agree to merge separate property into the common property during the marriage. In addition, this contributes to the difference with the

[171] The Democratic Republic in the South Vietnam collapsed completely.
[172] Article 7 of Decree 126/2014.

contract of marriage – the agreement model must be established before marriage and cannot be established after marriage.

Compared with the Hungarian legislation on marriage, there are two property regimes that couples are allowed to choose when establishing a cohabitation relationship: the statutory property regime and the property regime as agreed (also known as a marriage contract). With respect to the statutory property regime, there are two main types of property that are community property and separate property. As for the marriage contract, couples can agree at any time during the marriage process, and the validity of the marriage contract is calculated from the time they are established agreements.[173] This is considered a progressive difference compared to Vietnamese law. Unlike the law of Vietnam, Hungarian law does not limit the time of establishing a marriage contract before the time of marriage. The limitation of the time of establishing a marriage contract in Vietnamese law limits the will to establish ownership of the couple. This is the regulation that Vietnam law should learn from Hungarian law. In general, the Marriage and Family Law of Vietnam has had plenty of regulations which have improved considerably until present. However, there are still some limited rules that should be learned from other countries' legislation and Hungary is an excellent model.

Regarding Hungarian law in comparison, it has a long legal history on family law in Hungary with great changes in regulations[174] that have some similarities with family law in Vietnam in terms of matrimonial property law. Two legal property regimes were in force according to the Hungarian family law, including the separate property regime and the participation property regime, while the couple could enter marital property agreement regime as they wished before 1946. The Act XXXI of 1894 on the right to marry had already dealt with marriage contracts. According to the law, a marriage contract (contractus matrimonialis) was any contract that regulated the property relations of the spouses.[175] With respect to the default property regime, the couple could have community based on acquisitions and the separation of property, which was applied to nobles and professional persons of nonnoble birth. However, the spouses could consensually enter into another matrimonial property agreement if they reached a marriage contract. This was in contrast to other countries' legal regimes of that time as Hungarian family law allowed the husband no statutory right to administer the wife's separate property acquired either before marriage or during it. The participation in acquisitions regime was maintained after 1946 that allowed each spouse's community property and the separate property being distinguished. As far as the separate property is concerned, it was similar to the separate

[173] Section 4:63 (1) in Hungary Civil Code 2013 – Book Four (Family Law) prescribes that:
"(1) The function of the marriage contract is to permit the parties to the marriage or the spouses to define a property regime – in lieu of marital community of property – with a view to governing their property relationships during the marriage from the time specified in the agreement…"
[174] Timea, Barzó, "A magyar családjog múltja, jelene, jövője 1..." 15-30.
[175] Timea, Barzó, 'Hitelezővédelmi szabályok a házassági vagyonjogban 20-28.

property of today, including the property acquired before marriage, the inherited property and property acquired by free gift during marriage, the property replacing the separate property and the property which was declared as separate property in the matrimonial property agreement belonged to the spouse's separate property. In contrast, the comminute property is acquired on spouses owned during the marriage and was divided into halves at the time of the marriage's termination. The separate property, however, remained untouched, so spouses could not claim the half of it under the main rule of the participation of acquisitions regime. The Act IV of 1952 of Hungarian Family on Marriage, Family and Guardianship was adopted and provided the complex codification of family law for the first time in the Hungarian law.

Regarding the Act IV of 1952 of Hungarian Family on Marriage, Family and Guardianship, the community of property regime became the default matrimonial property regime that the spouses could acquire as common property during the matrimonial community of life. The fact was that the common property better protected the equal rights of the spouses and emphasized the role of the spouse in managing the household and caring of children. The separate property had not changed in the way of formation which included property acquired before marriage, the inherited property, the property acquired by gift during the matrimonial community of life, the property providing only one spouse's personal needs and property replacing the separate property belonging to the separate property of one spouse. However, a matrimonial property agreement was abolished in the Hungarian Family Act because the legislature most likely wanted to protect the weaker party. The opposite was true in the Act IV of 1986 of Hungarian Family which made it possible to enter into a matrimonial property agreement with certain formalities. Later modifications of the Hungarian Family Act left the matrimonial property rules untouched, which has some similarities to Vietnamese family law circumstances. Indeed, Vietnamese family laws recognised the marital property agreement during the French colonial time, but they were abolished for a long time until reintroduced again in the 2014 Law on Vietnamese Marriage and Family. The Act V of 2013 of Hungarian Civil Code maintained that spouses may choose the community property regime as the default regime or enter into the marital property agreement as they wish.[176] This Civil Code consits of Books, among which Family Law creates the fourth one. The Fourth Book - Family Law consists of five Parts, including principles, marriage, family law consequences of cohabitation, relationship of relatives and guardianship.[177] In terms of mediation in divorce, the conciliation was presented as an institution of marriage law of the denominations before 1895 and as an institution of the secular divorce law after 1895 (ordered by the Act XXXI of 1894 on

[176] Weiss, Emilia and Orsolya Szeibert-Erdős, "Property Relationship between Spouses-Hungary" 15-50.
[177] Szeibert-Erdős, Orsolya, "Family Law Book as Fourth Book of the New Hungarian Civil Code" 85–95.

Marriage and the Act I of 1911 on Civil Procedure) and it played an important role in divorce settlement.[178]

As far as alimony is concerned, the Matrimonial Causes Act (Act of 1894) stipulated that the wife could ask for an alimony upon divorce, if she had non-fault and the husband caused the dissolution of the marriage by his injurious conduct depriving his wife financial advantages.[179] It means that alimony between wife and husband had been examined for a long time in Hungarian law and it protected women's rights. The late codification process of private law finally resulted in the bill on the Hungarian Private Law Code (Act of 1928), which allowed mutual divorce finally.[180]

In conclusion, chapter 2 deals with the legal history of matrimonial property in Vietnam in comparison with China, France, Soviet, EU and Hungary in the aspects of family laws. The next chapter is an analysis of law in force and a comparison with EU and Hungarian family laws.

[178] Herger Csabáné, "A mediáció a magyar bontójogban 1952 előtt" 27 – 39.
[179] Herger Csabáné, "Alimoy in Hungarian Family Law in the 19th Century" 43–50.
[180] Herger Csabáné, "The Introduction of Secular Divorce Law in Hungary, 1895-1918: Social and Legal Consequences for Women" 138–148.

CHAPTER 3. MARITAL PROPERTY LAW IN MODERN VIETNAM

This chapter examines the basic principles of family law and marital property law, the bases for forming types of marital property, the difference between the statutory matrimonial property regime and the prenuptial agreement, and the parent-child relationship with respect to property rights. The agreed property regime existed in the legislative history of Vietnam under the name "marriage agreement" or "contractual marriage."[181] This term no longer appears in the Vietnamese Laws on Marriage and Family of 1959, 1986, and 2000. Later, the 2014 Law on Marriage and Family recognizes the marital agreement regime again with several provisions playing a crucial role in the protection of the property rights of spouses.

This chapter also analyses the consequences for marital property relations in three cases, namely, divorce, inheritance and the annulment of marriage. As regards divorce, the consequences for matrimonial property based on the matrimonial property regime of the husband and wife are either the statutory property regime or the agreed-upon property regime. If the husband and wife choose the property regime according to agreement, they will settle the marital property relationship based on that agreement. In contrast, the division of common property will be resolved based on the principle of halving and taking into account other factors, including contributions, faults, circumstances, and preference for women and children, if the spouses do not agree otherwise. In terms of succession, joint property is divided equally if one of the spouses dies. The surviving spouse is entitled to inherit from the deceased spouse in the first line of inheritance according to the law if the deceased did not leave a will. As far as annulment of illegal marriage is concerned, the property relationship is treated as cohabitation to be settled in accordance with the Civil Code and other relevant laws, if there is no agreement.

3.1 General principles of family law and their impact on matrimonial property law

Vietnamese history saw invasions from China, France, and the United States,[182] respectively, so these countries have influenced all branches of law in Vietnam. Therefore, the regulation of the basic principles of the Acts on Marriage and Family varied according to the historical period. To understand the principles of family law completely, one should consider the fundamental rules in Vietnam's Civil Code that serve as a guideline for all civil relations, including family relations. During this first step in the process of analysis, the relationship between civil and family law will be shown. Marital property law, which is

[181] Diep, Doan Thi Phuong "Chế Độ Tài Sản Thỏa Thuận Giữa vợ và Chồng Theo Quy Định Của Luật Hôn Nhân và Gia Đình" accessed 24 December 2021.
[182] Taylor, K.W., A History of the Vietnamese 300.

derived from these primary rules, is also considered in depth in this study. It will be clarified and interesting to see how the civil and family regulations of Vietnam compare to European counterparts like Hungary.

The principles of family law and their impact on matrimonial property law underwent several changes from the formation of the State to modern times in Vietnam. The fundamental principles of family law may be considered in three main stages, such as, the French colonial time, Northern Vietnam's independence since 1945, and the modern time. Besides, family law has a close relationship with civil law, which is a general regulation to control civil legal matters, including family matters. Vietnamese law does not divide the system of laws into public and private law as some European countries did in the 19th century. The term private law first appeared in Europe in 1985,[183] referring to the civil law system, which is different from the common law system that exists in Commonwealth countries. The civil code is the primary source of law in the civil law system. Vietnam's law is contained in a collection of various statutes such as the constitution, civil law, criminal law and administrative law, and the civil one governs matters such as marriage, property, labour, trade, civil relations involving foreign elements.

3.1.1 Principles of Vietnamese civil law relating to family law

Since the country's reunification in 1975, Vietnam's National Assembly has promulgated the Civil Codes of 1995,[184] 2005[185] and 2015 respectively, which have played a crucial role in regulating private law relations. The Civil Codes of 1995 and 2005, however, were not legally defined as the fundamental law of the private legal system and were quite different from the 2015 Civil Code. According to Article 4 of the 2015 Civil Code, the Civil Code is defined as the foundation and general law governing civil, commercial, marriage and labour relations between individuals and legal entities formed on the principle of free will, voluntariness, equality and self-responsibility among the participants. These civil relations themselves are also regulated in specific statutes, such as the Marriage and Family Law of 2014, the Commercial Law of 2005[186], and the Labor Code of 2019[187]. To some extent, regulations within specific laws do not cover all arising civil relations; in such cases the Civil Code of 2015 is to be applied, as a rule, to resolve civil disputes. The 2015 Civil Code has perfected a legal mechanism to ensure the consistency, stability and predictability of the legal system governing civil relations. It

[183] Klaus-Heiner Lehne, "Perspectives of European Private Law ERA-Forum 2-2002" accessed 24 April 2020.
[184] Civil Code 44/1995/QH09 was issued by the 09th Vietnamese National Assembly on October 28, 1995.
[185] Civil Code 33/2005/QH11 was issued by the 11th Vietnamese National Assembly on June 14, 2005.
[186] Commercial Act 36/2005/QH11 issued by the 11th Vietnamese National Assembly on June 14, 2005. This law is effective as of January 1, 2006.
[187] Labor Code 45/2019/QH14 issued by the 14th Vietnamese National Assembly on November 20, 2019. This law is effective as of January 1 year 2021.

clearly defines five basic principles, including equality; freedom, voluntary commitment, agreement; goodwill and honesty; respect for the interests of the nation, the public, the others and the bearing of self-responsibility for the people.

Regarding Hungarian civil law, Andrea Hegedűs (2015)[188] also mentioned the basic relationship between civil law and family law. Hungarian family law is contained in Book IV of Act V of 2011 on the Civil Code. Generally speaking, there is a basic similarity between different national legal systems, which shows the connection between civil and marriage issues on a daily basis.

3.1.1.1 The principle of interpretation

According to Article 2 of the Vietnamese Civil Code of 2015, all civil rights are recognized, respected, protected, and guaranteed under the Constitution, the Civil Code, and Statutes. Civil rights may be limited as prescribed by law in exceptional circumstances for reasons of national defence and security, social safety and order, social ethics, and the community's health.

The Civil Code is a general law that applies to civil relations, and other specific laws relating to civil spheres need to harmonise with this Civil Code; in particular, marriage and family relations form part of such civil affairs. Typically, Chapter XIII on Ownership of the Civil Code of 2015 is to be applied to settle marital property disputes if Chapter III of the Marriage and Family Law of 2014 does not lay down sufficient rules to cover all marital property conflicts. Besides, if another relevant law contains regulations that infringe or conflict with the Civil Code, the regulations of the Civil Code must be applied and have priority, except for international agreements that the Socialist Republic of Vietnam signed with other states and recognised as having priority with regard to compliance.

The 2015 Civil Code has made some significant changes to the basic principles in comparison to the 2005 Civil Code, which laid down too many specific provisions on cases, leading to limited civil rights or impeding mutual civil consent. Unlike, the Civil Code of 2005, the 2015 Civil Code no longer stipulates regulations that respect ethics, good traditions and reconciliation as fundamental principles. The 2015 Civil Code moves these contents into chapter XI on the relevant principles of the establishment and performance of ownership rights and other rights over property (Article 160 of the 2015 Civil Code). The abrogation of previous cumbersome principles in the Civil Code of 2005 encourages the freedom of civil transactions, but still ensures compliance with Vietnam's legal policies. The codification of basic principles in the 2015 Civil Code has a significant impact in practice, creating common legal standards and rules, guiding individuals and

[188] Andrea Hegedűs, Polgári Jog: Családjog 25-59.

legal entities in civil exchanges, and ensuring the transparency of law. Thereby, they minimize legal abuse and evasion of law, especially in contracts involving foreign elements or recognition and enforcement of arbitral awards. For example, many decisions of domestic and international arbitrators have not been recognized and enforced in Vietnam by the Vietnamese Court due to violating prolix basic principles prescribed in the 2005 Civil Code (as defined in Article 759 (3) of the 2005 Civil Code). As a result, foreign partners often required the application of their national laws when they signed contracts with Vietnam to prevent their contracts from being invalidated by the previous cumbersome principles of the Civil Code. This lack of clarity generally caused loss of priority for Vietnamese partners when partners were not in favour of applying Vietnamese law.

3.1.1.2 The principle of good faith and trustworthiness

Article 3 (3) of the 2015 Civil Code stipulates that each person must establish, exercise, or terminate his/her civil rights or obligations guided by the principle of goodwill and honesty.

The first principle of goodwill and sincerity is applied in relations between the contracting parties when they conclude or perform the contract. Besides, if the contract affects the interests of an impartial third party, the impartial third party is protected by this principle. The parties in civil relations must be honest and act in good faith to ensure the legitimate rights of the involved parties and of the innocent third party. The protection of sincere third parties is necessary to promote civil exchanges and honesty between the parties. If any party is dishonest, he/she is responsible for compensating for his/her act.

In some cases, the Law on Marriage and Family will not protect a third party's deceptive behaviour in establishing and conducting transactions with a spouse related to bank accounts, securities accounts, and other movable assets. In the case of ownership registration, this transaction is declared invalid according to the instructions in Article 8 of Decree 126/2014[189]. Accordingly, a third party shall be regarded as not acting in good faith in the following cases:

"1. He/she/it has been provided with information by a spouse under Article 16 of Decree 126/2014 *but still establishes and makes transactions against such information.*

2. The husband and wife have made public, following relevant laws, their agreement on possession, use, and disposition of property, and a third party has known or must know about this agreement but still establishes and makes transactions against such agreement." Besides, Article 16 of Decree 126/2014 mentions provision of information on the agreed

[189] Decree 126/2014/ND-CP dated December 31, 2014 by The Vietnam's Government. This Decree sets forth several Articles and Measures for implementation of the law on Marriage and Family 2014.

matrimonial property regime in transactions with third parties as follows: *"In case of applying the agreed matrimonial property regime, when establishing and making a transaction, a spouse shall provide a third party with relevant information. If a spouse fails to perform this obligation, the third party shall be regarded as acting in good faith and have his/her/its interests protected in accordance with the Civil Code."* This means the law would not protect a dishonest third party in a transaction with spouses having a marital agreement if he/she must have known or must know about this agreement but still establishes and makes transactions against such agreement.

3.1.1.3 The principle of expected manner and equality

The establishment, exercise, and termination of civil rights and obligations may not infringe national interests, public interests, lawful rights, and interests of other persons (Article 3(4) of the 2015 Civil Code). Lawmakers expect individuals and legal entities participating in civil law relations to behave appropriately. Ethical conduct guarantees the public order and protects the interests of other entities. For example, Articles 207 to 220 of the 2015 Civil Code govern rules of conduct relating to co-ownership of property. In the case of marital property, if the couple has common property, the management, use, and disposition of common property must comply with the principles of co-ownership.

Besides, Article 3 (1) of the 2015 Civil Code states: *"Every person shall be equal in civil relations, may not use any reason for unequal treatment to others, and enjoy the same protection policies of law regarding moral rights and economic rights."* In civil relations, all parties are equal and must not use differences in ethnicity, gender, social composition, economic circumstances, beliefs, religion, educational level, occupation as a reason to treat the other as not equivalent. Nowadays, equity and equality are often mentioned when it comes to guaranteeing human rights. Equity is not the same as equality, and at the same time, not all inequality may be inequity. The concept of inequity adopted by the World Health Organization is that of unnecessary, avoidable, and unjust inequalities. The principle of equality is directly associated with human rights, as is the right to equality. Thus, equality is an empirical concept, but equity represents an ethical imperative related to the principles of social justice and human rights. It is likely that human rights treaties all enshrine the principle of equality as a goal that nations are legally obligated to achieve, while equity is an essential tool for giving each person according to their needs.[190] Due to the influence of the ideology regarding the husband as the head of the household in feudal times, statistics in 2011 by the General Statistical Office showed that men still play the role of head of the household both in urban and rural areas. The statistics of 2009 on urban

[190] Facio and Morgan, "Equity or Equality for Women Understanding Cedaw's Equality Principles" 1133–1170.

areas in Vietnam shows that households with a male head account for 68.1% of households, while those with a female head of the household account for only 31.9%.[191] (see Figure 7)

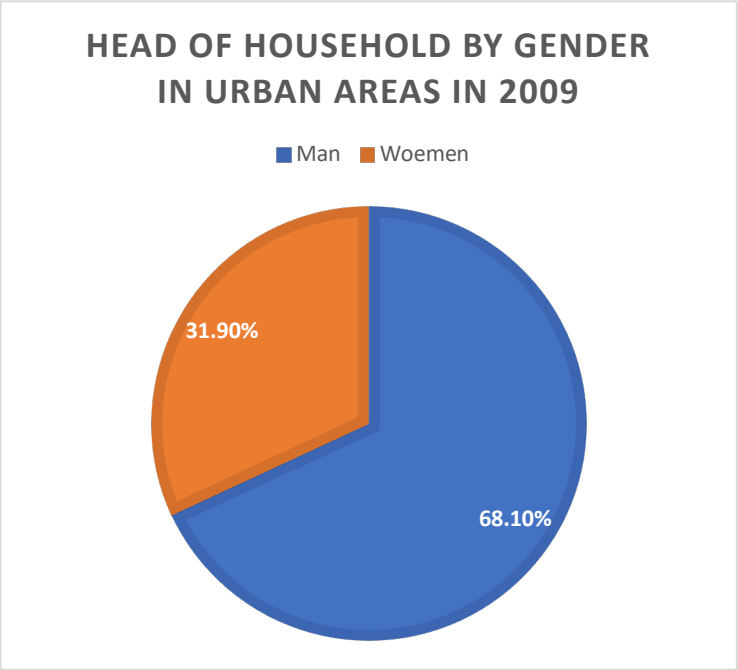


Figure 7. Head of household by gender in urban areas in 2009[192]

3.1.1.4 Prohibition of abuse of law

Each person establishes, exercises and terminates his/her civil rights and obligations based on entering into commitments and agreements freely and voluntarily. The law provides a mechanism for reimbursement through claiming damages or allowing a third party to act on the obligation of the obligor. Also, civil law requires a legal agreement to be respected by individuals, legal entities, or other subjects.

Article 3 (5) of the Civil Code 2015 stipulates that each person shall be liable for his/her failure to fulfil or the incorrect fulfilment of any such civil obligations. In civil relations, the parties' acts are entirely voluntary; neither party may coerce, threaten or impose his or her will on the other party, prohibit or prevent him or her from acting. If one party acts to force the other party to the contract to do something or to prohibit or prevent him or her from doing something, the effects of the agreement may be declared invalid, or the aggrieved party may request termination of the contract. With a view to promoting freedom of agreement, once a transaction is established without mutual consent, it is

[191] General Statistic Office, "Cấu Trúc Tuổi, Giới Tính và Tình Trạng Hôn Nhân Của Dân Số Việt Nam Năm 2009" 5.
[192] Ibid.

considered unsatisfactory. If a person violates the voluntary elements in civil law, he/she may be subject to criminal or administrative liability.

From a comparative perspective, there are significant similarities from the aspect of civil legal principles between Vietnam and Hungary – a member state of the European Union. For example, the first introductory provision in Act V of 2013 of the Hungarian Civil Code[193] states that *"the Civil Code governs the property and personal relations of persons under the principle of interdependence and the principle of equality"* (Section 1:1). Also, Sections 1:2 to 1:6, in turn, recognize that all parties involved in civil law relations should abide by the Fundamental Law and the Civil Code based on mutual respect, goodwill, and honesty. If either party violates the Civil Code or infringes the public interests and personal interests involved in civilization, he or she will be liable under Hungarian laws. It also addresses the *judicial process that shall be applied* if a person infringes public and personal interests (*Section 1:6)*. In general, the basic principles of the Vietnamese and Hungarian Civil Codes have similar content, both respect public and private interests, highly value equality, and interpret the Civil Code and Statutes based on the Constitution.

3.1.2 General principles of family law in Vietnam

The 2014 Law on Marriage and Family has nine chapters and 133 articles. This law adheres to the fundamental principle of "voluntary, progressive marriage, monogamy and equality of husband and wife." This principle is derived from and interpreted based on the Constitution, which stipulates that men and women have the right to marry and divorce, and the right to equality and respect for each other (Article 36(1)).

3.1.2.1 The principle of voluntary and progressive marriage and monogamy

It is the most essential and fundamental principle of the State's marriage and family protection regime. Voluntariness encourages the spouses to express their free will as subjects in personal and property relationships in marriage and family life. This is the progressive principle of modern marriage relations, which is different from the concept of feudal times. The progressive principle is the concretization of the central ideology "abolishing backward customs and practices in marriage and family" in Vietnam. From family life, backward and patriarchal ideas should also be removed to ensure progress and democracy.

The principle of monogamy is the primary and necessary principle to be able to build, perfect and protect the progressive marriage and family regime with a view to the essential

[193] Act V of 2013 of The Civil Code has been in force since 15 March 2014.

nature of love. This principle has wholly denied the polygamy system that has been recognized for a long time in Vietnamese social history.

The principle of equality of husband and wife continues to affirm the progressive thinking of Vietnam in the determination to build families - the cells of society based on solidity, freedom, and progress. Aspects of women and gender equality constitute an issue that is a concern for the whole world. Today, women continue to be recognized as having an equal role in society and careers. The family - it is a legitimate aspiration that needs to be cared for, respected, recognized, and protected by the State. Vietnam has achieved success in promoting gender equality and empowering women. The most significant achievements are the removal of disparities in educational access between boys and girls. However, the ultimate practical implementation of equality has not been achieved. For example, women have "a lower wage than men, and this wage gap did not decrease during the period 2004-2008. Women are more likely to have to do housework than men even after working hours." "It means that women have a greater work burden than men. The difference in daily housework hours between men and women is higher in urban areas than in rural areas and higher for Kinh/Hoa than for ethnic minorities."

According to the World Parliament Union's report in 2011, the percentage of women's political participation in Vietnam ranked 43rd in the world, down from 36th in 2010 and 2009, the 33rd in the year 2008, the 31st in the year 2007, the 25th in the year 2006 and 23rd in the year 2005. Vietnam is one of 21 countries that saw a sharp decline in the proportion of women in politics in 2011, while China has an extremely high percentage of women in politics at the local level - 43%.[194]

Although the law stipulates that women and men have the rights and ability to implement and manage sustainable resources, they are aware that this exercise of rights varies depending on access to land. Vietnam's Action Aid Research and Development Organization released the survey results "Women's access to land based on the status of issued common land use right certificates". In 2011, Nidhiya Menon, Yana Van Der Meulen Rodgers, and Huong Nguyen [195] showed that the number of land use rights certificates held by men was five times higher than those of women during the period 2004-2008. Only 15% of land use rights certificates were held by both men and women in 2004, which did not change much in 2008 with 20%. This meant that the husband was the one who usually had ownership of the common property. Another study about equality in Vietnam showed that "for people above 14 years old, men still have higher education and a higher rate of literacy than women. Gender inequality in employment is still persistent with women having lesser wages in employment than men during the period 2004-2008." Women are more likely to have to do housework than men even after the working hours

[194] United Nations Viet Nam, "Women Participate in Politics in Vietnam" accessed 3 April 2019.
[195] Menon, Nidhiya, Yana van der Meulen Rodgers, and Huong Nguyen, "Women's Land Rights and Children's Human Capital in Vietnam" 18–31.

for income, meaning that "women have a greater workload than men. The difference in daily housework hours between men and women is higher in urban areas than in rural areas, and also higher for Kinh/Hoa than for ethnic minorities." The 2014 Act encourages the couple to have their title on certificates of common land use right by exchanging new certificates if the wife wants to have her name on these certificates to represent co-ownership. To raise such awareness for women, the government should offer much more propagating policies and laws on exchanging old certificates for new ones recording both spouses' title to the right of use of common land, which should be presented to the public as an extremely significant social activity. Moreover, as mass organizations established voluntarily, to uphold the law and protect the rights of members, the Farmer's Union, Women's Union, and other member organizations of the Vietnam Fatherland Front cannot stay out of this activity. Propaganda activities on policies and laws on the issuance of exchanged certificates have attracted active participation and facilitated the promotion of the role of mass organizations in propaganda to raise awareness for their members about equality.[196] (see Figures 8 and 9)

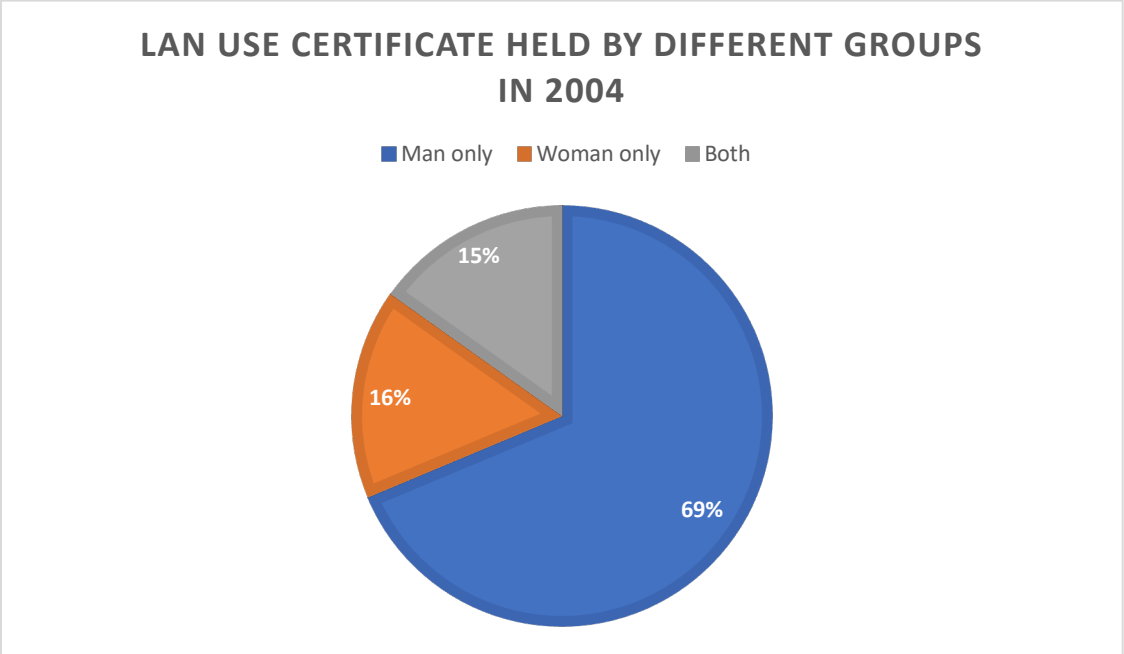


Figure 8. Land-use right held by different gender groups in 2004[197]

[196] Viet Cuong, Nguyen, "Gender Equality in Education, Health Care, and Employment: Evidence from Vietnam Gender Equality in Education, Health Care, and Employment: Evidence from Vietnam" 15-20.
[197] Menon, Nidhiya, Yana van der Meulen Rodgers, and Huong Nguyen, "Women's Land Rights and Children's Human Capital in Vietnam" 18–31.

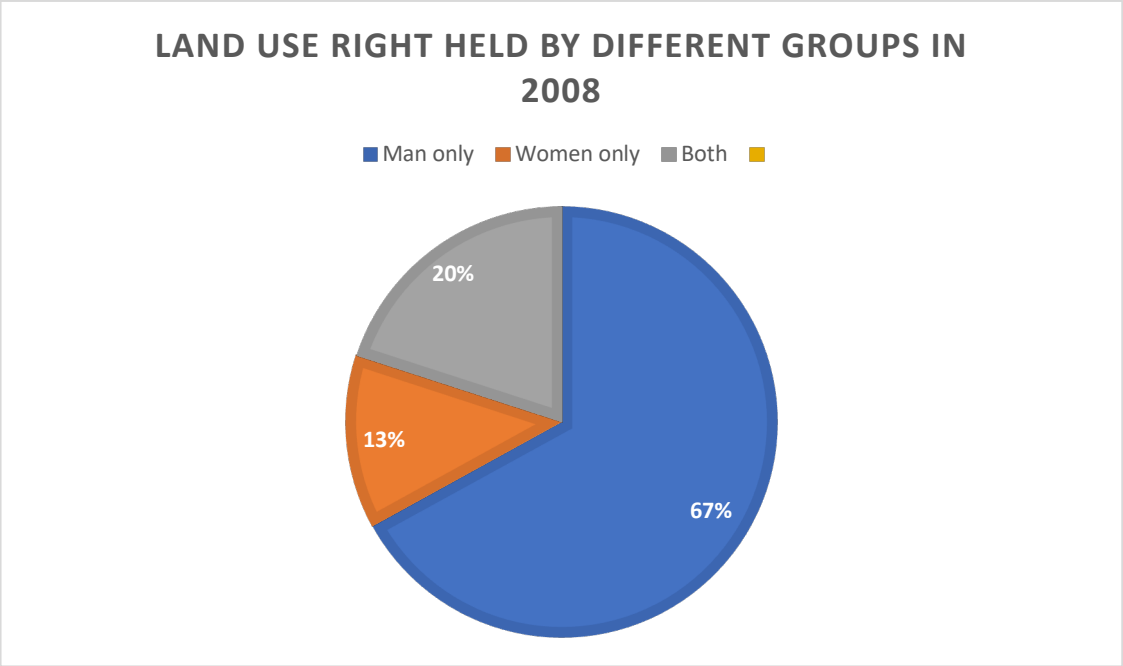


Figure 9. Land-use right held by different gender groups in 2008[198]

3.1.2.2 The principle of equality in marriage relations

This principle is prescribed in Article 2 (2) of the 2014 Act on Marriage and Family as follows: *"Marriage between Vietnamese citizens of different nationalities or religions, between religious and non-religious people, between people with beliefs and people without beliefs, and between Vietnamese citizens and foreigners shall be respected and protected by law."* Vietnamese Law always respects and protects the marriage relationship established between Vietnamese citizens of different ethnic groups, religions, and beliefs, or between the Vietnamese and foreigners. Individuals who are eligible for marriage have the right to freedom of marriage in Vietnam. Deception, coercion or exerting influence on the other are strictly prohibited in marriage and subject to legal sanctions (civil, administrative, criminal) according to the acts and seriousness of the violations. The law does not discriminate in marriage. Individuals who meet the conditions for marriage are entitled to get married regardless of their status, social background, gender, ethnicity, religion, and nationality. Vietnam, however, has not recognized same-sex marriage because of the cultural and natural factors in the marriage relationship.

198 Menon, Nidhiya, Yana van der Meulen Rodgers, and Huong Nguyen, "Women's Land Rights and Children's Human Capital in Vietnam" 18–31.

3.1.2.3 Principles for building a prosperous, progressive and happy family

The principle protecting the rights of family members specified in Article 2 (3) of the 2014 Law on Marriage and Family is that family members must be obliged to respect, care for and help each other. Parents and grandparents must not discriminate between children. It can be said that this is a provision full of humanity and represents the remarkable progress of Vietnamese lawmakers. This provision had already been mentioned in the 1959 Law on Marriage and Family - the first Marriage and Family Act after the country's reunion. Expressly, Article 2 of the Marriage and Family Law of 1959 stipulated *"Eliminating the remnants of the forced feudal regime, respecting men and women, respecting the rights of children."* According to Article 1 of the Marriage and Family Law of 1959, "The State guarantees the full implementation of a free and progressive marriage regime to build happy, democratic, and harmonious families, in which everyone unites to love each other, help each other to progress together." Thus, the newly issued 1959 Act on Marriage and Family had regulations to eliminate outdated Confucian ideas that existed thousands of years earlier. It encouraged the equality and happiness of individuals in society. It had shown the determination of Vietnamese lawmakers to realize the goal of building a happy and prosperous family. These rules have been upheld entirely by later marriage and family acts.

3.1.2.4 Principles to protect the rights of women, children, the elderly, people with disabilities, the interests of women and children

The 2014 Law on Marriage and Family safeguards the rights of children, the elderly, people with disabilities, and the interests of women and children. This is one of the fundamental principles of marriage and family law because these subjects are enormously popular in the social relations arising in the field of marriage and family.

Article 2 (4) of the Marriage and Family Law of 2000 provided that *"Parents are obliged to bring up their children into citizens useful for the society; children are obliged to respect, care for and support their parents; grand-children are obliged to respect, care for and support their grandparents; family members are obliged to look after, care for and help one another."* Since then, there are direct regulations for the protection of the rights of the elderly, people with disabilities, women, and children. For instance, the Elderly Act of 2009[199] sets out rules that create conditions for participation in cultural activities,

[199] The Elderly Act 39/2009/QH12 issued by the 12th Vietnamese National Assembly on November 23, 2009.

education, sports, entertainment, tourism, and leisure. Some regulations prescribe working conditions in conformity with their health and occupations suitable for the elderly. In terms of vulnerable persons, the 2010 Act on People with Disabilities[200] stipulates that people with disabilities are entitled to equal participation in social activities, health care, rehabilitation, education, and vocational training.

Moreover, women and children are two subjects of the protection of the rights of mothers and children when the spouses' divorce. The State also has many documents to protect children's rights such as the Ordinance on the protection, care and education of children of 1979, the 1991 Act on the protection, care and education of children, the 2004 Act on Protection, childcare and education and the current effective document- Child Act of 2016.[201]

In practical implementation, the reality of protecting children's rights needs to be taken into consideration and many more measures are needed to improve such priorities. Indeed, the sharp rise in sex ratios at birth in several major Asian countries, such as India and China, is one effect of persistent strong son preference in a context of rapidly contracting family size. Vietnam's preference for sons has been confirmed by fertility and contraceptive behaviour, as well as by ethnographic studies on the value of children.[202] The analysis of the 2009 Census data indicates that the sex ratio at birth in Vietnam has increased to an extent of 110.6 boys for every 100 girls in 2009, significantly higher than the average biological standard, which usually fluctuates between 104-106 boys for 100 girls.[203] The Vietnamese Government is genuinely concerned about the sex imbalance at birth. Choosing a gender during the prenatal period is the direct cause of the sex imbalance at birth. This is an illegal act, according to the provisions of the Ordinance on Population, issued by the National Assembly Standing Committee in 2003 and Government Decree No. 114, issued in October 2006. This issue is once again emphasized in the National Strategy on Population and Reproductive Health 2011 - 2020. According to data analysis and research monitoring the evolution of the sex ratio at birth at the national and provincial level, there is an urgent need to provide timely policy interventions and a programme.

[200] The People with Disabilities Act 51/2010/QH12 issued by the 12th Vietnamese National Assembly on June 17, 2010.
[201] Child Act 102/2016/QH14 issued by the 14th Vietnamese National Assembly on April 05, 2016. This law took effect from June 1, 2017.
[202] Bélanger, Jianye, Oanh, Le, and Viet Thanh, "Les Rapports de Masculinité à La Naissance Augmentent-Ils Au Vietnam" 255–276.
[203] General Statistics Office-Ministry of planning and investment, "General Census of Population and Housing in Vietnam 2009" 20.

3.1.2.5 Principles of inheriting and promoting the fine traditions, culture, and ethics of the Vietnamese nation in marriage and family

To ensure the preservation of the beauty in the family tradition of Asian culture in general and Vietnamese in particular, Article 2 (5) of the 2014 Act stipulates that the cultural traditions and fine ethics of the Vietnamese nation in marriage and family should be promoted. This principle will serve as a guideline for the specific provisions of marriage and family law, and the resolution of disputes.

According to Article 29 of the Marriage and Family Law of 2014, the spouse must comply with the principles below, whether they have the statutory property regime or the nuptial agreement regime, as follows:

First, "husband and wife have equal rights and obligations in the creation, possession, use, and disposition of their common property without discrimination between housework labour and income-generating labour."

Second, the husband and wife must "ensure conditions for meeting their family's essential needs."

Third, "when the exercise of property rights and performance of obligations of husband and wife infringes upon lawful rights and interests of the wife, husband, their family, or other persons, compensation shall be paid."

Thus, the basic principles in Marriage and Family Laws are the reiteration of the basic principles in civil law. Also, these laws are a true reflection of the development of Vietnamese society throughout historical periods. In the feudal period, the patriarchal principle was promoted, and the inequality between men and women was clearly shown. During the French colonial time, the patriarchal law still existed, but the equality between men and women was more taken care of and protected for women. From 1975 up to the present period, Vietnam has increasingly asserted equality and autonomy in society as well as among family members.

This principle of equality is affirmed throughout the world, which is not difficult to find in any state of Europe. For example, The European Convention on Human Rights (ECHR)[204] sets out regulations that protect equality in family law and non-discrimination. Studying the law in European countries, one may find, for example, that Act V of 2015 on the Hungarian Civil Code contains Book 4 on Marriage and Family Law, which sets out the basic principles of marriage and family. Specifically, part one of this book sets out the

[204] It was formally called the Convention for the Protection of Human Rights and Fundamental Freedoms in Europe and entered into force on 3 September 1953. It has undergone several amendments and supplementations during the years. The current state of signatures and ratifications of the Convention and its Protocols as well as the complete list of declarations and reservations are available at www.conventions.coe.int.

basic tenets of entities involved in marriage and family relationships. The principles are the following: protection of marriage and family, protection of the child's interest, equality of spouses, and lastly fairness and the protection of the weaker party. All principles affect the child's position and his or her best interest.[205] Sections 4:1 to 4:4 stipulate that Hungarian family law respects and protects marriage and family relations based on respect for individual freedoms and cohesion between members in the family. The child's legal rights and interests are a priority in the family, especially those of children who are not yet members. The husband and wife must behave equally in the exercise of their rights and performance of obligations in relation to each other. Equality is not only practiced between husband and wife but also among family members. Also, it must protect the disadvantaged and the elderly, the needy, or the disabled. Thus, although the Family Law of Hungary and Vietnam may have differences, the legal principles of marriage in these pieces of legislation still have certain similarities. These are progressive principles recognized and pursued by the legislative community in the world regardless of a civilized, advanced, and equal society.

On comparing and analysing basic principles in civil and family laws, one may observe different legal aspects throughout Vietnam's legal history. In general, new fundamental principles contain substantially more professional and progressive ideas than they did in the past in terms of protecting a couple's marital property interests. Indeed, they are concerned more about equality, progressive marriage, monogamy, the interest of women, children, the elderly and disabled people, which issues were not considered consciously in feudal times. Moreover, if the basic principles of civil and family laws in Hungary are taken into consideration in terms of comparative aspects, they seem like Vietnam's counterpart in general. In general, principles on Hungarian family law also protect marriage and family, the child's interest, equality of spouses, fairness, and the weaker party. These principles look like inevitable regulations that are mentioned in the family laws of countries in modern times, Vietnam and Hungary included.

3.1.3 The general principle of the application of property regimes

According to current Vietnamese law, under Article 28 of the Law on Marriage and Family, rules pertaining to the application of matrimonial property regimes are as follows:

"1. Husband and wife have the right to choose to apply the statutory or premarital property regime.

The statutory matrimonial property regime is prescribed in Articles 33 through 46 and Articles 59 - 64 of the 2014 Law on Marriage and Family.

[205] Szeibert-Erdős, Orsolya, "Parental Responsibilities and the Child's Best Interest in the New Hungarian Civil Code"143–150.

The premarital matrimonial property regime must comply with Articles 47, 48, 49, 50 and 59 of the 2014 Law.

2. Articles 29, 30, 31 and 32 of this Law shall apply regardless of the property regime chosen by husband and wife.

3. The Government shall stipulate in detail the matrimonial property regime."

First, on the basis of Article 28 of the 2014 Law on Marriage and Family, two types of property regimes are recognized, namely, the premarital and statutory property regime.

If husband and wife choose the prenuptial property regime, the provisions from Articles 47, 48, 49, 50 to 59 of the 2014 Law on Marriage and Family shall be applied to resolve marital property issues. From the perspective of sub-law documents, Article 5 and Article 6 of Joint Circular 01/2016 provide specified guidance on the prenuptial property regime.

On the other hand, if husband and wife choose the default property regime of the statutory one, regulations governing the property relationship shall be applied from Articles 33 to 46 and Article 59 to 64 of the 2014 Law on Marriage and Family to resolve their disputes. From the perspective of sub-law documents, Decree 126/2014, Section 2 Articles 9–14, provides detailed guidance on the statutory property regime.

Second, there are still some general provisions applicable to the two property regimes under Articles 29, 30, 31 to 32 of the 2014 Law. These are mainly general principles applying to both the prenuptial agreement and the statutory property regime.

In terms of the couple's rights and obligations relating to marital property, they *"have equal rights and obligations in the creation, possession, use and disposition of their common property without discrimination between housework labor and income-generating labor. Husband and wife have the obligation to ensure conditions for meeting their family's essential needs. If husband and wife have no common property or their common property is not enough to meet their family's essential needs, they shall contribute their separate property according to their financial capacity. When the performance of property rights and obligations of husband and wife infringes upon lawful rights and interests of the wife, husband, their family or other persons, compensation shall be paid."*

Concerning transactions related to the home being the sole domicile of spouses, *"the establishment, making and termination of transactions related to the home being the sole domicile of husband and wife shall be agreed by both of them. In case the home is under the separate ownership of the husband or wife, the owner has the right to establish, make and terminate transactions related to that property but shall ensure domicile for the couple." "Once spouses have transactions with third parties in good faith related to bank accounts, securities accounts and other movable assets not required by law to be registered for ownership and use"*, they must comply with Article 32 of the 2014 Law. In transactions with third parties in good faith, the spouse who is the holder of the bank or

securities account shall be regarded as the person having the right to establish and make transactions related to that property. *"In transactions with third parties in good faith, the spouses who possess a movable asset which is not required by law to be registered for ownership shall be regarded as the person having the right to establish and make transactions related to that asset in case the Civil Code prescribes protection of third parties in good faith."*

Third, the prenuptial agreement property regime gives the two parties the right to negotiate, but it may lead to the possibility that their agreements may be insufficient. Therefore, the law has foreseen ways to deal with inadequate agreement on the property regime of husband and wife in Article 59 of the 2014 Law on Marriage and Family and Article 7 of Joint Circular 01/2016.

3.1.4 Principles of European Family Law on matrimonial property relations between spouses

Although the European Member States have their own principles in terms of matrimonial property relations, the EU has made out its principles as fundamental regulations in the frames of the Principles of the Commission on European Family Law. Regarding matrimonial property relations, Chapter 1 of the Commission's fourth set of Principles on Property Relations between Spouses consists of regulations pointing out general rights and duties for the spouses. Similarly, equality is one of the fundamental principles being mentioned in the European Family Law Commission's Principles similarly to other nations' family laws all over the world. Spouses are equal not only with regard to their rights but also their duties, including contribution to the needs of the family according to their ability, and to the running of the household, the personal needs of the spouses and the maintenance, upbringing and education of the children. In case one of the parties breaches his or her obligation to contribute to the needs of the family, the other spouse may request the competent authority to determine the contribution. Each spouse has full legal capacity and in particular is free to enter into legal transactions with the other spouse and with third persons. Protection of the family home and household goods is among the basic duties of spouses and, in particular, administration and disposal of matrimonial property should be put under control by both. This is true that any act of disposal of rights to the family home or household goods requires the consent of both spouses under the Commission's principles. Any act of disposal by one spouse without the consent of the other is invalid if the latter does not ratify it. As far as representation between spouses is concerned, one spouse may authorise the other spouse to represent him or her in legal transactions. Likewise, the Article 25 (1) of the 2014 Vietnamese Law on Marriage and Family stipulates that one spouse may represent the other spouse in legal

transactions, delegations of power based on agreements and legal regulations. The spouses as addressees of EU Family Law are free to enter into marital property agreements. In the same way, spouses should be free to enter into agreements determining their marital property relationship with respect to Vietnamese family law.[206]

3.2. Statutory property regime

After gaining national reunification in 1975, the law on marital property in Vietnam has undergone many changes in such a way so as to ensure considerable fairness for couples. Specifically, before reunifying the country, North Vietnam had gained independence in 1945 and developed according to socialism. The 1959 Law on Marriage and Family applied in the North at that time recognized only the existence of common property in the marriage. Article 15 of the 1959 Law provides that husband and wife have equal rights in the use and disposal of common property. The separate property was not mentioned and recorded in the 1959 Law, so properties before and after the marriage period belonged to the common property of husband and wife. In addition, the 1959 Law had only recognized statutory property law as the default property model without permitting the premarital agreement in property law. After unifying the country, from 1975 up to now, the Laws on Marriage and Family of 1986, 2000 and 2014 have been issued respectively. Considering the provisions on marital property, the 1986, 2000 and 2014 Laws have all recognized the statutory property regime including common and separate property. However, unlike the Law of 1986 and 2000, the 2014 Law recognizes not only the statutory property regime but also the property regime based on a prenuptial agreement. Once the couples start their married life, they may choose either the statutory property regime or the premarital agreement property regime according to the 2014 Law. Thus, it can be seen that the 1959, 1986 and 2000 Laws only recognized the statutory property law regime and so they are different from the Law of 2014 recognizing both the statutory and the agreed property regime. In addition, under the 1959 Law, only common property exists in the statutory property model, so it is different from the 1986, 2000 and 2014 Laws.

The content of this part will focus on analysing the statutory property regime of the 2014 Law through current regulations, judgments and legal cases resolved in practice.

In terms of court judgments and decisions, according to the statistics on the official website of the Court,[207] the field of marriage accounts for 312579 out of a total of 5999683 court judgments and decisions published. This shows that judgments and decisions about marriage account for more than 52 percent of the total cases admitted by the Court.

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[206] Commission on European Family Law, "Principles of European Family Law Regarding Property Relations between Spouses" 1-10.

[207] Judgments and decisions being published on the Court's official website at https://congbobanan.toaan.gov.vn

Therefore, the resolution of disputes on marriage and family always plays an important role in the practice of court adjudication (see Figure 10).

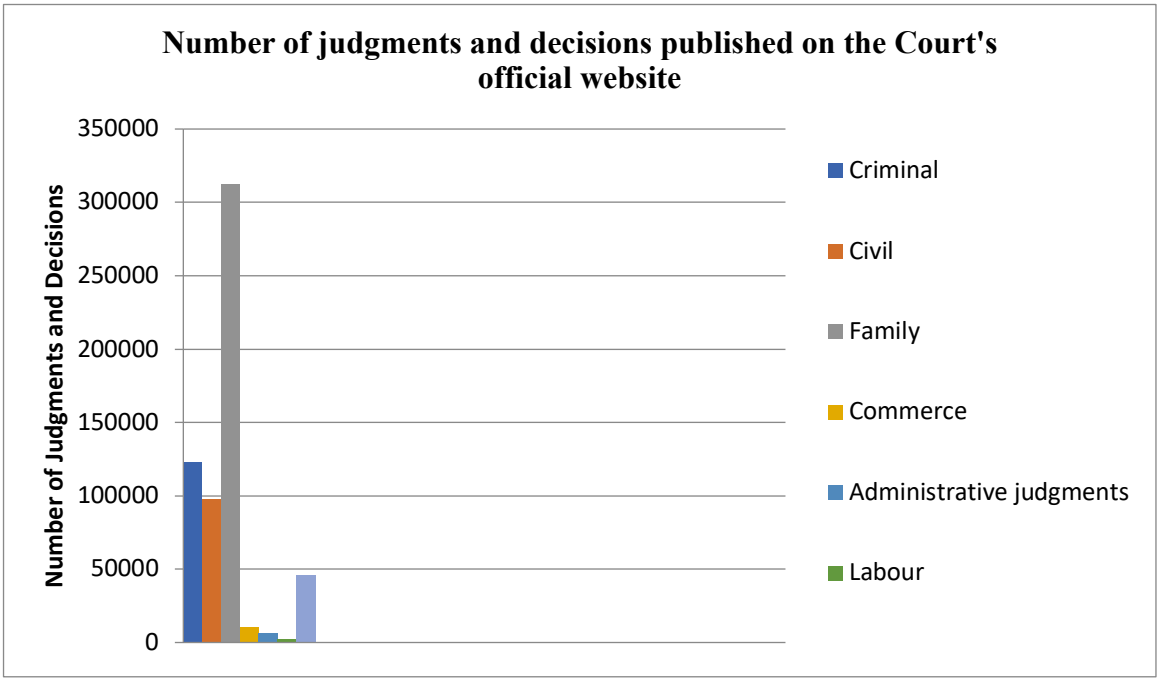

Figure 10. Number of judgments and decisions published on the Court's official website.[208]

When researching the concept of case law in the history of Vietnamese law, it is almost impossible to see the term 'case law' used in feudal times. During the French colonial period in Vietnam, from 1858 to 1954, case law was mainly used in training and teaching law in the South of Vietnam.[209] After that, the ally of France, the US replaced France and ruled in the South and case law was also applied in the period from 1954 to 1975. From 1975 up to 2016, case law was hardly used officially, but only mentioned in academic research. However, since 2016 up to now, case law has been officially recognized through decisions following the case law of the Supreme People's Court. Up to now, there have been 39 cases published on the website https://anle.toaan.gov.vn/webcenter/portal/anle/anle. Out of a total of 39 valid legal judgments, civil and commercial cases accounted for the largest numbers, with 21 and 8 respectively[210] (see Figure 11). Every year, the Supreme People's Court examines judgments from all levels of Courts as a source of case law for construction. In the process of applying case law, legal precedents can be cancelled if they no longer fit in with practical judgments or they are codified into legal documents if necessary.

[208] Judgments and decisions being published by the Court's official website on https://congbobanan.toaan.gov.vn
[209] Dung, Le Tien, "Case Law in Vietnamese Legal System" 1-10.
[210] Supreme People's Court, Electronic Site of Case Law accessed 28 May 2021.

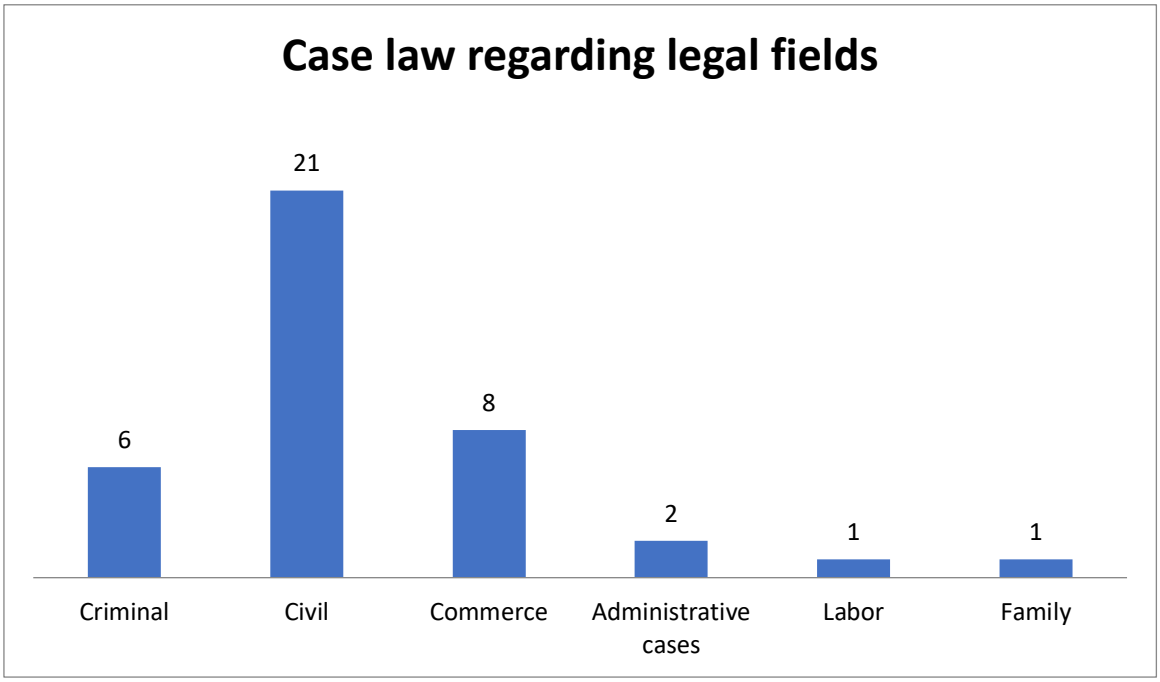

Figure 11. Vietnamese case law regarding legal fields approved by The Supreme Court.[211]

3.2.1 Principles regulating the statutory property regime

To begin with, *"the statutory matrimonial property regime must apply when husband and wife do not choose to apply a matrimonial property regime as agreed or their agreement on the matrimonial property regime is declared invalid by a court in accordance with Article 50 of the 2014 Law."*[212]

Secondly, when it comes to the statutory property regime, it consists of common and separate property, prescribed by Articles 33 and 43 respectively in the 2014 Law.

Regarding Article 33 of the 2014 Law, common property of husband and wife can be listed as follow:

"1. Common property of husband and wife includes property created by a spouse, incomes generated from labor, production and business activities, yields and profits arising from separate property and other lawful incomes in the marriage period; except the case prescribed in Article 40 (1) of this Law; property jointly inherited by or given to both, and other property agreed upon by husband and wife as common property.

The land use rights obtained by a spouse after marriage shall be common property of husband and wife, unless they are separately inherited by, or given to a spouse or are obtained through transactions made with separate property.

[211] Supreme People's Court, Electronic Site of Case Law accessed 28 May 2021.
[212] Article 7 of Decree 126/2014.

2. Common property of husband and wife shall be under integrated common ownership and used to meet family needs and perform common obligations of husband and wife.

3. When no ground exists to prove that a property in dispute between husband and wife is his/her separate property, such property shall be regarded as common property."

With respect to Article 43 of the 2014 Law, separate property of husband and wife can be divided into several groups as follows:

"1. Separate property of a spouse includes property owned by this person before marriage; property inherited by or given separately to him/her during the marriage period; property divided to him/her under Articles 38,39 and 40 of this Law; property to meet his/her essential needs and other property under his/her ownership as prescribed by law.

2. Property created from separate property of a husband or wife is also property of his/ her own. Yields and profits arising from separate property during the marriage period must comply with Article 33 (1) and Article 40 (1) of the 2014 Law."

Thirdly, when husband and wife choose the statutory property regime, the provisions in Articles 33 and 43 of the 2014 Law on Marriage and Family still allow spouses to merge separate property into common property or divide common property over the marriage period.[213] This means that spouses can change compositions of common and separate property depending on their will.

3.2.2 Common property in the statutory property regime

The basis for determining common property is mainly mentioned in Article 33 of the 2014 Law on Marriage and Family. In addition, Article 9 to Article 10 of Decree 126/2014 provides additional guidance on a number of cases determining the common property of husband and wife. Specifically, the common property of husband and wife can be listed as follows:

3.2.2.1. Common property of husband and wife includes property created by husband or wife, income from labour, production and business activities

The salary, in the sense of labour law, received during the marriage is the common property and source of livelihood for most spouses. For example, wages include basic wages and allowances such as allowances from job positions and responsibilities; working in remote and isolated areas; income from labour, salary on job assignment; periodical or irregular benefits, holidays bonus, and living allowances according to job positions.

[213] Articles 38 and 46 of the 2014 Law on Marriage and Family.

Income from production or business activities is actually the broadest category of income from labour, including net profits (excluding taxes and operating costs).

Article 36 of the Law on Marriage and Family also notes "*When husband and wife reach agreement on either spouse's use of the common property for business activities, this spouse has the right to make transactions related to that common property on his/her own. This agreement shall be made in writing*". For example, the spouses agree to contribute common property of husband and wife to a joint-stock company. According to the couple's agreement, the husband who is the representative for the property owner will be a member and shareholder in the joint-stock company. Although only the husband is allowed to participate in company meetings and has the right to vote according to Articles 115-127 of the 2020 Business Law,[214] the official income and income derived from capital contribution still belong to the common property of the couple.

Spouses have the right to use common property to contribute capital to a joint-stock company. This capital contribution can be represented by a husband and wife and one party can become a member of the company and can participate in voting and enjoy profits in accordance with the law on enterprises. The property arising from this capital contribution will belong to the common property of the husband and wife. However, marital relations, and relations between shareholders as well as company management are different stories as they are governed by the Law on Marriage and Family, and the Law on Enterprises respectively. Therefore, there is no reason to mix the handling of divorce between husband and wife with the handling of the relationship between two shareholders, between shareholders and the corporate governance apparatus, between shareholders and executives and administrators.[215]

3.2.2.2 Yields and profits arising from private property constitute common property

Yields arising from separate property of husband and wife are considered natural property acquired by a husband or wife from their own property; Income arising from a spouse's own property is an amount earned by a husband or wife from the exploitation of his or her own property. According to Article 33 (1) of the 2014 Law, these yields and incomes belong to their common property during the marriage period, because they have similar features to other earnings which are regular and frequent.

There is an understanding that if yields and profits arise from private property, these yields and profits should belong to the private property of the original owner. However, considering the nature of yields and returns as material benefits that arise regularly, it is more appropriate to recognize these assets as common assets. For example, before getting

[214] Business Law 49/2020/QH14 was issued by the 14th Vietnamese National Assembly on June 17, 2020.
[215] Vo, Tri Hao, 'Tách bạch quan hệ hôn nhân và quan hệ cổ đông – Bảo đảm quyền tự do hợp đồng, quyền tự do kinh doanh, quyền tài sản' accessed 2 February 2022.

married, a woman has accumulated 500 million VND in savings and deposited the money with the bank. This amount of money as well as the interest rate on savings from this deposit belonged to her private property before marriage as prescribed in Article 224 of the 2015 Civil Code. However, if she gets married afterwards, the interest rates incurred on savings belong to the common property of the spouses because it is income arising from private property as prescribed in Article 33 (1) of the 2014 Law on Marriage and Family. If the husband and wife terminate the marriage, the amount of the subsequent interest rate on savings will turn into the wife's private property instead.

3.2.2.3 Other legal income during the marriage period constitutes common property

If property is other lawful income of a spouse during the marriage period, it may include bonuses, lottery prizes, and allowances as prescribed by law that are considered as common property, except for the case prescribed in Article 11 (3) of Decree 126/2014.[216] Common property also arises under the rule that "a spouse has the right to establish ownership in accordance with the Civil Code for objects which are ownerless, buried, hidden, sunk, dropped on the ground or left over out of inadvertence, stray cattle or poultry and raised aquatic animals."

It is difficult to list the types of bonuses and benefits that are part of the common property, but typical incomes can be listed here as follows: 1) Unemployment benefits, retirement benefits, pensions upon termination of a one-time job, policy allowance, injury or disability allowance; 2) Bonuses associated with medals, noble titles, certificates of merit; bonuses associated with works of the mind (intellectual property, inventions); 3) Scholarships, training allowances; 4) Bonuses or in-kind bonuses for completing an assigned task with good results (sports competition, performance) or for performing well in a job with a promise of reward (finding the missing item, passing a test of courage, patience or endurance, setting a Guinness record, answering quiz questions correctly, correctly predicting sports performance); 5) Unexpected bonuses due to good performance of a job to please the rewarded, even though the latter did not promise the reward before (preventing theft, robbery; helping firefighting; saving the victim's property during a disaster).

In addition, lottery money is still determined as the common property of husband and wife during the divorce preparation period, because they are still legally married, so this is still their common property, except for winning the lottery upon the moment the divorce judgment takes effect, which is considered private property.

[216] According to Article 11 (3) of the Decree 126/2014, these allowances will be the couple's separate property as follows: "Allowance or incentives receivable by a spouse as prescribed by the law on preferential treatment toward persons with meritorious services to the revolution; other property rights associated with the personal identification of a spouse."

Similarly, prizes obtained during the marriage period belong to the common property of husband and wife. For example, the wife purchases household necessities at the supermarket. At the supermarket, there is a program of gratitude to customers to win the prize for customers who shop at the supermarket with bills from 500,000 VND or more. Luckily, she was awarded the first prize with a famous brand-named motorbike by the supermarket. This motorbike is considered common property because it was won by winning the prize during the marriage period. The reason is that the law stipulates that prizes won during the marriage period are common property because the material benefits are obtained by luck. Therefore, both should enjoy luck in order to increase solidarity and love in the family.

3.2.2.4 Property given or inherited together constitutes common property

A gift is part of the common property only when the donation is clearly identified as being given to husband and wife or the nature of the donation implies that it is meant as common property. For a donation of real estate, it is necessary to have a donation contract showing that a spouse enjoys the same property.

However, Case Law No. 03/2016/AL additionally recognizes the case where parents donate land use rights that are still shared property of their spouses, although the donation contract is not established in the prescribed form but through special circumstances as *Hong v. Nam*.[217] According to the above case, the husband and wife, who married in 1992 and divorced in 2009, had a dispute about an area of 80 square meters which was offered orally by the husband's parents-in-law without executing an official contract of donation of property in 1992. In 1993, the husband's parents-in-law agreed to the couple living separately in a four-storey house built by the parents-in-law, who had the land use right as well. In 2001, the authorized commune organized the registration for households in this region issuing a land use right certificate for declared households. The couple went to declare their property to the village office, underwent the procedures and was granted a land use right certificate number U060645 for 80m2 of land in the name of the couple. In 2002, the couple built a solid two-storey house and afterwards built a third floor in 2005. In 2009, when they divorced, the parties had a dispute over land use rights with the husband's parents-in-law.

Regarding the legal issue arising from this case law, Article 467 (1) of the 1995 Civil Code requires donations of real estate to be made in writing and certified by the State

[217] Approved by the Council of Judges of the Supreme People's Court on April 6, 2016 and announced under Decision 220/QD-CA dated April 6, 2016 of the Chief Justice of the Supreme People's Court. Cassation Review Decision 208/2013/DS-GĐT dated May 3, 2013 of the Civil Court of the Supreme People's Court on the "Divorce" case in Hanoi between the plaintiff (Ms. Do Thi Hong) and the defendant (Pham Gia Nam); Persons with related rights and obligations are Mr. Pham Gia Phac, Ms. Phung Thi Tai, Mr. Pham Gia On, Ms. Pham Thi Lu, Mr. Bui Van Dap, and Ms. Do Thi Ngoc Ha.

Notary Public or authenticated by a competent People's Committee (corresponding to Article 467 (1) of the 2005 Civil Code; Article 459 (1) of the 2015 Civil Code).[218] However, in reality, in many cases, family members who are parents, siblings donate land use rights to children and family members verbally without signing a contract of donation of property, which leads to serious consequences regarding the problem of asserting land use rights.

The resolution of Case Law 03/2016/AL is based on the will of the related parties to determine the effectiveness of the donation. Accordingly, civil transactions can be expressed verbally, in writing or by specific acts (corresponding to, Article 124 (1) of the 2005 Civil Code; Article 119 (1) of the 2015 Civil Code). Case law 03/2016/AL argues that the husband and wife had been granted the right to stay on the land belonging to the husband's parents-in-law since 1993. In 2001, when the authorized commune had the policy of registering and issuing land use right certificates, the couple registered for the right to use land without signing a contract on the donation of property with the parents-in-law. The Court believed that during the process of building a house on this land, no one in the household of the parents-in-law had any objections. Thus, the Court ruled the husband's parents-in-law had given the couple the right to use the land in the form of a verbal contract, although the requirements for the donation of land use rights according to the 1995 Civil Code must be in written form.[219] The Court explained that it was very common to see parents giving their children an area of land verbally and without paperwork in reality. Then the children built solid houses on that land area to serve as their place of residence. They also conducted the procedure for land registration and were issued a certificate of land use complying with the order, land law, and other relevant laws. Therefore, the parents supposedly agreed to the donation of the land use right to their children and could not recall it.[220] Case law 03/2016/AL proved that conducting land registration and being granted a certificate of land use right are conditions to find the husband and wife have been donated the land use right.

In addition, inheritance only belongs to the common property of husband and wife, if the content of the will mentions that both spouses are heirs in respect of the same inherited property. This means that if the husband or wife receives an inheritance from somebody, this succession belongs to the separate property of a spouse.

[218] ATIM Law Firm, Analyzing Case Law 03/2016/AL accessed 4 October 2021.
[219] Disputes arose at the time of the 1995 Civil Code taking effect, so the Judicial Council of the Supreme Court applied the 1995 Civil Code as a legal basis for dispute settlement.
[220] TNHH LNT Law Firm and Coworker, "Some Comments on the 10 Case Law Were Published by the Judicial Council of the Supreme People's Court " accessed 25 May 2021.

3.2.2.5 Other property agreed by husband and wife to be considered as common property

Merging separate property of husband and wife into common property is one of the typical provisions that spouses can agree on with regard to other property considered as common property. Specifically, Article 46 of the 2014 Law on Marriage and Family stipulates that

"1. Separate property of a spouse shall be merged into common property according to the agreement between the husband and wife.

2. For property merged into common property whose transactions are required by law to be under a certain form, the merger agreement must ensure that form.

3. Unless otherwise agreed by husband and wife or prescribed by law, obligations related to separate property already merged into common property shall be performed with common property."

In the absence of a specific provision of the written law, the provisions of the general law on the validity of a contract can be used to determine the effective date of the transaction of turning private assets into common assets. In principle, the merging of private assets into the common assets block is effective from the moment the transaction is established. In cases where the property to be combined is housing, land use rights, and properties subject to the registration of ownership, the consolidation of the property is effective from the time of registration.

3.2.2.6 Land use rights acquired by husband and wife after marriage

Article 34 of the 2014 Law on Marriage and Family stipulates *1. "For a common property which is required by law to be registered for ownership or use, both spouses shall be named in the ownership or use right certificate, unless otherwise agreed by the couple. 2. In case only one spouse is named in the property ownership or use right certificate, transactions related to such property must comply with"* Article 26 of the 2014 Law. *"Any dispute related to that property shall be settled under Article 33 (3) of the 2014 Law."* Meanwhile, Article 98 (4) of the 2013 Land Law[221] stipulates the principle relating to granting the use right certificate *"In case land use rights, or land-use rights and the ownership of houses and other land- attached assets or the ownership of houses and other land-attached assets are/is the joint property of husband and wife, the full names of both husband and wife must be recorded in the certificate of land use rights and ownership of houses and other land-attached assets unless husband and wife agree to record the full*

[221] Land Law 45/2013/QH13 was issued by the 13th Vietnamese National Assembly on November 29, 2013.

name of only one person. In case land use rights, or land-use rights and the ownership of houses and other land-attached assets, or the ownership of houses and other land-attached assets are/is the joint property of husband and wife, and the granted certificate only records the full name of the husband or wife, a new certificate which records the full names of both husband and wife may be granted if requested."

Article 20 (19)(b) of Circular 58/2020[222] stipulates that *"if vehicles are the common property of husband and wife, a voluntary declaration by the owners that it is the common property of husband and wife, the full names and signatures of husband and wife must be fully inscribed in the vehicle registration certificate."* Thus, for assets of great value, the law requires registration of ownership and use rights as well as a certificate of ownership and use, in which common property of husband and wife will be shown. When the couple exercises the rights to these common properties, the consent of both husband and wife is required.

In addition, the land use rights established after marriage belong to the common property of husband and wife. See, for example, the People's Court's judgment No. 38/2018/DS-PT dated January 26, 2018, on the request for recognition of private property. According to this case, the husband and wife got married in 1984. In 1987, the husband received the transfer of land from the seller. In 1996, the husband was granted a certificate of land use right by the district People's Committee for the entire above land area. On October 21, 2016, the wife had a separate civil obligation to fulfil toward X, so the district Civil Judgment Execution agency verified the wife's financial circumstances with a view to executing the judgment. The wife has declared the above land to secure the judgment execution for a separate debt to X, but the husband did not agree because he thought this was his own property. Therefore, the husband sued to request the Court to recognize the above-mentioned 16,090 square meter land as his own property. However, the People's Court of the province decided to uphold the first instance judgment and did not accept the husband's request to initiate a lawsuit on the request for recognition of the above-mentioned land area as private property. The court argued that the husband and wife were married in 1984; it was not until 1987 that the husband received the transfer of land during the marriage period. Thus, this land was transferred during the marriage of the husband and wife. Second, the husband also has no evidence that this is his own property, there is no evidence that this is the land purchased from the gold he was given by his parents as declared.[223] If husband and wife think that the land use rights acquired after their marriage are separate property, they must prove that such rights have been acquired through receiving separate inheritance, being given separately or as a result of doing transactions

[222] The Ministry of Public Security issued Circular 58/2020/TT-BCA on June 16, 2020, governing the process of awarding and cancelling road motor vehicle registration and number plates. From August 5, 2020, this Circular will be in effect.

[223] Ngoc Nhi, "Recognizing Private Property during Marriage" accessed 20 October 2021.

with separate property. In principle, if the land use rights are common property of husband and wife, their title must stay in the certificate of land use right according to the provisions in Article 34 of the 2014 Law on Marriage and Family and Article 12 of Decree 126/2014. Thus, the law requires husband and wife to jointly sign their names on the land use right certificates if the land is their joint property. However, judicial practice shows that many certificates of land use rights only stand in the name of the husband even though this land use right was formed during the marriage period.[224] If there is a dispute about the determination of land use rights as common property or the private property of the husband, how will the Court handle it? The Court argues that the land use rights are formed during the marriage period, excluding property inherited or given separately, or property created from separate property inherited, so the land use right is considered the common property of the couple. Therefore, in order to determine that the land use right is private property, the husband or wife must prove that the land use right has been transferred in consideration of his/her own money, or it has been donated, or received as inheritance and he/she has the full right to carry out the registration procedures for the use and ownership rights of that private property.

3.2.2.7 Property with no ground to be considered private property constitutes common property

The limitation of listing the common and private property in the statutory property regime is that it is impossible to cover all items of property actually arising during married life. Therefore, in order to have a comprehensive provision for determining the common and private property of husband and wife, lawmakers have fulfilled this wish in Article 33 (3) of the 2014 Law on Marriage and Family. Accordingly, in cases where there are no grounds to prove that the disputed property is the private property of each party, that property is considered common property. With this provision, it can be said that the law favours common property of husband and wife during the marriage period over private property. However, this provision is appropriate because marriage inherently promotes community, loving solidarity of the family. Once the property is formed but there is no specific regulation, or there is no evidence proving that the property is owned by one party, it should be determined that the property belongs to husband and wife. In addition, the contributions of common property and private property of the two parties in the process of creating a common life are sometimes difficult to calculate. Therefore, for reasons of the unclear evidence of the formation of the property, it is considered a common property to promote complete family affection.

[224] Hong, Tran Thi, "The Relationship between Spouses in the Name of Housing and Land Certificates: Current Status and Impact Factors" accessed 21 May 2021.

For example, the husband and wife got married in 2010 and bought a house in the centre of a big city for 2 billion VND. To buy this house, they used 1 billion VND accumulated by husband and wife in 5 years of living together, 300 million VND given by the husband's father to the couple, 700 million VND transferred by the wife from her own land plot. Thus, this house was formed during the marriage period, so it is defined as the common property of husband and wife. However, in terms of effort and contribution, the wife has contributed more than the husband in the process of creating the property. It is sometimes unnecessary to calculate who contributes more if they continue to remain married. The calculation of contributions is really required only when the husband and wife need to divide the property. For example, if their married life is not happy, they file for divorce and request the Court to divide the property, and then the wife can ask the Court to give her a bigger share according to the provisions of Article 59 (2)(b) of the 2014 Law on Marriage and Family.

3.2.2.8 The special features of wedding gold, dowry, and pre-wedding property

It is a popular practice in Vietnam that a husband and wife are given wedding gold on their wedding day. This is considered quite a special property that exists in human relations and comes from customs and habits. According to the wedding custom in Vietnam, before the wedding ceremony, the two parties will have a ceremony. However, customs related to wedding gold and dowry appear not only in the lives of Vietnamese people but also in countries around the world. For example, according to the wedding custom in Thailand, the dowry in Thailand "Sin Sod" is used by the groom to give to the bride's family as compensation for the family's loss when marrying a child. The dowry can be given in the form of gold or money as little as 100,000 baht depending on the groom's ability to demonstrate to the bride's family the groom's economic viability. In addition, the bride also received a dowry from her biological parents called "Tong Mun". Dowry and wedding gold in Thailand exists only in the form of custom and are not specified as a specific obligation in the law.[225]

The European custom of dowry dates back to ancient Rome and was later recorded during the medieval period and the Italian renaissance. However, over time, this custom has decreased in both quantity and quality and is no longer an important custom when men and women get married.[226] In Vietnam, the dowry is no longer really emphasized in the marriage rites, but only the love that the biological parents have for the bride before starting the married life. Besides, wedding gold, wedding money or other valuable gifts are given by the groom's family, friends or acquaintances on the occasion of the wedding

[225] Siam Legal, "Thai Dowry" accessed 19 December 2021.
[226] Siwan Anderson, "Why Dowry Payments Declined with Modernization in Europe but Are Rising in India" 269–310.

day. Therefore, this is one of the good customs in Vietnam and has been preserved from the past to this day. During this ceremony, the bride will be given jewellery by the groom's family with earrings and some valuable jewellery, which raises the question as to whether wedding gold is considered a common property or private property of husband and wife? Considering the provisions of the current law, the theory of donation contract will be applied to determine the general or specific nature of wedding gold. Article 33 of the 2014 Law on Marriage and Family stipulates that if a husband and wife are given gifts together, the property given is determined to belong to the common property. On the contrary, Article 43 of the Law on Marriage and Family stipulates that the private gifts in the marriage period belong to the private property of spouses. Spouses, however, often have disputes about wedding gold when they file for a divorce and request property division in Court. The wife herself thinks that this is the wife's private property, which is given to her by her husband's family, and the jewellery is for the most part crafted exclusively for women. However, the husband thinks that this is a type of property in the form of common ownership because it means that parents-in-law give them to them together to accumulate wealth for their initial married life. In terms of judicial practice, the judge determined that wedding gold is the common property of husband and wife, which it is reasonable to donate on the wedding day.[227] Particularly, earrings have two different understandings as specific property of this type. The first way of understanding is that custom earrings, in some parts of Vietnamese custom, are given to the bride alone, so the wife is entitled to keep this property if the couple divorce. In the above case, the Court determines that the earrings are the wife's own property if local custom considers the earrings to be the property of the husband's parents to be presented to the bride on the wedding day.[228] This proves that the bases for determining common and private property of husband and wife are clearly regulated in the 2014 Law on Marriage and Family and guiding documents. During the trial, the judge also relies on customs and practices to settle disputes over property between husband and wife. The grounds for the Court to apply customary practices to resolve marriage and family disputes are recorded in Article 7 of the 2014 Law on Marriage and Family. However, the second understanding is that earrings are a kind of common property of husband and wife because they were given to both of them together on the wedding day if the locality did not have the custom of treating the earrings as the wife's private property.

In addition, it is necessary to distinguish between wedding gold and dowry. According to custom, wedding gold is the property that a wife is given by the husband's family on the occasion of marriage. Dowries, on the other hand, are often valuable jewellery or possessions that the wife is given by her biological parents before marriage. Therefore, if

[227] Verdict 65/2017/HNGD - ST of the People's Court of Lai Vung District.
[228] Verdict 04/2018/HNGD - PT of Binh Phuoc Provincial People's Court.

the wedding gold is determined to be common property of the couple, the dowry is considered the private property of the wife due to be given before the marriage.

Besides, the organization of the wedding ceremony can take place before or after the parties register their marriage. Whether wedding gold is given before the marriage registration has an effect on the characteristic of this asset. Is the giving of wedding gold before the marriage registration time considered the private property of the wife before the marriage according to Article 43 (1) of the 2014 Law on Marriage and Family? This inference is inconsistent with the nature of the wedding gift and the initial purpose of accumulating wealth for the couple stepping over the marriage threshold. Therefore, only the parties should base it on whether the parties have established marriage registration or not to determine whether the wedding gold is common property. It is not necessary to consider whether the time of donating the wedding gold is before or after the marriage registration.

In addition, a wedding gold dispute also occurs in case the woman is donated the wedding gold during the engagement ceremony, but the two parties do not enter into a marriage. The resolution of the wedding gold dispute in this case depends on the goodwill of both parties, especially the man's family. Indeed, if the prospective husband considers that marriage is undesirable to both parties, he may agree to allow the potential wife to continue to use the wedding gold donated separately as compensation for the cancellation of marriage. Conversely, if the man requests the woman to return the wedding gold and the latter does not agree, a dispute over the wedding gold arises. Thus, the Court shall apply the theory of conditional donation contracts to settle disputes, which leads to the donation contract being voided due to the unfulfilled condition. The settlement of the consequences of invalid contracts is done according to Article 131 of the 2015 Civil Code 2015. Dealing with the consequences of invalid wedding gold donation contracts, the Court also considers the error factor to determine the level of wedding gold reimbursement from the woman's side. Then, the Court examines each party's fault to consider the refundable rate of wedding gold from the woman to the man.

For example, the prospective husband and wife organized an engagement on October 1, 2017 *(Dung v. Nhien) and* expected that the wedding would be held on November 21, 2017 according to the lunar calendar. At the betrothal event, the fiancé gave the fiancée an estimated amount of 37,986,000 VND, but then a conflict arose between the two parties and they cancelled the marriage, which led to the fiancé's family asking the fiancée to return the wedding gold. In terms of the consequences of the conditional donation contract in accordance with the 2015 Civil Code, the local Court found that the reason for the cancellation of the wedding came from both families. The parties did not directly find out whether the information heard from the two sides was correct, they were not willing to work together to resolve conflicts leading to the wedding cancellation. On the other hand, neither

betrothed was willing to enter into a marriage, nor did they set conditions and provide opportunities for each other to resolve conflicts. Therefore, the fault leading to the cancellation of the wedding is attributable to both parties, so the Court only ordered the woman to return ½ of the wedding gold worth 18,993,000 VND.[229]

When it comes to wedding money, it has the same feature as wedding gold.[230] Wedding money is also one of the interesting cultural features in Vietnamese weddings where the guests who attend the wedding ceremony often prepare the wedding money. Depending on the customs of each region, people can donate gold to the bride and groom or money. The wedding fee can be given in the form of a wedding ceremony accompanied by the wedding gold donated by the groom's family to the bride's family to cover the costs of serving on the wedding day. In addition, the wedding money is also congratulatory money donated by friends and relatives to the couple on the wedding day. The above wedding money is used to pay for service costs related to the couple's wedding day. If a part of the wedding money is still left over after deducting the expenses for the wedding day, it shall be determined as the common property of the husband and wife unless otherwise agreed by the husband and wife. The explanation for this is that its purpose is to be given to both parties on the wedding day, so it is defined as common property. Accordingly, wedding money and gold are both assets specified in Article 105 of the Civil Code of 2015, which have the same features and differ only in their form of appearance.

3.2.3 Separate property in the statutory property regime

The basis for determining separate assets mentioned mainly in Article 43 of the 2014 Law on Marriage and Family and Article 11 of Decree 126/2014 providing additional guidance on a number of cases relating to determining marital property is as follows:

3.2.3.1 Property obtained before marriage is the separate property of husband and wife

In principle, property created before marriage is the private property of each spouse unless that person agrees to import the separate property into the common property of husband and wife. If a dispute arises over property between husband and wife, the wife or husband needs to prove that such property is the property of one party from before the marriage and such property has not been merged into the common property.[231] Whenever a dispute on marital property arises, the Court usually asks the party to show his/her proof of

[229] Verdict 170/2018/DS - PT of Tay Ninh Provincial People's Court.
[230] Tiền Mừng Cưới: Ý Nghĩa, Phong Tục và Những Điều Cần Biết accessed 19 January 2021.
[231] Nguyen, Van Cu, *Chế độ tài sản của vợ chồng theo pháp luật Hôn nhân và gia đình* 50-65.

private property through a marriage certificate, his/her home ownership certificate or land use right certificate obtained before the marriage registration.

3.2.3.2 Property formed or derived from private property is private property

Article 43 (2) of the 2014 Law on Marriage and Family specifies that "Property created from the separate property of a husband or wife is also the property of his/ her own the property" which is a more progressive regulation than that of previous Laws on Marriage and Family. Previously, the 2000 Law on Marriage and Family lacked a provision to record property formed or derived from separate property as belonging to the private property of each spouse, although it still provides for legal grounds for determining the common property and private property of spouses. Such regulations, however, were unclear in some cases, which rendered it difficult for the Court to determine whether the disputed pieces of marital property were part of the common or private property of the spouses under Articles 27 and 32 of the 2000 Law on Marriage and Family. Although Article 32 of the 2000 Law had recognized the principle of presuming common property if a spouse has no grounds to prove that the disputed property is the private property of one spouse, however, the presumption of common property in some cases became unreasonable with regard to property existing in the marriage period but derived from the spouses' separate property. This shortcoming is logically solved by the 2014 Law on Marriage and Family, which absolutely recognizes such property as separate property to ensure individual property rights and create a solid legal foundation for the application of law.

For example, the husband has transferred a land plot to a buyer before getting married to the wife in 2010. The land plot is subject to clearance and compensation under the authorizing decision, pursuant to which the owner received an amount of 300 million VND and resettlement funding as a repayment. According to the provisions of Article 43 (2) of the 2014 Law on Marriage and Family, the compensation amount and the resettlement funding are the husband's separate property due to being formed from his own property. If the husband wants to get a new land-use right, does the new right form part of his private property? Let us assume that the husband uses the amount of compensation of 300 million VND to buy another land plot. In this case, the land is deemed the private property of the husband because it is derived from his private property according to the provisions of Article 33 (1) and Article 43 (2) of the 2014 Law on Marriage and Family. On the other hand, it is supposed that the husband uses the amount of compensation of 300 million VND and another 300 million VND accumulated by the couple during the process of living together to acquire a new land-use right. The land is now defined as the common property of the couple because it is formed during the marriage period under Article 33 (1-3) of the

2014 Law on Marriage and Family. The husband, however, has made a larger contribution to this piece of their common property than the wife, in respect of which he has the right to request recognition of his effort to contribute more to the common property in case the division of their common property takes place.

3.2.3.3 Yields and profits from separate property after the division of common property

Basically, yields and profits arising during the marriage period belong to the common property of the spouses no matter whether the original property belongs to either the private or common property of the spouses. Exceptionally, the yields and profits arising from the separate property following the division of common property during the marriage period belong to the separate property. This provision aims to ensure the stability of the separate property after the common property has been divided during the marriage period, so the yields and profits arising from the separate property after the division of the common property are the separate property of each party.[232]

For example, the husband and wife have a house and the savings of one billion VND at the bank as their common property and reach an agreement to divide these items of property during the marriage period. Accordingly, the house was divided to become the separate property of the husband, and the one billion savings deposit was divided to become the separate property of the wife. After being divided, if any yields or profits arise, they will belong to each spouse's separate property. If the husband uses the house for rent at the price of 5 million VND per month, the rental amount will be a part of his own property. Similarly, if the wife continues to deposit this amount of money at the bank, the savings and interest rate are parts of her separate property.

3.2.3.4 Items given separately or inherited separately are separate property

Fundamentally, donation and inheritance during the marriage period are defined as the private property of the husband and wife, if the donation and inheritance have a personal meaning or are a private gift. For example, offering something as a gift on a spouse's birthday has a personal meaning, so it is determined to belong to the spouse's private property.[233] In addition, Article 9 (1) of Decree 126/2014 stipulates that winning the lottery during the marriage period belongs to the common property of husband and wife, except when a spouse has been given the lottery ticket which later turns out to be a winning ticket. For example, the two men named A and B are close friends, and they both got married. On

[232] Nguyen, Phuong Lan, 'Hậu quả pháp lý của việc chia tài sản chung của vợ chồng trong thời kỳ hôn nhân' 22.
[233] Nguyen, Van Cu, *Chế độ tài sản của vợ chồng theo pháp luật Hôn nhân và gia đình* 115-120.

the occasion of a meeting, A bought two lottery tickets and graciously gave one to B. The habit of presenting lottery tickets between acquaintances is quite common in the Southern provinces of Vietnam. Let us suppose that their lottery tickets win a special prize. In this case, is the amount won deemed the spouse's private property or the common property of the couple? The amount won through the lottery ticket will be the common property of A and his wife as prescribed in Article 9 (1) of Decree 126/2014, but B will get the lottery money as his separate property because it has been given to him separately during the marriage period according to Article 43 (1) of the 2014 Law on Marriage and Family. However, B can merge this private property completely into the common property of spouses, if he thinks this is luck and wants his wife to enjoy joy together based on Article 46 of the 2014 Law on Marriage and Family.

With regard to legal inheritance, property inherited during the marriage period is separate property including both succession under a will or at law, except for Article 33 (1) of the 2014 Law on Marriage and Family Law. For example, Articles 651 and 652 of the 2015 Civil Code stipulate that when parents die, their biological children inherit their property according to the law as the first in line for succession. This first line of inheritance does not recognize that a daughter-in-law and a son-in-law could inherit from a parent-in-law and vice versa. For that reason, when a husband or wife receive a legal inheritance during the marriage period, the inheritance is deemed his/her private property. If an obligation arises for the heir, the spouse being the heir shall perform the separate obligations from his or her own property. Regarding the law of inheritance, a person entitled to inheritance has the responsibility to perform the property obligations within the scope of the estate left by the deceased, unless otherwise agreed according to Article 615 of the Civil Code of 2015.

In terms of inheritance under a will, if the content of the will mentions that only the husband or wife is entitled to the inheritance, the inheritance under the will shall belong to his/her separate property. Conversely, if the testator clearly lays down that both spouses are the beneficiaries of the estate, the inheritance under the will belongs to the common property.

3.2.3.5 Separate property formed through the will of husband and wife

If Article 46 of the 2014 Law on Marriage and Family enables spouses to import the separate property into their common property, then Article 38 of the 2014 Marriage and Family Law recognizes that husband and wife can do the opposite. That is, husband and wife have the right to agree to divide the common property during the marriage period into the separate property of each party even though the marriage still exists. Common property division during the marriage period is specified in Articles 38 to 42 of the 2014 Law on

Marriage and Family and Articles 14, 15 and 16 of Decree 126/2014. Accordingly, regulations on the division of common property during the marriage period are adjusted to include the following basic contents:

Spouses have the right to agree to the division of part or whole of their common property. If they fail to reach agreement, they have the right to request a court to settle their differences. The Court only deals with the division of common property when the husband and wife have not agreed on the division ratio but have decided to divide the property.

The agreement on the division of common property must be made in writing. This document is notarized at the request of husband and wife or as prescribed by law. That is, husband and wife are not required to notarize the common property[234] sharing agreement when there is no regulation by law. They can agree on a division of property and only the two parties know about the agreement. Only assets that are specifically enumerated by specialized law in terms of the form should be paid attention to in order to ensure compliance with regulations to avoid affecting the lawfulness of the agreement. For instance, if husband and wife agree to divide common property during the marriage period and it concerns a land use right, the division must be executed in writing, notarized or authenticated and registered according to the provisions of Article 95 and Article 167 (3) of the 2013 Land Law.

When *"common property of husband and wife is divided unless otherwise agreed by husband and wife, divided property and yields or profits arising from the separate property of each spouse after common property division are the separate property of each spouse. The undivided property portion remains the common property of husband and wife. The agreement between husband and wife dividing common property shall not change property rights and obligations previously established between them and a third party."*

Article 14 Decree 126/2014 stipulated that *"The division of common property in the marriage period shall not lead to termination of the statutory matrimonial property regime. From the time the division of common property takes effect, the divided property and yields and profits from such property and yields and profits from other separate property of a spouse must be the separate property of that spouse, unless otherwise agreed by husband and wife. From the time the division of common property takes effect, property gained from the exploitation of separate property of a spouse which cannot be determined as income from labour or production and business activities of a spouse or as yields or profits from such separate property must be under the joint ownership of husband and wife."*[235] The husband and wife, for example, agree to divide all common property during the marriage period, then the husband bought lottery tickets and won the prize later. The lottery winnings are defined as the common property of husband and wife according to the

[234] Nguyen, Hong Hai, 'Bàn thêm về chia tài sản chung của vợ chồng trong thời kỳ hôn nhân theo pháp luật hôn nhân và gia đình hiện hành' 29-35.
[235] Article 14 Decree 126/2014.

provisions of Article 9 (1) of Decree 126/2014 because common property division during the marriage period cannot lead to the termination of the statutory property regime.[236] Therefore, the property items acquired after the division of common property during the marriage period are still subject to Article 33 and Article 43 of the 2014 Law on Marriage and Family on the basis of determining the common and private property of spouses.

Common property division during the marriage period is ineffective in some cases if it infringes upon the interests of other persons. Common property division during the marriage period shall be invalidated in one of the following cases:

"1. It seriously harms the family's interests; or lawful rights and interests of minor children or adult children who have lost their civil act capacity or have no working capacity and no property to support themselves;

2. It aims to shirk the following obligations:

a/ Raising and support obligations;

b/ Damages payment obligations;

c/ Payment obligations when declared bankrupt by a court;

d/ Debt payment obligations;

e/ Tax payment obligations or other financial obligations toward the State;

f/ Other property obligations as prescribed by this Law, the Civil Code and other relevant laws."

Many couples have taken advantage of the regulations on common property division during the marriage period to avoid the actual performance of their own civil obligations towards others in reality. A wife, for instance, has a separate property obligation to the creditor; her private property will be distrained to repay the debt. If the wife's own property is not enough to repay the debt, the common property of the spouses will be divided during the marriage period and the wife's private property after the division is used to pay the separate debt. Supposedly, if the couple has the single common property which is the land use right of 2000m2, the land use rights will be divided equally between the parties on the basis of the deduction under Article 38 (3) of the 2014 Law on Marriage and Family. The wife, however, intends to avoid the fulfilment of her separate obligations toward the creditor by agreeing to divide the common land use right to become the entire separate property of her husband. Afterwards, the husband conducts registration of the land use right at the land registration office as his separate property in accordance with the provisions of Article 95 of the Land Law of 2013 and Article 5 (1) Decree 43/2014[237] guiding the implementation of the Land Law. Subsequently, the husband quickly transferred the land use right, which is his separate property after being divided during the marriage, to a righteous third person. What if the wife's own creditor requests debt

[236] Nguyen, Thi Hanh, *Chia tài sản chung của vợ chồng theo pháp luật Việt Nam – Thực tiễn áp dụng và hướng hoàn thiện* 35-54.

[237] Decree 43/2014/ND-CP was issued by th Government detailing a number of Land Law on May 15, 2014.

repayment and has known that the property for the performance of the existing obligations has been dispersed, how does the creditor react to protect their interest? This situation may occur because the division of common property during the marriage period is only carried out between husband and wife without notice to the creditor unless the creditor applies one of the security measures relating to obligations in accordance with Article 292 of the 2015 Civil Code. Article 292 of the 2015 Civil Code stipulates the *"types of security for performance of obligations as follows:*

1. Pledge of property;
2. Mortgage of property;
3. Deposit;
4. Security collateral;
5. Escrow deposit;
6. Title retention;
7. Guarantee;
8. Fidelity guarantees;
9. Lien on property."

What legal basis will be used to address the interests of the bona fide third party and the wife's private creditor? The interests of the bona fide third party are prioritized for protection under Article 133 (2) of the 2015 Civil Code because the third person on the basis of trust in the land use right after being divided separately and registered with the competent authority has established the transaction in good faith. Therefore, this transaction should be acknowledged in order to ensure the legitimate rights and interests of the third party and create a sense of peace of mind for citizens establishing transactions in accordance with law. The wife's own creditor can hardly apply the provisions of Article 42 (2) (d) of the 2014 Law on Marriage and Family to declare this transaction invalid because the above provision only applies in the period of making an agreement to divide the common property without transferring the property to a bona fide third party yet. Once the transaction has transferred the land use right to a bona fide third party, the wife's own creditor can only rely on the provisions in Article 133 (3) of the 2015 Civil Code to request the wife and the husband jointly to compensate for the damage.

It is thought that the creditors can protect themselves from damage by proactively applying one of the security measures relating to obligations specified in Article 292 of the 2015 Civil Code to bind the wife to perform her obligations from the beginning. The creditor, for instance, may require the wife to mortgage land use rights to secure the fulfilment of the wife's private civil obligations. The dispersal of common property in this case is difficult to implement because the disposition of property requires the consent of the mortgagee who is the creditor under Article 321 (5) of the 2015 Civil Code. Article 133

of the 2015 Civil Code about *"protection of the interests of bona fide third parties with regard to invalid civil transactions*

1. In cases where a civil transaction is invalid but the transacted property being a moveable property is not required to be registered and such property has already been transferred to a bona fide third party through another transaction, the transaction with the third party shall remain valid, except for the case specified in Article 167 of this Code.

2. In cases where a civil transaction is invalid, but the transacted property is registered at a competent authority and such property has already been transferred to a bona fide third party through another transaction which is established according to that registration, such transaction shall remain valid.

In cases where the transacted property which is required to be registered has not been registered at a competent authority, the transaction with the third party shall be invalid, except for cases where the bona fide third party received such property through an auction or a transaction with an another party being the owner of such property pursuant to a judgment or decision of a competent authority but thereafter such person is not the owner of the property as a result of the judgment or decision being amended or annulled.

3. The owner of a property shall have no right to reclaim the property from the bona fide third party if the transaction with such party remains valid as prescribed in paragraph 2 of this Article, but the owner may proceed against the party at fault to refund appropriate expenses and compensate for his/her damage."

In terms of legal practice, according to a statistical report at the Department of Justice of Can Tho city, from January 1, 2020, to December 12, 2021, a total of 268555 transactions were performed at the notary public, of which 1080 transactions were related to the distribution of common marital property, which account for 0.4% of transactions[238] This shows that the agreement on division of common assets accounts for a small percentage compared to other transactions made at the Can Tho city notary office.

[238] Data provided by Notary Office No. 1 in Can Tho city, Vietnam in December 2021.

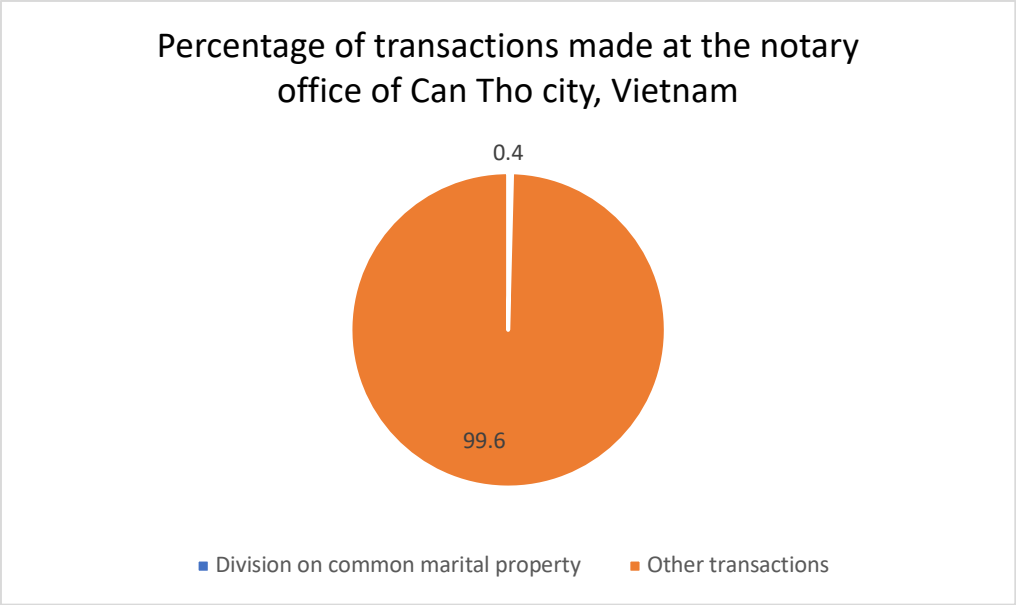

Figure 12. Percentage of transactions made at notary offices in Can Tho city, Vietnam (1/1/2020-12/2021).[239]

3.2.3.6 Property that serves individual essential needs is the private property of a spouse

Essential needs mean "ordinary needs for food, clothing, accommodation, learning, medical care and other ordinary needs which are indispensable in the life of each person and family." The 2014 Law on Marriage and Family recognizes that private property is things serving individual crucial needs, which is a new supplementary element to determine separate property. The 2014 Law on Marriage and Family is different from the 2000 Law on Marriage and Family in its regulation. The 2014 Law has replaced the definition *"private property is personal belongings and jewellery"* in the 2000 Law by *"private property is things serving individual crucial needs"* instead. This is a progressive idea to resolve shortcomings of the 2000 Law, because personal belongings and jewellery are the spouses' private property that may affect the interest of the other party in some cases. What if the husband or wife takes a great deal of money from their common property to buy belongings or jewellery serving an individual need, is it reasonable to consider these to form part of personal possessions? The 2000 Law did not consider whether the origin of belongings and jewellery was common or private property and contained no special explanations for that. Such a regulation is likely to create a space for a husband or wife to transform common property into private property causing disadvantage to the other party's property. Besides, regarding traditional Vietnamese culture, parents normally offer their children various kinds of jewellery on the wedding day, and the couple

[239] Data provided by Notary Office No. 1 in Can Tho city, Vietnam in December 2021.

often amasses wealth through jewellery during their marriage life. Therefore, jewellery in this case is recognized as an accumulation of material wealth of the husband and wife during the marriage period and should be part of the common property even if worn by one spouse only.

On that basis, the 2014 Law on Marriage and Family has removed the phrase *"personal belongings and jewellery"* and replaced it with the term "*serving individual essential needs"* to define separate property. The term "essential needs", however, should be analysed carefully in each case and interpreted differently adapted to and depending on the diversity of situations. Concerning individuals or families with different living standards, the concept of essential goods will not be the same based on each individual's living conditions and legitimate necessity. For example, for some individuals, items such as dishes, shoes, clothes are essential everyday items, but other individuals consider items such as cell phones, laptops, motorbikes and cars as essential personal belongings. Therefore, depending on each individual's living conditions and legitimate necessity, essential needs will differ for each family and spouse. This provision of the law is considered as a progressive, flexible breakthrough and clearly shows the empowerment of the judiciary to consider and resolve disputes based on the specific circumstances of each individual and family.

3.2.3.7 The separate property of husband and wife includes types of property provided for by law

This provision seems to be only a basis for anticipating cases where the law has not yet been anticipated, but in fact, it has a very important and extremely important meaning in the cognitive process and a solid legal basis in the application of laws. Specifically, Article 11 of Decree 126/2014 stipulates that the following assets are defined as separate assets:

"1. The economic right to intellectual property objects as prescribed by the law on intellectual property.

2. Property under the separate ownership of a spouse according to the judgment or decision of a court or another competent agency.

3. Allowance or incentives receivable by a spouse as prescribed by the law on preferential treatment toward persons with meritorious services to the revolution; other property rights associated with the personal identification of a spouse."

Separate property in respect of property rights to objects of intellectual property is defined according to Article 115 of the Civil Code of 2015 that is *"Property rights are the right to value in money, including property rights to the objects of intellectual property rights, land use rights and other property rights."* Regarding Article 21 of Decree

22/2018/[240] on copyright and related rights, property rights in the Intellectual Property Law, it mentions as follows:

"1/ The right to perform works before the public provided for at Article 20 (1) (b) of the Intellectual Property Law means the exclusive right of copyright owners or their authorized persons to perform works either directly or through phonograms or video recordings or with whatever technical devices accessible by the public. Public performance of works means the performance of works in any place accessible to the public.

2/ The right to reproduce works provided at Article 20 (1) (c) of the Intellectual Property Law means exclusive rights under copyright which are performed by copyright owners or their authorized persons to make copies of works by any means or in any form, including electronic ones.

3/ The right to distribute original works or copies thereof provided for at Point d, Article 20 (1) of the Intellectual Property Law means the exclusive right of copyright owners or their authorized persons in whatever forms or with the assistance of whatever technical devices accessible by the public to sell, lease or otherwise assign their original works or copies thereof.

4/ The right to communicate works to the public by wire or wireless means, electronic information networks or any other technical means provided at Article 20 (1)(đ) of the Intellectual Property Law means the exclusive right of copyright holders or their authorized persons to make their works or copies thereof available to the public, in such a way that members of the public may access such works from a place and at a time they themselves select.

5/ The right to lease original cinematographic works and computer programs or copies thereof provided for at Article 20 (1) (e) of the Intellectual Property Law means the exclusive right of copyright owners or their authorized persons to lease their works for use within a definite term.

6/ The right to lease works shall not apply to computer programs which do not themselves constitute principal subject matters for lease, such as computer programs conducive to the normal operation of means of transport as well as other machines and technical devices."

For example, a wife is active in the field of art, has a hobby of sometimes composing improvised poetry. Before she got married, she wrote 20 poems, only to publish them later in her own poetry collection. The wife got married to the husband and after getting married, the wife continued to compose. During her marriage, the wife composed 50 poems and she published them into a book. The wife is the author of 50 poems composed

[240] Decree 22/2018/ND-CP[240] guiding the 2005 Law on Intellectual Property. It is in effect as of April 10, 2018.

during her marriage, so naturally, the wife is protected by copyright. The term of protection runs from when the 50 poems are published for her whole life and to 50 years after the author's death. The wife still has all copyright and moral rights, while property rights arising during the marriage are considered common property (unless otherwise agreed).[241] After the divorce, these works continue to be republished, adapted, won prizes or generate any other material benefits, which are under the exclusive ownership of the wife. Therefore, property rights to objects of intellectual property listed in Article 21 of Decree 22/2018 are determined to be the private property of the spouse. It should be noted that the above-mentioned incomes from property rights are still considered the common property of husband and wife because they are generated by the spouses from income from work or production and business in accordance with Article 33 (1) of the 2014 Law on Marriage and Family. In addition, when it comes to intellectual property rights, they include different areas, such as copyright, industrial property rights for inventions, industrial designs, trademarks, geographical indications, trade secrets, trade names, layout designs of semiconductor integrated circuits, and rights to plant varieties and propagating materials which are all defined as the private property of each spouse.

The subsidies and preferences that husband and wife receive in accordance with the law on preferential treatment for people with meritorious services to the revolution belong to their private property. This provision is adjusted in Article 11 (3) of Decree 126/2014 by considering the identity of the person receiving the incentives. The husband or wife's own contributions to the nation's revolutionary cause should be respected and recognized as a party's separate property.

Property rights attached to their personal identities also belong to their own separate property. For example, the husband and wife got married in 2017; the wife won the lawsuit against a trespasser in a lawsuit claiming damages of honour. The court ruled that the trespasser had to pay compensation of 10 million VND to the wife. This amount is determined to be the wife's private property according to the provisions of Article 11 (3) of Decree 126/2014 because it is a property right attached to the spouse's relatives.

3.2.4. Using and handling assets under the statutory property regime

3.2.4.1 Possession, use and disposition of common property

Firstly, according to Article 13 of Decree 126/2014, the possession, use and disposal of common property shall be agreed upon by husband and wife. In the case where a husband or wife establishes and performs transactions related to the common property to

[241] Nguyen, Thi Huyen, Tác phẩm văn học có được xem là tài sản chung của vợ chồng? Accessed 12 January 2022.

meet the family's essential needs, the consent of the other party is considered, except for the case in Article 35 (2) of the 2014 Law on Marriage and Family. The disposition of the following common property shall be agreed in writing by husband and wife: real estate; movable assets which are required by law to be registered for ownership; assets which are the major income-generating source for the family.

Article 213 of the 2015 Civil Code provides for the joint ownership of husband and wife as follows:

"1. Multiple ownership between a husband and wife is divisible joint ownership.

2. A husband and wife jointly create and develop their marital property through their efforts and have equal rights to possess, use and dispose of such property.

3. A husband and wife shall discuss, agree on or authorize each other in relation to the possession, use and disposal of the marital property.

4. The marital property may be divided as agreed or pursuant to a decision of a court.

5. If a husband and wife select the regulations on property under agreement as prescribed in law on marriage and families, the marital property shall apply those regulations."

Basically, co-owners have equal rights in the possession, use and disposition of common property, but the ownership of common property between spouses has different characteristics.[242] For example, during the marriage period, the wife's salary and income-generating activities are defined as common property, because the couple needs to use the source of income to spend on and serve the daily needs of them as individuals and a family. Therefore, it is necessary to have flexibility in the regulations to create conditions for husband and wife to actively use the common property without the explicit consent of the other. For example, a wife may decide to use her income to purchase personal or family necessities, while a husband can invite friends for breakfast or parties with his own income without having to agree with the co-owner of common property. The provision in Article 13 of Decree 126/2014 is completely reasonable when it allows the husband and wife to establish and perform transactions related to common property to meet the essential needs of the family with the implicit consent of the other party.

Second, according to Article 35 (2) of the 2014 Law on Marriage and Family, the disposition of the following common property requires a written agreement between the owners as follows: *"1. Real estate includes a) Land; b) Houses, construction works attached to land; c) Other properties attached to land, houses, construction works; d) Other assets as prescribed by law.*[243] It means that common property is immovable property requiring a written agreement between spouses.

Some of the assets that are movable are required by law to be registered as follows:

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[242] Nguyen, Hong Hai, *Xác định chế độ tài sản của vợ chồng – Một số vấn đề lý luận và thực tiễn* 35-45.
[243] The 2013 Land Law and the 2014 Housing Law detail the types of property that are real estate.

The registration of inland waterway means of transport[244] shall comply with Article 25 (1) of the 2004 Law on Inland Waterway Traffic amended in 2014. The property is to meet the following conditions to be registered by a competent state agency as follows: 1) Having legal origin; 2) Meeting quality standards, technical safety and environmental protection in accordance with the law.

According to Article 29 of the 2006 Law on Vietnam Civil Aviation, the law stipulates those Vietnamese organizations and individuals with rights in aircraft specified in Article 28 (1) of the Law on Civil Aviation must register the rights according to the regulations of the Government. Rights in aircraft may be listed as follows: 1) Ownership of the aircraft; 2) Right to possess the aircraft by hire-purchase or lease for a term of six months or more; 3) Pledge or mortgage of aircraft; 4) Other rights by civil laws. The registration of aircraft is in accordance with Decree 68/2015[245] on registration of nationality and registration of rights to aircraft.

Registration of ships shall comply with the provisions of the 2015 Vietnam Maritime Code[246] and Decree 171/2016[247] on registration, deletion of registration and purchase, sale and building of ships. In particular, a ship is a specialized mobile floating vehicle operating at sea.

Regarding Article 71 (1) of the 2017 Law on Fisheries[248], fishing vessels with a maximum length of 06 meters or more must be registered in the national fishing vessel register and issued with the fishing vessel registration certificate as prescribed. Fishing vessels with the largest length of less than 06 meters shall be managed by the communal People's Committee for management. The registration of fishing vessels shall comply with the provisions of Circular 23/2018.[249]

According to Article 52 of the Law on Road Traffic of 2008[250], one of the conditions for motor vehicles to join in traffic is to be registered and attached the number plate issued by a competent state agency. Vehicle registration is done in accordance with Circular 58/2020 on vehicle registration.

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[244] Inland waterway means of transport are ships, boats and other floating structures, with or without engines, operating on inland waterways.

[245] Decree 68/2015/ND-CP was issued by the Government stipulating on registration ò nationality and rights towards aircraft on 18 August 2015.

[246] The 2015 Vietnam Maritime Code 95/2015/QH13 was issued by the National Assembly on 25th November 2015.

[247] Decree 171/2016/ND-CP was issued by the Government stipulating on registration, deregistration, purchase, sale and building of ships on December 27, 2016.

[248] Law on Fisheries 18/2017/QH14 was issued by the National Assembly on November 21, 2017.

[249] Circular 23/2018/TT-BNNPTNT issued by the Ministry of Agriculture and Rural Development on November 15, 2018. The Circular stipulates the registry of fishing vessels, the recognition of the fishing vessel registration establishment, and the maintenance of fishing vessels. ensure technical safety of fishing vessels, fishery surveillance ships, the registration of fishing ships and fisheries official ships, the deregistration of fishing vessels.

[250] The National Assembly passed Road Traffic Law 23/2008/QH12 on November 13, 2018. Road traffic rules, road traffic infrastructure, cars and road users, road transportation, and state control of road traffic are all covered by this law.

According to Article 30 (1) of the 2017 Railway Law,[251] one of the conditions for a railway vehicle to join in traffic is to have a railway vehicle registration certificate issued by a competent authority. Means of rail transport are registered under the provisions of the 2017 Law on Railways and Circular 21/2018.[252]

According to the 2001 Law on Cultural Heritage amended in 2009,[253] national treasures must be registered with the competent state agency for culture, sport and tourism. The State encourages organizations and individuals to register relics and antiques owned by them with a competent state agency in charge of culture, sports and tourism. The registration is carried out in accordance with the consolidated document of Circular 3203 dated September 3, 2013, guiding the order and procedures for registration of relics, antiques and national treasures.

According to Article 4 (9) of The 2017 Law on management and use of weapons, explosives and combat gears,[254] the management and use of weapons, explosives, supporting tools, weapons, explosives, explosives precursors and supporting tools must be tested, verified, evaluated, posted, and signed in accordance with the law on product and goods quality control before being allowed to be manufactured, traded or used in Vietnam.[255]

The disposition, possession and use of property which is the main source of income for the family require the unity of husband and wife in order not to affect the common life of the family. However, it is not easy to determine whether common assets are the main source of income for the family if the couple has many valuable common assets; especially those that are valuable items of property not requiring registration.

What if the husband and wife have a habit of buying gold to accumulate gold and they also own some other valuable real estate? According to the wording at Article 35 (2) (c) of the 2014 Law on Marriage and Family, this gold is not currently the main source of income for the family, because the purpose of buying gold is to accumulate and real estate may also be purchased from this gold of great value. Citing Article 13 of Decree 126/2014, husband and wife can reach an agreement on deciding about the gold, whereby one party can decide about the amount of gold but he or she should seek the consent of the other party to meet the family's essential needs. If such disposition does not meet the family's needs and is not agreed upon by the other party, may the person who is not participating in

[251] The National Assembly passed Railway Law 06/2017/QH14 on June 16, 2017. This law governs infrastructure rail planning, investment, construction, protection, management, maintenance, and development.
[252] Circular 21/2018/TT-BGTVT issued by the Ministry of Transport on April 27, 2018. This Circular regulates the registration of railway vehicles, and the movement of railway vehicles within Special case.
[253] Law on Cultural Heritage 28/2001/QH10 was issued by the National Assembly of Vietnam on 29th June, 2001 and this law was amended in 2009 on 18th June, 2009.
[254] Law on management and use of weapons, explosives and combat gears 14/2017/QH14 was issued by the National Assembly on 20th June 2017.
[255] Huong, Nguyen, "Property Required to Register" accessed 14 October 2021.

establishing the transaction request nullification of the transaction? This cannot be done according to the provisions of Article 32 of the 2014 Law on Marriage and Family and Article 133 of the 2015 Civil Code to protect a bona fide third person relating to bank accounts, securities accounts and other immovables in the case of which it is not required by law to register ownership or use rights. In addition, a party that does not participate in the establishment of a transaction can only request to declare a transaction invalid when a third party fails to establish and conduct transactions with a spouse for a bank account or account securities and other real estate that do not require ownership registration as prescribed. Specifically, Article 8 of Decree 126/2014 stipulates that *"third parties not acting in good faith when establishing and making transactions with a spouse related to a bank account, securities account and other movable assets for which ownership registration is not required by law. A third party that establishes and makes transactions with a spouse related to a bank account, securities account or other movable assets for which ownership registration is not required by law shall be regarded as not acting in good faith"* in the following cases:

"1. He/she/it has been provided with information by a spouse in accordance with Article 16 of this Decree but still establishes and makes transactions against such information.

2. The husband and wife have made public in accordance with relevant laws their agreement on possession, use and disposition of property and a third party has known or must know this agreement but still establishes and makes transactions against such agreement."

Thus, the disposition of assets in Article 35 (2) of the 2014 Law on Marriage and Family requires a clear written agreement because these are often assets of great value to the family.[256] In the case where the husband or wife disposes of the common property in violation of the provisions of Article 35 (2) of the 2014 Law on Marriage and Family, the other party has the right to request the Court to declare the transaction invalid and settle the legal consequences of invalid transactions.

3.2.4.2 Possession, use and disposition of separate property

Article 44 (1) of the 2014 Law on Marriage and Family stipulates that "a spouse has the right to possess, use and dispose of his/her separate property, and to merge or refuse to merge separate property into common property."

Article 44 (2) stipulates that "*When a spouse cannot manage his/her separate property himself/herself and does not authorize another person to manage it, the other spouse has the right to manage such property. The property manager must ensure benefits for the*

[256] La, Thi Tuyen, *Chế độ tài sản của vợ chồng theo Luật hôn nhân và gia đình Việt Nam 2014* 19-20.

property owner." Regarding the management of the wife's private property with respect to her husband and vice versa, the wife or husband must preserve that property as their own. If damage or loss occurs without good faith, they must be obliged to compensate for it at the request of the other party. In cases where one party arbitrarily disposes of the spouse's private property when participating in civil transactions, the other party has the right to request the Court to declare the transaction invalid.

In terms of the right to merge or refuse to merge separate property into common property, this provision contributes to solidarity and connection between spouses. However, it is very hard to calculate exactly how much the party's private property contributes to the common property if they have a lifelong marriage. For instance, in order to meet the life needs of the wife's family during the marriage period, the husband uses his own property for the common good without thinking about his own benefits from the use of that property. They often do not pay attention to finding evidence to support how much private property they have contributed to the common property. Therefore, during the marriage period, most of the private property of a spouse, used for the family's essential needs, disappears.

Separate property of a spouse will be under his or her own ownership, including the right to possess, use and dispose of that property without anyone having the right to prohibit it. Property will be under the separate management of each spouse; they have the right to import or not to merge that property into the common property. In addition, they also have separate obligations relating to the property of each person to be paid from their own property, such as paying debts arising from their own property, compensating for damage when the spouse is the cause, inheritance management.[257]

Article 44 (4) of the 2014 Law on Marriage and Family stipulates that "In cases where a husband and wife have their own property and the income and income from that property is the family's only source of living, this property must have the consent of the husband and wife." It can be seen that this is a case of restricting the spouse's right to self-determination over his or her own property. This provision is perfectly reasonable because the disposition of private property, in this case, will have an important impact on the family's life. This provision is based on the fine traditions of the Vietnamese family, contributing to stabilizing the life of husband and wife, and always having love, care and mutual support between family members.

[257] Tran, Thi Thuy Lien, *Luật hôn nhân và gia đình năm 2000 - Thành tựu, vướng mắc và hướng hoàn thiện* 61-65.

3.2.5 Responsibility stemming from exercising the right of disposition

Obligations refer to debts or liabilities of the spouses toward a third party that can be either a common obligation or a separate obligation of a husband or wife. On that basis, Article 37 and Article 45 of the 2014 Law on Marriage and Family indicate which obligations are identified as common and separate obligations of a spouse respectively.

3.2.5.1 Common property obligations of husband and wife

3.2.5.1.1 Bases for determining common property obligations of husband and wife

Article 37 of the 2014 Law on Marriage and Family provides for the common property obligations of husband and wife, including:

"1. Obligations arising from transactions established under their agreement, obligations to pay damages under their joint liability as prescribed by law;

2. Obligations performed by a spouse in order to meet the family's essential needs;

3. Obligations arising from the possession, use and disposition of common property;

4. Obligations arising from the use of the separate property for maintaining and developing common property or for generating major incomes for the family;

5. Obligations to pay damages caused by their children as prescribed by the Civil Code;

6. Other obligations as prescribed by relevant laws."

First, common obligations include transactions established by two people who mutually agree to these transactions. In real life, due to some circumstances or certain reasons, creating different family problems, husband and wife must agree together to establish and perform civil and commercial transactions to ensure the common interests of the family. However, when husband and wife share the same will and agree to perform civil transactions together to meet the common needs of the family, they must share common obligations for those transactions because of their voluntary agreement. By doing so, the interests of both husband and wife are guaranteed, and the legitimate rights and interests of a third party participating in the transaction with the couple are also protected.

For example, due to the need to mobilize capital for business, the husband and wife borrowed from the lender the amount of 30,000,000 VND, with an interest rate of 1% / month, and a loan term of 18 months. Both the husband and wife signed the loan form, when they borrowed the money. If the debt is due and the couple has not yet paid the principal and interest, the creditor has the right to sue to reclaim the above amount. Once

both husband and wife establish transactions with the creditor by signing a loan note, they both have a common obligation to pay the principal and interest to the creditor.

Property used to secure civil transactions established by the spouses' mutual agreement is not only common property, but it can also be private property. In case where the common property is not sufficient to guarantee the transaction, the third party participating in the transaction with husband and wife has the right to distrain the spouse's separate property without knowing who has more assets. However, husband and wife can ask a third party to distrain common property first, if that is not enough, the third party will continue to distrain their personal property.

Second, common obligations include liability to compensate for damage that is subject to the law. According to the provisions of the 2015 Civil Code, if any person that infringes upon the life, health, honour, dignity, prestige, property, rights and other legitimate interests of other persons causes damage, they must compensate for it.[258] This means that when husband and wife jointly commit acts that infringe upon the health, life, honour, dignity, prestige and other legitimate rights and interests of others, causing damage, they must both shoulder compensation for damage caused by their acts, including damage caused to health, life, honour, dignity, prestige and other legitimate rights and interests of other persons, offense and mental loss. Wife and husband's compensation must be guaranteed by their common property, the wife's private property and the husband's private property. If husband and wife fail to perform or fully perform their obligations to compensate for damage, the victim has the right to initiate a lawsuit requesting husband and wife to fulfil their obligations to compensate for damage according to the provisions of law.

Third, common obligations include the obligations performed by a husband or wife to meet the essential needs of the family. During the marriage period, to meet the physical and spiritual needs of family members, a spouse must formulate and perform a variety of civil contracts with many types of subjects. It can be seen that, in the actual married life, no married couple can fully remember how many civil contracts they have established and performed for the common benefit of the family. Although the transaction is only entered into by one spouse with a third party, but in order to meet the family's essential needs, it is still recognized as being in accordance with the law. On performance of such a contract, it cannot be requested that such contract be considered invalid due to a lack of consent. The wife, for example, uses the common money for daily business, pays school fees for children, medical treatment, so for such transactions she does not need to consult the husband because their purpose is to meet the essential needs of the family.

Fourth, common obligations may arise from the possession, use and disposition of the common property of the spouses. The couple as co-owners have equal rights and

[258] Article 584 of the 2015 Civil Code.

obligations in exercising ownership rights with respect to common property, so both have the right to possess, use and dispose of such common property. That is, both husband and wife have the right to use common property to ensure the performance of civil transactions that they establish. However, this does not mean that the couple could freely possess, use, and dispose of common property to secure the performance of civil transactions for any purpose.

Fifth, common obligations cover obligations due to the use of private property to maintain and develop the common property or to generate the main source of family income.

When a husband or wife establishes and performs civil transactions on their own with their own property but aims to maintain and develop the common property or to create the main source of income of the family, they have a common obligation in respect of such transactions. In case a transaction is established by a husband or wife with his/her own property in order to maintain the common property, the husband and wife must have joint obligations under the transaction. The performance of a common obligation must also be secured by the common property of husband and wife, private property of the wife and the husband's own property. If a husband or wife establishes a transaction but fails to fulfil the obligations in the transaction, the obligee has the right to distrain the above assets. It can be seen that the maintenance of common property can be seen as a kind of transaction to meet the essential needs of the family. However, not all common property benefits the family, but if the maintenance of the common property is necessary for the property to exist, it is still defined as a common obligation.

On the contrary, in cases where a spouse uses his / her own property to develop the common property, a common obligation of the husband or wife arises. However, property used to secure the performance of obligations includes only the common property of husband and wife and private property of the person who initiates the transaction. The development of the common wealth in this case does not have a decisive effect in maintaining the profitability of an asset, but mainly increases the value of the asset or satisfies the desired use of the asset by the person who established the transaction. Unlike a transaction aimed at maintaining a common block of assets, a transaction to upgrade the value of an asset requires more financial resources, so it can become a significant transaction.[259]

Sixthly, the common obligation may be compensation for damage caused by the spouses' children according to the 2015 Civil Code. When children cause damage, parents are obliged by the law to pay compensation, because parents must care for, educate and control their children.

[259] Dien, Nguyen Ngoc, *Bình Luận Khoa Học Luật Hôn Nhân* 45-60.

The issue of compensation for damage caused by the children is specified in Article 74 of the 2014 Law on Marriage and Family as follow: Parents must compensate for damages caused by their minor children or adult children who have lost their civil act capacity in accordance with the provisions of the 2015 Civil Code.

At the same time, the determination of the common responsibility of parents to compensate for the damage caused by their children is based on the provisions on the individual's capacity to pay compensation in Article 586 of the 2015 Civil Code and Regulations on compensation for damage caused by persons under fifteen years of age, persons losing civil act capacity and under the direct supervision of schools, hospitals and other organizations in Article 599 of the 2015 Civil Code.[260] The cases in which parents are obliged to compensate for the damage caused by their children are determined as follows:

First, when a child over fifteen but under eighteen years of age causes damage, he/she must bear liability with his/her own property in case of having private property. Once the children's own property is not enough, the parents are obliged to compensate for the deficit with their own property.

Second, in cases where a child under the age of fifteen causes damage and has a parent, the parents are obliged to compensate for all the damage using their property. Children under fifteen years old are incapable of compensating for damage, so children themselves are not responsible for compensation when causing damage. If the parent's property is insufficient to compensate for the damage and the minor child under the age of fifteen causing damage has his/her own property, such property shall compensate for the deficit.

Third, in case the minor child or the child who has lost civil act capacity causes damage and is under the supervision of an individual or guardianship organization, that individual or organization may use the ward's property to compensate for the damage. If the ward has no property or not enough property to compensate for the damage, the guardian must compensate for it with his /her property. If an individual or a guardian can prove that he or she was not at fault under the guardianship, he/she shall not have to use his/her property to compensate for the damage.

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[260] Article 599 of the 2015 Civil Code about *"Compensation for damage caused by persons under fifteen years of age or persons having lost capacity for civil acts and under direct supervision of school, hospital or other organization*
1. Where a person under fifteen years of age causes damage during school hours, the school must compensate for the damage.
2. If a legally incapacitated person causes damage to another person while under the direct supervision of a hospital or another juridical person, such hospital or the juridical person must compensate for the damage.
3. If, in the cases provided in paragraph 1 and 2 of this Article, the school, hospital or another juridical person proves that it was not at fault with respect to supervision, the parents or guardian of the person under fifteen years of age or of the legally incapacitated person must compensate."

However, if the damage is caused by a child under the age of fifteen or someone with no civil act capacity while being directly under the supervision of schools, hospitals or other organizations, these facilities are at fault in their supervision of juveniles, therefore they must compensate for the damage. Mistakes here often include management errors such as lack of responsibility, neglect of duties. If schools, hospitals or other organizations can prove that they were not at fault with regard to management, the parents and guardians of persons less than fifteen years of age or of persons with no civil act capacity must compensate for the damage.[261]

3.2.5.1.2 Performance of common property obligations of husband and wife

According to Articles 288 and 230 of the 2015 Civil Code, husband and wife can have joint obligations in the form of joint or partial obligations. In principle, to ensure the legitimate interests of the creditors, if the husband and wife have no other agreement, a joint obligation will arise between them.[262] A joint obligation is an obligation that must be performed by more than one person and the obligee may require any of the obligors to perform the entire obligation. Once a person has performed all of his joint obligations, he/she has the right to request other joint obligors to perform their share of the joint obligations towards him/her. Therefore, determining the property of the spouses that will be used to perform the common obligation is an issue that needs to be considered.[263] Of course, the common property of husband and wife will take the lead in respect of this kind of obligation, because there is nothing more reasonable than to use common property to pay for the couple's common obligations. However, if the common property of husband and wife is not enough to perform the entire joint obligation, does the creditor have the right to continue to request distraint of the spouse's private property for the performance of the joint obligation? If the obligation has not been fully fulfilled or has not been terminated according to the grounds enumerated in Article 372 of the 2015 Civil Code, the obligor must continue to perform its obligations. The creditor has the right to continue to distrain the wife's and the husband's own property until the joint obligation is satisfied. Regarding a joint obligation, the creditor may request distraint of any of the wife's own property and the husband's own property in no fixed order and as long as the obligation is promptly asserted. If only part of the spouses' private property is used for the performance of the joint obligation, this person may request the other party to perform his or her part of the repayment obligation under the joint obligation.

For example, Judgment No. 27/2018 April 5, 2018, of the People's Court of Tam Binh District, Vinh Long Province resolves disputes on divorce, child-rearing, child support and

[261] Article 599 of the 2015 Civil Code.
[262] Dien, Nguyen Ngoc, *Bình Luận Khoa Học Luật Hôn Nhân* 45-60.
[263] La, Thi Tuyen, *Chế độ tài sản của vợ chồng theo Luật hôn nhân và gia đình Việt Nam 2014* 19-20.

general obligations relating to the property of husband and wife. Husband and wife held the wedding ceremony and registered their marriage on April 2, 2015, at the Commune People's Committee. This was a marriage where due to matchmaking the spouses had not had time to get to know each other, so in life, the couple always quarrelled, which led to loss of happiness. Realizing that the marriage was irreversible, the wife filed for divorce. Regarding their general debt, the couple borrowed from the first creditor 03 gold 24K, the second creditor's loan was 24K gold and the amount was 5,600,000 VND. The wife asked her husband to divide the debt in half, each of them being responsible for repaying 1.5 gold 24K to the first creditor and returning 24K gold and the amount of 2,800,000 VND to the second creditor. The husband and wife agreed to divide the common debt in half, so based on Article 37 (1) of the 2014 Law on Marriage and Family, the Court ordered husband and wife to repay the loan according to their agreement. The above judgment shows that the couple has agreed on the common debt and reached an agreement that each person will perform half of the common obligation to the creditors. They can use common property to fulfil common property obligations. If they divorce and divide the common property upon divorce, after the division the separate property will be used for the performance of the common obligation concerning which they have agreed to pay half each.[264]

3.2.5.2 Separate property obligations of husband and wife

3.2.5.2.1 Types of separate property obligations of husband and wife

According to Article 45 of the Law on Marriage and Family, the separate obligations of husband and wife include the following specific obligations:

"1. The obligations he/she has before marriage.

2. The obligations arising from the possession, use and disposition of his/her separate property, other than the obligations arising from the preservation, maintenance and repair of his/her separate property under Article 44 (4) or Article 37 (4) of this Law;

3. The obligations arising from transactions established and made by himself/herself not for meeting the family's needs.

4. The obligations arising from his/her illegal acts."

First, the separate obligations of husband and wife include the obligations that arise before marriage. Regarding the obligations arising before marriage as the separate obligations of husband and wife is an appropriate provision because these are obligations that husband and wife independently establish when they are single.

[264] Verdict 27/2018/HNGĐ - ST April 5, 2018 of the People's Court of Tam Binh District.

The husband, for instance, establishes a loan contract with the creditor before getting married. Therefore, the obligation to pay the loan is defined as the husband's own obligation to the creditor. A separate obligation basically will be performed from the private property of the wife or husband who directly establishes the obligation. If a husband or wife uses the common property to perform their own obligations and the other person does not object, it is considered that an agreement between husband and wife has been reached on the use of the common property.

Second, Separate obligations are obligations related to the private property of husband and wife, except for Article 37 (4) of the Law on Marriage and Family. For example, the wife has a private house with a floor set up before getting married. During the marriage period, the wife decided to build an additional floor for this private house for business purposes and increase the value of her own property. Thus, the obligation to pay for the construction of a private house is defined as the wife's own obligation.

Third, the transaction established by a spouse, but not for the essential needs of the family, is considered a separate obligation of one party. It is necessary to clearly distinguish between common property obligations of husband and wife specified in Article 37 (2) and separate property obligations of husband and wife specified in Article 45 (3) of the 2014 Law on Marriage and Family. Both of the arising obligations are established and performed by a husband or wife only, but the important factor in determining whether it is the common obligation, or the separate obligation of the husband and wife is the essential needs of the family. Therefore, it can be seen that civil legal transactions performed by a spouse to meet the family's essential needs will generate a common property obligation for the spouses. Conversely, if civil legal transactions are performed by a spouse but are not intended to meet the essential needs of the family but, possibly, rather to gain personal benefit, then such obligation is considered an obligation to be satisfied from the separate property of husband and wife.

For example, the wife establishes a loan contract with the creditor during the marriage period to use it for the wife's gambling purposes, but the husband is not involved in establishing the loan transaction. Therefore, the obligation to pay the loan is the sole obligation of the wife. Here, the law does not specify whether the husband is aware or not of the loan but focuses on considering whether the loan meets the couple’s essential needs.

Fourth, the obligations of one party arising from illegal acts are the separate obligations of husband and wife. It is completely appropriate that, if either a husband or a wife commits a violation of law and their obligation derives from this act, it is defined as their own obligation. Accordingly, they must be responsible for their own misconduct. If the husband, for example, commits adultery and is administratively sanctioned for adultery, this obligation to pay the fine is, of course, defined as the husband's own obligation.

3.2.5.2.2 Responsibility for performing separate property obligations

Article 44 (3) of the 2014 Law on Marriage and Family stipulates "a separate property obligation of each person to be paid from his/her own property." This proves that in respect of the separate property obligations of the husband and wife, they will use their own property to perform. If the separate property is not enough for the performance of the obligation, the common property will be divided to perform the obligations of one party in the marriage relationship. Accordingly, if husband and wife have no agreement on the division of common property for the performance of separate civil obligations, the common property is divided equally between the two parties. Half of the shared property will be used to pay for the separate obligations of the husband and wife.

For example, the husband and wife get married and register their marriage at the Commune People's Committee. The wife is obliged to pay her private debt under a legally binding judgment, so the District Civil Judgment Execution Department has issued an execution against the property, a kiosk belonging to the market house, to enforce the judgment. After that, the husband filed a lawsuit asking for the division of the rental value of the kiosk property mentioned above during the marriage period. The husband asked to be divided in kind and agreed to hand over the rental value to his wife. Accordingly, the couple has rented a business kiosk of Trading Joint Stock Company B at the market with an area of 15m2, for a period of 15 years, with a rental price of 250,000,000VND. Although under the lease the wife is the only tenant, the leased property is the common property of husband and wife. From the time of renting up to now, the husband is the one who directly manages and uses the kiosks for trade. According to the minutes of the Valuation Council, the remaining rental value of the kiosks is 191,655,000 VND. Accordingly, the trial panel was resolved in the direction of ordering the husband to give his wife the amount of 95,827,500 VND (equivalent to 1/2 of the value of the kiosk rental) and the husband was allowed to continue using the kiosk to do business based on Article 33 of the 2014 Law on Marriage and Family, Article 213 of the 2015 Civil Code.[265] Thus, the above example shows that the separate obligations of a spouse need to be fulfilled from their separate property. If the separate property of a husband or wife is not enough to pay the wife or husband's separate obligations, they can divide the common property during the marriage period to perform the obligations. This ensures that both the interests of the private creditor and the other party's ownership rights in the common property are not infringed upon when one spouse has separate obligations to fulfil.

Thus, in property relations, the 2014 Law on marriage and family stipulates two property regimes for men and women to choose from, including the property regime

[265] Verdict 64/2019/HN - ST dated January 31, 2019 of the People's Court of Cho Gao District.

according to an agreement and the property regime according to the law. The statutory property regime will automatically apply if the husband and wife do not choose the property regime as agreed. In addition, the determination of whether husband and wife have common or separate obligations under a transaction established by one spouse is mainly based on whether such transaction meets the essential needs of the family or not. Accordingly, if the transaction is established by a husband or wife, but for the purpose of meeting the essential needs of the family, it is defined as a common obligation of husband and wife. Conversely, if a transaction is established by one spouse and is not intended to satisfy the essential needs of the family, such obligation is defined as the sole obligation of the party initiating the transaction.

3.2.6. Comparative Law: European countries and Hungary in the aspect of matrimonial property law and the statutory property regime

3.2.6.1 European matrimonial property law

The policy of free movement in Europe leads to an increase in the number of couples coming from different member states of Europe marrying or registering a partnership with each other. Therefore, it is necessary to have uniform regulations for general application to avoid legal conflicts between member states in the settlement of marriage registration and cohabitation between citizens. Specifically for the resolution of conflicts related to the matrimonial property regime, "a new European regulation was adopted on 24 June 2016 on the matrimonial property regimes of couples with a foreign element, following the enhanced cooperation mechanism." These marital property regimes of international couples shall be applied in 18 European Member States, which are as follows: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain and Sweden.[266] The "regulation came into force on 28 July 2016 and will become applicable in the Member States participating in the enhanced cooperation from 29 January 2019." The other European Member States, including Hungary, Denmark, Poland, Slovakia, Latvia, Ireland, Lithuania, Romania and Estonia: do not apply EU rules on property regimes for international couples". They may decide to join at any time and national law applies in these countries to handle the matrimonial property regime with a foreign element.

The main aim of the European Matrimonial Property Convention is "to create EU rules on property regimes making it easier for international couples to manage their property daily, and to divide it in case of separation or the death of one of the spouses/partners". Regarding Article 27 of the Convention, the law applicable to the

[266] European Justice, "European E-Justice Portal - Matrimonial Property Regimes" accessed 4 October 2021.

matrimonial property regime governs these relevant spheres as follows: “1/ The “classification of the spouses’ property into categories and the transfer of property from one category to the other; the responsibility of the spouses for liabilities and debts of the other spouse”; 2/ “The powers, rights and obligations of the spouses with respect to property”; 3/ “The dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property”; 4/ “The effects of the matrimonial property regime between spouses and with respect to third parties”; 5/ “The validity regarding the substance of the matrimonial property agreement.”

The term “international couples” can refer to marriages and registered partnerships between European citizens or non-European citizens who live in Europe and have different nationalities or live in a European country that is not their country of origin, or do not live in Europe but have assets in a European country. “The Convention set rules which determine the EU country court competent to deal with a case on the couple's property regimes.” The law applicable to the case and the rules for the recognition and enforcement in an EU country of decisions given in another EU country are among other categories that are mentioned in the Convention. However, there are issues that are excluded from the European Matrimonial Property Convention as follows: “the legal rights of spouses or partners; the existence, validity or recognition of a marriage or partnership; maintenance obligations between spouses or partners after a separation or divorce; the succession to the estate of the deceased spouse or partner.”

As regards the European Court’s jurisdiction on matrimonial property regimes, “in case of the death of a spouse/partner, the EU country court competent to deal with the inheritance of the deceasing spouse/partner will also deal with the couple's property regime matters.” Similarly, “the EU country court competent to deal with divorce/legal separation or the dissolution of the registered partnership will deal with the couple's property regime matters.” “In other cases, the competent court to deal with the couple's property regimes will be the court in the EU country” as follows: “of the current usual residence of both spouses/partners; or failing that the last usual residence of both spouses/partners; or failing that the usual residence of the respondent; or failing that the common nationality of spouses/partners; or failing that under whose law the registered partnership was registered.” “Examples: A bi-national homosexual couple (a Belgian and a Frenchman) concluded their marriage in Paris. Having lived in Vienna since their marriage, they preferred to submit any matters relating to their matrimonial property regime to the French courts (place of the marriage concluded). The same couple will also have the possibility to submit any matter relating to their matrimonial property regime to French law and the French courts /or to Austrian law and the Austrian courts (parallel between the applicable law and the jurisdiction).”[267]

[267] Notaries of Europe, ‘Matrimonial Property Property Regimes' 30-67.

In terms of choice of court agreement and choice of law agreement, excluding "inheritance, or divorce, legal separation or dissolution of the registered partnership, a spouse or registered partner can agree with his/her spouse or partner to make a choice of court agreement which requires a strict formality of being in writing, signed and dated by the couple." In terms of the choice of court agreement, the couple can choose in unison the European courts whose law is applicable to the couple's property regime: the courts of the EU country where the spouse's marriage was concluded or where the partnership is registered; or if the marriage or registered partnership cannot be recognised for the purposes of property regime proceedings, the spouse/partner may submit his/her case to a court in any other EU country where a connecting factor exists. Similarly, the international couple can make a compromise about their choice of law agreement by adhering to a certain degree of formality as opposed to the choice of court agreement which can be both drawn up before, on entering or during the marriage or registered partnership. As far as the spouses or partners can agree, the choice of law may be based on the following: "1/ The country of residence of both or either of the spouses/partners; or 2/ The country of nationality of either spouse or partner; or 3/ The country where the partnership is registered, if the couple live in a registered partnership."

Regarding the applicable law in case there is no choice of law agreement, if the couple have not made a formal choice of law agreement, the law of the following country will be applied to all the assets of the couple regardless of their location: the country: "of the spouses' first common habitual residence following marriage"; the country "of the spouses common nationality at the time of the marriage;" the country "with which the spouses jointly have the closest connection at the time of the marriage, taking into account all the circumstances;" the country "where your partnership is registered, if you are in a registered partnership."

For an example, "Spanish national Mr Thomas has lived in France with his wife, who is German, since their marriage in January 2020. French law will be applicable to their matrimonial property regime (first common habitual residence just after marriage). Regarding another example, the couple, who both have Italian nationality, lived in Argentina just after their marriage in February 2020 without signing a matrimonial property agreement. They move to Italy in 2021 where, a few months later, they decide to buy a property. The Italian notary will need to consider Argentinian law (first common habitual residence shortly after their marriage), which is applicable to their matrimonial property regime, when drafting the purchase document for the property. However, the applicable law will be based on their common nationality at the time of marriage if the couple's habitual residence is in different countries. This rule applies, for example, in the case of a couple who have Swedish nationality and marry in January 2019. The wife continues to live in Germany, whereas the husband lives and works in Malta. Swedish law

will be applicable because the common nationality at the time of their marriage is Swedish. An example for the country of closest connection at the time of the couple's marriage can be seen in the case where the spouses, who are Dutch, establish their common habitual residence immediately after their marriage in Austria. Two years later, they move to Germany where they live for 15 years. They consider that their matrimonial property regime is that of full community of property provided for by Dutch law. When the husband dies, the wife discovers that the Austrian regime of joint ownership of acquired property applies. She asks the competent court for Dutch law to be the law applicable to their matrimonial property regime.

With regard to "recognition and enforcement of court decisions, court decisions on property matters given in one EU country are recognised in other EU countries without any special procedure." However, it requires a declaration of enforceability because the enforcement does not automatically occur. The enforcement must be compatible with public policy and must not contradict any previous court decision on the same matter, if these criteria are not met, the court may refuse to recognise the decision.[268]

Compared to the European regulation on matrimonial property, regulations on jurisdiction on marital relationships with foreign elements in Vietnam are similar and determine jurisdiction and applicable law mainly based on the common habitual residence and nationality of the parties. From the point of view of Vietnamese law, determining the competence to settle a marriage relationship involving foreign elements is divided into two cases:

Firstly, if Vietnam and the country related to the marriage relationship have signed an international treaty (agreement on mutual legal assistance) on the issue of determination of jurisdiction, such international treaty shall be applied to resolve the issue and determine jurisdiction. The determination of the jurisdiction to settle marriage relations with foreign elements between Vietnam and other countries is very clearly defined. For example, the Mutual Legal Assistance Agreement between Vietnam and the Republic of Cuba stipulates: "1. In divorce cases, the competent authority is the authority of the Contracting State where the couple filed for divorce. If husband and wife reside together in the territory of any Contracting State, the authorities of that Contracting State shall also have jurisdiction. If the wife resides in one Contracting State and the husband resides in the other Contracting State, the authorities of the two Contracting States shall have jurisdiction. The conditions for divorce shall be applied according to the laws of the Contracting State of which the spouses are nationals. When applying for divorce, if the wife is a citizen of one Contracting State and the husband is a citizen of the other Contracting State and the same person resides in the territory of one Contracting State or

[268] An official website of the European Union, How to Manage Your Property Regime as an International Couple - Your Europe accessed 12 October 2021.

the two persons have different domiciles in the territory of each Contracting State, the authorities of both Contracting States shall have jurisdiction. The authority of the Contracting State that receives the application for divorce shall deal with it according to the laws of that country. For example, paragraph 1 and 2 of the Agreement on mutual legal assistance between Vietnam and Ukraine stipulate: "1. The divorce is under the jurisdiction of the judicial authority and is subject to the law of the contracting party of which the husband and wife are both citizens at the time of filing the divorce petition. If both spouses have their permanent residence in the territory of the other Contracting Party, the judicial authority of that Contracting Party shall also have jurisdiction over the divorce. 2 If, at the time of filing for divorce, the husband is a citizen of one Contracting Party, and the wife is a citizen of the other Contracting Party, and the husband has a permanent residence in the territory of this Contracting Party, and the wife is a resident in the territory of the other Contracting Party, the judicial authorities of both Contracting Parties shall have jurisdiction over the divorce. In that case, the settlement agency will apply the law of its own country." In general, to determine the jurisdiction to settle divorces involving foreign elements, mutual legal assistance agreements between Vietnam and other countries apply the law of residence and the principle of nationality law. The jurisdiction to settle divorce also applies to matrimonial property with foreign elements.[269]

Secondly, if Vietnam and the country involved in the divorce case have not yet signed an international treaty (mutual legal assistance agreement) on the issue of determining jurisdiction, then we will apply Vietnamese law (the 2015 Civil Procedure Code) to determine jurisdiction. The 2015 Civil Procedure Code[270] divides divorce cases with foreign elements within the jurisdiction of Vietnamese courts after determining the jurisdiction of courts at all levels into two groups of cases: The general jurisdiction of Vietnamese Courts is listed in Article 469[271] and the group of cases under the exclusive jurisdiction of the Vietnamese Courts is listed in Article 470.

3.2.6.2 Hungarian matrimonial property law

Although Hungary does not participate in the European Matrimonial Property Convention, this country still has a private international law to deal with marriage relations with foreign elements, and matrimonial property relations with a foreign element. Hungary has signed protocols which are also relevant for the determination of the applicable law with Albania, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, Cuba, the Czech Republic, Kosovo, Macedonia, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Slovenia

[269] Phan Trung Hien et al., Giáo Trình Luật Hôn Nhân và Gia Đình 210.
[270] Civil Procedure Code No. 92/2015/QH13 was issued by the 13th Vietnamese National Assembly on November 25, 2015.
[271] Article 469 (1) (d) of The 2015 Civil Procedure Code.

and Vietnam. Pursuant to Article 24 and 27 of Act XXVIII of 2017 on Hungarian Private International Law, if the couple have a common nationality, the law of the country of which they have a common nationality will apply. The law of the country of the couple's joint habitual residence will apply if they have different nationalities. If the spouses have more than one common nationality, the common nationality with which the spouses have the closest connection having regard to the entire range of circumstances shall apply. If at the time of evaluation, the nationality of the spouses is different, the law of the State where the joint habitual residence of the spouses is located, or in the absence thereof, the State where the last joint habitual residence of the spouses was located shall apply. If the spouses had no joint habitual residence, the law of the State of the acting court shall be applicable. In contrast, according to French law, a divorce involving foreign elements is resolved according to the law of the common place of residence of the couple. If the spouses do not have a common place of residence, the divorce will be resolved according to the law of the country of both spouses' nationality.[272]

Similarly, the couple can agree to sign choice of law agreement in Hungary compared to The European Matrimonial Property Convention. It means that the spouses may agree to designate the law applicable to their property regime provided such as: the law of any State of which either party is a national at the time the agreement was reached; or the law of the State of the habitual residence of either party at the time the agreement was reached; or the law of the State where the acting court is located.

In terms of jurisdiction over the personal and property relations of spouses with foreign elements, Hungarian courts shall have jurisdiction over such relations if the defendant spouse's habitual residence is in Hungary; or the spouses' last common habitual residence was in Hungary, provided that the habitual residence of either of the spouses is still in Hungary at the time of filing for action; or both spouses are Hungarian citizens. The Hungarian court has jurisdiction over proceedings relating to matrimonial property rights if the specific property to which the proceedings pertain is situated in Hungary. With respect to Articles 102 and 103 of Act XXVIII of 2017 on Private International Law, Hungarian courts shall have jurisdiction in proceedings concerning the legal effects of registered partnerships in the following cases: if it was established in Hungary, or at least one of the registered partners is a Hungarian citizen. As regards the sphere of succession, if a Hungarian court has jurisdiction, the scope of such jurisdiction shall also cover questions of law in matrimonial property rights arising from succession. [273]

As far as Vietnamese law is concerned, the law of the nationality of the parties, the law of the place of residence and the law of the court may be applied in order to determine the law applicable to a marriage relationship involving a foreign element. In the view of

[272] Giang, Le Thi Nam, *Tư Pháp Quốc Tế* 157.
[273] An official website of the European Union, 'Couples in Hungary' accessed 4 October 2021.

Vietnam, in case there is a legal assistance agreement between Vietnam and other countries, the mutual legal assistance agreement shall be applied to determine the law applicable to divorce involving foreign elements. As regards mutual legal assistance agreements to which Vietnam is a contracting party, the common nationality law is applied to determine the applicable law, if both spouses have the same nationality. The law of the common habitual residence shall be applied to determine the applicable law, if the spouses are of different nationalities but have the same habitual residence. The system of court law is applied to determine the applicable law if the spouses are not of the same nationality and, at the time of filing the divorce petition, the spouses do not reside together in the same State. For example, Article 26 of the Agreement on mutual legal assistance between Vietnam and Poland stipulates: *"1. The divorce must comply with the laws of the Contracting State of which the spouses are nationals at the time of filing the divorce petition. 2. If at the time of filing the divorce petition, the spouses are not citizens of the same Contracting State, the law to be followed shall be the law of the Contracting State in which they have a common residence or have domiciled together for the last time. together. If they do not have a common place of habitual residence in the territory of a Contracting State, then according to the law of the Contracting State there is a court to deal with the divorce."*

If, at the time of divorce, the wife is a citizen of one Contracting State, the husband is a citizen of the other Contracting State and both of them have a permanent residence in the territory of a Contracting State, or one is a permanent resident in the territory of one Contracting State and the other is a permanent resident in the territory of the other Contracting State, the courts of both Contracting States shall have jurisdiction. The accepting court will apply its own law. For example, Article 33 of the Agreement on mutual legal assistance between Vietnam and Hungary provides that *"If the spouses are both nationals of one Contracting State and at the time of the divorce both reside in the territory of the other Contracting State, the divorce shall be settled according to the laws of the country of which they are nationals, the courts of both Contracting countries have jurisdiction over divorces. The signing of the Mutual Legal Assistance Agreement between Vietnam and Hungary proves that the close relationship and marriage and family relations arise in practice between the two countries."*

In the absence of an international treaty between Vietnam and other countries, Vietnamese law (The 2014 Law on Marriage and Family) shall be applied to determine the applicable law. According to the provisions of Article 127 of the 2014 Law on Marriage and Family, the divorce between Vietnamese citizens and foreigners, between foreigners and others permanently residing in Vietnam shall be settled by the competent authorities of Vietnam according to the provisions of the Law on Marriage and Family of Vietnam. For example, Mr. David is a French citizen who wants to divorce Mrs. Adelia- a British

citizen. Both husband and wife are permanent residents in Vietnam. If the Vietnamese court accepts, the Vietnamese court will apply Vietnamese law to resolve their divorce. In case the party being a Vietnamese citizen does not permanently reside in Vietnam at the time of request for divorce, the divorce shall be settled according to the law of the country where the husband and wife reside together. If they do not have a common place of permanent residence, the settlement shall be in accordance with Vietnamese law. In the case of settlement of foreign immovable property, the divorce shall comply with the laws of the country where such immovable property is located. For another example, Mr. Hung is a Vietnamese citizen, who divorced Mrs. Hoa, who is also a Vietnamese citizen. However, the couple had a dispute over property, namely, a real estate in France, when they divorced. If the Vietnamese Court accepts it, the Vietnamese Court will apply French law to settle the dispute over the real estate.

Thus, the Law on Marriage and Family of Vietnam has applied the system of law of residence and the system of law of the place where the property is located to determine the applicable law to settle divorce with foreign elements. However, in order to solve the legal issues of divorce with foreign elements, Vietnamese law applies the system of the law of the court seised to determine the applicable law.[274] Requests for the recognition and enforcement of divorce judgments and decisions of foreign courts in Vietnam shall comply with the provisions of the Civil Procedure Code. In case a judgment or a decision of a court or other competent foreign agency is not required to be enforced in Vietnam or there is no written request for non-recognition in Vietnam, it shall be recorded by the Government.[275]

As far as the Hungarian statutory matrimonial property regime is concerned, all resources obtained together or independently by the couple during the conjugal community of property form part of the undivided common property of the spouses, apart from assets belonging to a spouse's personal property. Benefits from personal property also belong to the couple's joint property if these benefits are acquired during their married life, "including any administrative or maintenance costs and charges for these assets."[276] "In addition, in case an obligation – relating to the common property or to the personal property of either spouse – was fulfilled during the existence of the conjugal community of property, it must be considered as having been satisfied from the common property, unless proven otherwise. In the event that the value is added to the common or separate property while the conjugal community of property applies, it will be expected that the source of the added value (investment, renovation or maintenance) come from the common property, unless proven otherwise."[277] As far as the separate assets of each spouse are concerned, they include the following: "assets acquired before the beginning of the marital community

[274] Article 2 (3) of the 2015 Civil Procedure Code.
[275] Article 125 (1) of the 2014 Law on Marriage and Family.
[276] Art. 4:37 (1) and (3-4) of the Act V of 2013 on the Civil Code.
[277] Art. 4:40 (1-2) of the Act V of 2013 on the Civil Code.

of property; assets inherited or received as a gift and assets received without compensation during the marital community of property; rights of the spouse as the proprietor of intellectual property, except for the royalties due during the marital community of property; any compensation received for personal injury; assets of personal use of customary value; assets substituting separate assets, and anything of value acquired for such assets." Assets of personal use of customary value belong to the separate property under Hungarian Civil Law, while they are not mentioned specifically in Vietnamese family law. "If an asset replaces an asset of customary value which was the separate property of one of the spouses and which was used during the spouses' common everyday life, the new asset becomes part of the common property after five years of joint marital life as regards the Hungarian Civil Code."[278] This can be explained by the fact that the specific nature of this property has changed due to the replacement of this property with another property and then the utility function of this property has served the married life after getting married.

As regards the administration of the property in Hungary, "either spouse may use the assets belonging to the common property, according to their purpose. Neither of the spouses should exercise this right with prejudice to the rights and lawful interests of the other spouse. Both spouses together are entitled to administer the assets of their common property. Either spouse can claim the permission of the other spouse for activities that are necessary to protect and maintain their common property. Urgent measures for the protection of assets may be taken by either spouse without the consent of the other spouse. However, the other spouse should be notified thereof without delay."[279] "Special rules are applicable to the use and the administration of the assets belonging to the common property but serving for the pursuit of the profession or private entrepreneurial activity of one of the spouses. Hungarian law also prescribes special rules in respect of the exercise of membership or shareholders' rights if the spouse is a member or shareholder of a sole proprietorship, a cooperative society or a company."[280] "During the community of property the spouses shall be able to make any disposition relating to their community property collectively, or subject to the other spouse's consent. As regards an agreement concluded by one of the spouses during the community of property, no formal requirements apply to the other spouse's consent."[281] Similarly, Vietnam also allows one spouse to have the right to dispose of common property, if such transactions are to serve the essential needs of the family, it is considered as having the consent of the other spouse.

With respect to debt relating to marital property in Hungary, "community property of the spouses shall include the burdens of their common assets and they shall collectively

[278] Art. 4:38 (1-3) of the Act V of 2013 on the Civil Code.
[279] Art. 4:42 (1-2) of the Act V of 2013 on the Civil Code.
[280] Art. 4:43 (1-2) of the Act V of 2013 on the Civil Code.
[281] Art. 4:45 of the Act V of 2013 on the Civil Code.

shoulder the debts arising out of or in connection with obligations undertaken by either of the spouses during community of property. Community property shall not include those assets, burdens and debts which are treated as separate property of either spouse."[282] "Apart from statutory maintenance obligations, any debt arising out of or in connection with an act that took place before the onset of the joint marital life shall be charged to the separate property. Separate property shall include the burdens on assets forming part of separate property and the interest on any debt treated as separate liability."[283] "Even if a debt belongs to the separate property of a spouse, in relation to third parties the other spouse is also liable for it." Separate property shall include any debt incurred during joint marital life: 1/ "that is related to the acquisition or maintenance of separate property, excluding the expenses related to the proceeds of such separate property and to the maintenance of assets which are used or utilized by the spouses collectively;" 2/ "that is related to a spouse's disposition of his/her separate property;" 3/ "by one spouse without consideration upon community property, without the consent of the other spouse;" and 4/ "resulting from any unlawful and intentional conduct, or gross negligence of the spouse, if the debt is in excess of the other spouse's enrichment." There are similarities between Vietnam and Hungary regarding the joint and separate debt of husband and wife. Even if a husband and wife have separate obligations, the common property is also subject to satisfying the debt to a third party because the common property also includes the rights of the party in question and can be used to pay debts to the third party.

3.3. Marital agreement property regime

Prenuptial agreement is a form of matrimonial property regime established in family laws in many countries. The recognition of the matrimonial agreement on property contributes to the equal rights of spouses, because they are free to agree on the assets they created before entering the marriage. Recognizing the necessity of this property regime, the 2014 Law on Marriage and Family of Vietnam allows couples to choose between the statutory property regime and the agreed property regime. This article will focus on historical development, legal content relating to the prenuptial agreement regime based on Vietnamese law in the perspective of progressive legal aspects of European countries.

The first part of this title will focus on the history of the establishment of the agreed property regime in Vietnam. Accordingly, a norm of matrimonial agreement appeared at the time of the invasion of the French colonialists in 1858. On the basis of learning the legal quintessence from the 1804 Napoleonic Code, Vietnamese law began to think about allowing husband and wife to establish a matrimonial contract. However, the prenuptial

[282] Art. 4:37 (2) and (4) of the Act V of 2013 on the Civil Code.
[283] Art. 4:39 (1-4) of the Act V of 2013 on the Civil Code.

agreement was abolished in family law for a while before being recognized again in the 2014 Law on Marriage and Family to meet the requirements of the development of matrimonial property flow. The other part of this research will focus on the basic legal content of the matrimonial agreement property regime which concerns the basis for formation, conditions, form and content, and its termination.

3.3.1 The establishment of the matrimonial agreement

First, a marital agreement must be signed before the spouses register their marriage. The agreement before marriage is considered a basic feature to distinguish between the agreed property regime and the statutory property regime. Regarding the French Civil Code, for a valid marital contract, couples must comply with clearly stated procedural requirements through involving a notary. The marriage certificate will clearly state the spouses' agreement and the notary will record the couple's compromise on the face of the marriage certificate. There would be further registrations, if one of the spouses is a merchant according to French law. The spouses have to inform third parties about their agreement, if not, the contract will be invalid to third parties, except for those third parties who have known about the existence and terms of the contract. The spouses must go through the Court's procedure, if they wish further amendment or modification of the contract to ensure the interest of the family and third parties. The court will determine the later agreement to make sure that it complies with the relevant laws and the interest of family members and other parties.[284]

Second, the prenuptial agreement regime is in the form of notarized or authenticated documents. The notarized or authenticated written agreement is a common written agreement with certification procedures at a notary public agency or certification at a competent state agency. The form of notarization or authentication gives the agreement a much stronger legal value than conventional documents. In terms of evidence, the notarized or authenticated agreement will have more reliability, so in the current Law on Marriage and Family, the provisions of the husband and wife's agreement must be notarized or authenticated to ensure safety, limit the arising of conflicts and disputes between husband and wife.

Third, the matrimonial agreement on property comes into effect at the date of marriage registration. In addition, husband and wife can agree to amend, supplement and terminate the property regime according to the agreement. During the marriage period, husband and wife may amend and supplement part or all of the contents of the signed agreement on the property regime before the marriage, if they agree to change or terminate the prenuptial

[284] Brown, Susan Vogt, "The Enforcement of Marital Contracts in the United States, Great Britain, France and Quebec" 15.

agreement. Once the prenuptial agreement is terminated based on the couple's compromise, the statutory property regime can be applied. However, the amendment and supplementation must not violate the provisions of the current Law on Marriage and Family, which stipulates that otherwise the agreement is invalid. In addition, this amendment and supplement agreement must still be notarized or authenticated to take effect.

3.3.2 Basic contents of an agreement on the matrimonial property regime

The spouses are free to settle matters related to property. However, when settled, the parties must also ensure that the contents of their agreement meet the requirements of the basic matrimonial property regulations of the 2014 Law on Marriage and Family[285]. If the agreement lacks one of the basic content elements leading to invalidity, statutory property law will apply instead. Accordingly, the spouses can agree on property in many different ways as follows:

The couple have both common property and private property. If the couple choose this option, the property of the spouses includes three blocks of property including the common property, the wife's separate property and the husband's separate property. Husband and wife may determine that their possessions before or during the marriage are common property, and with respect to separate property that it consists of personal effects and articles of personal use and any property acquired by gift, or inheritance, individually. It can be said that this choice does not lessen the common property community of the husband and wife - the foundation of the marriage. It also creates favourable conditions for them to take the initiative in disposing of their own property and can prevent cases of marriage with a dishonest purpose where a spouse is targeting the other's separate assets. In addition, the determination of common and separate property enables husband and wife to be responsible for the stability and development of the family. If the spouses feel that such an agreement is incompatible with the goal of marriage, which is a community of responsibility, joint strength, shared will, they have to decide jointly on their property, they can choose the other two options mentioned below.

The couple have only common property, there is no private property between spouses, but all property acquired by the husband or wife during marriage is common property.[286] Thus, during the marriage period, only one property exists, which is the common property, the property created by husband and wife before marriage or during the marriage period. In this case their belongings are the common property of husband and wife. When they choose to have only this common property, the couple's interests are influenced by the

[285] Mainly mentioned in Articles 29, 30, 31, 32 of the 2014 Law on Marriage and Family.
[286] Article 15 (1) (b) of Decree 126/2014.

community in marriage and the interests of the family come first. During the marriage period, a common ownership relationship between spouses always exists. Thus, this option does not recognize the right to have private property, but only acknowledges joint ownership. Perhaps this provision is derived from the concept of common needs, the common interests of the family are supreme, and the property of the husband and wife is recognized and protected by law for that same purpose. This model, however, has drawbacks at some points as if a party wants to conduct business or invest separately, and does not want to affect the common property, he/she must take the common property to invest it in his/her own business due to the lack of separate property based on their prenuptial agreement. If this type of agreement still does not meet the demands of the spouses, they may choose the third regime mentioned below under which they only have separate property during their married life.

The spouses have only separate property, there is no common property between husband and wife, but all property acquired by them before and during the marriage constitutes private possession.[287] Unlike the second option, with this option, the husband and wife will have to determine the amount of property during the marriage period, which is not their common property, but only two separate property blocks, which are the property of the wife and husband. Accordingly, each spouse is free to manage and dispose of their assets and income after marriage. With this option, husband and wife will have a great deal of autonomy in the matter of disposing of their property. This provision is probably suitable for couples' working in production and having business jobs where they need to avoid possible risks to their families, caused by business failures. In practice, Vietnamese couples do not seem to choose this model due to the influence of the long-standing customs and concept of the Vietnamese valuing marriage as a bond between family members. The fact that one party proposes to establish separate property before marriage causes loss of self-esteem for the other party because of pre-marriage separation. So, although it is officially mentioned in the law, the parties are still quite cautious about this method before getting married. In fact, this method is chosen when a party has a lot of property before marriage and the choice of the agreement to establish a separate property regime before marriage will help their wealth to be preserved.

With regard to determining the content of property in the agreement, husband and wife agree on the rights of each party to the common property, private property as well as separate obligations, common obligations borne from the two parties' property and the family's essential needs, which will be guaranteed by common property or private property. Ensuring the conditions to meet the family's essential needs is the spouses' obligation. In cases where they agree that the property to ensure the family's essential needs is common property, if it is not enough, they need to agree on the amount of

[287] Article 15 of Decree 126/2014.

contribution from their own property as well as the common property to ensure the essential needs of the family.

Concerning the conditions, procedures and principles of the property division upon termination of the prenuptial agreement regime, these issues should be clearly mentioned as the very first step of the compromise. The agreement to establish the matrimonial property regime is made before the marriage and takes effect at the date the couple carry out the marriage registration procedures according to the order, conditions and provisions of the law. Stemming from the needs of each party, spouses can agree on the conditions for the termination of the property regime according to their agreement and determine in which cases the spouses have the right to demand to end this property regime. Once they agree on the termination of the property regime, the property will be divided between them according to the procedure (agreement or request to the competent authority to settle their property relations) based on the agreement of the couple and the principle of property division upon termination. In principle, property can be divided based on the method of common property division during the marriage period or according to other division principles, which are agreed upon by the husband and wife. When a dispute occurs, the agreement of the husband and wife is applied to the settlement of the dispute.[288]

For example, "in case of applying the agreed matrimonial property regime, the settlement of property upon divorce must comply with such agreement. In case the agreement is insufficient or unclear, the settlement must comply with the corresponding provisions of paragraph 2, 3, 4 and Article 5 and Articles 60, 61, 62, 63 and 64 of the 2014 Law on Marriage and Family" which has the same rules as if the spouses were applying the statutory property regime. Regarding common property in the marital agreement regime, it *"shall be divided into two, taking into account the following factors: 1) Circumstances of the family, husband and wife;" 2) "Each spouse's contributions to the creation, maintenance and development of common property. The housework done in the family by a spouse shall be regarded as income-generating labour;" 3) "Protecting the legitimate interests of each spouse in their production, business and career activities to create conditions for them to continue working to generate incomes;" 4) "Each spouse's faults in the infringement of spousal rights and obligations. Common property of husband and wife shall be divided in kind, if impossible to be divided in kind, common property shall be divided based on its value. The partner who receives the property in kind with a value bigger than the portion he/she is entitled to receive shall pay the value difference to the other. Separate property of a spouse shall be under his/her ownership, except for separate property already merged into common property in accordance with"* the 2014 Law on Marriage and Family. "A spouse who requests division of separate property which has been merged into or mixed with common property shall be paid for the value of his/her

[288] Linh, Nguyen Thi My, Marital Agreement in Vietnam from 1858 until Now 150–161.

property contributed to common property, unless otherwise agreed by husband and wife." "The lawful rights and interests of the wife, minor children or adult children who have lost their civil act capacity or have no working capacity and no property to support them shall be protected."

However, a marital contract must be established prior to marriage and not after it. During the marriage period, couples are entitled to switch from a marital contract to a statutory marital property regime. Conversely, couples who are applying a statutory property regime cannot transfer to a marital contract after marriage. Explaining this rule, lawmakers argued that the choice of the statutory property regime means that spouses could still agree to divide their common property into separate property or merge separate property into common property during the marriage. In addition, this leads to a difference compared with the marital contract – the agreement model must be established before marriage and cannot be established after marriage.

Compared to the Hungarian legislation on marriage, there are two property regimes which are the statutory property regime and the matrimonial agreement property regime. With respect to the statutory property regime, there are two main types of property: community property and separate property. As for the marital contract, couples may choose to sign a premarital agreement (also known as ante-nuptial agreement) or post marital agreement which takes effect from the time of establishing the agreements.[289] Unlike Vietnam's law, where a marital agreement can only be signed before getting married, Hungarian law does not limit the time of establishing a marital contract. This is a regulation that Vietnamese family law should learn from Hungarian law.[290] Many countries in Europe consider pre-marriage and post-marriage agreements indistinguishable, applying the same legal standard to the spouse whether the compromise was made before or after the marriage. In Germany, for example, spouses can choose from contractual property arrangements recognised in the German Civil Code, but agreements between spouses must not result in unacceptably inconsistent burden sharing. In France, by contrast, spouses are prohibited from changing their property regime until two years have elapsed according to the French Civil Code to protect the interest of the family. Some other European states limit the spouses' agreement at the time of divorce relating to maintenance or refuse to recognise the waiver of future maintenance by the spouses. Taking German law, for instance, it allows spouses to change the default rules to keep and exclude post-divorce alimony in its entirety. Concerning the formation of marriage contracts, they require that the agreement be executed before a notary, who serves as an impartial advisor being

[289] Article 4:63 in Hungary Code of 2013 – Book Four (Family Law) prescribes that: "1) The function of the marriage contract is to permit the parties to the marriage or the spouses to define a property regime - in lieu of marital community of property - with a view to governing their property relationships during the marriage from the time specified in the agreement"

[290] Linh, Nguyen Thi My, The Development of Matrimonial Property law in Vietnam 66–74.

trained and experienced in many European nations.[291] Similarly, the couple can sign a prenuptial agreement in Russia, similarly to Hungary, Germany and France (See the figure below). The figure shows that the number of prenuptial agreements signed in Russia witnessed a considerable increase from 2014 to 2020. It means that this type of marital property agreement regime has become a modern trend chosen by couples.

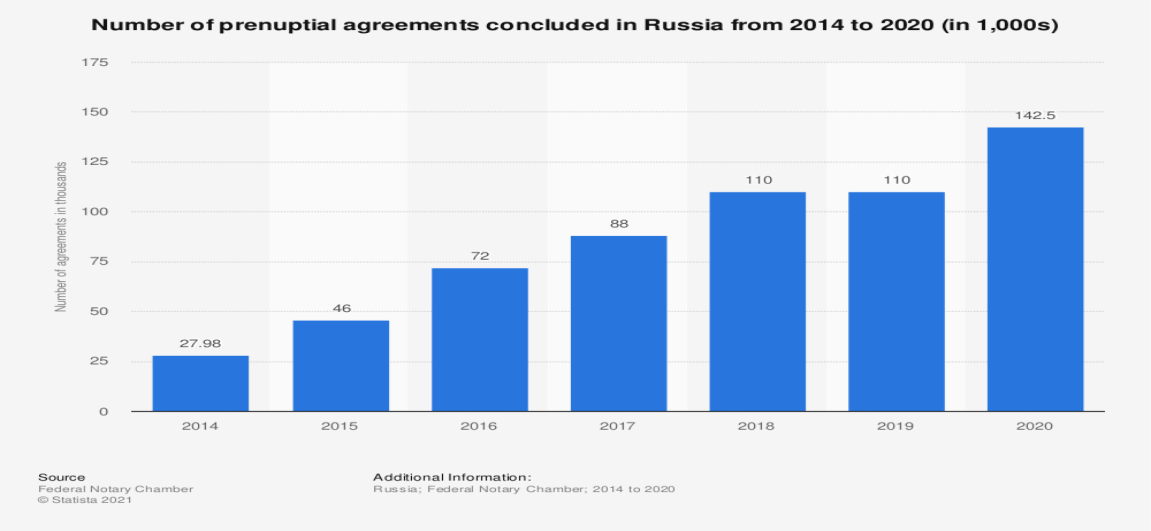

Figure 13. Number of prenuptial agreements signed in Russia witnessed a considerable increase from 2014 to 2020 supplied by Statista company.[292]

In addition to the abovementioned main contents, in the content of the agreement, the couple can agree on other contents, such as the support of parents and children related to the matrimonial property regime based on the needs and circumstances of each party. The general principle of the matrimonial property regime stipulates that husband and wife are equal in terms of their rights and obligations in the creation, possession, use and disposition of common property and there must be no differentiation between family workers and income workers. The spouses have to ensure the conditions to meet the family's essential needs, if the exercise of property rights and the performance of obligations by a spouse infringes upon the legitimate rights and interests of the other spouse, their family and other persons, compensation must be made.

[291] Barbara A Atwood, "Marital Contracts and the Meaning of Marriage" 11–41.
[292] Statista Company, "Russia: Number of Prenuptial Agreements 2020" accessed 17 December 2021.

3.3.3 Modification and invalidation issues relating to an agreed property regime

3.3.3.1 Modification of the prenuptial agreement on property

Pursuant to Article 17 of Decree No. 126/2014 detailing a number of articles and measures to implement the Act on Marriage and Family and Article 49 of the 2014 Law on Marriage and Family, the spouses have the right to reach an agreement, amend, supplement a part or all of the contents of the prenuptial agreement property regime or apply the statutory property regime according to law. Property rights and obligations arising before the effective date of the amendment and supplementation of the prenuptial agreement property regime are still legally valid, unless otherwise agreed by the parties. On the other hand, when performing transactions with a third person related to the agreed property, the spouses are obliged to provide the third person with information on agreements related to that property.

Regarding the time of modification, during the marriage period, the couple have the right to agree to amend or supplement a part or all of the contents of the property regime or apply the statutory property regime. Although the marriage agreement is highly stable, the law still allows it to be amended even after they get married to ensure rights related to the property of the couple and to ensure freedom. The husband and wife's agreement is protected by the law.

In terms of content, the amendment and supplementation of the agreement as well as the content of the newly established agreement are not only related to the rights and obligations of the spouses but also to the interests of a third person. Therefore, when amending and supplementing the content of the prenuptial agreement property regime, they must follow strict formal requirements as well; they must be executed in the form of notarized or authenticated documents as prescribed by law. The amendment and supplementation take effect from the date of the notarization or authentication.

Modification and supplementation of a part or the whole of the agreement does not terminate the agreement on the matrimonial property regime,[293] there will only be changes in some of the contents of previous agreements. When a modified or supplemented agreement on the prenuptial agreement regime is established, the spouses need to provide third parties with relevant information in case of having a transaction with a third person. If a husband or wife violates this obligation, the interests of a third person will still be protected by law according to the provisions of the Civil Code. This regulation aims to

[293] Dang, Hong Duong, "Định ước tài sản trước hôn nhân theo Luật Hôn nhân và Gia đình 2014" accessed 1 January 2022.

avoid the situation in which the couple takes advantage of the modification and supplementation of the content of the agreement on the matrimonial property regime to avoid the completion of civil obligations. If the agreement is amended and supplemented, property rights and obligations arising before the effective date of the modification or supplementation are still legally valid, except that the party has another agreement. Thus, whether an agreement on the matrimonial property regime is newly established or amended, supplemented, it only changes the rights and obligations between husband and wife according to the agreement, without changing the rights as well as property obligations of the spouse toward the relevant third party.

3.3.3.2 Invalidation of the prenuptial agreement

According to Article 50 of the 2014 Law on Marriage and Family and Article 6 of Joint Circular 01/2016, the agreement on the matrimonial property regime can be declared invalid by the Court. Once an agreement on the prenuptial agreement regime is declared totally invalid by the Court, the statutory property regime shall be applied. If the prenuptial agreement on property is declared to be partially invalid, the contents that are not invalid will still apply. Concerning the invalid content, the statutory provisions on the matrimonial property regime shall be applied. The prenuptial agreement on property is declared invalid when violating one of the following provisions:

Firstly, the agreement is defined as invalid, if it does not comply with the conditions of validity of the transaction specified in the Civil Code and other relevant laws, such as the legal capacity of husband and wife, agreement content, it violates prohibitions, or violates social ethics. If the spouses, for example, are not of marriageable age at the time of making the agreement or lose their civil act capacity at the time of the agreement, the agreement will be declared invalid. The agreement will also be declared void, if at the time of establishment, one or both parties were in a state of involuntariness (threatened, deceived, and mistaken). Thus, based on the provisions, if the marriage is declared void due to the violation of the age requirement or the condition of voluntariness, the agreement on the property regime between husband and wife is also declared invalid.

Secondly, the agreement is invalid if it breaches one of the provisions of Articles 29, 30, 31, and 34 of the 2014 Law on Marriage and Family because of an imbalance in establishing property rights; or not guaranteeing the essential needs of the family; or because of breaking transaction rules regarding the house being the only residence of spouses. It may also be void if the content of the agreement seriously violates the rights and interests of parents, children and other family members. The contents of an agreement on the matrimonial property regime are invalidated due to a serious violation of the right to support, the right to inheritance and other legitimate rights and interests of parents,

children and other members. If the agreement evades the support obligation specified in Articles 110 to 115 of the Law on Family and Marriage or obstructs the right to inheritance of independent heirs, it will be worthless. For example, the father has an adult child but the child cannot work. After that, the father gets married to the stepmother and they sign a property agreement regime, in which the entirety of the father's assets will be inherited by the stepmother when the father dies. In this case, the content of the agreement on the property regime between the couple will be invalidated with respect to the part of property of the father, and the adult child inherits in accordance with the legal provisions.[294] Concerning the above provisions, the law allows husband and wife to freely agree to dispose of their property but they still have to ensure the property obligations that husband and wife have to bear toward a third person and members of the family. This provision also contributes to preventing agreements established by husband and wife for dishonest purposes, for avoiding the performance of civil obligations and affecting the legitimate rights and interests of related persons; it contributes to protecting the legitimate rights of parents, children and other family members recognized by law.

Thirdly, the agreement is invalid if it breaches the regulations on transactions with a bona fide third person relating to bank accounts, securities accounts and other real estate that do not require registration of ownership or of the right to use by law. For example, before marriage, the spouses have a written agreement on the establishment of the property regime, in a document identifying land use rights as the private property of the husband before the marriage (in fact, the husband already mortgaged this land use right to a bank) to become the common property of the spouses after marriage. Unfortunately, the husband cannot pay the debt before the due date, the bank requests to dispose of the collateral, which is the land use right, but the husband disagrees and thinks that this is the common property of the spouses and not the husband's separate property. The bank files a lawsuit with the Court and requests the husband to repay the debt as well as the cancellation of the written agreement on the property regime of the couple and the disposal of the mortgaged property, that is, the land use right of the husband. The court must determine that the agreement to establish the property regime of husband and wife is invalid because of a serious violation of the bank's rights to the property mortgaged by the husband.

Fourthly, the agreement is invalid if it violates the regulations on the rights and obligations of spouses in meeting the essential needs of the family. Once one party has a need to use and dispose of property to serve the essential needs of the family as well as themselves in daily life, there is no need for permission from the other party. The other party has no control, prohibiting the other party from using common property of husband

[294] Article 5 and 6 of the Joint Circular 01/2016 dated on January 6, 2016 which is a guideline on the implementation of the Law on Marriage and Family by the Chief Justice of the Supreme People's Court - Head of the Supreme People's Procuracy - Minister Issued by the Ministry of Justice.

and wife. Regarding a number of cases related to property of great value, the law, however, states that disposition over the common property requires the consent of both parties.

Fifthly, the agreement is invalid if it violates regulations on transactions related to the house which is the only residence of husband and wife. The establishment, execution and termination of house-related transactions relating to the spouses' sole residence must be agreed by both parties. If a house is privately owned by one party, the owner has the right to establish, perform or terminate transactions related to such property but must ensure accommodation for the other party. Whenever a violation happens, the aggrieved party or the guardian of the person whose rights and interests are infringed upon with regard to basic principles can submit a petition to the court. Procedures for reviewing the invalid agreement on the matrimonial property regime are specified in Article 5 of Joint Circular No.01/2016. Specifically, the following agencies, organizations and individuals, in accordance with the civil procedure law, have the right to request the Court to declare that the agreement on the matrimonial property regime is invalid in the case specified in Article 50 (1) of the Act on Marriage and Family: 1) The wife or husband who have agreed on the property regime; 2) The aggrieved person, the guardian of the person whose rights and interests are violated due to an agreement on the property regime of husband and wife. Regarding the order and procedures for settling a request, the court can declare a marital agreement being invalid.

3.3.4 Termination of the matrimonial agreement property regime

3.3.4.1 The termination of the matrimonial agreement property regime according to the parties' will

The property regime under the agreement of the husband and wife will end when the husband and wife agree to terminate the property regime according to the agreement of the husband and wife. At this time, husband and wife will carry out procedures to confirm the termination of the property regime as agreed by them. Although the property regime under the agreement of husband and wife terminates, the marital relationship still exists, and the statutory property regime will apply automatically, since the property regime according to the agreement ends.

3.3.4.2 The termination of the matrimonial agreement property regime according to law: dissolution and the spouses' death

Once the couple divorce or one of the spouses dies and the Court's judgment declares this incident, the marriage relationship will end, and the marital agreement regime will also

terminate. In this case, if a prenuptial agreement regime has been made, this agreement will be applied to the settlement of property upon divorce, and the property items not included in this agreement will be divided according to the provisions of law. The provisions of Article 59 (1) of the 2014 Law on Marriage and Family on the settlement of the property relationship between husband and wife upon divorce state: *"The settlement of property shall be agreed upon by the concerned parties in case of applying the statutory matrimonial property regime. If they fail to reach agreement thereon, at the request of a spouse or both, a court shall settle it according to paragraphs 2, 3, 4 and 5 of this Article and Articles 60, 61, 62, 63 and 64 of this Law."* If husband and wife have established an agreed property regime, but the contents of the agreement do not say anything about the way and conditions to divide property upon divorce, the Court will deal with the division according to the statutory property regime. Similarly, illegal marriage cancellation also leads to termination of the marriage with effect to the date the couple register their marriage and this situation seems to have the same legal consequences for the property relationship as divorce. According to the provisions of Article 3 (6) of the 2014 Law on Marriage and Family, *"Illegal marriage means that a man or woman has registered their marriage at a competent state agency, but one or both parties violate the marriage conditions according to the provisions of Article 8 of the 2014 Law"*. Concerning the legal consequences of the marital property relationship, the agreement on the property regime cannot continue to be valid after the marital relationship has been cancelled by the Court, because the property relationship between husband and wife only exists when their marriage is recognized. Once there is a prenuptial agreement without provisions foreseeing what should happen if the couple's marriage is null and void, the regulations on marital property division upon the spouses' divorce shall be applied to settle their property. In summary, how to resolve the property relationship between husband and wife when terminating the marriage relationship is one of the important issues that both partners often consider in their agreement.

To conclude, the recognition of prenuptial agreements means an inevitable development of the marital property model by allowing the spouses to apply the prenuptial agreement or statutory marital property that depends on the spouses' will and desire. Thus, the concept of the matrimonial agreement on property is a term that has been present since the French colonial period in Vietnam and is currently being re-regulated in the 2014 Act on Marriage and Family. In general, the establishment of a prenuptial agreement needs to be in writing and notarized or authenticated. This is a regulation that has many similarities with the French and Hungarian Civil Code. However, at present, Vietnamese laws only recognise the form of the ante-nuptial agreement (also known as a premarital agreement) but not yet the post-marital agreement as in Hungarian law. The unrecognized post-marital agreement should be considered in the Vietnamese marriage and family law because the

couple may have a need to agree on the property after marriage during the process of living together.

3.3.5 The difference between a marital agreement and a statutory property regime and Hungarian law in comparision

The marital agreement and statutory property regime are the two property regimes recognized by the 2014 Marriage and Family Law that spouses have the right to choose to establish. Each property regime has its own characteristics and advantages, and husband and wife choose the appropriate property regime depending on the purpose of their marriage and their economic interests. On the basis of the provisions of Article 28 of the 2018 Law on Marriage and Family and the provisions referenced from this Article, the marital agreement and statutory property regime have some basic differences as follows:

First, the marital agreement property regime must be established before a man and woman get married in accordance with Article 47 of the 2014 Law on Marriage and Family. Accordingly, the marital agreement property regime of husband and wife arises from the date of marriage registration. In contrast, the statutory property regime is considered as the default property regime that is applied when men and women do not choose the property regime according to the prenuptial agreement before marriage or the agreement is invalid. That is, the statutory property regime is automatically applied when a man or woman does not have any agreement on property before marriage or has an agreement but it is declared invalid by the Court in accordance with Article 50 of the 2014 Law on Marriage and Family.[295] In addition, the statutory property regime is also applicable to the case where the husband and wife establish the property regime according to their agreement but have agreed to terminate this regime during the marriage period and change to apply the statutory property regime.[296]

Second, Article 47 of the 2014 Law on Marriage and Family stipulates that the marital agreement property regime must be made in writing and notarized or authenticated. This proves that the prenuptial agreement property regime only comes into effect when it ensures the above provisions in the form above.

In contrast, the statutory property regime does not explicitly stipulate the form of establishment. Thus, the statutory property regime is applied automatically starting from the moment the parties get married, if there is no agreement or the existing agreement is invalid.

Third, Article 15 of Decree 126/2014 lays out three basic methods for husband and wife to negotiate on the property, if they choose the marital agreement property regime as

[295] Article 7 of Decree 126/2014.
[296] Article 17 (1) of Decree 126/2014.

follows: *"1/ Matrimonial property includes common property and separate property of husband and wife; 2/ Husband and wife have no separate property and all property a spouse has before marriage or during the marriage period is common property; 3/ Husband and wife have no common property and all property a spouse has before marriage and during the marriage, period is the separate property of that spouse."* Thus, if husband and wife choose the second or third method, they only have either common or separate property. This leads to the fact that the couple can have only one type of property during the marriage period when choosing the prenuptial agreement property regime. Conversely, when husband and wife apply the statutory property regime, the property is always composed of common and separate property due to the default provisions in Articles 33 and 43 of the 2014 Law on Marriage and Family.

Fourth, Article 17 of Decree 126/2014 allows husband and wife the right to change from the agreed property regime to the statutory property regime. This change should be made in writing and notarized or authenticated. In other words, the change is the basis for terminating the ante-nuptial property regime and switching to the statutory property regime.

Conversely, are husband and wife allowed to terminate the statutory property regime and agree to apply the agreed property regime during the marriage period? The 2014 Marriage and Family Law and the current guiding documents do not regulate this issue. Accordingly, if the husband and wife are allowed to apply the agreed property regime during the marriage period, it will lose the characteristic that the "agreement must be established before marriage" in Article 47 of the Marriage Law and family. In addition, even when a couple apply the statutory property regime, they still have the right to negotiate on property. For example, the couple are entitled to divide common property during the marriage period into the separate property of each party or agree to merge separate property into common property. Therefore, spouses do not need to terminate the statutory property regime but can still agree on the property during the marriage period.

In addition, the establishment of the agreed property regime is based on the agreement of the husband and wife, so the management, use and disposition of property will be based on such agreements. However, the statutory property regime will be managed, used and determined according to the provisions of the Law on Marriage and Family, if the couple's agreement lacks basic regulations.

Regarding Hungarian law in comparison with Vietnam, similarly, "unless otherwise provided in their marriage contract, after marriage, the spouses are subject to the community of property regime for the duration of their joint marital life (statutory matrimonial property regime)". "Upon entering into marriage, the statutory matrimonial property regime will become effective also retroactively for the time of the spouses' life

partnership preceding marriage."[297] "The Civil Code regulates two optional matrimonial property systems in detail: the marital property acquisition regime and the separation of property system, but in a matrimonial property contract it is not mandatory to choose one of these systems.[298] "If the parties to the marriage or the spouses agree to install a marital property acquisition regime in the marriage contract, they shall be considered independent in their property acquisitions during their matrimonial relationship, therefore the rules on separation of property shall apply between them. After the termination of marriage, either of the spouse may demand a share of the growth in assets which is considered to have been acquired jointly. Jointly acquired property means the net value, at the time of termination of marriage, of the spouse's property remaining after his/her debt share and separate property are deducted. As regards marital property, the property existing at the time of termination of the matrimonial relationship shall be presumed to have been acquired jointly. Specific assets, burdens and debts to be taken into account as separate property shall be determined relying on the provisions of the matrimonial property regime on separate property. In addition to existing separate property, the value of any separate property which the spouses spent during their matrimonial relationship on jointly acquired property or on the separate property of the other spouse shall also be considered to comprise a part of separate property. Compensation for any shortage in separate property shall be permitted only if expressly specified." [299]

In terms of the Hungarian marriage contract, "a marriage contract shall be considered valid if executed in an authentic instrument or in a private document countersigned by an attorney. A marriage contract shall be considered effective in dealing with third parties if the contract is recorded in the national register of marriage contracts, or if the spouses are able to prove that the third party was aware, or should have been aware that such contract existed, including its contents."[300] "The function of the marriage contract is to permit the parties to the marriage or the spouses to define a property regime - in lieu of marital community of property - with a view to governing their property relationships during the marriage from the time specified in the agreement. In the marriage contract the parties may define several different property regimes relating to certain specific assets, and they may even deviate from the rules on statutory and optional property regimes, if such deviation is not precluded by Family Law."[301] "A marriage contract shall not contain any clause having retroactive effect for changing, to the detriment of a third party, any obligation a spouse may have in dealing with third parties arising before the marriage contract was concluded. Where an agreement of the spouses alters the community property or separate property status of an asset in derogation from the relevant provisions of the marriage contract, such

[297] Art. 4:34 (2) and 4:35 (1) of the Act V of 2013 on the Civil Code.
[298] Art. 4:69-4:73 of Act V of 2013 on the Civil Code.
[299] Art. 4:63 of of Act V of 2013 on the Civil Code.
[300] Art. 4:65 (1) of Act V of 2013 on the Civil Code.
[301] Art. 4:63 (2) of the Act V of 2013 on the Civil Code.

agreement shall be considered effective in dealing with third parties if the third party was aware, or should have been aware that the asset in question belonged to community property or separate property under the agreement."[302] "The spouses shall be able to amend or terminate the marriage contract during their matrimonial relationship. Any amendment to and the termination of marriage contracts shall be governed by the provisions on the scope and validity of contracts."[303] Similarly, Vietnam also requires the parties when making a prenuptial agreement to comply with a certain form and the amendment must also be in a set form, similarly to Hungary. This provision is appropriate because compliance with the regulations on form contributes to ensuring that the agreement is placed under the supervision of the competent authority to help the contract come into force for the relevant parties. However, Vietnam does not have regulations on the establishment of post-nuptial agreement and does not recognize the retroactive effect of the marriage contract in contrast with Hungary. These are considered reasonable provisions in the Hungarian Civil Code that Vietnam can refer to when formulating the law. Regarding the cost of making a marriage contract in Hungary, *"There are several hidden costs involved in entering into a matrimonial property contract. This is where the fee for the lawyer who drafted the document comes into play - the fee depends on the specialist - or the fee for the notary. The registration of the marriage contract is HUF 10,000, and the inquiry of the marriage contract is occasionally HUF 1,000 - anyone who is likely to have a legal interest in it can request the document and make a note of it."*[304] In Vietnam, the notarization price includes document preparation fee and notarization fee based on the value of the transaction property. Therefore, if the agreement on property between husband and wife is of great value, the notarization price will be higher. For example, if husband and wife agree on a property worth 1 billion VND, the notarization fee represents 0.1%[305] of the property value, which is equivalent to 1 million VND (equivalent to 14000 HUF or 38 Euro) excluding contract drafting fees, duplicating fees and other additional fees if any.

Online notary service in terms of matrimonial property contracts and division of the matrimonial property is a useful tool to support the right to matrimonial property. In order to ensure the speed and convenience for couples in implementing agreements on property division or establishing a marriage contract, the notary office provides both face-to-face and online services. In Hungary, notary activities are supervised by the "Ministry of Justice and the National Chamber of Civil Law Notaries." "The notaries operate under self-governance" and have an organizational structure consisting of "the territorial chambers of civil law notaries, the presidency of the territorial chambers and the Hungarian Chamber of

[302] Art. 4:67 (1) of the Act V of 2013 on the Civil Code.
[303] Art. 4:66 of the Act V of 2013 on the Civil Code.
[304] Pénzcentrum, "Házassági szerződés: Milyen esetben szükséges egy házassági vagyonjogi szerződés megkötése" accessed 15 December 2021.
[305] Notary office No. 4 Ho Chi Minh City, 'Thủ Tục Công Chứng Văn Bản Thỏa Thuận Phân Chia Tài Sản Chung Của vợ Chồng' accessed 15 December 2021.

Civil Law Notaries." "The territorial chambers are public bodies which consist of five territorial chambers in Hungary having their seats" in Budapest, Győr, Pécs, Szeged and Miskolc. "The bodies of self-government are legal persons, eligible to use the coat of arms of the State. The notary becomes a member of the given territorial chamber by his appointment." The territorial chamber includes the "trainee and deputy notary who becomes a member of the territorial chamber by being enrolled in the registry of the chamber." The Hungarian Chamber of Civil Law Notaries consists of territorial chambers with the National Chamber Public Body as the supreme body of self-government representing notaries. The National Chamber Public "Body provides the chambers with conditions to operate, is involved in preparatory legislative work, and issues guidelines pertaining to the activities of notaries, as well as trainee and deputy notaries." The National Chamber Public Body includes the Board, the Presidency, the President, and the Auditors, who are appointed for a mandate of four years. The main function of the Board is to bring together the delegates of the territorial chambers and decide issues of strategic importance. The role of the national President represents the national "Chamber, its Board and Presidency, chairs the sittings of the national Presidency and Board, and undertakes to prepare and implement their resolutions."[306] The establishment of a marriage contract in Hungary is strictly regulated in terms of form and registration at notary offices. Accordingly, they can make direct registration or online registration on the official website of the Hungarian Chamber of Civil Law Notaries at

https://www.mokk.hu/ugyfeleknek/index_en.php. In Vietnam, the current notary agency is also a unit operating under the model of a notary public office or a private enterprise and self-governance. Similarly, Vietnam also allows online registration like Hungary to make it easier for couples to agree to establish marital property at

https://www.congchungtructuyen.vn/.

3.4. The legal implications of divorce for matrimonial property

3.4.1 Legal overview of divorce

3.4.1.1 The concept of divorce

As far as the provisions of Article 3 (14) of the 2014 Law on Marriage and Family are concerned, divorce is the termination of the husband-and-wife relationship according to a legally effective judgment or decision of the Court. The marriage will terminate only following a court judgment or decision in case one spouse initiates a divorce lawsuit or

[306] Hungarian National Chamber of Notaries, Magyar Országos Közjegyzői Kamara accessed 15 December 2021.

following a court decision based on both spouses' request for divorce. Divorce is based on the spouses' voluntariness because it is the result of the wilful act of the husband and wife exercising their freedom right to divorce. The State manages society by law, so there can be no forced marriage and the State also cannot force husband and wife to live together when the purpose of marriage cannot be achieved. It also means that the State allows citizens to freely divorce (freely within the framework of the law) when the purpose of their marriage is not achieved, and the marriage cannot be extended any longer. It is believed that divorce is considered as the best solution in such situations. Thus, divorce is a legal event of voluntary nature, expressing the self-democracy and voluntary freedom of one or both spouses in the situation that the marriage has ended and is placed under State supervision through effective judgments and decisions of the Court.

One research study was conducted by a Vietnamese scholar relating to the reasons for divorce in Vietnam. One of the most fundamental reasons for divorce in Vietnam recently results from differences in lifestyle between the spouses. Adultery, childlessness and domestic violence are among other elements for divorce based on the study (See Figure 14 below)

	2009	2010	2011	2012	2013	2014	2015	2016	2017	All
Economic problems		1.2					1.2	0.9	0.3	0.4
Adultery	4.3	6.7	5.8	6.5	8.3	7.3	8.4	7.3	7.4	6.9
Domestic violence		5.2	4.7	7.7	6.5	6.5	5.3	4.2	7.4	5.6
Other social problems	8.7	9	3.1	6.5	6.8	5.4	7.1	6.6	4	5.7
Childless			1.9		0.3			0.3		0.3
Lifestyle difference	87	78.1	84.4	79.3	78.1	80.8	78	80.7	80.9	81.3

Figure 14. Percentage distribution of divorce reasons in South Vietnam, period 2009-2017 (N = 2,608).[307]

3.4.1.2 The subjects of the right to request a divorce

3.4.1.2.1. The husband, the wife or both spouses

With regard to Article 51 (1) of the 2014 Law on Marriage and Family, it is stated that "Wife, husband or both have the right to request a court to settle a divorce". In terms of this provision, both husband and wife have the right to request a divorce when family life cannot continue. This provision contributes to the realization of equal rights between men and women, especially the elimination of patriarchal rights. However, not every request for divorce will be resolved by the Court, because the Court only accepts divorce when the marital situation has become serious and unsatisfactory. Grounds for divorce are provisions of the law which clearly define the conditions and the court must base its decision on these conditions in the process of settling the divorce of husband and wife. The different states

[307] Thi, Tran Thi Minh, "Complex Transformation of Divorce in Vietnam under the Forces of Modernization and Individualism" 225–245.

have different views on the conditions and circumstances in which divorce is allowed. The Vietnamese law on marriage and family does not stipulate separate grounds and specific cases for allowing divorce. The divorce court bases its decision on a completely objective recognition of the nature of the husband and wife's marital relationship. The court will only grant a divorce to the spouses if it deems that the husband and wife no longer love each other, the marital purpose has not been achieved and the marriage relationship cannot be maintained.

3.4.1.2.2. The father, the mother or other relatives of the spouse

The 2014 Law on Marriage and Family provides that the subjects required for divorce settlement may be parents or other relatives in case one of the spouses suffers from mental illness or other diseases according to Article 51 (2) of the 2014 Law on Marriage and Family. Article 51 (2) of the Law on Marriage and Family of 2014 stipulates as follows: *"Fathers, mothers and other relatives have the right to request the court to settle divorce when the spouses are unable to perceive and control their own behaviour due to mental illness or other diseases and are also victims of domestic violence caused by their husbands and wives, seriously affecting their lives, health and spirits."* Thus, from January 1, 2015 – the day the 2014 Law on Marriage and Family took effect, parents and other relatives can also request divorce settlement when one of the spouses - due to mental illness or other disease - cannot perceive or control their own behaviour, and at the same time the spouses are victims of domestic violence caused by their husbands and wives, seriously affecting their lives, health and spirit.

3.4.1.2.3 Some exceptional limitations on the right to a divorce settlement

One of the basic principles of the Vietnamese Law on Marriage and Family is progressive, voluntary marriage. The wife and husband are free to decide whether the marriage relationship between them should continue or become terminated, because the termination or existence of the marriage relationship significantly affects the other spouse. Freedom to divorce is one of the civil rights of citizens as stipulated in the Constitution, the Civil Code, and the Law on Marriage and Family. However, although the subject's rights are prescribed by law, if the exercise of that right affects the rights and interests of other subjects in the family, this activity in turn will be limited. This is certainly true in the case of the wife who is pregnant or raising a child under 12 months old, then the husband's right to request a divorce will be restricted. Limiting the husband's right to request divorce is regulated by the 2014 Law on Marriage and Family in Article 51 (3) as follows: *"Husbands have no right to request a divorce in cases where the wife is pregnant, giving*

birth or raising children under 12 months old." A possible explanation for this might be that the wife needs to be protected and cared for during pregnancy and child-rearing. The husband's right to divorce, however, will be restored once the wife has passed the stage of pregnancy or nursing a child under 12 months. The law does not limit the wife's right to divorce if they are pregnant and raising a child under 12 months because this is their prerogative, and they have the right to refuse that privilege.

3.4.2 Legal consequences of divorce

Once the court's divorce judgment takes legal effect, the marriage relationship ends according to the law. From this moment onward, the divorced wife or husband has the right to marry another person without any strings attached from the other party. After terminating the marital relationship, the personal rights and obligations between the husband and wife will cease completely, whether or not the husband and wife reach an agreement as a result of the Court's decision. That is, the personal rights and obligations between husband and wife arising from marriage will automatically terminate, including: the obligation to love, respect, care for and help each other to progress; the obligation to be faithful to each other; the right to represent each other. A number of other personal rights that spouses have as citizens are not affected and remain unchanged even if the couple divorces. What if the husband and wife have divorced and the court's divorce judgment has taken legal effect, and then the couple returns to live together without registering their marriage? Will their marital status be automatically restored? They can only proceed with re-marriage registration so that the marriage relationship becomes legally valid from the time of registration.

The division of common property upon divorce is considered based on the property regime applied by the husband and wife and other factors on the basis of ensuring the rights and interests of the parties when dividing the property.[308] Some principles are set when resolving the property relationship of husband and wife upon divorce. They are as follows:

3.4.2.1 The first principle

"In case of applying the agreed matrimonial property regime, the settlement of property upon divorce must comply with such agreement." If this agreement is unclear or ineffective, the Court will rely on the general principles when dividing the spouse's property. As regards to the provisions of Article 59 (1) of the 2014 Law on Marriage and Family, if husband and wife choose the property regime as agreed upon before marriage, the property settlement upon divorce shall take place according to that agreement. With

[308] See Article 59 of the 2014 Law on Marriage and Family.

respect to Article 7 (1) (b) of Joint Circular 01/2016, if there is a written agreement on the property regime of husband and wife and this document is not declared invalid by the Court in its entirety, the Court shall apply the contents of the written agreement to divide the property of husband and wife upon divorce. Accordingly, division of the common property of husband and wife upon divorce is based on the husband and wife's agreement with the content agreed upon in a notarized or authenticated document before they get married. Their agreement on how to divide common property will apply to dividing common property. They may, for example, stipulate in a written property agreement that in case of divorce the wife receives 60 percent, and the husband receives 40 percent when dividing the common property. The legal agreement between husband and wife serves as evidence concerning the division of common property of husband and wife upon divorce.[309] When conducting divorce proceedings, the spouses must comply with the content of their voluntary and lawful agreement. The court is responsible for considering and evaluating the content of the agreement to recognize the division of common property in accordance with the agreement of the husband and wife. The law on marriage and family demonstrates the right to freedom, equality, and voluntary agreement on the property relationship of husband and wife in general, and the division of the common property of husband and wife upon divorce in particular. The Court, thereby, has the responsibility to consider, evaluate and recognize those voluntary agreements. The voluntary agreement of husband and wife upon divorce is applicable to both cases of consensual divorce and divorce at the request of one party.

Regarding consensual divorce, the husband and wife have the right to agree on the division of common property, which means that only if there is no dispute over property and other issues, will the Court recognize this agreement by deciding to recognize the divorce agreement. In the practical application of law, it is believed that an effective measure to avoid disputes arising from the division of common property of the spouses is where the involved parties can come to an agreement between themselves if the involved parties can reach an agreement with each other, or they are guided, assisted and provided explanations by the Court because of the importance of respect for self-agreement between the spouses. However, the above-mentioned self-agreement of husband and wife must not be contrary to the principles prescribed by law which must ensure the lawful rights and interests of the wife and minor children or adult children who have lost their civil act capacity or have no legal act capacity to work and no assets to support themselves.

With respect to divorce at the request of one party, if one party to a marriage relationship thinks that the marriage cannot continue, they can file a divorce petition to the Court alone without the consent of the other spouse. The law gives the parties in a marriage relationship the freedom to marry and divorce, so once the purpose of the

[309] Article 7 (1) (b) of Circular 01/2016.

marriage is not achieved, the common life cannot last, they have the right to apply for a divorce.

Together, the husband and wife can agree with each other on the division of common property when they file for a divorce. A consequence of this division may be that the husband and wife receive equal shares or there is a difference according to the wishes of the husband and wife. However, this agreement must ensure the interests of the other party, especially the interests of the wife, minor children, adult children who have lost their civil act capacity to work and have no property to support themselves.

3.4.2.2 The second principle

If the husband and wife choose the statutory property regime and they have an agreement on the division of property upon divorce, they will base division of the common property on this agreement. If the agreement is incomplete or unclear, the Court will rely on general principles when resolving the division of common property. Regarding Article 7 (1) of Joint Circular 01/2016, it provides that the principle of settlement of husband and wife's property after divorce is determined primarily based on the agreement of husband and wife. Until the divorce, husband and wife still have the right to reach an agreement with each other on all issues, such as care and child support, the husband and wife's obligations and especially the division of common property of husband and wife upon divorce. Therefore, the Court has the responsibility to consider, evaluate and recognize those voluntary agreements. When husband and wife cannot agree on the division of common property, they have the right to ask the Court to settle the division. Thus, if the spouses request, the Court will proceed to divide the common property among the parties. The court shall divide the common property on the basis of compliance with the principles of division of common property of husband and wife upon divorce as prescribed by the marriage and family law. Regarding Article 7 (4) of Joint Circular 01/2016, if husband and wife apply the statutory property regime, the common property of husband and wife will be divided in principle upon divorce taking into account other factors to determine the proportions of the property. Those other factors will be clarified in the third principle analysed below.

According to the data provided by the statistics staff at the Can Tho City's Court, from 2017 to 2020, a total of 165 marriage cases were handled and resolved at the first instance level (see Table 1 below). The interesting issue is that these data are not public. The collection of data was conducted by the statistics staff at the Can Tho city's Court; and a small amount of money was paid by the author to get these data. Notably, disputes over marital property account for a large proportion of the arising disputes, including disputes over property division upon divorce, property division after divorce and division of

common property during the marriage period. For example, in 2020, the above three property disputes account for 54.8% of all marriage disputes (see Figure 15 below). This shows that property disputes are one of the topics that most concern spouses because they are directly related to the ownership rights of individuals.

Table 1. Number of marriage and family disputes handled at the first instance level by the Can Tho City Court from 2017 to 2020.[310]

Types of marital disputes	Years			
	2017	2018	2019	2020
Disputes over property during divorce	4	7	31	41
Disputes over property after divorce	6	12	22	27
Disputes over division of common property during marriage	17	13	10	6
Disputes about cohabitation and annulment	6	20	31	20
Maintenance disputes	1	1	2	1
Other marital disputes	43	50	34	40
Total	77	90	130	135

[310] The data provided by the statistics staff at the Cantho City Court, from 2017 to 2020.

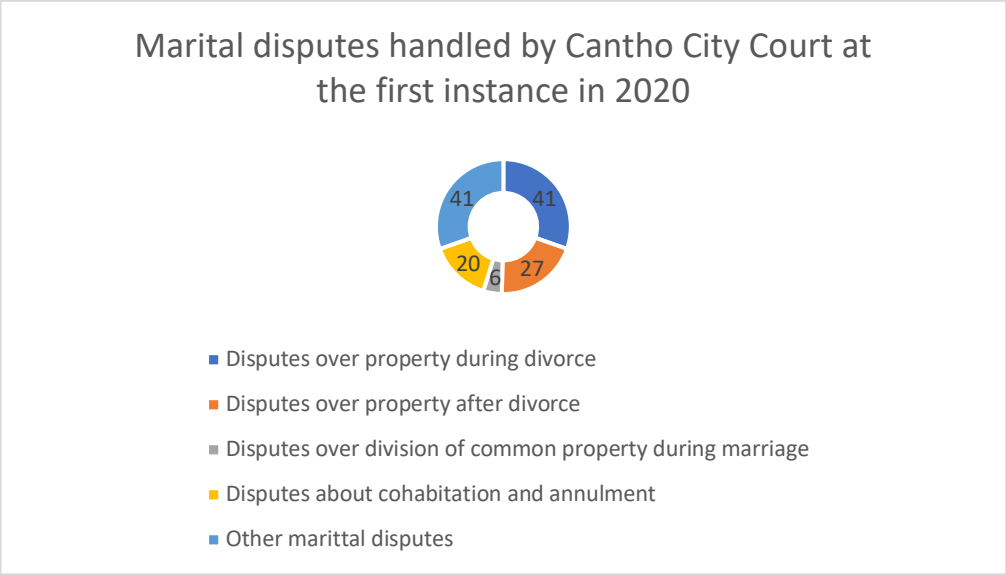

Figure 15. Marital disputes were handled by Can Tho City Court in the first instance in 2020.[311]

3.4.2.3 The third principle

Once the parties have reached an agreement, but the agreement is not clear, unambiguous or the parties have a dispute, the division of common property shall be resolved by the Court according to the following principles:

Common property shall be divided into two, taking into account the following factors: *"a/ Circumstances of the family, husband and wife; b/ Each spouse's contributions to the creation, maintenance and development of the common property. The housework done in the family by a spouse shall be regarded as income-generating labour; c/ Protecting the legitimate interests of each spouse in their production, business and career activities to create conditions for them to continue working to generate incomes; d/ Each spouse's faults in the infringement of spousal rights and obligations."*

Division of the common property with regard to the circumstances of the family, husband and wife comprise several elements, including the status of legal capacity, behavioural capacity, health, property, ability to work and generate income after divorce, the spouses' personal and property rights and obligations to other family members in accordance with the Law on Marriage and Family. The party facing more difficulties after the divorce is entitled to a larger share of the property than the other party, or is given priority to receive the type of property that ensures their maintenance and stability of their life, but this division must be consistent with the actual circumstances of the spouse, and

[311] The data provided by the statistics staff at the Can Tho City Court, from 2017 to 2020

family.[312] With respect to the above guidance of Joint Circular 01/2016, when resolving the division of common property of husband and wife, it is necessary to consider the following factors: 1) the status of legal capacity and civil act capacity of the spouses; 2) the health of the spouse; 3) the ability to work to generate income after the divorce of the spouses; 4) relationship between husband and wife and other family members in which husband and wife have personal rights and obligations and property. The law only mentions the health factor for consideration but does not explain it or provide a criterion to base it on. The World Health Organization (WHO) defines health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. Thus, assessing health factors, the Court must consider physical, mental and social health. Those who are in poor health are given priority in the process of dividing the common property of husband and wife upon divorce. A spouse with weaker health may receive a larger share of the property or receive property to meet his or her needs, such as housing, means of transport, and production and business tools. In the process of divorce settlement, the Court must consider the health factor to divide the common property of the husband and wife in a reasonable way, ensuring the life and interests of the person with weaker health.

The contribution of husband and wife to the creation, maintenance and development of common property means the contribution of separate property, income, family work and labour of husband and wife in creating, maintaining and developing the common property. A wife or husband who stays at home to take care of children and family but does not work is regarded as an employee with income equivalent to the income of a working husband or wife. The husband or wife who puts in more effort to contribute will be given a greater share.[313] Family labour is just a certain type of work, done in the family that does not directly create wealth, but is equated with income-generating labour in terms of economic value. Of course, if one lived alone, housework certainly could not be considered income labour. By contrast, in married life, one person's housework and another person's direct income-earning work have the effect of creating conditions for each other, where one person ensures the housework so that the other can work safely to create wealth; and the creation of wealth by the other has the effect of creating peace of mind for this person in the work of taking care of the housework.[314] It is necessary to interpret the term 'contribution effort' relatively broadly on the basis of considering the origin of joint asset formation. 'Contributing effort' means the labour of each party spent to contribute to the creation of assets while living together; the part of each party's property acquired before the marriage has been added to the common property; part of the property given to the couple by the families of each party on the wedding day or during their cohabitation, due

[312] Article 7 (4) (a) of Joint Circular 01/2016.
[313] Article 7 (4) (b) of Joint Circular 01/2016.
[314] Dien, Nguyen Ngoc, Bình Luận Khoa Học Luật Hôn Nhân 76.

to joint inheritance. No matter where it comes from, if it is considered common property, when calculating the contribution, it is necessary to consider which party contributes more to that property.[315] Legal practice shows that the effort to contribute to the cause of marriage and family has many types and can be temporarily divided as follows: 1) the effort to create and develop property; 2) efforts to preserve assets; 3) care and nurturing efforts. Up to now, the competent state agency has not provided guidance on any cases where contributions have been counted, or cases in which contributions have not been counted and how to reasonably quantify effort.[316] The determination of contributions is also based on separate property, because the party that contributes more to the maintenance and development of the common property will be given a larger share during division.

Protecting the legitimate interests of each party in production, business and profession so that the parties have the conditions to continue working to generate income is a right the division of common property of husband and wife must ensure for their active husband and wife. They must be allowed to continue practising their profession; husband and wife who are engaged in production and business activities may continue to produce and do business to generate income and they must pay the other party the difference in property value. The protection of the legitimate interests of each party in production, business and professional activities must not affect the minimum living conditions of spouses, minor children and adult children who have lost their legal capacity in civil law.[317] For example, the woodworking workshop is directly exploited by the husband and the beauty salon centre is directly managed by the wife during the marriage. In the process of dividing common property upon divorce, the husband is given priority in the case of the wood workshop and the wife is given priority in the case of the beauty salon centre on the basis of considering the difference in value between these items of their common property. From there, they can continue to exploit tools and means to generate income to ensure their livelihood after divorce.

"The fault of each party in violating the rights and obligations of husband and wife is the fault of the husband or wife in violation of their personal rights and obligations, resulting in divorce."[318] This is certainly true in case one party violates the obligation of fidelity, causing the other party to be too sad, unable to find a solution, and therefore intending to commit suicide; one side is indifferent, neglectful, uninterested, and uncaring, making the other party feel abandoned, so they are melancholic and depressed.[319] If the husband and wife violate their obligations, in terms of personal behaviour in marriage, during the division of common property of husband and wife upon divorce, the Court

[315] Thu Huong and Duy Kien, "Một Số Vấn Đề Cơ Bản về Chia Tài Sản Chung Của vợ Chồng Khi Ly Hôn Theo Luật Hôn Nhân và Gia Đình và Thực Tiễn Giải Quyết" 27-35.
[316] Long, Nguyen Hoang, "Bàn về Công Sức Đóng Góp Trong vụ Án Hôn Nhân và Gia Đình" 18.
[317] Article 7 (4) (c) of Joint Circular 01/2016.
[318] Article 7 (4) (d) of Joint Circular 01/2016.
[319] Hanoi University of Procuracy, Giáo Trình Luật Hôn Nhân và Gia Đình 140.

considers such violations to ensure the interests of the spouses. In case the husband commits domestic violence or unfaithfulness, when settling divorce, the court, for example, must consider the husband's fault when dividing the husband and wife's common property, in order to give priority to the wife, ensuring the legitimate rights and interests of the wife. If the husband and wife violate property rights and obligations, causing the loss or decrease of the common property, the person committing the act will not be given priority in the process of dividing the common property of the husband and wife upon divorce. This is certainly true in the case where a husband often drinks and gambles causing the couple's common property to decrease; in such a case the Court may give priority to the wife to receive a larger share of the common property upon divorce.

Common property of husband and wife shall be *"divided in kind, if impossible to be divided in kind, common property shall be divided based on its value. The partner who receives the property in kind with a value bigger than the portion he/she is entitled to receive shall pay the value difference to the other."*

"Separate property of a spouse shall be under his/her ownership, except for separate property already merged into common property in accordance with this Law. A spouse who requests division of separate property which has been merged into or mixed with common property shall be paid for the value of his/her property contributed to common property, unless otherwise agreed by husband and wife."

"The lawful rights and interests of the wife, minor children or adult children who have lost their civil act capacity or have no working capacity and no property to support themselves shall be protected." The wife can be seen as a subject in a group of disadvantaged people in society. Besides, the wife may lose job opportunities or no longer qualify for employment in some fields, the possibility of no income is very high after the divorce. In addition, the wife must bear the loss of physical health in taking care of the family, during pregnancy, childbirth, care and education of children. Therefore, the lawful rights and interests of the wife are protected by the law during the division of common property upon divorce, ensuring a good life for the wife in the future.[320] However, the protection of the lawful rights and interests of the wife, minor children and adult children who have lost their civil act capacity or are unable to work and have no property to support themselves, does not mean that priority should be granted to provide the wife a larger share in the common property or provide the children a part of the common property of the husband and wife. Priority as understood here means that the property is being divided in a beneficial way that ensures the life of the wife, minor or adult children who have lost their civil capacity or are unable to work and have no assets to support themselves. This is certainly true in the case of the division of a house which is common property and the sole residence of the couple. It is necessary to grasp the principle that "even if divorced, each

[320] Nguyen, Bình Luận Khoa Học Luật Hôn Nhân và Gia Đình 135.

party has the right to have a house; Therefore, housing settlement must be aimed at creating conditions for each party to have a stable place to live, especially for their children, and in any case not to let wives and children leave the house when they really are homeless."[321] In case it is not possible to divide the property in kind, the Court shall consider and decide to let the wife or husband directly raise minor children, children with restricted or lost civil act capacity and receive the property in kind and pay the value of the property to the other spouse. The aim of this regulation is to ensure that the rights of the above subjects are not infringed or belittled in the process of dividing the common property of husband and wife upon divorce. They are the weakest in marriage and family relationships – those who, due to their age, health and the economic and social prejudices against them, are in a situation where they must depend on other family members.[322] The protection of vulnerable subjects is very necessary and humane, which principle is applied by almost all countries in the world.

3.4.3 Analysing division of common property of husband and wife in specific cases

3.4.3.1 Division of common property of husband and wife in case the couple lives together with their family

It is very common for husband and wife to live together with the family in Vietnam as a result of the traditional family model being affected by Confucians a long time ago. When husband and wife live together with the family, they have contributed efforts to the creation, maintenance, and development of the family's common property, thereby leading to the problem of dividing the common property of the couple. The division of common property of husband and wife living together must ensure the interests of both husband and wife, especially the wife, minor children, adult children who have lost their civil act capacity or have no legal capacity to work and self-support assets. As regards the provisions of Article 61 of the 2014 Law on Marriage and Family, the division of common property of husband and wife living together with the family is as follows:

Firstly, in case the husband and wife live together with the family but divorce, if the husband and wife's property in the common property of the family cannot be determined, they will be given a part of the common property of the family based on their *"efforts and contributions to the creation, maintenance and development of the common property as well as to the common life of the family. The husband and wife's contributions to the creation, maintenance and development of the common property as well as to the common*

[321] Hanoi Law University, Giáo Trình Luật Hôn Nhân và Gia Đình Việt Nam 187.
[322] Chau, Le Vinh, "Bảo vệ Người Yếu Thế Theo Quy Định Của Luật Hôn Nhân và Gia Đình Năm 2014" 21.

life of the family shall be settled" with respect to Article 59 (2) of the 2014 Law on Marriage and Family. When dividing the common property of husband and wife, the principle of the division of husband and wife's property upon divorce shall be applied. The common property of husband and wife is divided in half taking into account the circumstances of the family and of the husband and wife, including contributions of husband and wife to the creation, maintenance and development of the common property; the legitimate interests of each party in production, business and profession so that the parties have conditions to continue working to generate income; the fault of each party in violating the rights and obligations of husband and wife.

Second, in case husband and wife live together with the family and the husband and wife's assets in the family's common property can be determined in part, then the spouse's part of the property shall be subtracted from the family's common property regarding the provisions of Article 59 of the 2014 Law on Marriage and Family. Applying the principle of property division upon divorce, the common property of husband and wife is divided in half, taking into account the following factors and circumstances of the family and of the husband and wife, such as: contributions of husband and wife to the creation, maintenance and development of common property; the legitimate interests of each party in production, business and profession so that the parties have conditions to continue working to generate income, and the fault of each party in violating the rights and obligations of husband and wife, protecting the wife, minor children and adult children who have lost their civil act capacity or have no working capacity and no property to live on their own.

3.4.3.2 Division of common property of husband and wife with regard to land use rights

Land use right is a special and highly valuable asset in the common property of husband and wife. Therefore, in order to create a legal basis in protecting the legitimate rights and interests of the spouses upon divorce with respect to land use rights, the Law on Marriage and Family has dedicated a separate article to deal with this problem.[323] The settlement of the division of property involving a land use right is usually done carefully, verifying and clarifying all issues related to the land use rights. As far as the provisions of Article 62 of the 2014 Law on Marriage and Family is concerned, the division of common property of husband and wife in the form of land use rights shall be settled as follows: 1/ Regarding agricultural land for planting annual crops and aquaculture, if both parties have the demand and meet conditions to directly use the land, it shall be divided according to the agreement of the two parties. If an agreement cannot be reached, they can request the Court to settle it pursuant to the provisions of Article 59 of the 2014 Law on Marriage and

[323] Ho Chi Minh City University of Law, Giáo Trình Luật Hôn Nhân và Gia Đình Việt Nam 179.

Family. In case only one party has the need and meets the conditions to directly use the land, then he/she may continue to use the land but must pay the other party the value of the land use right; 2/ In case the husband and wife have the right to use agricultural land for annual crops and aquaculture with the household, upon divorce, the husband and wife's land use rights are separated and divided similarly to agricultural land for growing annual crops and aquaculture without living with the family. 3/ Agricultural land for perennial crops, forestry land for afforestation, and residential land shall be divided with regard to the provisions of Article 59 of the 2014 Law on Marriage and Family. 4/ For other types of land, it shall be divided according to the provisions of the law on land. In the case of a group of land users whose land use rights can be divided into parts for each member of the group, if each member of the group wants to exercise his or her share of the land use right, he/she must carry out the following procedures: "split the plot according to regulations, carry out procedures for issuance of certificates of land use rights, ownership of houses and other land-attached assets, and exercise the rights and obligations of land users according to the provisions of the 2013 Law on Land."[324]

Husband and wife whose land use right has been divided must conduct the division of the parcel according to regulations and carry out the procedures for granting the certificate of land use right. In addition, in case a husband and wife live together with their family but do not have the right to use land together with the household, the interests of the party who does not have the right to use the land and does not continue to live with the family are dissolved in accordance with the provisions of Article 61 of the 2014 Law on Marriage and Family. This shows that land use right is one of the property rights and also the most valuable and meaningful asset in the common property of husband and wife, so in reality this dispute is very popular and complex.[325] Therefore, when dividing land use rights, the Court needs to consider the status of land use rights, the functions and value of land use rights so that the value of land use rights does not decrease in the future, but increases instead.

In summary, in order to ensure the rights of husband and wife in the division of common property held in the form of land use rights, the Court should have regard to the special nature of the common property as a result of the great value of this type of asset. When dividing land use rights, the husband and wife's ability to profit from land use rights must be equal. The other factors that are taken into account to divide them include that division must be commensurate with the circumstances of the family and of the husband and wife, including their contribution to the creation, maintenance and development of the common property. Other elements considered are as follows: income from their labour; the legitimate interests of each party in production, business and profession so that the parties

[324] Article 167 (2) (b) of the 2013 Land Law.
[325] Phuong, Đinh Thị Mai, Bình Luận Khoa Học Luật Hôn Nhân và Gia Đình Việt Nam Năm 2000 99.

have conditions to continue working to generate income; and the fault of each party in violating the rights and obligations of husband and wife.

3.4.3.3 Division of the common property of husband and wife put into a business

Regarding Article 4 (16) of the 2014 Law on Enterprise, "Business is the continuous performance of one, several or all stages of the process, investment, from production to consumption of products or supply services in the market for the purpose of profit". Business of husband and wife means the continuous implementation of one, several or all stages of the investment process starting from production to consumption of products or provision of services on the market for the purpose of husband and wife, generating profits and income to create, maintain and develop the common property. With regard to the business, it may happen that both husband and wife participate or only the husband or wife participates in the investment for profit purposes. Regarding Article 2 (1) of the 2005 Law on Commercial Law, commercial activities are actions for profit-making purposes, including purchase and sale of goods, services, investment, trade promotion and other commercial ones for other profitable purposes. Commercial activities of the spouse mean the husband and wife's participation in the purchase and sale of goods, services, investment, trade promotion and other profitable purposes, in order to create and maintain and develop the common property. According to the provisions of Article 64 of the 2014 Law on Marriage and Family, the division of common property of husband and wife invested into a business must take place so that the husband and wife who are conducting business activities related to common property have the right to receive such property and must pay the other party the portion of the value of the property, unless otherwise provided for by business law. Based on the foregoing, spouses who are conducting business activities related to common property have the right to receive priority in receiving such common property upon divorce and are obliged to pay the other party the value of such property. Legislators create conditions for the party doing business to continue to operate the business and generate a normal income after the divorce. The aim of this regulation is to protect the legitimate interests of each party in production, business and profession, thereby enabling them to continue working to generate income.

Example 1: Jeff and Mackenzie Bezos's case is considered one of the most expensive divorces not only in the US but also in the world. The ex-couple owns roughly 16% of online behemoth Amazon.com. "Amazon recently crossed the $1 trillion valuation mark and Mr Bezos's worth is estimated to be $137 billion."[326] The husband founded Amazon in 1994 and is its current CEO. He also has a wide range of other financial interests including

[326] Family Law by Lexis Nexis, "Jeff and Mackenzie Bezos' Divorce - 'a Loving Exploration" accessed 19 December 2021.

The Washington Post and space-oriented Blue Origin, while the wife is an author with two published novels. They married in 1993 and have four children together. It has been widely reported that they did not have a prenuptial agreement. However, whether a post-marriage contract was signed has not been disclosed.[327] They had reached an agreement on the division of property upon divorce through a prestigious attorney and partner's office in the US.[328] "According to the divorce filings Jeff Bezos will keep 75% of the former couple's Amazon stock and control 100% of the voting rights. He also retained all the interest in The Washington Post and Blue Origin. Mackenzie Bezos was awarded 25% of their Amazon shares valued at over 38 billion dollars."[329] Reaching an agreement upon divorce brings great benefits to both parties, including avoiding the costs of a divorce battle and protecting the privacy of the divorcing spouses. As far as Jeff Bezos and Mackenzie's divorce is concerned, if spouses choose the collaborative process or another alternative like divorce mediation, they are a proof that divorce does not have to become a war. Divorce can be amicable, and marriages can end well by not becoming part of the public court record.[330]

Example 2: As regards Mr Vu vs Mrs Thao's divorce case in Vietnam, the ex-couple got married more than 20 years ago and have four children together. After a long time of many conflicts, in 2015, the wife filed an application for divorce and the case has just come to an end in April 2021.

Based on the husband's proposal to withdraw the request to divide 70 billion dongs in the account named after the wife, the Supreme People's Court has amended this part. Other decisions are upheld. Previously, the Supreme People's Procuracy protested at cassation, asking to cancel the first instance and appellate judgments on the part of marriage and division of common property, and hand the file over to the People's Court of Ho Chi Minh City for re-trial. This cassation result is considered to close a cult legal battle related to marriage, common child-rearing and joint property division during the marriage of the couple. The appellate judgment on December 5, 2019, of the High People's Court in Ho Chi Minh City declared the consent to divorce between the parties. Regarding alimony, the court recognized the wife's willingness to raise four children. The husband supported each child with 2.5 billion VND /year from 2013 until they finished university.

Regarding assets, the court assigned the husband to own real estate and all shares in companies in Trung Nguyen Group, including all his shares in the company of Trung Nguyen Group, equivalent to more than 5,700 billion VND. Regarding real estate, the

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[327] The Abrams Law Firm, "Jeff and MacKenzie Bezos' Record $160 Billion Divorce Is Final" accessed 29 January 2021.

[328] Kate Duffy, "Two Attorneys in Bill and Melinda Gates' Divorce Also Worked on Jeff Bezos' Split in 2019" accessed 24 December 2021.

[329] Caroline Halleman and Chloe Foussianes, "Jeff Bezos Divorce Details - Jeff Bezos and His Wife MacKenzie Are Divorcing" accessed 24 October 2021.

[330] Springfield, "Why Amazon's Jeff and Mackenzie Bezos May Have Chosen Collaborative Divorce - Collaborative Divorce Attorney in Raleigh, NC" accessed 15 December 2021.

court assigned the husband to own all six houses and land that the husband is managing and using with a value of 350 billion VND in Ho Chi Minh City, Nha Trang City[331] and Buon Ma Thuot City.[332] The court assigned Ms Thao to own nearly 376 billion VND worth of real estate in Ho Chi Minh City and Da Nang City, along with assets of money, gold, and foreign currency in banks, totalling 1,764 billion VND. The husband has to pay the difference in the value of assets for Mrs Thao in the amount of nearly 1,224 billion VND. In addition, the appellate court recognized the husband's willingness to leave his assets at Trung Nguyen International Company in Singapore to the wife.

After the appellate trial court, the Supreme People's Procuracy issued a decision to request a postponement of the judgment execution on the property part in order to have time to process the wife's application for cassation. The husband actually paid more than 1,220 billion VND to the judgment enforcement agency one day before receiving the decision about the postponement of the execution of the judgment. After that, the Supreme People's Procuracy issued a decision to review this divorce case. The protest pointed out violations and errors of the first instance and appellate judgments. For example, the deed and report on valuation results for Trung Nguyen Group Joint Stock Company, issued on June 25, 2018, by the date of the first-instance trial (February 20, 2019), all have expired. The plaintiff appealed against the first-instance judgment, but the appellate court did not re-valuate, but still took the expired valuation results into account to divide the property. The Court of First Instance and the Court of Appeal did not summon the people who are managing the real estate to participate in the proceedings in order to thoroughly settle the case. On the other hand, the second instance court did not clarify the origin of the money in the bank in the wife's name, including 1,400,269 GBD and 7,350,000 USD; nor did it clarify the process of management and use of this money; It is not clear how much money is left and who is managing it. Although the issues related to this money have not been clarified, the court has determined that this is the husband and wife's common property and divided it.[333]

Through the two property division cases of couples who have been involved in joint business activities before the divorce, it can be seen that if the ex-spouses reach an agreement on the property, this will bring benefits to the couples after the divorce. Reaching an agreement has many advantages, such as avoiding paying court fees for the division of valuable assets and ensuring that private information is not disclosed to the public. Reaching an agreement also helps the parties continue to operate the business and does not reduce profits after the divorce.

[331] It belongs to Khanh Hoa province, Vietnam.
[332] It belongs to Dak Lak province, Vietnam.
[333] Hoang Yen, Kết Thúc vụ Ly Hôn Ngàn Tỉ Của vợ Chồng Trung Nguyên accessed 24 October 2021.

3.4.4 Payment of the common property obligations of husband and wife upon divorce

Regarding Article 95 of the 2014 Law on Marriage and Family, the payment of common property obligations of husband and wife shall be agreed upon by the husband and wife; If they cannot reach an agreement, they shall request the Court to settle. Thus, when the Court settles the divorce case, if the husband and wife have a request to divide the property and settle the common debt, the Court will accept the settlement in the same case. If a husband or wife or both spouses during their marriage have a transaction with another person to borrow a debt to meet the family's essential living needs (such as repair, housing construction, etc), but now cannot agree on the debt repayment obligation, which is a joint obligation or a separate one, they can request the Court to settle. The Court will base its evaluation on the evidence, testimonies and conclude whether or not it is a common debt based on the purpose of borrowing, namely, whether the borrowed assets are used for the general needs of the family, or the specific needs of the wife or husband. During the settlement of the case, the Court will summon the creditor to participate in the proceedings as a person with related rights and obligations and summon witnesses (if any) to clarify the disputed issues. Creditors can make independent claims to protect their interests during the procedure of the debtors' divorce or even after the debtors' divorce. According to the provisions of civil procedure law, in civil dispute cases, the involved parties are obliged to present evidence to prove that their claims are well-grounded and in accordance with the law. If they fail to provide evidence or provide insufficient evidence, they shall bear the consequences of such failure or incomplete proof.

With respect to Article 7 (3) of Circular 01/2016, when dividing common property of husband and wife upon divorce, the Court must determine whether the spouse has property rights and obligations in relation to a third party or not in order to bring a third person to participate in the proceedings as a person with related interests and obligations. In case a husband and wife have property rights and obligations in relation to a third party that they request to settle, the court must settle them when dividing the husband and wife's common property. Nevertheless, if the third party does not request settlement, he/she can submit for a separate request to the court in the future. Thus, it is the responsibility of the husband and wife to notify the court where the divorce is granted about the common debts, as a result of which the Court will promptly notify the creditor. Creditors will consider whether their interests are affected by the debtor's divorce and decide if they want to participate in the divorce case as a person with related interests.

3.4.5 Parental obligations to care for, raise and educate children and property relations upon divorce

3.4.5.1 Parental responsibilities to care for, raise and educate children upon divorce

As regards Article 81 of the 2014 Law on Marriage and Family, parents still have the right and obligation to look after, care for, raise and educate their minor children and adult children with civil incapacity or inability to work and no property to support themselves after the termination of their marriage. They might agree on the person to directly raise the child, the rights and obligations of each party towards the child after the divorce, if not, the court shall decide to assign the child to one party to directly raise the child based on the interests of all aspects of the child. If the child is 7 years or older, his/her wishes must be considered. Generally speaking, children under 36 months of age shall be assigned to their mothers to directly raise them, unless the mothers are not eligible to directly look after, care for, raise and educate the children or the parents have other agreements in accordance with the interests of the children. For the sake of the child, the Court may decide to change the person directly raising the child based on the request of one or both parties. A change in the person directly raising a child is made after a divorce, in case the person directly raising the child does not guarantee the child's interests in all aspects and if the child is 7 years old or older, the court must take into account the child's wishes.[334]

After the divorce, the person who does not directly raise the child has the right and the obligation to visit the child without any hindrance. If a parent who does not directly raise a child abuses visitation to obstruct or adversely affect the care, upbringing and education of the child, the person directly raising the child has the right to request the Court to limit visitation. In addition, the parent who directly raises the child has the right to request the person who does not directly raise the child to perform the obligations specified in Article 82 of the 2014 Law on Marriage and Family; request the person who does not directly raise children and family members to respect their right to raise children. Parents who directly raise children together with family members must not obstruct the person who does not directly raise the children in visiting, caring for, nurturing and educating their children.[335]

3.4.5.2 Parental responsibility toward children with regard to property

A parent-child relationship is created mainly through birth or upbringing, and includes relations between adoptive parents and children, as well as stepparents and stepchildren. In terms of parents and children through natural birth events, the identification of parents and

[334] Article 84 of the 2014 Law on Marriage and Family of Vietnam.
[335] Article 83 of the 2014 Law on Marriage and Family of Vietnam.

children is determined based on birth events through birth certificates issued by medical establishments. In this case, the mother-child relationship is determined based on the birth certificate. Father-child relationship is determined through a registered marriage relationship between father and mother. If the parents only cohabit, the paternity relationship with the child can only be determined through the fact that the father carries out the child recognition procedure at the competent state agency, which is the People's Committee of the ward, commune or township. Similarly, Book Four on Family Law of Act V of 2013 on the Civil Code of Hungary, which entered into force on 15th March 2014, has similar regulations, including a perspective of giving birth in incognito and substitute maternity. Andrea Hegedűs (2016)[336] mentioned that "the maternal status is not based on presumptions because - by the nature of birth - it can be usually decided clearly who the child's mother is: the one who gave birth to the child." So, maternity is a matter of fact that the woman giving birth to the child shall be considered the mother of that child.

Children's property rights are an under-researched area that spans the humanitarian and development gap. Access to the property is essential for adult life choices and financial well-being. However, the ability to claim ownership from adults can be significantly compromised by humanitarian emergencies that occur at a young age.[337]Therefore, paying attention to the protection of property rights of children is necessary for the development of their personal property at different stages of life. This section emphasizes that children have the right to own property and are protected under Vietnamese law. Children's property can be formed from many sources, such as through income from labour, inheritance, gifts and other lawful sources as prescribed by law. This section also analyses the role of parents in ensuring their children's performance on the property through civil transactions. Do all civil transactions related to the property of minor children have to be done through a legal representative who is normally the parent? If parents perform their responsibilities with regard to their offspring's property so that this leads to the destruction of their children's property, what are the legal sanctions? These questions will be analysed and answered in the body of this part. The second goal of this part is to compare the regulations on parental responsibility for their offspring's assets from the perspective of international, European and Hungarian law to have a comprehensive and multi-dimensional view.

Historically, a child is a human being between birth and puberty,[338] which is a general thought from a social perspective. According to some medical information, puberty varies between girls and boys. For girls, the age of puberty is 15 years of age, for boys, it is 16

[336] Andrea, Hegedűs, "Problem of Settling Maternal Legal Status in Hungary" 82–88.
[337] Joireman, Sandra F., "Protecting Future Rights for Future Citizens: Children's Property Rights in Fragile Environments" 470–482.
[338] Nguyen Thanh Huyen, "Policy Analysis Of Supporting Children" 1219-1232.

years. The United Nations Convention on the Rights of the Child[339] also states that a child is a human under the age of 18. Hence, age is considered a criterion to determine whether that person is a child. It means that below that age limit someone is regarded as a child and from that age limit upwards he or she is no longer considered a child. The age limit noted in the Convention is 18 years of age.[340] Based on this short definition of the child, the article could have a narrow examination of the scope and object of the researched issue. The article emphasizes the importance of parents' responsibility in ensuring their children's ownership of property. The section also researches and analyses the regulations on the management and disposition of property of children, including those who have fully turned 18 years old but lost their civil act capacity. The next goal is to analyse how parents can manage their children's assets fairly and without frittering away their children's assets.

3.4.5.2.1 Children's property: a fundamental right

Generally, Article 75 (1) of the 2014 Law on Marriage and Family states that *"children have the right to have their property including property separately inherited by or given to them, incomes from their work, yields and profits arising from their property and other lawful incomes. Property created from children's property is also their property. If they have incomes, children who are full 15 years or older and live with their parents have the obligation to attend to the family's common life and make contributions to meeting the family's essential needs. Children must contribute their incomes to meeting the family's essential needs"* according to Article 70 (4) of the 2014 Law on Marriage and Family.

The provision that children have the right to property continues to be affirmed in the Law on Children. Article 20 of the 2016 Law on Children stipulates that *"Children have the right to own, inherit and other rights to property as prescribed by law."*[341] These provisions show that children have the right to have their property regardless of whether they are an adult or a minor, have full civil act capacity or have lost their civil act capacity, live with or do not live with their parents. However, it can be seen that, almost implicitly, when a child is an adult and no longer lives with his or her parents, all the property that the child has from legal sources is acquired by the family and society recognizes it as the child's property. The problem only really needs to be clarified when the child is a minor, or has lost the civil act capacity and is still living with parents.

Based on the 2015 Civil Code, the 2014 Law on Marriage and Family and the 2015 Law on Children, the minor's assets are derived from various sources as follows:

[339] United Nations General Assembly, Convention on the Rights of the Child, 1-5.
[340] Giang, Huynh Thi Truc, "The Legal Concept of 'Child' and Children's Rights in Vietnam from 1945 until Today" 113-127.
[341] Law 102/2016/QH13 was issued by The National Assembly on Children on dated on 2016, May 04, gazette number 102/2016/QH13.

First, the child's property derives from property being inherited and given separately, which can be seen as two common bases for creating wealth. According to the 2015 Civil Code, when a minor is less than 6 years old, all civil transactions related to them must be established and performed by the legal representative. However, with a transaction for daily needs, the less than 6-year-old minor can carry out the contract by herself or himself without parental agreement manifestly based on Article 125 (2)(b) of the 2015 Civil Code, which stipulates that those transactions performed by minors will not be invalid. In addition, when giving property to a minor, if the property donated is a real estate, it is necessary to comply with additional provisions on the form of the contract. Specifically, Article 459 (1) of the 2015 Civil Code has the following provisions: *"Donating real estate must be made in writing, notarized, authenticated or registered, if the real estate must be registered for ownership rights following the law."* In the case of succession, it can be contributed to separate property according to a will or under inheritance according to law. The inherited property shall be considered as the minor's asset only when the testator specifies the name of the minor and the part of the estate. The grandfather, for example, makes a will to leave all of his estates to his grandchildren. After the grandfather's death, his part of the estate will be transferred to his grandchildren's property, even though they are minor children.

Second, age-appropriate income earned in compliance with labour laws constitutes the private assets of the minor based on Article 161 of the 2012 Labor Code, which states that a minor employee is an employee under 18 years of age. Therefore, the offspring living with parents can still have an income from their working capacity.

However, the fact that children have their property through income is not much notable and common in Vietnam. According to a survey[342] of the job market in Vietnam,[343] the 16-19 age groups (36%) have fewer job opportunities than the 25-30 age group (48%). The reason may be that they have more practical experience in the labour market. (See the figure 16 below)

[342] This study was conducted by Love Frankie, a regional social change and research organization, and research firm IRL (Indochina Research Ltd) in 2019.
[343] Frankie, Love and Bristish Council, "Báo Cáo Nghiên Cứu Thế Hệ Trẻ Việt Nam - Research Report on Young Vietnamese Generation Trẻ" 10.

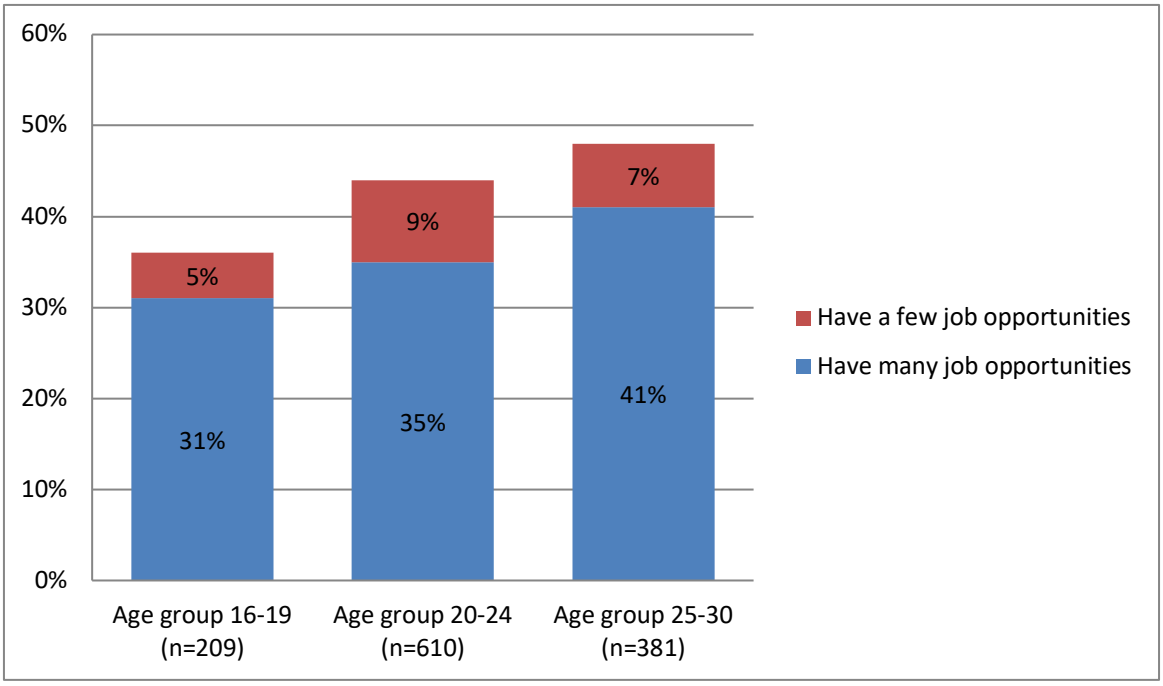

Figure 16. Percentage of workers by age group who think that there are a few and many job opportunities.[344]

Third, children's property derives from the yield and income arising from their property. Article 109 of the 2015 Civil Code states: *"1) Yields are natural products that an asset brings; 2) Income is the profit earned from the exploitation of property."* The benefits arising from a child's property are natural products produced from an asset that is his or her property. Taking an example, a child is given a cow by his/her maternal grandparents and later the cow gives birth to a calf. Thus, since the calf is the yield of the cow, which is inherently the property of the minor, this calf is also part of the child's property. An income arising from a child's property is an income earned from the exploitation of a child's property. For example, a child is given money by relatives and friends on Tet holiday[345] with the hope the child will eat well and grow up healthy. Tet is the Vietnamese New Year and is the most important festival and public holiday in Vietnam. The Vietnamese people give lucky money not only to children but also to their elders. For children, lucky money means „giving money to children to welcome the new age on the first day of the Lunar New Year. In other words, the adults hope their children will eat well and grow up healthy. Parents create a bank account for savings for the child with an interest rate of 8%/year. The interest on savings earned from the bank is also a profit arising from the initial asset of the minor.

[344] Frankie, Love and Bristish Council, "Báo Cáo Nghiên Cứu Thế Hệ Trẻ Việt Nam - Research Report on Young Vietnamese Generation Trẻ" 10.
[345] 'Vietnam's Tet Holiday: Lucky Money accessed 3 April 2021.

Fourth, property formed from children's property is also their property. Such formation of property, which continues to become the child's property, can be understood as formation through civil transactions. For example, having a separate amount of money from work and accumulation, the children use that money to buy an apartment. Thus, even if the house purchase takes place during the time the children are living with the parents, it is still considered their property.

3.4.5.2.2 Children's right to perform civil transaction by parental responsibility

Parental responsibility is a statutory concept, filled with common law content, which covers certain obligations prescribed by law. Some parents take these obligations very seriously, but not all parents. Responsible parents and caregivers, on the other hand, provide care, regardless of their legal status, in countless ways and without reference to legal rights and obligations. They consider the many complexities of their children's lives and tailor them to their potentials and opportunities.[346]

What is the content of parental responsibility in respect of minors' contracts? Parents are not liable under their children's contracts unless they expressly undertake such liability, nor can they enforce them on the minor's behalf. Generally speaking, "if the child was given any property under the condition that his/her parents should be deprived of access to such property, the guardian authority shall appoint a trustee - taking into consideration the recommendation of the settlor - for the administration of such property (hereinafter referred to as trustee). If the third person granting the property excluded one of the parents from managing the property, the other parent otherwise entitled to manage the property shall manage the property." "In connection with contracts of minor importance, the parent acting on the child's behalf may be considered by bona fide third parties as acting in the name of the other parent as well." "Moreover, a minor is bound by a contract for services if it is for his or her benefit, and therefore contracts of employment are valid—including apprenticeships, but also the paper round, the Saturday job in shops and the full-time job of a minor who has left school."

The fact that parents perform civil transactions for their minor children including those who have turned 18 years old but lost their civil act capacity is specified in Article 73 (2) of the 2014 Law on Marriage and Family. It is said that *"parents are representatives at law of their children, except when the children have other persons to be their guardians or representatives at law. A parent has the right to make transactions on his/her own to meet the essential needs of their minor or children who are full 18 years old but lost their civil act capacity or have no working capacity and no property to support themselves. For transactions related to real estate or movable assets with registered ownership or use*

[346] Rebecca, Stephen, and Jonathan, eds., Responsible Parents and Parental Responsibility 10.

rights or property used for business activities, children must obtain their parents' consent. Parents shall take joint responsibility for making transactions related to their children's property prescribed by the Civil Code and the Law on Marriage and Family. Parents shall pay compensation for damage caused by their minor following the Civil Code."

Provisions on allowing parents to "carry out civil transactions by themselves to meet the essential needs of their minor children and their children with disabilities" can be applied when parents are the legal representatives for the children. If the parents are not in that role, the children already have a legal representative performing civil transactions for the minor or children who have fully turned 18 years old but having lost civil act capacity.

A parent has the right to conduct transactions by himself or herself to meet the essential needs of the minor and children who have lost their civil act capacity but are 18 years old, or unable to work and have no assets to support themselves according to Article 73 (2) of the 2014 Law on Marriage and Family. Transactions to meet the essential needs can be understood as contracts for common living needs, such as clothing, accommodation, study, medical examination, treatment, and other common living needs indispensable for the life of children.[347]

Pursuant to the 2015 Civil Code, the establishment of civil transactions by a minor is specified as follows:

Firstly, if the minor is under 6 years old, all transactions of the minor will be made by the legal representative. When the parents are the legal representatives for the minor child under 6 years old, the parents will be the ones to perform all civil transactions for the minor child. Transactions made by parents or other legal representatives, in this case, can be just small transactions serving the daily essential needs of the minor such as: buying food, drinks, school supplies, but can also be large transactions involving real estate or property subject to the ownership of the minor, such as transfer of land use rights of the minor children inherited from a paternal grandfather to others. Thus, when the minor is less than 6 years old, the provisions of Article 73 (2) of the above Law on Marriage and Family and the provisions of the Civil Code 2015 are applicable.

Secondly, if the minor establishing and performing transactions is over 6 but less than 15 years old, the consent of the legal representative must be obtained, except for transactions serving daily life needs and being age-appropriate.[348] This provision shows that adolescents in the period from 6 years of age to less than 15 years of age can perform transactions to serve their daily needs by themselves.

Finally, Article 21 (4) of the 2015 Civil Code stipulates: *"A person from full 15 years old to less than 18 years old shall enter into and perform civil transactions by himself/herself, except for civil transactions related to real estate and movables requiring*

[347] JM Kruger, "The Philosophical Underpinnings of Children's Rights Theory" 436.
[348] Nguyen, Huu, and Dang, Bich, Nghiên cứu việc thực hiện quyền trẻ em ở Việt Nam – một số vấn đề lý luận và thực tiễn accessed on 05 February 2021.

registration and other transactions as prescribed by law that are subject to the consent of his/her legal representative."

3.4.5.2.3 Parental obligation to manage and dispose of their offspring's property

Regarding parental responsibility over management of children's property, Article 76 (1-2) of the 2014 Law on Marriage and Family provide some regulations on the management of minor's assets - based on age and cognitive ability as follows: *"1) Children aged full 15 or older may themselves manage or ask their parents to manage their property; 2) Property of children who are under 15 or children who have lost their civil act capacity shall be managed by their parents. Parents may authorize other persons to manage their children's property. Unless otherwise agreed by parents and children, children's property managed by their parents or other persons shall be given to them when they are full 15 years or older or have fully restored their civil act capacity. In some cases, parents shall not manage their children's property when their children are under the guardianship of other persons as prescribed by the Civil Code; or when the persons giving or bequeathing under testament property to their children have designated other persons to manage such property, or in other cases, as prescribed by law. In case parents are managing the property of their minors who are assigned to other guardians, the children's property shall be delivered to the guardians for management under the Civil Code."*

In the first case, a minor child who is full 15 years old can manage his/her property because lawmakers have recognized the cognitive ability of people aged 15 years who deserve to be able to manage their property. This regulation also shows that the law does not limit the value of assets that minors can manage. This means that any property that is privately owned by the minor can be managed by the minor on his or her own. According to the Vietnamese dictionary, management is understood as "to look after, take care of, and preserve something", which can be done by the minor itself.[349] With this understanding, it is completely appropriate for the minor to look after, take care of, and preserve ordinary assets of little value and associated with the daily living needs of the minor such as computers, telephones, jewellery, motorbikes. If the property is real estate such as houses, land, businesses, or real estate of great value, the law allows the minor to manage them.

In addition to managing the property on their own, minors who are full 15 years old can ask their parents to manage their property. This provision is not compulsory but is just another option to broaden legal directions in managing private property for the minor. As far as the scope of application is concerned, since the law has no limits, we can deduce that, whenever there is an agreement with the juvenile that the minor children's custodian is the parent, parents can represent their children. In other words, parental management is

[349] VDict, Definition of Management accessed June 9, 2021.

possible even in cases where the minor is unable to manage his/her property, even though the children are from full 15 to less than 18-year-olds. It is also consistent with the psychology and lifestyle of Vietnamese people, because children at those ages in Vietnam are still taken care of by parents from small things like eating, daily activities to managing property.

To actively manage their assets and actively participate in transactions, the law on banking allows people from full 15 years of age to less than 18 years of age to set up a bank card if they have their assets to secure the implementation of obligations in the use of the card. The cards they use are debit cards without an overdraft. However, people from full 6 years of age to less than 15 years of age can only have a supplementary card through the legal representative who is the main cardholder.[350] This is also basically consistent with the spirit of the Civil Code and the Law on Marriage and Family on the property management of minors under the age of 15.[351]

Concerning disposition of property of children, Article 76 of the 2014 Law on Marriage and Family clarifies some rules as follows: *"1) Parents or guardians who manage under-15 children's property have the right to dispose of such property in the interests of the children and shall take into account the children's desire if they are full 9 years or older; 2) Children aged between full 15 and under 18 have the right to dispose of their property other than real estate, movable assets with registered ownership and use rights or property used for business activities the disposal of which is subject to the written consent of their parents or guardians; 3) Guardians of children who have lost their civil act capacity but are fully 18 years old may dispose of the latter's property."*[352]

Generally speaking, when the minor child is under 15 years old or the child is a person with a loss of civil act capacity, the child's property is managed by his or her parents. Unlike the first case, in this case, parents must manage the minor child's property because at this time the minor child is less than 15 years old. The ability to know right and wrong in the implementation of the act as well as the consequences of the act that they perform is still limited, so the law does not allow them to manage the property by themselves. This provision also recognizes management by the parents as an obligation toward their children, but the ability to perceive and control behaviour is no longer due to mental illness or some other illness. According to civil law, this is the case where the adult child loses the civil act capacity.

In addition to the property management for their children, parents can authorize another person to manage property on the parents' behalf. It can be seen that parents will delegate the management of their children's property to others when the parents do not

[350] Thư viện pháp luật, Trẻ Em Có Được Mở Tài Khoản ATM accessed June 9, 2021.
[351] Giang, Huynh Thi Truc, "Beginning of Protection of Children's Rights in the Vietnamese Legal Development" 105–118.
[352] Thư viện pháp luật, "Con Cái Được Quản Lý, Định Đoạt Tài Sản Riêng Như Thế Nào? - How Do Children Manage and Dispose of Their Property" accessed June 9, 2021.

have the conditions to manage those assets by themselves. Authorization can be given to any person the parents find the best at performing this task. For example, a minor (12 years old) inherits from his grandfather a perennial orchard in a village far from the city centre. However, the child and the parents live in the city centre, which is not convenient for taking care of and keeping the garden. Therefore, the parents of the juvenile decide to ask the minor's uncle, who lives next to the orchard, to manage it.

The management by the parent or another person of the minor child's property, or the property of the adult child having lost his or her civil act capacity, in this second case, will end when the minor child is full 15 years old or older or the adult child who has lost his/her civil act capacity has fully recovered his/her civil act capacity, unless otherwise agreed.

Article 76 (4) of the 2014 Law on Marriage and Family stipulates: *"In cases where parents are managing the separate property of their minor children or the children aged over 18 years old but having lost their civil act capacity and that child is assigned another guardian, the children's property shall be handed over to the guardian for management according to the provisions of the Civil Code."*

When a minor child has a parent and is still placed in the custody of a guardian, the parent is still eligible to care, educate and protect the legal rights of the child even though he or she is no longer entitled to the management of their offspring's assets.

With respect to Article 47 (1) of the 2015 Civil Code, a child will become a ward when: 1) There is no parent or the parent is unidentifiable; 2) The child has parents but both parents have lost their civil act capacity; Both parents have difficulties in cognition and behaviour control; Both parents have limited civil act capacity; Both parents have been declared by the Court to have restricted rights over their children; Neither parent meets the conditions to care for and educate their children and a guardian is required.

Thus, the Law on Marriage and Family has recognized the management of the minor child's property through the role of a guardian as a legal proposition when the minor's parents are still alive, but they are unable to continue with the management of their children's property. When the child has a guardian, the parents must hand over the minor child's personal property to the guardian for management according to the provisions of the Civil Code.

In case a child loses his or her civil act capacity, according to civil law, the guardian of such person is determined as follows: 1) The first is their spouse; 2) The second is their child; 3) The third is their parents. When the parents are also the guardians of the child, in this case, the handover of property is not required.

In addition, to ensure the unified management of the child's property, Article 76 (3) of the 2014 Law on Marriage and Family also stipulates: *"Parents do not manage their children's property in case the child is under the guardianship of another person by the civil law."* This means that, when a minor child or an adult child having lost his/her civil

act capacity is under the guardianship of another person and has acquired some additional property of his/her own, the newly arising property will be under the management of the guardian.

Regarding the disposition of separate property of the minor who is full 15 years old, according to the provisions of Article 77 (2) of the 2014 Law on Marriage and Family, he/she can dispose of property under his ownership, except for immovable estate. This provision of the 2014 Law on Marriage and Family is compatible with Article 21 (3) of the 2015 Civil Code, which mentions that *"Where a person from full six to less than fifteen years of age establishes and performs civil purchase transactions, such transactions must be approved by the legal representative, except for civil transactions serving the needs of daily living appropriate to their age."*

For the children who lose civil act capacity, the person with the right to dispose of property is his/her guardian.[353]

3.4.5.2.4. Restricting parents' rights over their offspring's assets

Regarding obligations of parents toward their children, the Law on Marriage and Family also contains provisions restricting parents' rights toward their minor which are reasonable and necessary rules. Having legal provisions to review parents' rights over their children will create a legal corridor reducing situations of abuse as well as protecting the legitimate rights and interests of children.

The restriction on parents' rights over their minor is imposed when the parents fall into the cases specified in Article 85 (1) of the 2014 Law on Marriage and Family as follows: *"1) He/she is convicted of one of the crimes of intentionally infringing upon the life, health, dignity or honour of this child or commits acts of seriously breaching the obligations to look after, care for, raise and educate children; 2) He/she disperses property of the child; 3) He/she leads a deprived life; 4) He/she incites or forces the child to act against law or social ethics. On a case-by-case basis, a court shall itself, or at the request of the persons, agencies or organizations prescribed in Article 86 of the 2014 Law on Marriage and Family, issue a decision disallowing a parent to look after, care for and educate a child or manage the child's property or act as the child's representative at law for between 1 and 5 years. The court may consider shortening this period."*

The Court may, on its own or at the request of an individual, agency or organization with decision-making authority, limit some of the rights of a parent over a minor child. These authorities are divided into two groups:

The first is the group of subjects that are allowed to directly request the Court to restrict the parents' rights: 1) Parents, guardians of the minor children, according to the

[353] Article 77 (3) of the 2014 Law on Marriage and Family.

provisions of law and the civil procedure law have the right to request the Court to limit the rights of parents over minors; 2) Next of kin; 3) The state management agency in charge of families; 4) The state management agency in charge of children; 5) The Women's Union.

The second group of subjects only has the right to request competent agencies and organizations to ask the Court to limit the rights of parents. They include individuals, agencies, and organizations. Other persons, when detecting that a parent commits a violation specified in Article 85 (1) of this Law, also have the right to request the restriction of parental rights. The organization or organizations specified at Article 86 (2) (c-d) of the 2014 Law on Marriage and Family may also request the Court to limit the rights of parents.

When detecting that a parent is committing violations,[354] other persons, agencies and organizations such as the state management agency in charge of families, the state management agency in charge of children, and the Women's Union have the right to request a court to restrict this parent's rights over the minor child.

However, it is very difficult for the above subjects to detect and request the Court to limit parental rights over their children, because of the privacy of the transactions that parents carry out relating to their children's property. The children themself are not aware enough to be able to act to protect their property from being dispersed by parents. According to a survey conducted by the Research Institute for Management and Sustainable Development and by Save the Children in Vietnam,[355] 9 out of 10 children think that they have no or little opportunity to express their opinions before the decision-making authority. The survey shows that 86.6% of children think that it is very important for decision-makers to listen to children's opinions.[356] However, up to 88.3% of the children participating in the survey said that they have little or no opportunity to express their opinions to decision-makers.[357]

This shows that state management agencies need to pay attention to policy implementation solutions to help children to participate, to express their opinions, to be

[354] Duc Binh, Gần 70% trẻ em Việt Nam từng bị bạo hành, xâm hại accessed on 21 February 2021.
[355] The survey "Voices of Vietnamese Children" by the Institute of Management Research and Sustainable Development and Save the Children in Vietnam was conducted based on the Organization's "Young Voices" survey guideline framework. Save the Children Sweden incorporates the needs and context of practical implementation of the International Convention on the Rights of the Child and the 2016 Law on Children in Vietnam. The survey was conducted with the participation of 1,740 Vietnamese children aged 11 to 16 years old in 7 provinces/cities in the North, Central and South regions. The survey was conducted with the participation of children in rural and urban areas; a group of children in schools and groups of out-of-school children; Children of Kinh and children of ethnic minorities. The information collection method used by the survey includes information through questionnaires, combined with focus group discussions in localities to enable children to express personal views about the initial results of the survey to collect more evidence, voices as well as solutions for the issues of concern.
[356] Competent people include senior management in Central government, the provinces, districts, wards/communes, residential groups, school principals, teachers, parents…
[357] The subjects of the survey were children under the age of 18.

heard and to achieve that children's opinions are taken into account concerning all issues related to children in general and concerning the protection of children's property rights in particular. State management agencies need to promote communication and raise the awareness of departments, social organizations, schools, families and communities to enable them to take timely action if children's rights are violated in terms of their property and health by the parents and others. Strengthening awareness education for children to protect their rights if violated is extremely necessary. According to a study,[358] children have a sense of protection of property rights from a very young age, from the ages of 4 and 5. Therefore, families and schools must focus on educating children to protect their property rights from the earlier stages of life.

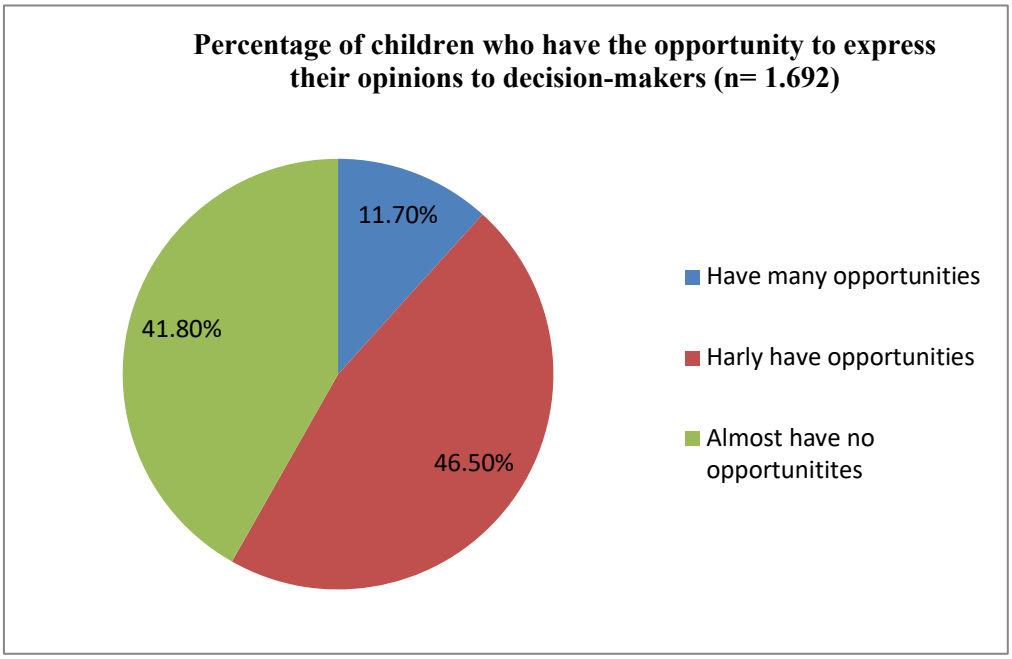

Figure 17. Percentage of children who have the opportunity to express their opinions to decision-makers.[359]

In cases where a parent is restricted by a court in his/her rights over the minor child, another person will exercise the right to look after, care for and educate the child, manage their property and represent the child at law.

The custody, care, education of a minor and management of a minor child's personal property are assigned to guardians by the 2015 Civil Code and the 2014 Law on Marriage and Family in the following cases: *"1) Parents have restricted rights towards their minor children; 2) A parent is not restricted in his/her rights toward the minor child but is ineligible for the exercise of rights and obligations toward the child; 3) A parent has*

[358] McDermott, Catherine H. and Nicholaus S. Noles, "The Role of Age, Theory of Mind, and Linguistic Ability in Children's Understanding of Ownership" 91.
[359] Linh, Nguyen Phuong, "Báo Cáo Kết Quả Khảo Sát Tiếng Nói Trẻ Em Việt Nam- A Research Report on Young Voice in Vietnam" 49–52.

restricted rights towards the minor child and the other parent has not been identified yet. Parents, whose rights towards their minor children have been restricted by a Court, must still perform their child support obligations."

From the perspective of international law on the protection of children's rights in general, there are many organizations and agencies established on a global or regional scale to ensure the full development of children in society. UNICEF is the UN organization mandated to protect the rights of every child, everywhere, especially the most disadvantaged, and is the only organization specifically named in the Convention on the Rights of the Child as a source of expert assistance and advice. There is a profound idea in this Convention: those children are not just objects that are owned by their parents and for which decisions are made by adults. Instead, they are people and individuals with their rights. The convention says childhood is different from adulthood and until the age of 18 it is a special, safe time in which children are allowed to grow, learn, play, develop and prosper with pride. The convention became the most widely ratified human rights treaty in history and helped transform children's lives.[360] The European Convention on Human Rights is an international treaty that only member states of the Council of Europe may sign. The Convention, which established the Court and lays down how it is to function, contains a list of the rights and guarantees which the States have undertaken to respect, among those are the right to respect for private and family life.[361] The European Convention on Human Rights has served as a basis for plenty of judgments recognizing private and family life. A family relationship is a relationship between family members based on a blood relationship, an adoption or a marriage event. The European Court of Human Rights found that respect for family life did not protect the desire to start a family, but those who acted as parents of children (not legally or genetically related). Therefore, withing the meaning of the European Convention on Human Rights, it seems that due to close social relationships, it is possible to form a family relationship between adults and children without kinship.[362]

Specifically, concerning the Hungarian law on the protection of children's property rights, the law has adequate mechanisms to ensure that children have their property and methods to protect these assets. There are several similarities between Hungarian and Vietnamese laws on parental responsibility relating to children's property rights.

Similarly, in Section 4:159 of the 2013 Hungarian Civil Code, parents will be restricted in their rights if they destroy their children's property in the process of managing their children's assets.[363]

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[360] UNICEF, "What Is the Convention on the Rights of the Child? | UNICEF?" accessed 28 May 2021.
[361] European Court of Human Rights and Council of Europe, 'Questions and Answers European Court of Human Rights 9.
[362] Banda, Fareda and John Eekelaar, "International Conceptions of the Family" 833–862.
[363] Section 4:155 -4:163 of the 2013 Hungary Civil Code– Book Four (Family Law).

In summary, children's rights in general and children's property rights in particular are an area that needs attention from the state, society and family because it concerns the future generation. Based on an analysis of current regulations on parents' responsibilities relating to their children's property rights in Vietnam, the article has pointed out basic issues. Parents are the representatives of their children with regard to their property if the children are minors or have reached adulthood but have lost their civil act capacity. However, not all children need the consent of their parents when making transactions with their property if the transactions are appropriate for their age and such transactions are a necessity. Real-life shows that, sometimes, when parents exercise the right to manage and dispose of their children's private property, it can lead to the destruction of their children's property, which may be detected by individuals or organizations. However, the relationship between parents and children within the narrow and private scope of the modern family model can hardly allow such individuals and organizations to protect the children. Therefore, it is always necessary to strengthen propaganda and dissemination of the law to help communities, families and children understand their rights and responsibilities.[364] From the perspective of comparative law, there does not seem to be too much difference between national, regional, and international laws in the spirit of protecting children's property rights.

3.4.6 Maintenance of a relative following divorce

Withing the meaning of Article 3 (24) of the 2014 Law on Marriage and Family, support is an obligation of a person to contribute money or other property to meet the essential needs of a person who does not live with him or her but has a relationship with him or her based on marriage, blood or rearing. It can be seen that alimony is a legal relationship characterized by a personal relationship associated with property and only arising between family members when the statutory conditions are satisfied. When husband and wife divorce, a support relationship may arise in the following two cases: 1/ A support relationship between parents and children upon divorce; 2/ A support relationship between husband and wife after divorce. The most striking feature is that the alimony relationship does not automatically arise when the parties divorce but it must be requested. The person claiming child support will be the father or mother who has the right to directly raise the child after their divorce. In the case of support between husband and wife after divorce, the person requesting support is the spouse who is facing difficulties and needs.

[364] Vackermo, Marie and Lars-Gordan, Sund, 'The Interest Theory, Children's Rights and Social Authorities' 752.

3.4.6.1 Parental support for children upon divorce

According to the provisions of Article 110 of the 2014 Law on Marriage and Family, fathers and mothers have the obligation to support their minor children and adult children who are unable to work and have no property to support themselves for a period of time, if they are not living with the child or they are living with the child but violating their obligation to raise the child. It can be seen that the alimony obligations of parents towards the child will arise in two cases as follows: 1/ When the child does not live with the parents, but the child is a minor; 2/ When that child is an adult but has no working capacity and no property to support himself. Compared with a parent's nurturing obligation, supporting obligations require parents to provide money, property or even food and drink to maintain their child's life, but they arise only when they are not living together. On the other hand, parental nurturing duty is a fundamental obligation that both parents take on their shoulders in relation to their children regardless of whether the parents and children live at the same residence. Thus, when a child does not live with his/her parents due to divorce, as long as the child is a minor, a support obligation will arise for the parent. However, when the child is an adult aged over 18, it is necessary to meet two more conditions for support as follows: 1/ The child has no working capacity; 2/ The child has no property to support himself/herself. Parental support for a child aged over 18 when the child has no wife, husband and children, or the child has such relatives but they are not able to take care of and help him/her. This conclusion is compatible with other provisions in civil law regarding the regulation on the selection of guardians for people who have lost their civil act capacity (Article 53 of the 2015 Civil Code).

As far as the level of support is concerned, it shall be agreed upon by the person with *"the support obligation and the supported person or the latter's guardian on the basis of the actual income and ability of the person with the support obligation and the essential needs of the supported person. If they fail to reach agreement, they may request a court to settle it"* (Article 116 of the Law on Marriage and Family). The change of support level shall be agreed upon by the parties, however, the parties may ask the court to settle the issue in case they cannot reach an agreement. It is believed that the level of support is not specifically fixed by law but is made according to an agreement between the obligor and the person receiving support or the latter's guardian. The basis for agreement on the level of support is the income, the actual ability of the person with the support obligation and the essential needs of the children. If the level of support cannot be agreed, it will be resolved by the Court. The level of support in this case is normally compromised between the obligor and the other parent. When the parties reach the necessary agreement in determining the amount of support, the alimony relationship will begin to take effect. However, there are also many cases where the level of support must be determined by the

Court because the parties cannot reach an agreement. The reason for this failure to reach an agreement usually results from the fact that the obligor wants to support the obligee at a lower rate than the obligee's request or vice versa. The Court usually orders the obligor to provide monthly support to the obligee in a certain amount depending on the obligor's actual ability to support. However, this support amount can still be changed at a later time if it is reasonable.[365]

On the question of when the support obligations between parents and children will end, with regard to termination of support, the parents' child support obligation will become terminated in the following cases: firstly, the supported child is mature and has working capacity; secondly, the person receiving support has property to support himself; thirdly, the person receiving support is adopted by another person (Article 118 of the Law on Marriage and Family).

3.4.6.2 Support obligations between husband and wife upon divorce

In the event of a divorce, if the party is in difficulty and needy and he or she makes a request for alimony and has a legitimate reason for it, the other party is obliged to support him/her according to his/her ability (Article 115 of the Law on Marriage and Family). This provision shows that the support obligation between husband and wife is only formed when the divorced couple have respect for the basic ethical and legal conceptions of marital love. Once the marital relationship of husband and wife is created, "husband and wife have the obligation to love, be faithful, respect, care for, and help each other; share and perform household chores."[366] However, when husband and wife divorce each other, the rights and obligations of husband and wife will cease. But this does not mean that all the grace that had formed and existed for a long time before the end of the marriage can be denied. Therefore, if one party is in a difficult or needy situation, the ex-husband or wife might support him/her upon divorce based on the request of the person to be supported.

From a legal perspective, certain conditions need to be met before a couple's support obligations can arise. These conditions are as follows: 1/ Their marriage must be a legal relationship created through marriage registration at the right competent agency and both spouses must meet the conditions for marriage in accordance with the Law on Marriage and Family. However, there are also cases where one of the parties or both get married in violation of the marriage conditions, but then the marriage relationship is recognized by the Court, or their divorce is resolved, thereby giving rise to support relationships. 2/ The person receiving support must be in the circumstance of difficulties and needs when getting a divorce. In legal science, the difficult situation of a husband and wife can be

[365] Article 116 (2) of the 2014 Law on Marriage and Family.
[366] Article 19 (1) of the 2014 Law on Marriage and Family.

understood as meaning that they have financial difficulties or cannot generate income to meet the minimum material needs."[367]

This support relationship will end when the supported person is married to another person.[368] As long as the supported person has established a new marital relationship, the support relationship will end without the need for satisfying any other conditions in terms of economic ability as well as financial ability, and the working capacity of the supported person. Even if the person receiving support continues to fall into a difficult or needy situation after getting married to another person, he or she is not allowed to ask the ex-spouse to continue providing support. In fact, there are many cases in which the party receiving alimony does not get married after divorce, but only lives together or cohabits with another person. It is thought that the support in this case will be terminated if the supporting person proves that the supported person has a cohabitation relationship.

3.4.7 European private law with respect to divorce and legal separation

3.4.7.1 Divorce and legal separation

Most countries give the Court the authority to decide on divorce and declare an end to the couple's married status. The court also considers the issue of children born out of their marriage to ensure that the minor children are raised and supported when the parents get a divorce. It will also lead to a division of the assets owned in common by the spouses, and if necessary, to the payment of a contribution or maintenance by one spouse to another. There are regulations for working out with which court an application for divorce must be filed when the couple separate, including those who are of different nationalities or living in different Member States in the European Union during the marriage through mutual recognitions.[369]

National laws in EU nations will decide the reasons based on which the couple can file for separation or legitimate division, and the strategies included. However, a number of EU rules help determine which courts have jurisdiction and which law applies in cases involving two or more EU countries due to the couple living in different countries or having different nationalities. The spouses can file their request with the courts in the country where they live, where they last lived together, where one of spouses has lived at least 6 months and has a nationality of that country. The law that governs the divorce is not necessarily the law of the country where the spouses file for divorce. There is an agreement about which law should apply to cross-border divorces between 17 EU countries including

[367] Ho Chi Minh City University of Law, Giáo Trình Luật Hôn Nhân và Gia Đình Việt Nam 56.
[368] Article 118 (5) of the 2014 Law on Marriage and Family.
[369] European Justice, European E-Justice Portal - Divorce and Legal Separation accessed 4 October 2021.

Austria, Belgium, Bulgaria, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia, and Spain.[370]

Similarly, the court may grant divorce at the request of either or both spouses in Hungary, similarly to Vietnamese family law, if their marriage has completely and irretrievably broken down. The best interest of the spouses' common minor children must be a primary consideration, when divorce is granted. When divorce is obtained, the right of custody and maintenance of the common child, contact between the parent and the child, alimony for any of the spouses, use of the family home and, in the case of joint parental responsibility, the residence of the child is regulated by a court settlement in case the parties can come to an agreement meeting the statutory requirements or by a court judgment in the absence of an agreement between the spouses.[371] The spouses do not need to agree on the division of common matrimonial property to obtain divorce from the court, because it is completely independent of the Court's divorce settlement. On the contrary, the Vietnamese Court can deal with a combination of direct custody of children, child support, division of common property of husband and wife, and joint debt payment in addition to approving divorce. According to the compilation issued by the Statistical and Analytical Codification Department of the Ministry of Justice about Matrimonial cases in 2000, "a total of 23,968 marriages were dissolved during 2000, of which 18,440 marriages (76.94%) were dissolved by mutual consent."[372] (see Figure 18)

[370] An official website of the European Union, Legal Separation and Divorce Law accessed 4 October 2021.
[371] See an analysis of the earlier Hungarian regulations relating to the dissolution of the spouses' matrimonial property Andrea, Hegedűs, *A házassági vagyonjog, különös tekintettel a házastársi vagyonközösség* 1993.
[372] Commission on European Family Law and Emila Weiss, Orsolya Szeibert, "Grounds for Divorce and Maintenance Between Former Spouses in Hungary" 1-10.

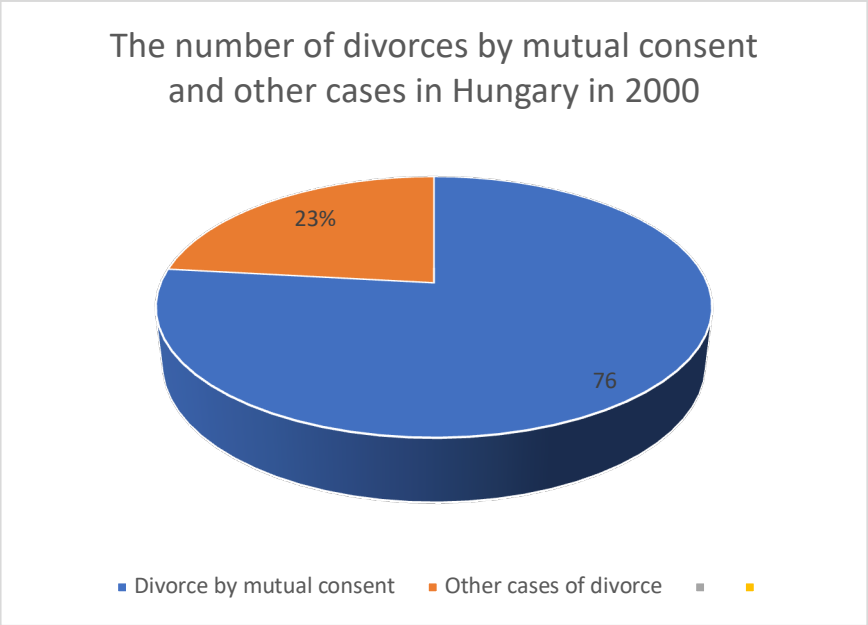

Figure 18. The number of mutual consent and other cases of divorce in Hungary in 2000 by the Statistical and Analytical Codification Department of the Hungarian Ministry of Justice.[373]

The division of property of the spouses**.** As far as divorce is concerned, the couple no longer hold a joint estate and either of them may apply for the division of matrimonial property. The court will decide the division of common property between them based on whether they have entered a marriage contract or not. If the marriage contract is established and ensures the formality which is to be set down in writing in a public instrument or private instrument countersigned by a lawyer, the Court will use it as a basis to resolve the division of property for the couple in open claims. On the contrary, if the spouses did not enter into a contract on the division of common assets or the contract concluded does not regulate all the claims that may arise from the divorce, the Court will proceed to divide the common property of husband and wife based on the following principles: 1/ "In determining the distribution of assets among the spouses in terms of ownership of certain items, the court shall first and foremost take into account the spouses' uniform statement"; 2/ "The assets which are required for the pursuit of profession or private entrepreneurial activities by either spouse shall in principle accrue to the spouse who is engaged in the pursuit of that profession or business activity"; 3/ "If one of the spouses is a member or shareholder of a business association where the capital contribution of that spouse was provided from the community property, the court may assign a share of ownership in the business association to the other spouse - at this/her request - under the provisions on the transfer of corporate membership rights, if his/her share from the community property

[373] Commission on European Family Law and Emila Weiss, Orsolya Szeibert, "Grounds for Divorce and Maintenance Between Former Spouses in Hungary" 1-10.

cannot be allocated otherwise in accordance with the provisions on the disbursement of a share from the community property subject to the provisions" set out in Civil Code and Family Rules; 4/ "If the asset carries any debt, in the property relationships of spouses it shall be covered by the spouse who gained ownership of the asset following distribution. The distribution of debts shall apply in respect of the creditor according to the rules on the assumption of debts. Separate property existing at the time of termination of common of property shall be allocated in kind, except when this is not possible on account of the mixing of assets or if division is likely to considerably diminish the value of common property or separate property."[374] The Court also takes into consideration compensation for investments from common assets into the spouse's separate assets, investments from the spouse's separate property into common property or management and maintenance costs. In case the spouses hold no common matrimonial property at the time of their divorce and the party in debt has no separate assets either, then the compensation cannot be considered.

Regarding the practice of settlement in Hungary, matters of exercising parental responsibility over the child must be decided by common agreement between the parents. If the parents fail to come to an agreement in custody matters and maintenance allowance, the court will grant the rights of custody to the parent who can better promote the physical, mental, and moral development of the child with respect to the court's assessment. The court may grant the right of custody to a third person who seeks to exercise the right of custody himself or herself, if the children's best interests are put at risk by any of their parents.

The child has the right to maintain direct personal contact with the absent parent, including the right and the duty of the absent parent to maintain personal relations and direct contact with the child on a regular basis (right of access). The parent or other person holding the right of custody must not infringe upon the right of access and provide information to the absent parent on the development, health and studies of the child on a regular basis, and may not withhold such information if requested by the absent parent. Parents living separately exercise control over essential questions concerning the child's future, involving the use or change of name of the minor child, his or her place of residence other than the residence shared with the parent with custody, his or her place of stay abroad for permanent residence or establishment, as well as the nationality, education, and career of the child.

There is no judicial separation regime in Hungary or Vietnam, but both just recognise legal separation as one of the conditions for the Court to establish the end of marriage. The conditions for legal separation applicable to the start and end of the common life of the spouses as a couple and, consequently, to the period for which they held a joint estate, will be established by judicial discretion. As regards the exercise of its discretionary powers,

[374] Section 4:61 and 4:61 of the V of 2013 on Hungarian Civil Code.

the court must subject the various aspects of the spouses' life as a married couple under scrutiny, including their sexual relationship, economic interdependence, common family home and household, expressions of the couple's unity, common children raised, relatives, taking care of the child of either spouse. Consequently, the court establishes if the spouses' common life as married couple continues or has come to an end by a joint analysis of all the interrelated economic, family, emotional and intentional factors involved.

When the end of their common matrimonial life has been established by legal separation, the spouses are free to seek division of the matrimonial property. This is true in the case where the spouses can acquire assets independently, except for pre-existing common property. The couple must agree on sharing parental responsibility if they have common children. On the other hand, Vietnam has not yet recognized legal separation in family law, although it has considered this issue in the 2014 Draft Law on Marriage and Family. According to a survey on divorce and separation rates in Vietnam in 2009 among men, divorce and separation accounted for 64% and 36% respectively. The same proportion is true for women with divorce and separation rates of 72% and 28% respectively.[375] (See Figure 19) This shows the fact that a large number of men and women choose to separate instead of divorce, so it is necessary to introduce regulations governing property relations for couples when they live in legal separation.

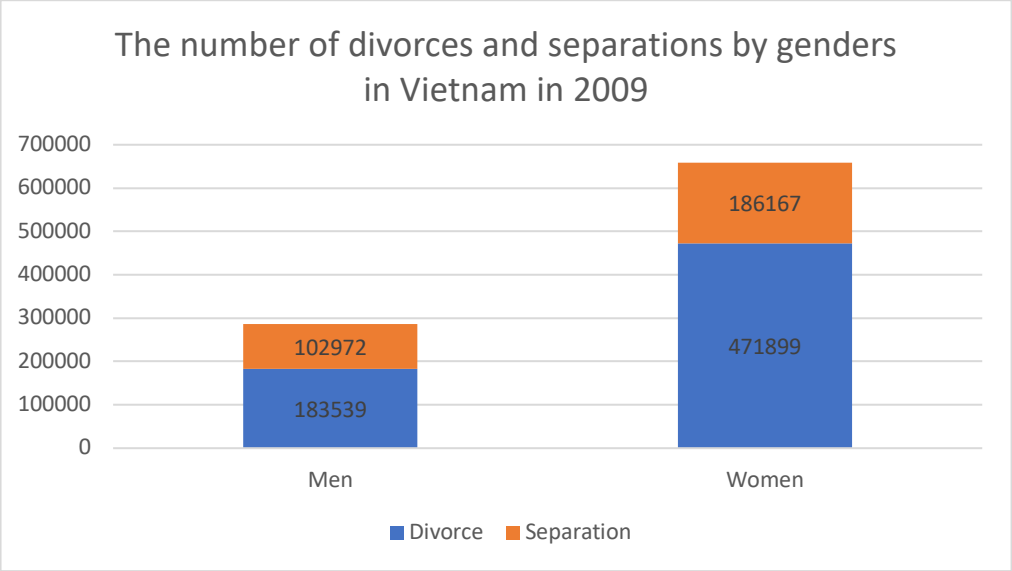

Figure 19. The number of divorces and separations by genders in Vietnam in 2009 according to Vietnamese General Statistic Office's survey.[376]

As far as the general rules on jurisdiction are concerned, the competent court in the divorce proceedings will be the court having jurisdiction over the place of residence of the

[375] Vietnamese General Statistic Office, Cấu Trúc Tuổi, Giới Tính và Tình Trạng Hôn Nhân 24.
[376] Vietnamese General Statistic Office, Cấu Trúc Tuổi, Giới Tính và Tình Trạng Hôn Nhân 24.

defendant. If the defendant does not have a place of residence in Hungary, jurisdiction is established based on the place of stay of the defendant. If the place of stay of the defendant is unknown or is abroad, his or her last place of residence in Hungary will be considered. If this cannot be established or if the defendant did not have one, jurisdiction will be established on the basis of the claimant's place of residence or the last common place of residence of the spouses. The court will have exclusive competence in any new proceedings brought in relation to the same marriage in matrimonial matters concerning rights in property arising out of the matrimonial relationship, when matrimonial proceedings are referred to the court. Regarding a divorce proceeding between spouses who do not live in this Member State or who are of different nationalities, Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation is applicable in Hungary. With regard to all cases with a foreign aspect, the law applied by the courts of Hungary will be the law specified by the Regulation granting the spouses freedom to choose the applicable law pursuant to Articles 5-7 and connecting factors are established to specify the applicable law only in the absence of a valid choice by the parties under Articles 8-10.[377]

3.4.7.2 Comparative Law: European and Hungarian family law with regard to maintenance

European laws allow requesting a maintenance between family members, including child support from a parent not living with the child, alimony between spouses when divorcing, or other maintenance between family members. The court of the creditors' home State has the responsibility to determine the obligation of the debtor to pay maintenance and set the amount of alimony. The settlement of the court of the creditors' home State will be easily recognised in the other Member States of the European Union due to the 2007 Hague Protocol. The 2007 Hague Protocol determines "the law applicable to maintenance obligations and any judgment on maintenance issued by the courts of the Member States circulates freely in the European Union and may be enforced in all the Member States without additional formalities ensuring maintenance creditors and debtors benefit from administrative assistance offered by the Member States." Later, new rules on maintenance matters were introduced on 18 June 2011 that apply in all 27 European Member States on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Once *"maintenance is due from or to the benefit of a person living in a non-EU State, the Convention on the International Recovery of Child Support and Other Forms of*

[377] European Justice, 'European E-Justice Portal - Divorce and Legal Separation' accessed 12 December 2021.

Family Maintenance[378]*and the Protocol on the Law Applicable to Maintenance Obligations*[379] *may help the creditor in recovering his/her maintenance in non-EU States which are contracting parties to these international instruments. The Convention has entered into force for the EU towards third States party to that Convention since 1 August 2014."*[380]

Regarding Hungarian law in comparison, the maintenance obligation generally makes direct relatives liable towards family members as follows: *"1/ The parent has an obligation of support towards the child, and the child has an obligation of support towards the parent. If a child eligible for child support does not have a parent to pay child support, his or her support will be passed on to relatives further away. When a person eligible for support has no children, their support must be borne by more distant descendants."*[381] *2/ "Minors who do not have immediate relatives who are required to provide support should be supported by their elder sibling, provided that the elder sibling can meet the support obligation without jeopardizing their ability to support themselves, their spouse or partner and their direct dependents."*[382] *3/ "Spouses living together are obliged to support in their household the dependent minors of the other spouse (stepchild) brought into the common household by the other spouse with the consent of the supporting spouse."*[383] *4/ "If the step-parents provide support for an extended period, the step-children have a responsibility to support their dependent step-parents."*[384] *5/ "Foster children have a support obligation towards the person who has cared for them in their home for a long time without requesting financial compensation, who is not biological, adoptive or stepmother (foster parents) of the child."*[385] *6/ "Alimony may be requested by a spouse from the other spouse in the case of legal separation, or from the ex-spouse in the case of divorce, when the spouse is unable to support him- or herself through no fault of his or her own."*[386] As far as legal separation is concerned, "an ex-spouse unable to support himself or herself through no fault of his/her own may apply for alimony from another ex-spouse", provided that the relationship has lasted at least one year and has resulted in the birth of a child.[387]

As regards the obligation to pay maintenance to the other spouse, a spouse may demand alimony from the other spouse in the case of legal separation or divorce, if a

[378] This Convetion was concluded on 23 November 2007 and has been in force since 01 January 2013. See full text of the Convention on https://www.hcch.net/en/instruments/conventions/full-text/?cid=131.
[379] This Protocol was concluded on 23 November 2007 and has been in force since 01 August 2013. See full text of the Protocol on https://www.hcch.net/en/instruments/conventions/full-text/?cid=133.
[380] European Justice, 'European E-Justice Portal - Family Maintenance' accessed 4 October 2021.
[381] Section 4:196(1) to (4) the Act V of the 2013 Hungarian Civil Code.
[382] Section 4:197 of the Act V of 2013 on the Hungarian Civil Code.
[383] Section 4:198(1) of the Act V of 2013 on the Hungarian Civil Code.
[384] Section 4:199(1) of the Act V of 2013 on the Hungarian Civil Code.
[385] Section 4:199(2) of the Act V of 2013 on the Hungarian Civil Code.
[386] Section 4:29(1) of the Act V of 2013 on the Hungarian Civil Code.
[387] Section 4:86(1) of the Act V of 2013 on the Hungarian Civil Code.

former spouse is in need of it through no fault of his or her own and deserves to get the alimony from the latter. The payment of alimony should in no way endanger the livelihood of the spouse obliged to pay alimony, and that of the other spouse receiving the alimony to maintain his/her daily life needs. The obligation to pay alimony may have a limited term if it can be assumed that the party requesting alimony will no longer be in need after the expiry of such term. It is true that in case the spouses lived together as a couple for less than a year and have no common children from the marriage, the spouse receiving the alimony is entitled to maintenance only for a period equivalent to the duration of their common life. In exceptional cases, the court may order the payment of alimony for a longer period on equitable grounds and in exceptional cases if the spouse or former spouse requests alimony on account of the deterioration of his or her situation.[388] Differently, the provisions on support in Vietnam between spouses terminate only when the person receiving support is married to another person, or the parties to the support relationship die if the parties do not otherwise agree.

There are two forms of support, including benefits in kind and cash benefits (so-called support allowances). In the case of maintenance obligations towards minors, the child's father has the right and the obligation to care for his child in a family, raise him and create the conditions for his physical, cognitive, emotional and moral development, in housing, food and clothing in particular, as well as the child's access to education and health care. The parent who lives with the child in the same home provides for the material needs of the child, while the separated parent (or who lives in the same home but does not contribute to the maintenance of the child) mainly takes care of the child through the payment of alimony. All minors (under 18 years of age) are entitled to alimony under the presumption of necessity established by law. Children under the age of 20 are also entitled to alimony as long as they are in secondary school. Children of working age (from the age of 18) who continue their education are entitled to alimony regardless of the presumption of need if they need alimony in order to continue their studies within a reasonable period of time. However, the current regulation seeks to encourage that children can complete their secondary education without having to work alongside it. Thus, they may be entitled to child support until they reach the age of sixteen or even twenty. The child must immediately inform the parents of his intention to continue his studies.[389] Studies consist of any course or training required to qualify for a career and the studies are conducted continuously in a postgraduate or postgraduate program in higher education or higher professional education. When exceptionally justified, parents may need to provide for the maintenance of a child of 25 or older.[390] However, there is no maintenance obligation of the parents towards an adult child in further education if the child is not considered to be

[388] European Justice, European E-Justice Portal - Divorce and Legal Separation accessed 4 October 2021.
[389] Section 4:220(1) of the Act V of 2013 on the Hungarian Civil Code.
[390] Section 4:220(5) of the Act V of 2013 on the Hungarian Civil Code.

dependent, if he or she fails to fulfil his/her educational and exam obligations through a fault of his or her own, or if the granting of child support would endanger the livelihood of the parents. A child of legal age is also deemed not to be dependent if he/she does not have any relationships with the parent who is obliged to provide maintenance for no legitimate reason.[391]

As far as the amount and form of maintenance is concerned, the person entitled to maintenance and the person obliged to pay maintenance are free to make an agreement. Once the parties could not reach an agreement, the court will decide on the child's maintenance allowance based on the creditor's request. The issue of jurisdiction and the division of responsibilities between the courts and the guardianship authority have also been clarified. Under the current rules, the courts have exclusive jurisdiction over the decision on child support, whereas the guardianship authority has a right in the matter to decide on the fulfilment of the obligation to pay maintenance in a lump sum approval. The amount of child support varies from case to case depending on the obligor's financial circumstances and the reasonable needs of the child, which are examined by the court.[392] The changed socio-political circumstances in Hungary make the judge's decisions regarding child maintenance more difficult. Changed economic circumstances of Central and Eastern Europe have resulted in significant increases of living and educational expenses and a considerable rise in the rate of unemployment. On the other hand, some parents accumulate considerable wealth, which they later disguise to avoid paying child maintenance or alimony. To solve this problem, the Hungarian judicial practice takes into consideration the actual incomes of the obligor parent instead of that parent's declaration of assets. In addition to considering the parent's real income, the court considers the growing costs of higher education when fixing child allowance.[393]

In terms of the general rules of jurisdiction, "the court in the territory of which the defendant (debtor) lives shall have jurisdiction." If the debtor does not have an address in Hungary, jurisdiction will be governed by his/her place of residence. Once "the defendant's place of residence is unknown or is abroad, his or her last domicile in Hungary will be considered." If "the defendant's place of employment and domicile are not located in the same area, the court will, acting on a request by the defendant lodged no later than the first hearing in the case, refer the matter to the court with jurisdiction over the defendant's place of employment, in order to conduct the hearing and deliver a judgment."[394]

The court decides on maintenance allowance based on several elements as follows: *"1/ The justified needs of the child consist of regular expenditure required to meet the costs of*

[391] Section 4:220(3) and (4) of the Act V of 2013 on the Hungarian Civil Code.
[392] Krausz Bernadett, "A kiskorú gyermek tartásának szabályozása a polgári korban magyarországon" 83–101.
[393] Koros, Andras, "Children's Rights in the Hungarian Judicial Practice" 67.
[394] Section 29 of the Act CXXX of 2016 on the Code of Hungarian Civil Procedure.

the child's subsistence, medical care, upbringing and education; 2/ The income and financial situation of both parents; 3/ The other children living in the same household with the parents including their biological children, stepchildren or foster children, and the children towards whom the parents have a maintenance obligation; 4/ The creditor's own income, and 5/ The child-protection, family-support, social-insurance and welfare benefits provided for the child and the parent for raising the child."[395]

The maintenance allowance must be paid as a fixed amount which is decided by the Court depending on the amount of the allowance payable adjusted automatically each year. The amount of the allowance is compatible "with the increase in the consumer price index published annually by the Hungarian Central Statistics Office, from 1 January of the following year."[396] Vietnam does not have the provisions on changes in the level of support that are implicitly present in the provisions of Hungarian Law on alimony. It would be logical for Vietnam to learn to note that the pension level will change automatically every year in line with the annual consumer price change announced on 1 January by the Hungarian Central Statistical Office. In fact, the current level of alimony in Vietnam is set by the Court based on the minimum wage set by the Government but it does not change continuously every year and usually only changes to keep up with rising consumer prices. This is a progressive regulation because it ensures that pensioners receive support appropriate to their own needs and in line with common general expenditures. The starting point is currently the 15-25% of income of the obligor, which may be adjusted by certain factors. The court normally awards 20% of the obligator's income, while the guardianship authority sets the child support at 15-30% per month but always in a fixed amount.[397] In general, *"when determining the average income of the person obliged to pay maintenance, the person's total annual income in the year preceding the institution of proceedings for maintenance must be taken into consideration."*[398] Vietnam does not have a fixed amount of child support compared to the Hungarian law of 15-25%. Failing to set a fixed level of support, according to Vietnamese legislators, will create flexibility for the Judge when considering the actual needs of the supportee and the supporter's ability on a case-by-case basis. Similarly, the Hungarian Civil Code states that *"if a change in the parties' agreement or in the circumstances that formed the basis of the court judgment on the amount of the maintenance allowance would put at risk a vital legal interest of either of the parties if that party were to continue paying maintenance under the same conditions, such party may request a change in the amount or the terms of payment. The person obliged to pay maintenance must pay the maintenance allowance to the person entitled to receive maintenance periodically (e.g., monthly, quarterly, annually) in advance."*

[395] Section 4:218 (2) of the Act V of 2013 on the Hungarian Civil Code.
[396] Section 4:207 of the Act V of 2013 on the Hungarian Civil Code.
[397] Csorna Kalman, *Rokonság (Kinship)* 1.
[398] Section 4:218 (4) of the Act V of 2013 on the Hungarian Civil Code.

If the debtor deliberately fails to pay the maintenance, the creditor may apply to the court, which may order its enforcement. Restoration claims older than six months can be enforced with retroactive effect in case the creditor had a good reason for delaying with the enforcement application, but claims older than three years cannot be enforced in court.[399] If *"the debtor has no regular income or the amount to be deducted*[400] *from his or her income does not cover the amount due, the court will order enforcement by issuing the document providing for enforcement regarding wages and other assets as laid down in the Act on Enforcement."* People could be sentenced to two years in prison if, through a fault of their own, they fail to pay the maintenance allowance established in the enforceable decision of an authority.

With respect to alimony having a foreign element, it is under the authority of the Ministry of Justice of Hungary and the central authority for maintenance matters in the other Member State based on Council Regulation (EC) No 4/2009. The applicant may request alimony, thereby the Hungarian court may determine the request and make the decision on maintenance allowance payment. "The formal request[401] is received not by the Ministry of Justice, but by the district court determined according to the applicant's domicile, place of residence or place of employment, or by the district court that handed down the first-instance decision for which enforcement is requested. The district court will forward the request and the required attachments to the Ministry of Justice, which will send the translated request to the central authority responsible for maintenance matters in the other Member State. The central authority will take the measures and thereby initiate proceedings against the debtor. Later, the Hungarian Ministry of Justice will notify the applicant about the result of proceedings based on the information received from abroad."[402]

3.5. Property relations resulting from the death of the spouses

3.5.1 The concept of death or being declared dead by the Court

With respect to the explanation of scientists, a person is considered dead when the heart stops beating, the lungs stop breathing, the brain and related organs are no longer functioning. Cases leading to death are illness, old age, accidents, natural disasters and some other similar cases. Thus, death is an event that terminates the life and legal behaviour of a person in society. Regarding death in the case of being declared dead by the

[399] Section 4:208 (3) of the Act V of 2013 on the Hungarian Civil Code.
[400] "The deducted amount cannot exceed 50 % of the employee's wages. With regard to the unemployment allowance including unemployment benefit, pre-pension unemployment benefit, income supplement and jobseeker's allowance, a maximum of 33 % may be deducted as maintenance allowance."
[401] The application of the Maintenance Regulation in Hungary is governed by Act LXII of 2011.
[402] European Justice, European E-Justice Portal - Family Maintenance accessed 4 October 2021.

Court, Article 71 of the 2015 Civil Code provides that persons with related rights and interests may request the Court to issue a decision declaring a person dead in the following cases: 1/ “After three years from the effective date of a court's decision declaring a person missing, there is still no reliable information that such person is alive;” 2/ “The person has disappeared during a war and there is still no reliable information that such person is alive after five years from the end of the war;” 3/ “The person met with an accident, catastrophe or a natural disaster and there is still no reliable information that such person is alive after two years from the end of such accident, catastrophe or natural disaster, unless otherwise provided for by law;” 4/ “The person has been missing for five consecutive years or longer and there is no reliable information that such person is still alive; this time limit shall be calculated in accordance with Article 68 (1) of the 2015 Civil Code.” Based on the above cases, the Court determines the date of death of the person who is declared dead. “The decision on declaring a person dead issued by a court must be sent to the People’s Committees of the commune where the dead person resided to be recorded as prescribed in the Law on Civil Status Affairs.” A person may be declared dead when the individual is biologically no longer alive or is dead, or due to his disappearance for a period of time prescribed by law based on the petition of the person with related rights and obligations.

3.5.2 Legal consequences of when one of the spouses dies or is declared dead by the Court

3.5.2.1 Determining the time to terminate the marriage relationship due to the death of a spouse

Article 65 of the 2014 Law on Marriage and Family stipulates that “Marriage is terminated from the time of death of either spouse”. It can be said that this is a regulation that serves to "legislate" about a matter of course by laying down that the marriage has ended when one of the spouses is no longer alive. In fact, in many cases, when both husband and wife are alive and still living together under the same roof, their marriage is no longer meaningful, but for various reasons, neither husband nor wife wants to terminate that nominal relationship. And here, when one of the spouses dies, even though they still love the deceased with all their heart, few people can think that their marriage still exists and carries the full nature of the spousal relationship. Therefore, the rationality of this regulation should be recognized. Thus, according to the current Law on Marriage and Family, when a husband or wife dies, the marriage will end.[403] For example, in February 2015, Mr A and Mrs B got married. On September 1, 2015, Mr A died in a traffic accident.

[403] Phan Trung Hien, and Huynh Thi Truc Giang, *Hỏi - Đáp và Bình Luận Luật Hôn Nhân và Gia Đình* 119.

Then the marriage relationship of Mr and Mrs B will have ended at the time of Mr A's death due to a traffic accident on September 1, 2015.

In pragmatic law, natural death will be determined by a death certificate issued in accordance with current regulations on civil status. The civil status law stipulates that within 15 days from the date of death, the wife, husband or children, father, mother or other relatives of the deceased are responsible for registering the death.[404] When registering a death according to the provisions of the Law on civil status, the content of the death registration shall be determined according to the death notice or the certificate issued instead of the death notice by the competent authority. For example, for a person who dies at a medical facility, the head of the medical facility shall issue a death notice; for the person who dies due to the execution of a death sentence, the Chairman of the death sentence execution council shall issue a certificate certifying the execution of the death sentence instead of the death notice; For a person who dies on a means of transport, in an accident, is killed, dies suddenly or in doubtful circumstances, the written certification of the police agency or the examination results of the forensic examination agency shall replace the death notice.[405] Determining the time when a person has died is very important, this is the basis for determining the time to terminate the marriage and also the time to open the inheritance procedure when the person with the property dies.

Death registration is the recognition by a competent state agency of the termination of an individual's existence. The legal recognition of the death event and the time of death of an individual is of great significance as a basis for termination and change of the legal relations of that individual, including their marriage and family. Therefore, when a spouse dies but is not declared dead, the legal relationship between husband and wife still exists. Therefore, "a person cannot marry another person if he or she does not have documents proving that his or her spouse is dead, as a basis for terminating the marriage relationship in accordance with the law." [406]

Marriage is a right attached to the person of each individual that cannot be transferred to another person.[407] When one of the spouses dies first, the marriage ends. When marriage ends, the rights and obligations of husband and wife also end. The regulation of the time of termination of the marriage in case one spouse dies first has ensured the legitimate rights and interests of husband and wife in personal and property relationships.

When a spouse is declared dead by the Court, the marriage between the two of them will also end. The time of marriage termination is specified in Article 65 of the Law on Marriage and Family 2014 as follows: "In case the court declares that a spouse is dead, the

[404] Article 33 (1) of the 2014 Law on Civil Status. The National Assembly passed Civil Status Law 60/2014/QH13 on November 20, 2014.
[405] Article 4 (2) Decree 123/2015 detailing a number of articles and measures to implement the Law on Civil Status.
[406] Ministry of Justice - Administrative reform website.
[407] Article 25 (1) of the 2015 Civil Code.

time of marriage termination shall be determined according to the date of death recorded in the court's judgment or decision." Thus, unlike biological death, which is determined based on death registration procedures, legal death is determined based on the effective judgment of the Court. Specifically, the time of termination of marriage due to a spouse being declared dead by the Court is the date of death of that spouse recorded in the Court's judgment or decision declaring a person dead. The date of death of the person declared dead will be determined differently on a case-by-case basis.[408] It is necessary to clearly determine the date of death of the person who is declared dead, which is recorded in the judgment, this is an important basis for determining the time of termination of the marriage.

For example: Mr. Pham Quang Hai is a crew member of Quang Ninh Shipping and Import-Export Joint Stock Company. On May 3, 2010, Mr. Hai was dispatched by the company to receive and hand over all the work at the ship. On December 28, 2010, on the journey from Kemaman (Malaysia) to Ho Chi Minh City - Vietnam, unfortunately, the ship had an accident, the ship sank in Vietnamese waters. After organizing search and rescue coordination, 12 crew members were rescued, and 04 crew members' bodies were found trapped in the ship and identified by the Institute of Criminal Science of the Ministry of Public Security. The remaining 07 crew members have not been found, including Mr Pham Quang Hai born in 1978, in An Duong district, Hai Phong province. On February 15, 2015, Mr Pham Quang Phuc, Mr Hai's biological father, filed an application with the People's Court of An Duong district to declare Mr Pham Quang Hai dead.[409] From the above example, if based on the 2015 Civil Code, the date Mr. Hai is considered dead is two years after the date of the accident or disaster[410], i.e. December 29, 2012. Determination of the death of a person who is declared dead by the Court is also confirmed by a death notice, but the death registration is done on the basis of a legally valid court decision declaring the death. The content of death registration shall be determined according to the death notice or the certificate issued instead of the death notice by a competent authority. For a person who is declared dead by the Court, the effective judgment or decision of the Court shall replace the death notice.

As far as Article 72 of the 2015 Civil Code is concerned, *"when a decision of a court declaring that a person is dead becomes legally effective, all marriage and family relations and other personal relations of such person shall be resolved in the same manner as if the person were dead. The property relations of a person who is declared dead by a Court shall be resolved in the same manner as if such person were dead; the property of such person shall be dealt with in accordance with the law on inheritance."* With regard to Article 65 of the 2014 Law on Marriage and Family, a marriage is terminated from the

[408] Article 71 (2) of the 2015 Civil Code.
[409] Vinh, Doan Thi, "Xác Định Ngày Chết Là Ngày Nào?" accessed on 21 December 2020.
[410] Article 71 (1) (c) of the 2015 Civil Code.

time of death of a spouse. In case a court declares a spouse to be dead, the time of termination of the marriage is the date of death stated in the court's judgment or decision. *"When a spouse is dead or declared to be dead by a court, the other shall manage the common property, unless another person is designated to manage the estate under his/her testament, or the heirs agree to designate another person to manage the estate. When there is a request for division of the estate, unless the couple has reached an agreement on the property regime, the common property of husband and wife shall be divided into two. The property portion of the spouse who is dead or declared to be dead by a court shall be divided in accordance with inheritance law. In case the division of the estate would seriously affect the life of the living spouse and the family, this spouse has the right to request a court to restrict the division of the estate in accordance with the Civil Code. Unless otherwise prescribed by business law, the property of husband and wife used for business activities shall be settled according to*" the law. Together, these regulations indicate that the declaration of a spouse dead by the Court is a legal consequence of protecting the rights and interests of the surviving spouse and other relatives of the person declared dead.

3.5.2.2 Property relationships of the deceased spouse

The joint property of husband and wife will be divided equally if requested by the surviving spouse in case their spouse is declared dead by the Court. The division of common property in case one of the spouses has died is different from other cases of division of common property of husband and wife. If during the division of common property during the marriage period or the division of common property upon divorce the spouses cannot reach an agreement, the common property shall be divided equally taking into account other factors. However, with regard to the division of common property due to the death of one of the spouses without an agreement before their death, the property is divided based upon the principle of halving and without taking into account other factors. The explanation for this provision may be that the death of one spouse leads to the absence of their will when conducting the division of common property. Therefore, the Court will proceed to divide the common property between them without taking into account other factors to ensure fairness.

Once the common property is divided, the surviving spouse will receive half of their rights while the deceased husband or wife's share will be divided among their heirs. The deceased spouse's heir can be an heir according to a will or according to the law in accordance with the Civil Code of 2015. Regarding inheritance by will, the wife or husband freely expresses who will inherit their property after their death. In the case of inheritance at law, the division of inheritance from the deceased spouse will take place

according to the category and line of succession as prescribed in Article 651 of the 2015 Civil Code. The first level of heirs of the deceased wife or husband are as follows: the spouses, biological parents, adoptive parents, offspring and adopted children of the deceased. If the marriage relationship between the spouses still exists until the time when one of the spouses dies, the surviving person will inherit in the first line of inheritance from the deceased person. For example, if a husband had biological parents, a wife and two children before his death, the husband's estate would be divided equally among the heirs into five parts if he did not have a will before his death.

3.5.3 Personal and property relations when one spouse is declared dead but later returns

In case one of the spouses is declared dead by the Court but they are still alive and have returned, the settlement of their personal and property relations shall take place according to the law. Pursuant to Article 73 of the 2015 Civil Code, when a person who has been declared dead returns or there is reliable information that such person is still alive, at the request of that person or the person with the right to make such a request or having related interests, the Court will issue a decision to annul the decision declaring the person dead. Considering the personal relationship of the survivors, it is fully restored. Whether their marital relationship can be restored or not depends on the current marital status of their spouse. If their spouse is still unmarried, their marital relationship is automatically restored. However, if the spouse is already married to another person, the marriage relationship between the surviving spouse and the returning spouse will not automatically be restored. The spouse's current marital relationship with the current spouse will remain recognized and valid. If this spouse declares that he or she still has feelings for the former spouse, who was declared dead but then returned, he or she can divorce their current spouse and re-register their marriage with the former spouse. The person who is declared dead but still alive has the right to request the people who have received the inherited property to return the property and the current value of the property. In case the heir of a person who is declared dead knows that this person is still alive but deliberately conceals this fact in order to inherit, he/she must return the entire property received, including yields and profits. If damage is caused, compensation must be made. Property relations between husband and wife shall be settled in accordance with the provisions of the Civil Code and the Law on Marriage and Family.

The property relationship of the person who is declared dead and later returns to his or her spouse will be resolved depending on whether their marital relationship is automatically restored or not. If their marriage is restored, the property relation shall be restored on the effective date of the court’s decision cancelling the declaration of death of

the person who is the husband or wife. The property acquired by his/her spouse from the effective date of the court's decision declaring the death of the husband or wife to the effective date of the court's decision cancelling such declaration is the separate property of that spouse. If their marriage is not restored, property which was created before the effective date of the court's decision declaring the death of the husband or the wife and which has not been divided shall be settled as in the case of property division upon divorce.

3.5.4 Comparative Law: European countries and Hungary with regard to the spouse's inheritance

Regulation No 650/2012 of the European Parliament and of the Council (4 July 2012) is designed to handle issues on the jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (hereinafter referred to as the EU Succession Regulation). Once a European Certificate of Succession "is issued, it will be recognised in all Member States without any special procedure being required. As far as the Regulation of July 2012 is concerned, the courts of the Member State in which citizens had their last habitual residence will have jurisdiction to deal with the succession and the law of this Member State will apply" as well.[411] Concerning the question of public policy, it is essential to sum up the main rules on the determination of the applicable law under the EU Succession Regulation. In the absence of choice, according to Article 21, habitual residence (in lieu of nationality) is the relevant connecting factor. So, the law applicable to succession as a whole is the law of the country where the deceased was habitually resident at the time of his or her death. As Recital 23 of the Preamble states, the place of habitual residence represents a genuine link between the succession and the State in which jurisdiction is exercised, and declares that the habitual residence determined should reveal a close and stable connection with the State concerned.[412]

The Hungarian Civil Code guarantees the substantive basis of the right of inheritance through some general rules on succession. These rules are particularly relevant from the aspect of public policy matters, especially if there is a violation of the non-discrimination principle. The right to inherit is ultimately based on legal capacity, specifically on section XV of the Fundamental Law of Hungary (25 April 2011) and section 2(1) of the Hungarian Civil Code, as they provide that the legal capacity of each natural persons is equal. The right to inherit shall not lapse according to section 7:2 of the Hungarian Civil Code. This

[411] European Justice, European E-Justice Portal - Succession accessed 4 October 2021.
[412] Csöndes, Mónika, "The Public Policy (Order Public) Rule of the EU Succession Regulation and the Hungarian Inheritance Law" 888–905.

means that inheritance law claims as property law claims shall not lapse. However, it should be noted that under Hungarian law the reserved (compulsory) share falls under the realm of the law of obligations, thus the period of limitation for claims for a reserved share shall be five years. In addition, section 7:3 of the Hungarian Civil Code states that the disposition of one's property after death may take place by testamentary disposition or by intestate succession. Next to the will, the Hungarian inheritance law accepts two other forms of testamentary disposition that are the agreement as to succession and the testamentary gift.[413]

With regard to inheritance by the Hungarian spouse, inheritance by a spouse only applies to a legal marriage or a registered partnership, whereas cohabitation does not give rise to an inheritance relationship pursuant to section 7:62 of the Civil Code and section 3(1) of the Act regulating registered partnership (Act XXIX of 2009).[414] The spouse's share of inheritance depends on whether the deceased spouse has children or living parents as follows: *1/ "If the deceased person has no descendant or surviving parent, the surviving spouse inherits the entire state. As a result, the intestate succession of the surviving spouse precludes intestate succession by the descendants of the deceased person's parents or siblings of the deceased person) or by distant relatives in the ascending or lateral lines." 2/ "If the deceased person has descendants and a surviving spouse, the surviving spouse has the following rights in succession, including life estate on the family dwelling used together with the deceased person and a share of the estate of the same size as inherited by the children of the deceased in kind or in cash (known as one 'share of a child'). The life estate may be redeemed in the course of the probate proceedings based on consideration of the interested parties (the spouse's and the descendant's) reasonable interests.*" Thus, the descendants and the spouse may stipulate in their agreement regarding the allocation of the estate that the spouse will receive a life estate for the entire estate and the child might get the legacy in cash instead. *3/ "If the deceased person has no descendant (or the descendant is excluded from succession) and the deceased person has surviving parents as well as a surviving spouse, the surviving spouse has the following rights in succession": "the family dwelling used together with the deceased person, including furnishings and appliances (the ownership title to such property rather than an estate for life); and half of the remaining part of the estate." "The other half of the estate is distributed between the two parents of the deceased person in equal shares. If one of the parents is debarred from succession, the other parent and the surviving spouse inherit in equal shares the portion that would be allocated to the debarred parent."*[415]

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[413] Csöndes, Mónika, "The Public Policy (Order Public) Rule of the EU Succession Regulation and the Hungarian Inheritance Law" 888–905.
[414] European Justice, European E-Justice Portal - Succession accessed 4 October 2021.
[415] Section 7:58, 7:60, 7:61 of the Civil Code.

By contrast, the Civil Code of Vietnam only recognizes the inheritance of surviving spouses based on a legally registered marriage relationship, while annulment of an illegal marriage or cohabitation does not give rise to inheritance relations between the spouses. Vietnam does not record a registered partnership, so the issue of inheritance is not analysed in this case. Compared to the Hungarian Civil Code, according to the line of inheritance under Vietnamese law, the spouses, parents and children are in the same first line of inheritance of the deceased and they are entitled to an equal share. On the other hand, the Hungarian Civil Code considers the inheritance of the surviving spouse to be more substantial than that of other heirs of the deceased, for example, the surviving spouse can enjoy the entire estate if the deceased has no children and parents.

3.6. Legal property consequences of the annulment of an illegal marriage

3.6.1 Cases of cancellation of illicit marriages

As far as the provisions of Articles 10, 11 and 12 of the 2014 Law on Marriage and Family are concerned, an illegal marriage might be annulled by the Court. However, illegal marriage will not automatically be void by itself whenever it occurs in reality, but only the relevant people may request the Court to annul it.

3.6.1.1 Subjects of the right to request annulment of an illegal marriage

Article 10 of the 2014 Law on Marriage and Family stipulates that the person who has the right to request an annulment of an illegal marriage is as follows: 1/ Persons who have been forced into marriage, or who have been deceived into marriage, in accordance with the law on civil procedure, have the right to request or request the individual or organization specified in “paragraph 2 of this Article to request the Court to annul an illegal marriage due to the violation of the provisions of Article 8 (1) (b) of the 2014 Law on Marriage and Family. 2/ The following individuals, agencies and organizations have the right, in accordance with civil procedure law, to request the Court to annul an illegal marriage due to the violation of the provisions of Article 8 (1) (a-d) of the 2014 Law on Marriage and Family, including the wife or husband of a married person who marries another person; father, mother, child, guardian or another legal representative of the person who got married illegally; the State management agency on family; State management agencies in charge of children; the Women's Union. 3/ Other individuals, agencies and organizations, when detecting illegal marriages, have the right to request the agencies or organizations specified in Article 10 (2) (b-d) to request the Court to declare the annulment of the illegal marriage.”

3.6.1.2 Grounds and outcomes for the legal annulment

Once a relevant individual, a competent agency or organization requests the Court to annul an illegal marriage, the Court will consider and settle the request. If both parties have fully met the conditions for marriage as prescribed in Article 8 of the Law on Marriage and Family 2014 and request recognition of their marital relationship at the time when the Court is handling the request, the Court shall recognize their marital relationship without voiding their marriage. In this case, the marriage relationship is established from the time the parties meet the conditions for marriage in accordance with the Law on Marriage and Family. [416]

3.6.1.2.1 Annulment of the marriage if the parties are not eligible for marriage

If neither of the parties is eligible for marriage at the time the Court is resolving the case of the illegal marriage, the Court will void the marriage. The court's decision on annulment of an illegal marriage or recognition of the marriage relationship must be sent to the relevant parties as follows: 1/ The competent authority that had approved the marriage registration for updating the couple's civil status; 2/ Both parties involved in the voidable marriage; 3/ Relevant individuals, agencies and organizations in accordance with the law on Civil Procedures.[417] The request of the involved parties and the conditions of the marriage play an important role leading to a decision on whether the marriage will be annulled or recognized with regard to Articles 8 (1) and 11 of the 2014 Law on Marriage and Family.[418]

3.6.1.2.2 Unvoiding a marriage if the parties have fully met the conditions for marriage

In case the parties do not fully meet the conditions for marriage at the time of marriage, but later fully meet the conditions for marriage specified in Article 8 of the Law on Marriage and Family, the Court shall handle the case as follows:[419]

If both parties to the marriage jointly request the Court to recognize the marriage relationship, the Court shall decide to recognize such marriage relationship from the time when the parties to the marriage fully meet the conditions for marriage. This is true in the case of the following examples:

[416] Article 11 (2) of the 2014 Law on Marriage and Family.
[417] Article 11 (3) of the 2014 Law on Marriage and Family.
[418] Article 4 (1) of Joint Circular 01/2016.
[419] Article 4 (1) of Joint Circular 01/2016.

Example 1: Mr Thanh was born on January 25, 1996, and Mrs Bien was born on January 10, 1995. On January 8, 2015, Mr Thanh and Mrs Bien registered their marriage. On September 25, 2016, the Court opened a hearing to settle the request for annulment of their illegal marriage. If, at the hearing, Mr Thanh and Mrs Bien both requested recognition of their marital relationship because they met all the conditions for marriage at the time the Court was handling the case, then the Court would consider and recognize their marriage relationship due to both of them having been old enough to get married since January 25, 2016.

Example 2: Mr Han and Mrs Bich registered their legal marriage on July 5, 2009 and never divorced. On May 10, 2012, Mr Han married Mrs Chuyen, while Mrs Bich died on June 12, 2014. On May 15, 2015, the Court opened a hearing to settle the request for annulment of the illegal marriage between Mr Han and Mrs Chuyen. If, at the hearing, Mr Han and Mrs Chuyen both requested recognition of their marriage relationship and it was deemed that all other conditions for marriage had been met, the Court would consider and recognize the marriage relationship of Mr Han and Mrs Chuyen from the date that they met all the conditions for marriage – which is the day when Mrs Bich died on June 12, 2014.

Example 3: Although Mr Anh was declared incapacitated by the Court on May 27, 2009, he still married Mrs Bich on September 30, 2009. Later, on August 12, 2012, the Court decided to annul the decision declaring Mr Anh incapacitated for civil acts. On February 12, 2015, the Court opened a hearing to settle the request for annulment of the couple's illegal marriage. At the meeting, if Mr Anh and Mrs Bich both requested recognition of the marital relationship and it was deemed that other conditions for marriage had been met, the Court would consider and recognize the marital relationship of the couple from the date that, according to a legally effective court decision, Mrs Anh was no longer regarded as having lost her civil act capacity.

Example 4: Ms Long married Mrs Quyen due to coercion by their parents on July 27, 2015. Later, on July 27, 2019, the Court opened a hearing to settle the request for annulment of the illegal marriage. At the meeting, if Mr. Long and Mrs. Quyen both requested recognition of the marital relationship and deemed that other marriage conditions have been met, the Court would consider and recognize their marriage relationship from the date that the forced spouse fell in love with the other spouse and desired recognition of their marriage.

The court shall decide to annul the illegal marriage, even though the couple have met the conditions for marriage due to the couple's request in the following cases: 1/ One or both parties request an annulment of the illegal marriage; 2/ Just one party requests recognition of the marriage relationship; 3/ Just one party requests a divorce, and the other party does not have any request. The Court settles the legal consequences of a voidable marriage regarding the rights and obligations of the father, mother and child, the spouses'

property relations, the obligations and contracts between the parties from the time of the annulment of the marriage with respect to the provisions of Article 12 of the 2014 Law on Marriage and Family.

If both parties jointly request the Court for a divorce or one party requests the divorce and the other party requests recognition of the marital relationship, the Court shall grant the divorce. In this case, the rights and obligations of parents and children from the time of the dissolution of marriage by divorce shall be settled according to the regulations on the rights and obligations of parents and children upon divorce. Property relations, obligations and contracts between the parties from the time of marriage when they meet the eligibility conditions for marriage shall be settled according to the provisions of Article 16 of the 2014 Law on Marriage and Family, whereas property relations, obligations and contracts between the parties from the time of divorce shall be settled according to the provisions of Article 59 of the 2014 Law on Marriage and Family. When handling the request for annulment of an illegal marriage, the Court also relies on the provisions of the Law on Marriage and Family which was in force at the time the couple established the marital relationship to determine whether to annul or recognize the marriage. The order and procedures for the settlement of requests for the handling of illegal marriages shall comply with the provisions of the Law on Marriage and Family and the Law on Civil Procedure which is in effect at the time of the settlement.

3.6.2. Property solutions when annulling illegal marriage

As far as the personal relationship is concerned, Article 12 (1) of the 2014 Law on Marriage and Family stipulates that *"When an illegal marriage is annulled, the two parties must terminate the husband-and-wife relationship."* In principle, the State does not recognize men and women who are illegally married as husband and wife. When the illegal marriage is annulled by the Court, the two parties must terminate the relationship as husband and wife from the time of establishing the illegal husband and wife relationship. For example, Mr Diep and Mrs Lan got married illegally due to coercion (violation of vows) on July 18, 2018. Then the Court annulled the illegal marriage and the Court's decision took effect. According to the law, Mr Diep and Mrs Lan ended their illegal husband and wife relationship on July 18, 2018.

In terms of the parent-child relationship, Article 12 (2) of the 2014 Law on Marriage and Family 2014 provides that *"Children's interests shall be settled in the same way as parents applying for the divorce."* Thus, the rights and obligations of parents towards their children when an illegal marriage is annulled are similar to the rights and obligations of parents towards their children upon divorce. This regulation aims to protect children and

equality between the father, mother and child, although the law does not recognize the parents' relationship.

With respect to property relations, Article 12 (3) and Article 16 of the 2014 Law on Marriage and Family 2014 states that property relations, obligations and contracts between the parties shall be settled by agreement between the parties. In case there is no agreement, the settlement shall be in accordance with the provisions of the Civil Code and other relevant provisions of law. The settlement of property relations must ensure the legitimate rights and interests of women and children. Household work and other related work to maintain the common life are considered as income work. Considering all the above provisions, it seems that the law protects women even though their marriage is voided. It is thought that the protection of women and children in the process of property division when an illegal marriage is annulled is a very humane thing. For example, Mr Diep and Mrs. Lan had their illegal marriage annulled, and they will receive equal shares from the common property even if Mr. Diep is a worker generating income for the family and Mrs. Lan stays at home to take care of her husband and children and performs other household chores.

3.6.3 Hungarian law in comparison

Similarly, Hungarian marriage law recognizes that the authority to annul an illegal marriage rests with the Court. The court will annul an illegal marriage in one of the following cases: 1/ A former marriage or registered partnership of either of the parties still exists; 2/ The parties to the marriage are each other's relatives in direct line or each other's siblings; 3/ Either party to the marriage is the descendant by the birth of the sibling of the other party to the marriage; 4/ Either party to the marriage has adopted the other party to the marriage; 5/ Either party entered into the marriage as an incapacitated subject as a result of a declaration of capacity or in a fully incapacitated state even though not having a declaration of lacking capacity at the time of the marriage; 6/ The parties to the marriage were not jointly present when they declared their intention to marry; 7/ Either party to the marriage is a minor. There is an exception in the case of minors aged at least 16 years old, who may enter into marriage with the prior approval of the guardianship and child protection authority. When an illegal marriage is annulled in Hungary, the legal consequences of marriage annulment for the spouses' property are similar to those of Vietnam. If both spouses entered into a subsequently annulled marriage in good faith, the legal consequences of that marriage in terms of property are the same as in the case of a valid marriage. When the marriage is annulled, the spouses may enforce their claims to property in accordance with the same rules that apply in the case of a divorce granted by the court. If only one of the spouses entered into the marriage in good faith, these rules will apply only at his or her request. The annulment of the marriage does not affect the

presumption of paternity.[420] Meanwhile, Vietnamese law deals with the consequences of annulment of an illegal marriage for the property relations of the couple in the same way as in the case of a cohabiting couple. When cancelling an illegal marriage, Vietnamese law does not consider the good faith factor to resolve the consequences for the property relationship between the couple.

To sum up, this chapter has shown the consequences of marital property relations in case of divorce, inheritance relations when one spouse dies, and property relations when the marital relationship is annulled. The next chapter is considered as a special case concerning property relations in the case of cohabitation that is not recognized by law. Therefore, it is reasonable to find out how to resolve disputes relating to property relations between cohabiting partners.

To sum up, this chapter has shown the consequences of marital property relations in case of divorce, inheritance relations when one spouse dies, and property relations when the marital relationship is annulled. The next chapter is considered as a special case concerning property relations between cohabitations that are not recognized by law. Therefore, it is reasonable to find out how to resolve disputes for property relations between cohabitations.

[420] European Justice, European E-Justice Portal - Divorce and Legal Separation accessed 12 December 2021.

CHAPTER 4. CONJUGAL PROPERTY RIGHTS TO COHABITATIONS

Cohabitation in principle is not recognized in Vietnam, so the property relationship between the partners, if any, will be applied according to the 2015 Civil Code governing common property between them. To legalize a cohabitation relationship in Vietnam, perhaps the only way is to register the marriage, while some countries allow this relationship to be legalized in the form of a civil union or registered partnership. Allowing the couple to be a civil union or registered partnership will help them better secure their ownership rights once the cohabitation relationship is terminated and serve as an evidence basis for the Court to recognize this relationship.

4.1 The cohabitation's property rights

4.1.1 Principles for resolving property relations between cohabitants

4.1.1.1 A definition of cohabitation

Marriage is the establishment of a husband-and-wife relationship with registration, while cohabitation is a relationship without marriage registration. Accordingly, cohabitation as husband and wife without marriage registration is a case where a man and woman establish a cohabitation relationship and exercise their husband and wife's rights and obligations to each other, to their family and to society, but fails to register in accordance with the law. It can be explained that a cohabitation is a man and a woman living together and considering each other as husband and wife, while the law does not recognize this relationship. Cohabitation is not only the man and woman who establish a cohabitation relationship but also includes same-sex couples living together. If a man and a man or a woman and a woman live together, it is a case of cohabitation between people of the same sex. Cohabitation between people of the same sex is not currently prohibited under the law on marriage and family. However, this cohabitation cannot be legalized by a legally recognized marriage relationship, because Article 8 (2) of the Law on Marriage and Family 2014 stipulates that "The State does not recognize marriage between persons who are not legally married to the same-sex." Regarding Article 14 (1) of the 2014 Law on Marriage and Family, it addresses that man and woman living together as husband and wife do not give rise to a husband-and-wife relationship. This proves that same-sex people living together do not give rise to a husband-and-wife relationship either.

In principle, cohabitation does not give rise to rights and obligations between husband and wife, except for that cohabitation was established before January 3, 1987. This is a real phenomenon in society and has been included in the law. Failure to register marriage will

not result in a husband-and-wife relationship, but other relationships need to be adjusted. If a man and woman live together as husband and wife and then register their marriage, the marriage and family relationship shall only be counted from the time of registration.

4.1.1.2 Characteristics and classification of cohabitation relationships as husband and wife

Firstly, cohabitation may satisfy the marriage conditions or violate the marriage conditions under Article 8 of the 2014 Law on Marriage and Family. Although a man and a woman are eligible for marriage as prescribed by law, they still live together as husband and wife without registering their marriage. Stemming from a few different objectives as well as subjective reasons that the parties are eligible to get married but do not register the marriage.[421] For example, in mountainous provinces, due to customs and traditions, marriage only needs to be witnessed by the village elders, while knowledge and awareness of the law are still limited and low leading to a low number of marriage registration. Another reason is that a free ideological lifestyle in big cities results in a high number of cohabitations. Even though they have not registered their marriage but have met all the conditions for marriage, the legal bases in Articles 14, 15, and 16 of the Law on Marriage and Family will apply to resolve the issue determine the relationships that arise between them. In some cases, living together as husband and wife may also violate the conditions of marriage, for example being not eligible for marriage may be due to age, voluntary will or violation of the prohibition, thereby such persons cannot register their marriage.

Second, cohabitants live together as husband and wife, but there is no marriage certificate between them. Men and women who want to build a family and establish a marriage relationship must register their marriage according to the order and procedures in the Law on Marriage and Family. This is the binding basis of the rights and obligations of the two parties in the relationship and is also evidence of a legal marriage, arising rights and obligations between husband and wife, between husband and wife and third parties and protected by law. The marriage certificate is issued by a state agency competent to register for marriage and is mandatory evidence for the Court to consider and accept the settlement when the couple wants to divorce. When a man, woman or both parties want a divorce but do not provide the Court with a marriage certificate, the Court will not recognize their relationship as husband and wife, except for the case of actual marriage. If husband and wife are divorced and want to reunite, they must register their marriage together to get a new marriage certificate, then they will be recognized as lawful husband and wife. Similarly, all other marriage rites such as holding a family wedding ceremony or getting

[421] Andrea, Hegedűs, "Élettársi kapcsolat kontra házasság: hasonlóságok és különbözőségek a hatályos magánjogban" 30-60.

married according to customs, or to religious rituals at church without a marriage certificate issued by a competent State agency are not recognized as legal. Thus, the marriage must be registered at the marriage registry office to be legally valid, so the two parties will have rights and obligations between husband and wife.

4.1.1.3 Consequences on the property between cohabitation

Regarding cohabitation, the form of consolidated common property between the couple cannot arise because the relationship is not recognized by law. Consequently, the property created by someone during the time of cohabitation is that person's separate property and is not considered community property at all. If the common property of husband and wife in the process of cohabitation is defined as consolidated common property,[422] it shall be considered as an estate that is put under common ownership in part.[423] The property of each male and female party shall be settled according to the principle that whose private property is still under the ownership of that person. The common property built by both of them is determined to be jointly owned by shares and is divided according to each person's contribution to the common property. If there is a dispute over property, the interests of the parties will be resolved on the principle that the assets they have created during the time of living together as husband and wife will be divided and counted with the efforts and contributions of each person.

4.1.1.4 Consequences on the parent-child relationship

4.1.1.4.1 The concept of children born from a cohabiting relationship

The rights and obligations of parents towards their unregistered children prescribed in, Article 68(2) of The Marriage and Family Law No. 52/2014/QH13 "Children who are born regardless of their parent-child relationship toward cohabitation all have the same rights and obligations as parent-child on registered marriage prescribed in the Law on Marriage and Family, the Civil Code and other relevant laws." Thus, the marital status of parents does not affect the rights and obligations of parents towards their children. The rights between parents and children remain equal, with no discrimination. Therefore, in cases where a man and a woman are registered or not, the law still recognizes the relationship as

[422] Article 210 of the 2015 Civil Code: *"1. Consolidated common ownership is joint ownership in which the share of ownership by each joint owner is not determined over the common property.*
Consolidated common ownership includes divisible consolidated joint ownership and undivided consolidated joint ownership. 2. Consolidating common owners have equal rights and obligations to assets under common ownership."
[423] Article 209 (1) of the 2015 Civil Code: *"Shared ownership is common ownership in which each owner's share of ownership is determined to the common property".*

a father and mother of children, which means they have the same rights and obligations as a married parent. Because the affection of parents and children is sacred, noble sentiment, it acknowledged this not only morally but also legally.

The Law on Marriage and Family of 2014 stipulates the rights and obligations of parents and children in cases where a man and a woman live together as husband and wife without registering their marriage as follows: *"Rights and obligations between a man and woman cohabiting as husband and wife and their children must comply with this Law's provisions on rights and obligations of parents and children."*[424] This provision proves that the child born from the cohabiting relationship is still guaranteed by the law to ensure the rights and obligations between parents and children as stipulated in chapter V of the Marriage and Family Law. Accordingly, from Article 68 to Article 87, Section 1, Chapter V of The Marriage and Family Law No. 52/2014/QH13 stipulates rights and obligations between parents and children including the following basic contents: 1) Protection of rights and obligations between parents and children; 2) Obligations and rights to care for and raise children; 3) Obligations and rights to educate children; 4) Represent the child; 5) Compensate for damage caused to children; 6) The right to own property of the child; 7) Manage child's private property.

Thus, a child born from a cohabiting relationship is born from a cohabiting relationship where there is no marriage registration between father and mother. The parent's cohabitation may not violate the conditions for marriage or maybe in cases of violation of the marriage condition. The scope of this analysis mainly focuses on analyzing the opposite sex cohabitants.

In the case of same-sex cohabitation, children born between same-sex partners only give rise to a parent-children relationship. Because of their biological characteristics, same-sex cohabitants cannot have the same blood-related children. Therefore, children born among same-sex cohabitants are children of one-party having consanguinity. Therefore, the determination of legal rights and obligations between a parent and a child only arises between the child and the parent with whom the child is related. The provisions on rights and obligations between parents and children will apply to this child and parents under Section 1Chapter V of The Marriage and Family Law of 2014. The other partner in homosexuality, naturally has no legal obligation for the child without its blood relation. However, the fact that homosexual cohabitation might behave like parents towards the child of his/her partner is a matter of personal affection.

[424] Article 15 of the 2014 Law on Marriage and Family.

4.1.1.4.2 Some challenges to children's rights which may be faced with in cohabitation

According to statistics of UNICEF in Vietnam, cohabitation with children in some places with backward customs and practices is still a problem. In 2014, one out of every ten women aged 20-24 in Vietnam married or lived as a couple before the age of 18. Up to now, the proportion of cohabiting at a young age has not decreased much.[425]

Under Article 68 (2) of the Law on Marriage and Family, there is no legal distinction between the child born from lawful marriage and cohabitation. However, the rights of the latter born from a cohabiting relationship are not a guarantee as to the former one. There are two main issues as follows:

4.1.1.4.2.1 Trouble in identifying the parent-child relationship

Under the provisions of Article 88 of the Marriage and Family Law, the relationship between parents and children in the case of parents having a legal marriage relationship is the legal relationship arising between the parent and the child natural fertilization. The parent-child relationship, in this case, is determined based on the speculation principle prescribed in Article 88 (1) of the 2014 Law:

"1. A child who is born or conceived by the wife during the marriage period is the common child of the husband and wife.

A child who is born within 300 days from the time of termination of a marriage shall be regarded as a child conceived by the wife during the marriage period.

A child who is born before the date of marriage registration and recognized by his/her parents is the common child of the husband and wife."

In contrast, the relationship between the parent and the child in the case of parents living together as husband and wife is not recognized by law automatically. The parents in this relationship may have actual marriage conditions but do not conduct marriage registration at the competent state authority. That leads to not be recognized the parent-child relationship and protected by law. In some cases, the relationship between the father and the mother may be just a relationship outside the marriage of the father.[426] Typically, the father had a legal marriage, but they had an extra-marital relationship with another single woman, leading to pregnancy and childbirth.

[425] UNICEF and UNFPA, Understanding the Reality of Child Marriage accessed 2 September 2019.

[426] In this case, the relationship can only be outside the marriage of the father. As, if a mother has a legal marriage and then has an illicit relationship with another man leading to pregnancy, the child is born when the mother is in a lawful relationship. The law will be presumed to be the illegitimate child of the mother and the person who is her husband on the certificate of marriage registration.

If the parent does not live in a legal marriage, the determination of a parent-child relationship in this case cannot apply to the provisions of Article 88 of the 2014 Law on Marriage and Family because of the period of marriage between a father and mother does not exist following the law. Therefore, in this case, the basis for determining the relationship between parents and children from the cohabitation relationship is based on the event of *"giving birth"* from a single woman. After that, if the father in this relationship notifies his child recognition to the competent state agencies, the illegitimate relationship between parents and children will be recognized and protected by law.

In a nutshell, if the child is born out of a lawful marriage relationship, then he/she is speculated as a common child. Rights and obligations between parents and children will automatically arise between family members together if there is no dispute arising about the determination of the parent-child relationship. In contrast, children born from cohabiting relationship are not automatically born of paternity. The mother, due to the natural birth factor, can prove the mother-child relationship through the birth certificate issued by the health department. However, the father and the child do not automatically raise the father-child relationship. Accordingly, the father must carry out the procedures for recognizing the child according to The Civil Status Law, if he desires to establish a father-child relationship.

4.1.1.4.2.2 Obstacles in birth registration for a child born from a spousal relationship

In a cohabitation relationship, when the child wants to register a birth for a child and the mother wants the child to be born with a father, the father must acknowledge the child and must comply with the provisions of law. Specifically, Article 15 of Decree 123/2015[427] guiding the implementation of the 2014 Law on Civil Status stipulates:

"1. The People's Committee of commune where the child resides shall apply for birth registration for the child with unidentified parents.

2. If a child's father is unidentified, the family name, race, native place, nationality of the child in the application for birth registration shall be determined according to respective information of his/her mother; the child's father section in vital records and birth certificate shall be left blank.

3. If the father, at the time of application for birth registration, applies for recognition of father-child relationship as prescribed in Article 25 (1) of the Law on civil status, the People's Committee shall both process the recognition and birth registration; birth registration contents shall be determined as prescribed in Article 4 (1) of this Decree."

[427] Decree 123/2015/ND-CP was issued by the Government stipulating on guidelines for law on civil status on 15th November 2015.

Thus, right from the birth, a child born from cohabitation is considered "child cannot identify the father"[428] if the father has not done procedures to recognize the child. If the father accepts a child and applies for a child's birth registration, *the child's father section* will be filled in. After the time the father has taken the procedures to receive a child and give birth to a child, this child will enjoy the same rights as the common children of the couple due to being born in the marriage period such as the right to birth registration, the right to nationality.

This procedure is applicable in cases where a child is born from a parent's unaccompanied marriage relationship and there is no dispute over the adoption of a father and mother. According to Article 24 of the 2014 Law on Civil Status, the recognition of parents may process at the People's Committee of the commune where the recipient or parent resides.

In order to register the recognition of father, mother or child, the person who requests registration of father-child recognition shall submit a declaration using the prescribed form and evidence proving the relationship between the parents and the child to the civil registration office.[429] Within three working days from the date of receipt of all required documents, if the receipt, the parents, the child are correct and there is no dispute, civil status officials who registers to receive a father, mother or child shall sign in the vital records and report to the President of the People's Committee of the commune, which issues the extract to the applicant. In case of necessity to verify, the time limit may prolong for no more than five working days.

However, if the father does not recognize the child born from the cohabitation, the woman will have to choose the solution to sue to the Court to determine fatherhood for their child. If the child is already an adult, he or she may file a lawsuit against his/her father himself/herself following Article 90 of the 2014 Law on Marriage and Family, which details the content of the exercise of the right to request in this case. Typically, *"1. A person has the right to recognize his/her parent even in case the parent has died. 2. An adult may recognize his/her parent without the consent of the other parent"*[430]. Judicial practice shows that the evidence proving the parent-child relationship is proof of the results of DNA examinations conducted by a competent assessment organization. Based on the Court's decision on paternity, the father is responsible for bringing up in Article 101 of the 2014 Law on Marriage and Family and paternity according to law.

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[428] There is a change in the term "children born form cohabitation relationship" compared to the past. Accordingly, previously Article 15 of Decree 158/2008 referred to children born from a cohabiting relationship as "illegitimate children". However, since the issuance of Decree 123/2015 guiding the implementation of the Law on Civil Status 60/2014/QH13, this term has no longer been used and is replaced by the term "children born form cohabitation relationship."

[429] Article 25 (1) of the 2014 Law on Civil Status.

[430] Article 90 of the 2014 Law on Marriage and Family.

In the aspect of the mother-child relationship, it is not difficult to prove it by the birth certificate issued by a health facility after the mother gives birth. Therefore, the determination of the relationship between mother and child from the cohabitation relationship has no difference for children born from legal marriage relations. Evidence proving the relationship between mother and child is on the birth certificate issued by the health services.

4.1.1.4.3 The children's rights in the cohabiting relationship

Generally, there are two basic groups of rights that children born from the cohabitation relationship as husband and wife are concerned and protected by law. Specifically, the human rights group and the property rights group. In principle, children born from a lawful marriage relationship or born from a cohabiting relationship are all provided with the same legal rights without any differences.

The Article 70 and Article 71 (1) of the 2014 Law on Marriage and Family recognize that parents have equal obligations and rights, together to care for and raise their children. The children may include mature children who lose civil act capacity or have no working capacity and no property to support themselves.

Besides, the resolution of the obligation to care for and raise children after parents have terminated their cohabiting relationship as husband and wife also sets out to consider. *"For a couple who has not registered their marriage but requests a divorce, the court shall accept the case and declare non-recognition of their spousal relationship under Article 14 (1) of Marriage and Family Law; and shall settle any children- or property-related requests according to Articles 15 and 16 of Marriage and Family Law"*[431].

The custody of children between people who live together as husband and wife upon the termination of the cohabiting relationship, the care and nurturing of children after the termination of the relationship shall be settled like the husband-and-wife relation after divorce in Article 81,[432] Article 82,[433] Article 83,[434] and Article 84[435] of the 2014 Law on Marriage and Family. Accordingly, when a parent terminates their cohabiting relationship, the care, education and raising of minor children, it is the law's first and foremost function to protect the children's rights. Article 81 of the 2014 Law stipulates who will be

[431] Article 53 (2) of the 2014 Law on Marriage and Family.
[432] Article 81 the 2014 Law on Marriage and Family provides for looking after, care for, raising and education of children after divorce.
[433] Article 82 the 2014 Law on Marriage and Family provides for obligations and rights of the parent who does not directly raise children after divorce.
[434] Article 83 of the 2014 Law on Marriage and Family stipulates obligations and rights of the parent directly raising children toward the person who does not directly raise children after divorce.
[435] Article 84 of the 2014 Law on Marriage and Family provides for change of the person directly raising children after divorce.

responsible for direct child rearing after two persons have terminated their relationship and the other will have child support as provided in Article 110 of the 2014 Law.

Parents living together as husband and wife have the right to educate their children, take care of and create conditions for their children to be educated. Learning is one of the basic rights of children. Therefore, Article 16 (1) of the Child Law of 2016 also recognizes that *"Children have the right to education and study to develop comprehensively and reach their full potential.*"[436] In order to ensure that children have their right to education, the Law on Marriage and Family has provided for the education of children and facilitation of their education over the years. Accordingly, parents have the responsibility to create conditions for their children to live in a warm, harmonious family environment; be a good role model for all children; closely coordinate with schools, agencies and organizations in educating children.

In the case of an adult child who is standing at the threshold of a career choice, parents must guide their child to choose a career because the child might still lack the necessary experience to be able to choose and identify a good job. However, parents need to understand that their responsibility here is only to guide their children. Therefore, when a child has chosen a career for himself, the law also recognizes that it is the parent's responsibility to respect his right to choose a career, to participate in political, economic, cultural and social activities.

However, parents living together as husband and wife performing the education of their children will be inhibited if their parents live together illegally. For example, the father had a legal marriage, and maintained an illegal cohabitation relationship with another woman. A child born from an unlawful cohabitation relationship is unlikely to receive the full education from a father because he must maintain two cohabiting relationships with two women at the same time, especially, when this man still conceals the relationship of illegal living together and his lawful wife is completely unaware of the husband's illegal relationship.

The right to equal treatment among children has been recognized as a right from the first provisions of the 2014 Law. Specifically, Article 2 (3) of the 2014 Law provides that *"Building a prosperous, progressive and happy family; Family members must respect, care for and help each other; no discrimination between children."*

Besides, the Child Law of 2016[437] continues to assert equal and non-discriminatory rights among children regardless of differences in family, religious and ethnic backgrounds in Articles 5 and 6.

When formulating regulations on the rights and obligations of parents towards legal children, it is only based on the existence of the parent and child relationship, regardless of

[436] Article 72 (2) of the 2014 Law on Marriage and Family.
[437] The Children's Law 102/2016/QH13 was promulgated by the National Assembly of Vietnam on April 5, 2016 and took effect from June 1, 2017.

the nature whether such a relationship stems from a legal marriage relationship or it does not. Therefore, children born from a lawful marriage relationship, from an illegal marriage relationship or a cohabitation like a husband and wife are treated equally based on birth rights, the right to nationality and fully enjoy other personal rights prescribed in the Constitution and the Civil Code such as the right to residence, civil status, guardianship, property rights and inheritance.

Article 73 (1) of the 2014 Law stipulates the representation to children as follows: *"Parents are representatives at law of minor children or adult children who have lost their civil act capacity, except when the children have other persons to be their guardians or representatives at law"*. According to Article 21 (1) of the 2015 Civil Code, "*Minors are persons who are under eighteen years of age."* Those under the age of 18 *"are said to be physically immature enough to be fully aware of the meaning, social and legal implications of their conduct."*[438]

Therefore, there is a need to have a representative for them, help them to establish and perform civil transactions as well as protect their legitimate rights and interests. The first person mentioned in doing this task is of course none but the parents of the minor. The recognition of parents as the legal representative of children in Article 73 (1) of the 2014 Law is a continuation provision on legal representatives in Article 136 (1) of the 2015 Civil Code. Article 136 of the 2015 Civil Code stipulates that there is a provision that the legal representative for a juvenile is his/her parents.

Besides, the children who are incapable of civil acts also have parents who are the legal representatives. Incapacitated persons with civil acts are those who are "unable to perceive or master the act due to mental illness or another disease, at the request of the person with related rights, interests or agencies or organizations. In the case of a competent official, the Court shall issue a decision declaring this person to be incapable of civil acts based on the conclusion of forensic psychiatric assessment."[439] Because the cognitive ability of people with civil act capacity limits is due to illness, it is necessary to have caregivers and help in legal activities to limit the benefits of their will be violated by others. As the regulations on representatives of minors, the provision of parents as representatives for children incapable of civil acts is also a regulation originating from civil law. However, the 2015 Civil Code prescribes that the parents become legal representatives for children incapable of civil acts. Specifically, according to Article 47 (1) (c) of the 2015 Civil Code, the person who is incapable of civil acts is the ward. At the same time, Article 53 (3) of the 2015 Civil Code stipulates the determination of a guardian for a person incapacitated with civil acts as follows *"If an adult is a legally incapacitated person and has no spouse or child or such person has spouse or children, but they do not*

[438] Dien, Nguyen Ngoc, Giáo Trình Luật Hôn Nhân và Gia Đình Việt Nam 68.
[439] Article 22 (1) of the 2015 Civil Code.

fully meet the requirements to be a guardian, his/her father and/or mother shall be the guardian." Besides, Article 136 (2) of the 2015 Civil Code stipulates that the legal representative for the ward is to be their guardian.

Thus, from the synthesis and analysis of the above provisions, we can see that under the provisions of civil law, parents can only be the legal representative for their children to lose civil act capacity when parents are guardians of children; and to be a guardian for the child, the child must be without a spouse, or the children are not eligible to be guardians.

Article 75 (1) of the 2014 Law stipulates: *"Children have the right to own property. Personal property of a child includes separate inheritance, separate gift, income from the labour of the child, yields, income arising from the child's property and other lawful income. Property formed from their property is also their property."*

This provision shows that the child has the right to own property regardless of whether the child is an adult or a minor, has full civil act capacity or has lost civil act capacity, living with or not living with parents. Children born from a cohabiting relationship still have the same property rights as any child born from a lawful marriage relationship. When a child becomes an adult and no longer lives with his/her parents, all the properties that the child has from legal sources will be his/her. The problem only needs to be clarified when the child is a minor or has lost civil act capacity and is still living with his/her parents.

According to civil law, when minors are under six years old, all civil transactions related to them must be established and performed by their representatives.[440] Besides, when giving the property to a minor, if the donated property is real estate, it is necessary to comply with the form of the contract. Specifically, Article 459 (1) of the 2015 Civil Code stipulates that *"A gift of immovable property must be recorded in writing and notarized or certified and must be registered if the law on the immoveable property requires registration of ownership"*. Thus, in order for the given property to be the private property of a minor child, apart from the owner clearly expressing his/her intention for the minor child, he/she must also comply with the provisions of the civil law on conditions of the transaction as well as the form of the transaction when required by law. The inheritance of separate inheritance from others also gives rise to separate property for minor children. Private inheritance may be formed from a will by inheritance or by law. In cases where the testator has made a will, the inherited property shall be considered the personal property of the minor child only when the testator indicates the minor's name and the part of the estate. They enjoy the will.

According to Article 161 of the Labour Code of 2012, a minor employee is an employee under 18 years of age. The labour law permits the employment of workers under the age of 18. Therefore, minors living with their parents can still have an income source

[440] Article 21 (2) of the 2015 Civil Code.

from their labour force; therefore, that source of income is also considered to be the private property of a minor child.

Article 109 of the Civil Code of 2015 prescribes: *"1/ Yield means natural products brought by property. 2/ Income means a profit earned from the development of the property."* Yields arising from their property are natural products born from an asset that is their property. For example, a child is bestowed a cow by his/her grandparents and after a while the cow gives birth to a calf. Thus, because the calf is the yield from the cow, which is inherently private to the child, the calf is also part of its wealth. Income derived from a child's property is an income gained from the exploitation of his/her property.

Marriage and Family Law of 2014 and guiding documents do not explain the term *"other legal income"* or *"other legal income of children."* However, Article 9 of Decree 126/2014 explains the term "other legal income of husband and wife". We can use the interpretation of Article 9 to clarify other types of legal income of children. Specifically, these are income items such as *"1/ Bonuses, lottery prizes and allowances, except the case prescribed Article 11 (3) of this Decree; 2/ Property: a spouse has the right to establish ownership by the Civil Code for ownerless objects, buried, hidden, sunk, dropped on the ground or leftover out of inadvertence, stray cattle or poultry and raised aquatic animals."* However, this interpretation is only the author's point of view not yet truly recognized by law. Therefore, there should be a regulation explaining this issue soon to create a legal corridor for the determination of children's property to be complete.

The formation of the child's property to continue to become his/her property through civil transactions. For example, a child gets a certain amount of money from labour, after a long time of accumulation, the son/daughter uses that money to buy an apartment to build a private life. Thus, even though the purchase takes place during the time the children are living with their parents, the house is still considered to be their property according to this provision.

It is common sense for parents to be responsible for raising their children, creating the best conditions for their children to develop physically and intellectually by Article 69 (8) of the 2014 Law as a duty and a right of parents. However, this group of parents' rights and obligations is best guaranteed when parents live with their children, but in some special cases such as divorced parents, the rights and obligations of fathers or the mother is not directly to raise the affected children. On the other hand, there are also many cases, although still living with children, but parents do not fulfill the responsibility of raising. Therefore, in order to ensure the best interests of the children, the law recognizes the parents' obligation to support them.

According to Article 3 (24) of the 2014 Law on Marriage and Family, *"Support means an act whereby a person must contribute money or other kinds of property to meet the essential needs of another person who does not live together with but has marriage, blood*

or raising relation with the former and is a minor or an adult who has no working capacity and no property to support himself/herself or meets with financial difficulties as prescribed by Marriage and Family Law." The support relationship between a parent and child must originate from a blood or foster relationship. As such, children born from a cohabiting relationship may require support from one parent if they do not live with the child and keep them related by blood. Practice shows that proving the relationship can be difficult if the father in the relationship has not conducted legal procedures to recognize the children. Once the father has acknowledged the child from the cohabitation relationship, it is not difficult to ask for child support from the father.

According to Article 110 of the 2014 Law, *"Parents who do not live with their children or live with their children but violate the support obligation must support minor children and adult children who have no working capacity and no property to support themselves."* From this provision, the supporting obligation of parents will arise in two cases.

The child to be supported in the relationship with parents must be a minor or an adult child who has no working capacity and no property to support himself or herself. Thus, when a child is not living with a parent, if the child is a minor, the support obligation of the parent will automatically arise. However, when the child is an adult, there must be two additional conditions: incapable of working and no property to support himself/herself. These two conditions must exist simultaneously as follows: 1/ The parent's support for an adult child who does not live without working capacity; 2/ The child has no property to support himself or herself; 3/ the child does not have a spouse or children. These subjects have no conditions to look after and help the adults who have no working capacity and no property to support themselves. This conclusion creates compatibility with other provisions of civil law. Specifically, the provisions on the selection of guardians for people incapable of civil acts are stipulated in Article 53 of the 2015 Civil Code.

According to current laws and regulations, the state and society do not discriminate against children's rights who may have differences in parents' marital status. The children have the right to inherit the inheritance at law left by their parents if they have wills, proof or a decision issued by the judgment of a competent agency proving the parent and child relationship.

The child's birth certificate is out of wedlock stating the father's name, or the parent is not the legal spouse, but paternity is accepted by law. Accordingly, when the father dies, the son will inherit the inheritance according to the law according to the first inheritance cave. In case the father makes a will, the children will inherit their father's legacy according to the will. If a father dies without a will or an illegal will exist, the estate will be distributed according to law. According to Article 651 (1) of the 2015 Civil Code, the first inheritance includes *"Heirs at law are categorized in the following order of priority:*

a) The first level of heirs comprises: spouses, biological parents, adoptive parents, offspring and adopted children of the deceased;

b) The second level of heirs comprises: grandparents and siblings of the deceased; and biological grandchildren of the deceased;

c) The third level of heirs comprises: biological great-grandparents of the deceased, biological uncles and aunts of the deceased and biological nephews and nieces of the deceased."

In case the father has not yet proceeded to recognize the child before his death, the child must go through the procedures for recognizing his/her father as prescribed in Article 90 of the Law on Marriage and Family. By doing this, he/she can claim to be entitled to legal inheritance as the first inheritance class.

Generally, children born from a cohabiting relationship enjoy the same personal rights and property rights as those born from a lawful marriage relationship. Specifically, children born from a cohabiting relationship have the right to ask their parents to perform the obligation to care for, love, educate and represent their children when they are minors or adults but have lost their civil capacity. Besides, children born from a cohabiting relationship have the right to have their property, the right to request support when their parents cease to live together, the right to inherit according to the first line of inheritance upon the death of their parents. However, for a child to be born out of cohabitation to fully exercise the above rights, this child must prove his/her parent-child relationship. Proving a parent-child relationship does not seem difficult for a child born from a legal marriage relationship by the marriage registration event of the father and mother.

On the contrary, it is more difficult to prove a father and son relationship, especially, if the parent-child relationship arises under social recognition and the recognition of family members. The law needs a more convincing ground for this paternity by recognizing each other legally by administrative and judicial procedures.

The rights and obligations of parents towards their children without marriage registration are specified in Article 68 (2) of the 2014 Law on Marriage and Family, which stipulates that "Children are born regardless of their parent's marital status. All have the same rights and obligations towards their parents as prescribed in the Law on Marriage and Family, the Civil Code and other relevant laws." Thus, the marital status of the parents does not affect the rights and obligations of the parents towards their children, whether they are children in legal marriage or children out of legal marriage. The rights between parents and children are still equal, which means no discrimination. Regardless, if a man and woman have registered their marriage or not, the law still recognizes the parental relationship, which has the same rights and obligations as parents with marriage registration because of the noble feelings and moral issues between them. The 2014 Law on Marriage and Family stipulates the rights and obligations of parents and children in

cohabitation as follows: *"The rights and obligations between parents and children born form cohabitation shall be settled according to the provisions of the Law on Marriage and Family regarding the rights and obligations of parents and children."*[441]

In addition, when the mother wants to register the birth of her child, if the mother wants the child to be born with a father, at that time the father must come to receive the child and must comply with the provisions of law. Specifically, Article 15 (2-3) of Decree 123/2015 stipulates as follows: *"2. If the father cannot be identified, when registering for birth the child's surname, ethnicity, hometown, nationality shall be determined according to the mother's family name, ethnicity, hometown and nationality; the section about the father in the child's civil status book and birth certificate is left blank; 3. If at the time of birth registration the father requests to carry out the procedures for child recognition according to the provisions of Article 25 (1) of the Law on civil status, the People's Committee shall jointly handle the child recognition and birth registration; Contents of birth registration shall be determined according to the provisions of Article 4 (1) of Decree."* Thus, a child whose father cannot be identified is fully entitled to the same rights as children being born during the marriage period, including the right to be born and the right to have nationality. If the father does not recognize the child born from the cohabitation relationship, the mother will file a lawsuit to the Court for confirmation of the father for the child. On the basis of the Court's ruling on paternity, the father has the responsibility to nurture in Article 101 of the 2014 Law on Marriage and Family and the paternity relationships as prescribed by law.

As regards to the termination of cohabitation, the Court shall accept and declare not to recognize the husband and wife relationship as prescribed in Article 14 (1) of the Law on Marriage and Family if the couple files for divorce and requests about nurturing common children according to the provisions of Article 15.[442] Child custody rights upon termination of the cohabitation relationship, the care, upbringing and education of children shall be settled as if the cohabitation relationship is terminated with respect to Articles 81, Article 82, Article 83 and Article 84 of the 2014 Law.

4.1.2 An exception for cohabitation before January 3, 1987

4.1.2.1 Conditions of application

First cohabitation established before January 3, 1987, will be recognized the same as a legal marriage. The date January 3, 1987 was chosen as the time when the 1986 Law on Marriage and Family took effect. It can be explained that the economic context of Vietnam

[441] Article 15 of the 2014 Law on Marriage and Family.
[442] Article 53 (2) of the 2014 Law on Marriage and Family.

at this time has just entered the period of national renewal since 1986, so it is necessary to have policies to support cohabitation in difficult times.[443]

Second, cohabitation must still meet the conditions for marriage at the time of establishing the relationship, even though they do not go through marriage registration. This conclusion is obtained on the basis of inferring the cohabitation relationship in spite of the marriage not being registered, but the relationship of the cohabiting parties is still recognized. Therefore, they still have to ensure the same eligibility for marriage as couples with legal marriage registration. For example, cohabitation between people with the same surname within three generations still cannot be recognized as a legal husband and wife relationship because of violating the conditions prohibiting marriage between people having a surname within three generations, although they established the relationship before January 3, 1987.

Example 1: Mr. Quach Ngoc Dung and Mrs. Truong Tam Vinh Hien have been living together as husband and wife since 2014 (without registering marriage). After getting married, the couple lived in province S. In August 2015, the couple built their own house in province S. They had a happy period until the beginning of 2016 when they had conflicts due to disagreements in life. In October 2016, Mr. Dung filed a lawsuit requesting the Court of District T, province S not to recognize the relationship between Mr. Dung and Mrs. Hien. On November 27, 2018, the Court brought the case to a trial. Accordingly, paragraph 3 (b) of Resolution 35/2000[444] stipulates: "Men and women live together as husband and wife from January 3, 1987, to on January 1, 2001, if they fully meet the conditions for marriage as prescribed in the 2000 Law on Marriage and Family, they are obliged to register their marriage within two years from the effective date of this Law until January 1, 2003. If they do not register their marriage within this time limit but have a request for divorce, the Court shall apply the divorce provisions of the 2000 Law on Marriage and Family for settlement. If they do not register their marriage after 2003, the law will not recognize them as husband and wife;". The 2014 Law on Marriage and Family

[443] According to the provisions of Article 2 (4) of Circular 01/2016 guiding the implementation of the Law on Marriage and Family of 2014, there is a case of cohabiting as husband and wife before January 3, 1987 without registration married but still considered a married person:
"A married person" defined at Article 5 (2) (c) of the Law on Marriage and Family is a person who falls into one of the following cases:
a) A person who has been married to another person in accordance with the law on marriage and family but has not been divorced or has no event of the death of their spouse or their spouse is not declared as a spouse dead;
b) Persons who established a husband-and-wife relationship with another person before January 3, 1987, but have not yet registered their marriage and have not divorced, or have not had the event that their spouse dies or their spouse is not declared dead;
c) The person who is married to another person violates the marriage conditions as prescribed in the Law on Marriage and Family but has been recognized by the Court as having the marriage relationship by a court judgment or decision that has taken legal effect by law and have not been divorced or without the fact that their spouses have died or their spouses have not been declared dead."
[444] Resolution 35/2000 was issued by the National Assembly of Vietnam on June 9, 2000.

2014 has similar regulations as the previous one with regard to Article 14, Articles 16 and 53. On the basis of legal references, the Court of district T, province S declared that Mr. Dung and Mrs. Hien were not recognized as husband and wife.[445]

Example 2: In 1980, Mr. Nguyen Van Tinh and Mrs. Tran Thi Qui lived together as husband and wife and had no marriage registration. They had two common children, which are Nguyen Tuan Dung (born in 1981) and Nguyen Minh Hang (born in 1986). In 2018, the couple had a conflict in the process of living together, so Mrs. Qui filed an application to the District Court for a divorce to Mr. Tinh. Thus, Mr. Tinh and Mrs. Qui were in the case of living together as husband and wife before January 3, 1987 based on the provisions of Article 2 (4) of Circular 01/2016 guiding the implementation of the 2014 Marriage and Family, the couple is still considered legally husband and wife. Therefore, the District Court of P has granted Mrs. Quit a divorce from Mr. Tinh based on Article 51 of the 2014 Law on Marriage and Family.

Third, in terms of trial practice, the grounds for the Court to determine that two people living together as husband and wife before January 3, 1987 are usually based on one of the following evidences: 1/ Based on the child's birth certificate to determine the husband and wife's life together. This is considered convincing evidence if the child's birth certificate showing that the child was born before January 3, 1987 or within 300 days from January 3, 1987 is still accepted;[446] 2/ Based on the household registration book to determine the time of living together. If two people live together as husband and wife, prove that they live together in a place of residence defined before January 3, 1987; 3/ Certification of the locality where the two lived together as husband and wife before January 3, 1987.

4.1.2.2 Legal solutions

4.1.2.2.1 Legal recognition for the cohabitation starting before January 3, 1987

Firstly, the identity between men and women living together as husband and wife is recognized by law. In case a man and woman live together as husband and wife established before January 3, 1987, they are still recognized as husband and wife by law. Rights and obligations will arise from Articles 17 to 23 of the 2014 Law on Marriage and Family. Accordingly, husband and wife must be faithful, love, care for and help each other, and build a happy family together, happiness, equality, progress. When one spouse or both spouses have a request for divorce, the Court shall accept the settlement according to the same general procedures as in the case of husband and wife having registered their marriage (lawful marriage). As a general rule, when the court's divorce decision takes legal

[445] Verdict No. 76/2018 of the People's Court of Tran De district, Soc Trang province heard on November 27, 2018 on "divorce and property disputes upon divorce".
[446] Article 88 of the 2014 Law on Marriage and Family.

effect, the husband-and-wife relationship is terminated, that is, the personal rights and obligations between husband and wife since the time of their marriage and attachment respectively. Between husband and wife, such as the obligation to love, respect, care for and help each other, progress, will naturally end. There is a number of other moral rights that husband and wife as citizens are not affected and do not change even though the marriage relationship has ended. Divorced spouses have the right to marry another person.

Second, in terms of property relations, the regulations on property relations between husband and wife during the marriage will be applied to cases where a man and woman live together as husband and wife established before January 3, 1987, because this is the case of "actual marriage" recognized by law. Specifically, property relations between men and women living together as husband and wife before January 3, 1987, will be settled according to the provisions of Article 131 (1) of the Law on Marriage and Family 2014. It is true in the case of Mr. Phuc and Mrs. Hang, who lived together from 1982 to 2018. When a conflict arose in the process of living together, they filed for divorce at the District Court. During the process of resolving the divorce, Mr. Phuc and Mrs. Hang had a dispute over the ownership of two houses. In terms of origin, the house in X District was given by Mr. Phuc's parents in 1983 and a house in Y district was inherited by Mrs. Hang according to the law from her father in 2016. Thus, according to Article 131 (1) of the 2014 Law on Marriage and Family and regarding the time when the property was formed, the Court will apply the law at that time to determine the general and separate nature of the property. Specifically, the house in X district was formed in 1983, then the 1959 Family Law was be applied. According to Article 15 of the 1959 Family Law, during the marriage, husband and wife only have common properties, so the house in X district was identified as the joint property which was formed in 2016 regarding the 2014 Law on Marriage and Family being applied to determine. Specifically, as regards the provisions of Article 43 of the 2014 Law on Marriage and Family, the property to be inherited belongs to the separate property of the husband and wife. Therefore, the house in Y district was identified as Mrs. Hang's private property due to inheritance from her father.

4.1.2.2.2 Legal dissolution of the cohabitation relationship living before January 1, 1987

Firstly, if the couple terminates the cohabitation relationship, they must go through the divorce procedure at the Court because their cohabitation is still recognized by law as a legal husband and wife. Therefore, ending the cohabitation relationship, they need to go through the same divorce procedure as married couples with registered marriage.

Second, if one of the two parties lives together and dies, the other person will be entitled to inherit according to the law according to the first line of inheritance as the spouse of the deceased person.

Thus, in principle, cohabitation as husband and wife is a cohabitation relationship that is not legally recognized by the law. Therefore, they can terminate the cohabitation relationship at any time they want and do not need to go through any proceedings in Court if there is no dispute. Even the parties still do not need to conduct legal proceedings if they voluntarily reach agreements on common children and property after the termination of cohabitation. The conduct of proceedings at the Court only occurs when they do not reach the necessary agreement on the issues of children or property when terminating the cohabitation relationship. Accordingly, if children are determined to be common children of people living together as husband and wife, their interests will be settled in the same way as in the case of parents applying for divorce for their children. The provisions on the right to directly raise children (Article 81), and the alimony obligations between parents towards their children after divorce (Article 110) apply to the settlement. Property relations are settled according to Article 16 of the Law on Marriage and Family on a clear basis between living parties once a dispute arises. As an exception, the cohabitation relationship as husband and wife established before January 3, 1987, is still recognized as a legal husband and wife. Therefore, the provisions on the relationship between father, mother, child and husband and wife relationship in the 2014 Law on Marriage and Family are applied to settle cohabitation relationships as husband and wife established before January 3, 1987. The advantage of the cohabitation relationship as husband and wife established before January 3, 1987, brought about quite a large amount of common property.

4.2 Comparative Law: European and Hungarian laws in the aspects of cohabitation, civil union and registered partnership

The couple can make a partnership official without getting married with a civil union or registered partnership in several EU countries, while the civil union and registered partnership are not mentioned in Vietnamese family law. It can be explained that civil unions allow two parties who live together as a couple to register their relationship with the relevant public authority in their country of residence. Generally speaking, civil unions and registered partnerships are considered equivalent or comparable to marriage in some European Member States, whereas property rights and maintenance rights for people in registered partnerships are not applied the same way in all European countries. However, Bulgaria, Latvia, Lithuania, Poland, Romania, and Slovakia do not apply these regulations on registered partnerships. One solution for the couples living in a country where they cannot get married or they cannot enter a registered partnership, or they choose

not to do either is that they could set up a cohabitation contract with their partner and settle practical or legal aspects of their cohabitation. If conflicts about property arise, the law of the country where the conflict occurred will generally apply. Although the couple may sign a cohabitation contract, it may still be difficult for them to enforce couple's rights.[447] *"If the couple move to an European country which does not recognise registered partnerships at all, the partnership will be considered as a duly attested long-term relationship which means a host country must facilitate the entry and residence of the partner."*[448] This is true in the case of Laura, who is an entrepreneur from Germany exploring a business opportunity in the country Slovakia and wanted her registered partner Chang- unemployed at the time- to join her there. Although Slovakia does not recognise registered partnerships, the existence of the partnership served as proof that the couple had a long-term relationship, and Chang was allowed to move there with Laura.

In Hungary, cohabitants can legalise their relationship in term of registered partners. "Hungarian law distinguishes between civil partnerships between different genders and between same sex couples. These types of civil partnerships have no exact legal definition. Related case law has formed criteria based on which civil partnerships are recognised. The two minimum criteria to recognise civil partnerships addressed in the Civil Code are emotional and financial community."[449] "If the partnership is recognised by the court, the Civil Code (Act V of 2013) applies. Under the Civil Code, a civil partnership can involve maintenance responsibilities, and the right of the partner to facilitate the property of the other party can be recognised. Regarding asset matters based on a civil partnership, the Civil Code contains provisions in Book 6 separately from marital and family legal provisions, among general civil law provisions. There is a nationwide registry of civil partnerships into which partners can request to have themselves registered by a notary public (*Decree 83 of 2009 (XII.30) of the Minister of Justice*). Having a civil partnership registered in the registry may serve as evidence in case of a later legal dispute."[450] "As the Fundamental Law of Hungary defines marriage as a bond between a woman and a man, the legislator to recognise same sex couples' partnerships has enacted Act XXIX of 2009 on Registered Civil Partnerships." "Registered partnership" would be "bejegyzett partnerkapcsolat" in Hungarian, but the Act uses the phrase "bejegyzett élettársi kapcsolat" that is to say "registered cohabitation."[451] "The legal consequences of being in a registered civil partnership are largely equal to marriage (in relation to maintenance, marital asset

[447] An official website of the European Union, 'Unmarried Couples (Cohabitation) – Rights/Obligations across Europe - Your Europe' accessed 4th October 2021,
[448] An official website of the European Union, 'Civil Unions and Registered Partnerships: Recognition in Different EU Countries - Your Europe' accessed 29th October 2021.
[449] Andrea, Hegedűs, Az élettársi kapcsolat szabályozásának áttekintése, különös tekintettel a polgári jogi kodifikációs folyamatra 26-49.
[450] Kölcsényi & Némethi Law Firm; Soma Kölcsényi, Family Law in Hungary: Overview accessed 4 October 2021.
[451] Szeibert-Erdős, Orsolya, "Same-Sex Partners in Hungary-Cohabitation and Registered Partnership" 212.

issues, property facilitation and succession).” Cohabitation, however, has remained a contract if the couple does not register their relationship. Once cohabitants have a common child and they live together at least for one year, family law consequences may apply to them owing to protect of the child’s best interest.[452] A much debate question is whether former cohabitants ask for maintenance after breaking up. Once the partners have lived together for at least one year and they have a common child, they can request for a maintenance. It means that, even if the cohabitants have lived together for many years but childless, neither of them has a right to demand maintenance, except for former cohabitants reaching an agreement on that.[453]

Thus, Hungary has registered a registered partnership for heterosexual or same-sex couples through registration and they can use this as proof of the existence of cohabitation in the Court to recognized rights and obligations. Differently, in Vietnam, cohabitation and same-sex cohabitation are not recognized in the form of partnership registration. “In EU countries which recognise de facto unions, the couple will also have rights and obligations concerning property, inheritance and maintenance payments following a separation**.** These rights are particularly important for same-sex couples, as not all EU countries allow them to get married or register their partnership in any way.” “All countries that allow same-sex marriages generally recognise same-sex registered partnerships concluded in other countries.”

“In countries which do not allow same-sex marriages, but which have introduced some form of registered partnership, a same-sex marriage abroad generally gives you the same rights as a registered partnership.”[454]

As regards to same-sex couples, there is no document explaining specifically what same-sex marriage is under Vietnamese law. However, it can be understood that same-sex marriage is a marriage between two people of the same sex. Previously, one of the marriages ban cases mentioned in Article 10 of the Law on Marriage and Family 2000 was marriage between people of the same sex. At the same time, according to Article 8 (1) (e) of Decree 87/2001 (which has expired), marriage between people of the same sex will be subject to a fine of between VND 100,000 and 500,000. However, until Decree 82/2020[455] is currently in effect, same-sex people marrying each other are no longer penalized. Failure to recognize cohabitation and same sex marriage leads to certain moral and property consequences between cohabitation. In terms of identity, there is no legal binding between

[452] Szeibert-Erdős, Orsolya, “Marriage and Cohabitation in the New Hungarian Civil Code—Answering the New Challenges” 173-191.
[453] Szeibert-Erdős, Orsolya,“Solidarity and Maintenance Obligations in the Family — Old and New Elements in the New Hungarian Civil Code” 77.
[454] An official website of the European Union, ‘Unmarried Couples (Cohabitation) – Rights/Obligations across Europe - Your Europe’ accessed October 4, 2021.
[455] Decree 82/2020/ND-CP was issued by the Government regulating on sanctions towards administrative violations in the field of judicial assistance, judicial administration, marriage and family, civil enforcement, bankruptcy of enterprises and cooperativesvon July 15,2020.

two gay people, no marriage registration is granted, and they are not recognized as legal spouses. Therefore, children, alimony, rights and obligations of husband and wife will not exist. Regarding the property relationship, because there is no husband-and-wife relationship, the property regime of husband and wife as provided for in the Law on Marriage and Family does not apply. If a dispute arises, the property shall not be divided according to the general principle of common property of husband and wife.

In fact, in the process of living together, couples contribute and share the economy flexibly, depending on the circumstances of each person as well as their wishes and long-term plans. The property relationship over time is gradually established between two people and becomes more and more complicated, as the longer they live together, the more purchases and accumulations they have. In the 35-49 age group, up to 55% of cohabiting couples currently share high-value assets (e.g. cars, savings books, gold, etc.), 50% currently contribute joint business investment capital, 57.9% currently own the house and land (however, the registration papers are only in the name of one of them), and 20% said that they owned the real estate in the name of both. These rates are also significantly lower in the two younger age groups. Specifically, only 37.4% of the 24-34 age group said that they contributed capital to invest in business with their partner, in the group of 19-24, this rate was 23.8%. Property ownership, even in the names of one or both of them, is also significantly lower in the two age groups.[456]

Thus, same-sex couples face certain difficulties in the process of living together, including difficulties in legal procedures, documents related to permanent residence registration with couples living with their families; family or joint ownership of land; not receiving family-related benefits (benefits related to marriage, illness, childbirth, or family vacations); difficulty in being named as the legal representative/conservator of the spouse; difficulties in the couple's property relationship due to the lack of a legal framework to regulate and guide the situations that may occur when the relationship breakdown leads to a dispute over property ownership; and can't apply for joint adoption. A survey was conducted to get people's opinions on support for same-sex marriage conducted before the promulgation of the 2014 Law on Marriage and Family. The survey showed that 33.7% of people supported legality of same-sex marriage, 8.6% hesitated, 52.9% did not support, and 4.8% did not care or did not respond. This study shows that the recognition of same-sex marriage has not been widely agreed, so it does not seem appropriate to allow same-sex marriage in Vietnam. It will be appropriate if same-sex couples legalize their cohabitation by registering cohabitation as the model of some countries analysed above. (see Figure 20).

[456] Vũ Thành Long, Đỗ Quỳnh Anh, and Chu Lan Anh, "Tình Yêu và Quan Hệ Chung Sống Của Người Đồng Tính, Song Tính và Chuyển Giới ở Việt Nam 3-10.

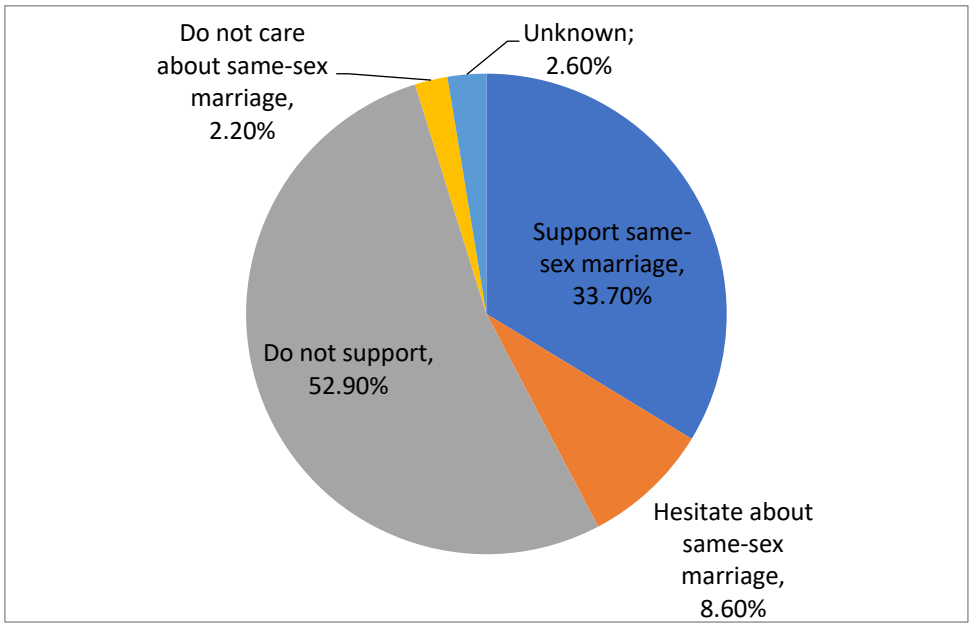

Figure 20. Opinions about recognition to same-sex marriage in Vietnam[457]

According to data supplied by Statista Company, there were significant changes in support of same-sex marriage worldwide between 2013 and 2021. This is true in the case of Hungary as well where only 30% supported same sex marriage in 2013 but this number had increased to 46% in 2021. This shows that support for same sex marriage is on the rise in every country, except in Sweden and Spain. It is not too difficult to explain this because support of same sex marriage is inherently high in Sweden and Spain with 79% and 76% in 2021 respectively. In terms of the number of countries that had legalized same-sex marriage as of 2021, Europe is a pioneer in supporting same-sex marriage, while Africa seems to be a country that is still quite conservative on this issue as only one country recognizes same-sex marriage. France is one of the countries in Europe that recognizes both same-sex marriage and civil partnership according to data supplied by Statista Company about the number of same sex marriage in France from 2002 to 2018. (See Figure 21, 22 and 23)

[457] Vũ Thành Long, Đỗ Quỳnh Anh, and Chu Lan Anh, "Tình Yêu và Quan Hệ Chung Sống Của Người Đồng Tính, Sonh Tính và Chuyển Giới ở Việt Nam 3-10.

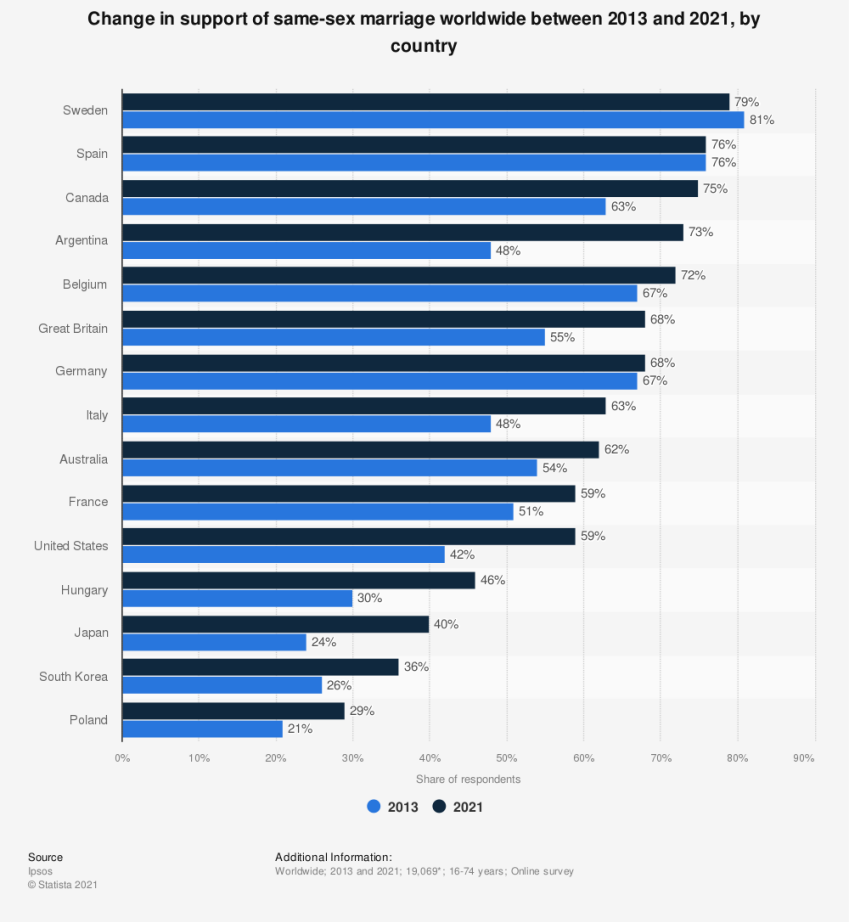

Figure 21. Change in support of same-sex marriage worldwide between 2013 and 2021, supplied by Statista Company.[458]

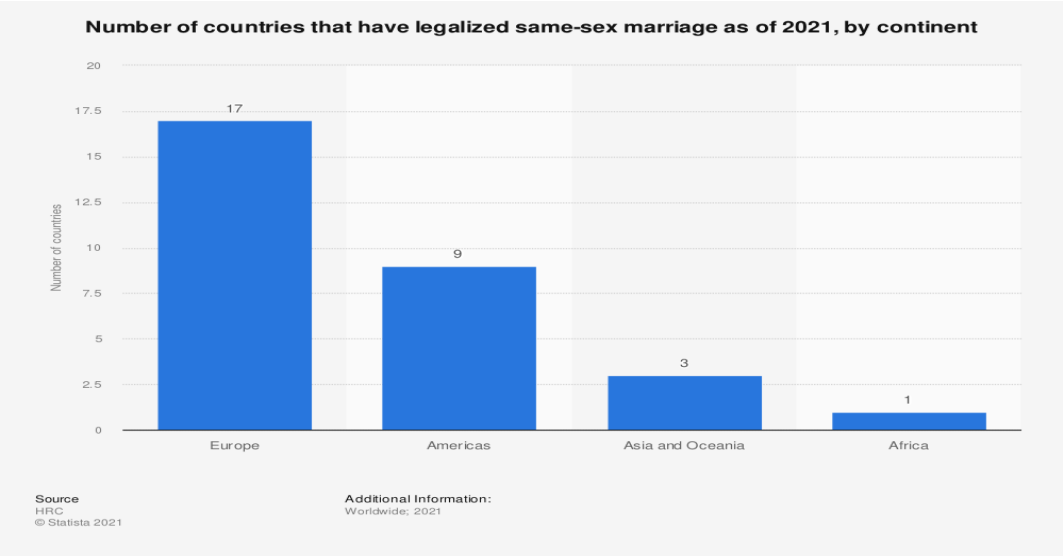

Figure 22. The number of countries that had legalized same-sex marriage as of 2021 regarding continent, supplied by Statista Company.[459]

[458] Statista Company, Change in Same-Sex Marriage Support Worldwide by Country 2021 accessed 17 December 2021.

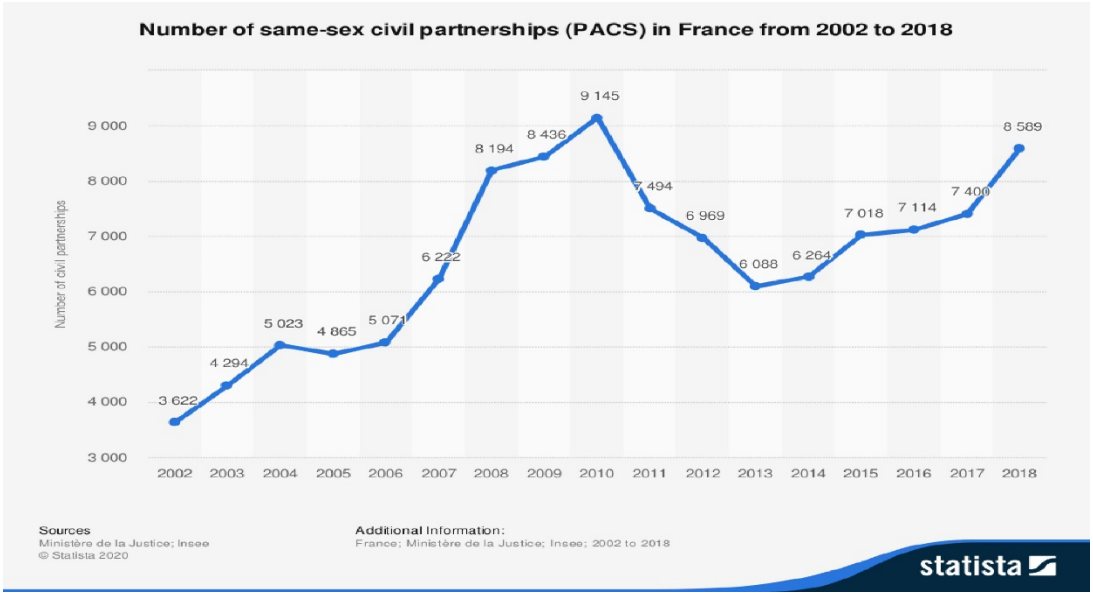

Figure 23. The number of same sex marriage in France from 2002 to 2018, supplied by Statista Company.[460]

In short, civil union and registered partnership are concepts that are not mentioned in Vietnamese law. Therefore, cohabitation can only legalize a cohabitation relationship by registering a marriage in Vietnam. The consideration of registering a registered partnership between people living together, including the opposite sex and same-sex partners, is considered an option in line with the development trend of modern times. This issue will be covered again in Chapter 5 on findings and recommendations.

[459] Statista Company, Gay Marriage Worldwide by Continent accessed 17 December 2021.
[460] Statista Company, Number of Same-Sex-Marriages in France 2013-2019 accessed 17 December 2021.

CHAPTER 5. RESEARCH FINDINGS AND RECOMMENDATIONS

Chapters 1 to 4 have analysed all legal issues related to marital property, including legal history, law in force, legal consequences in case of separation, and property rights towards cohabitants. The purpose of this chapter is to review the current shortcomings of marital property, thereby finding perfect solutions.

5.1 Findings

The findings of the study were summarized according to the statement of the problems stated in Chapter 1.

What is the role of matrimonial property law in marriage and family law? It is hard to deny the great role of marital property law for husband and wife and for society. From the perspective of husband and wife, matrimonial property law contributes to the protection of ownership rights for the subjects in the marriage relationship. The law allows them to agree to establish an agreed-upon property regime which guarantees their freedom of will in establishing each person's ownership rights. The gradual improvement of the law on marital property not only ensures the ownership of husband and wife, but also helps to create solid legal foundations when settling disputes. Once the legal regulations are perfected, disputes, if any, will be resolved more quickly. With respect to the role of matrimonial property law towards society, it plays a big role in ensuring the rights between husband and wife and third parties in transactions related to marital property. The nature of family relations is a part of civil society relationships, so more or less in married life, husband and wife will establish civil transactions with other people. One of the civil transactions that cannot be ignored is that related to marital property. Therefore, the marriage and civil law sets aside many main provisions for property relations between husband and wife and third parties. This is clearly seen in regulations such as that if a husband and wife establish a property regime according to an agreement, they must notify the third party in the transactions that the husband and wife establish it and the provisions protect the third party’s interest in good faith. The improvement of the marriage law contributes to a good settlement of the internal relations of that family, including the relationship between husband and wife and between husband and wife and other family members. This is true in the case guarantees that support obligations between husband and wife or child support. Spousal support obligations will arise in the event of a divorce and a person falls into a difficult situation and needs financial support from a previous husband or wife. The parent's support obligation for their child is that when they divorce if the child is underage, the parents who do not live together are responsible for providing financial support to ensure the child's all-round development.

How has the regulation of matrimonial property changed over the historical periods in Vietnam? I found that matrimonial property law has developed in a more reasonable direction, although there are still recommendations for amendments and supplements. The development of legal history in Vietnam can be divided into four main stages, including the formation of the state to the feudal period in Vietnam under the influence of China (178 BC–1858), the French (1858–1954) and the United States (1954–1975) colonial period, after independence time under socialism (1975-until now). It is no doubt that the development of Vietnam's legal system has been heavily influenced by invasions from China, France and the Soviet Union (1940s). However, the law in force of marital property law in Vietnam is a learning from the legislative experience of many private regulatory agencies in other countries such as EU family laws, not only those mentioned above, which I have mentioned in chapters 2, 3, and 4 respectively of the study.

As regards to Chinese law in comparison, generally speaking, China has undergone several changes in family law throughout its development. For example, The Great Qing Legal Code also known as the Qing Code (Ching Code) which was the legal code of the Qing empire (1644–1912). This code had a great influence not only in China but also in Vietnam. This is true in the case of the Gia Long Code of Vietnam which was nearly identical to the Qing Code. The 1950 Law on Marriage was adopted by The People's Republic of China as evidence on the new formation of the State from the feudal marriage system to socialist development.[461] Thirty years later, the 1980 Law on Marriage was replaced by the previous one that mentioned marriage being a contract between individuals rather than families. It also abolished concubine and polygamy from the previous one that protected better the equality among spouses and other family members.[462] The 1980 Law expired and was replaced to the new Civil Code by the National People's Congress of China, which entered into force on 1st January 2021.[463] Family regulations are mentioned in Book V of The Chinese Civil Code, which rule marriage, family, and adoption. Spouses can come to an agreement on whether the property gained during the existence of the marriage and before the marriage, which are called pre-nuptial and post-nuptial agreements. The agreement must be in writing and can consist of properties that are owned separately, jointly or both. If there is no agreement, the statutory matrimonial property regime will apply, which includes separate and common property. Similarly, Chinese Family Law is a part of the Civil Code and consists of two matrimonial property regimes, including statutory and marital property agreement compared to Hungarian Family Law and Vietnam's Civil Codes from 1858 to 1954.[464]

[461] Cheng, Yang, Family Law in China 248–258.
[462] Engel, John W., "Marriage in the People's Republic of China: Analysis of a New Law" 955.
[463] Rödl & Partner, "China's Civil Code" accessed 14 December 2021.
[464] V & T Law Firm Ningning Zhao, "Family Law in China: Overview Practical Law" accessed 14 December 2021.

When the French colonialists invaded Vietnam from 1858 to 1954, in the field of marriage and family, the application of legal regulations focused mainly on documents such as the Gia Long Code (1812), the Southern Civil Code (1883), the Northern Civil Code (1931) and the Central Civil Code (1936). At the beginning of the invasion, France temporarily applied the Nguyen Dynasty's law (mainly Gia Long Code) and indigenous Vietnamese customs. Since 1883, France had gradually changed the traditional lifestyle by Europeanization trends. Typically, France copied almost all the provisions in the First Book of the French Civil Code – Napoleon Code in 1804 to Vietnam to build the Civil Code in the South. However, the Southern Civil Code only referred the general provisions in the French Civil Code, so many important contents had not been mentioned. Therefore, the Southern Civil Code had not yet acknowledged the existence of the matrimonial community property. In contrast, France colonists stipulated in detail about the matrimonial community property in both the Northern and Central Civil Codes. *"The Northern Civil Code and the Central Civil Code were referred several contents of the French Civil Code."*[465] Finally, the historical context of Vietnam during French conquest greatly affected the Vietnamese legal system and the matrimonial property law. Legislation on property was an interplay between feudal regulations (Gia Long Code) and Western-style ones. Therefore, the French influence on the legal system of marital property in Vietnam is clearly demonstrated by comparing these Civil Codes.

In conclusion, it is evident that the French greatly influenced the Vietnamese legal system from 1858 to 1954 after Chinese domination. Vietnamese Family Law has some similarities to other nations which both prescribe two types of matrimonial property regimes, including the default and marital property agreement. From 1945, the North of Vietnam regained independence under the leadership of the Communist Party. This region built a civil and family law system that differed significantly from codes drawn up during the French colonial period. In 1959, North Vietnam promulgated the Act on Marriage and Family. These new laws were entirely independent of the pre-existing Civil Code. Besides, socialist countries often called the Act on Marriage and Family instead of "Family Law" as in French and German Civil Codes.[466] Following the reunification of 1975, however, Vietnam enacted several Civil Codes (1995, 2005 and 2015) that drew heavily on the Civil Codes of France, Germany, and Switzerland. For example, the first chapter of the Vietnamese Civil Code 2015 governs general provisions like the German Civil Code. Vietnam Civil Code still contains the rules on civil relations involving foreign elements which are similar to the French Civil Code. These prove that the European civil and family

[465] Mau, Vu van, Dân Luật Khái Luận 76.
[466] There are some similarities in codification among socialist states in comparison to Chinese and Vietnamese practices. X. Feng, Review of the Development of Marriage Law 331–398.

law has a profound influence on Vietnamese law not only in the past but also in present time.[467]

Is the regulation on marital property complete and reasonable? The 2014 law on marriage and family added a prenuptial agreement property regime in addition to the statutory property regime, which is considered a progressive point. The fact that the legislator dedicates a section from Article 28 -50 on the matrimonial property regime in the 2014 Law on Marriage and Family has shown the necessity and importance of this issue compared to the previous regulations. The property law also recognizes the equality between spouses in matters of ownership. As far as the marriage regime is concerned, equality is understood as equality in rights and obligations in all aspects of the family as well as in the exercise of citizenship rights and obligations as prescribed by law. This principle is specifically stated in Article 17 of the 2014 Law on Marriage and Family as follows: "Wife and husband are equal, have equal rights and obligations in all aspects of the family, in the exercise of rights, citizens' obligations are stipulated in the Constitution, the Law on Marriage and Family and other relevant laws. The legislator orients the spouse towards comprehensive equality, recognizing the husband and wife's common contribution in both spiritual and material terms. It cannot be denied that the regulations on the marital property have improved considerably, but there are still many unreasonable points that need to be amended and supplemented (see Conclusion and Recommendation).

What are the characteristic of the wife's property status? And how is gender equality protected? Regarding the wife's property status, there has been a considerable change in the wife's property status from the beginning of the state to the recent time. To begin with, the wife seems to be equal with the husband in the possession's rights in Van Lang State, while the feudal time witnessed great changes in the role of the wife. This society recognized them just as a part of the family and put them under the control of the husband - the head of the family. Hundreds of years later, the wife's property status had gained some benefits owing to copying several regulations in the French Civil Code during French colonial time that the wife could possess their separate property and share the common property with her husband. However, gender equality had just been taken into consideration deeply when Northern Vietnam gained independence in 1945 and developed under socialism. It can be said that the wife's property status and gender equality rights had placed a crucial role among other marriage relations in modern times. The wife has equal rights as the husband in possession, management, disposal of their matrimonial property based on the Civil Code, the Laws on Marriage and Family and other relevant laws.

The extent to which creditor's protection extends in property transactions with spouses. The marriage law stipulates that if spouses establish a property regime according to an agreement, they are obliged to notify the relevant third party in transactions related to

[467] Linh, Nguyen Thi My, The Development of Matrimonial Property Law in Vietnam 309–316.

marital property. If the transactions are between a spouse and a third party relating to common property, which is a bank account or a business operation in the name of one spouse, such a transaction will have legal value with the third party. If a civil transaction related to movable property or real estate has been registered at a competent authority, such transaction will still have a legal value between spouses and a bona fide third party. Persons whose interests have been infringed have the right to request spouses to compensate them for damage in accordance with Article 133 of the 2015 Civil Code. The recognition of the legal value between the transactions established by the spouses or one spouse and the third party in good faith is to ensure the fairness and legitimate interests of the third party. Rights and obligations established by spouses with a third party continue to arise after their divorce. However, the third party will not be able to claim the spouses for damages related to the transaction of marital property if it has been fully informed by the spouses about the marital property established by the parties.

What are the differences in regulations on the matrimonial property between Vietnam and other countries? What can Vietnam learn from regulations in these countries for the relevant issue? I find that by noticing the differences, Vietnam can learn from some countries' regulations on the law on marital property. Those differences are analysed in chapters 2, 3, and 4, including differences in regulations, subjects of application of the law and the common law or civil law system. The regulations on marital property that Vietnam can learn from other countries will be clarified in the Conclusion section.

5.2 Conclusion

5.2.1 Strengthening propaganda to raise awareness of property rights for women to contribute to ensuring gender equality

Basically, Vietnam has been better and better recognizing the role of women in society and in the family. From the perspective of women's ownership rights in the family, the law recognizes the principle of equality, which means there is no discrimination in the ownership rights of husband and wife. However, based on the analysis through the chapters, it shows that the wife's ownership rights in the family are not equal in practice. For example, statistics show that the proportion of male-headed households in urban areas accounts for 61.9%, while women account for only 38.1%[468], which is almost twice as low as that of men. The proportion of women whose names are on land use right certificates is also lower than that of men in the statistics conducted in 2004-2008. In 2011, Nidhiya

[468] General Statistics Office, Cấu Trúc Tuổi- Giới Tính và Tình Trạng 10-30.

Menon et al. showed[469] that land use right held by men accounted for 68%, while it was just 16 % for women in 2004. This study demonstrated that the husband is the one who usually represents for the common property ownership. The authors also found only 15% land use right held by both men and women in 2004 which did not changemuch in 2008 with 20%. The inequality had been exited in land use right certificated held by genders.

Despite the fact that several laws, including the Civil Code, the Law on Marriage and Family, and the Land Law, guarantee equal land rights for men and women, poor enforcement has failed to protect women's land rights in the face of traditional practices such as son preference, patrilineal kinship, and patrilocal residence. As a result, women have been effectively excluded from family land succession in many areas, and have been discouraged or even prevented from seeking legal assistance to assert their land rights. Women have even claimed that they don't have a piece of their biological family's land because they feel inferior to their male brothers and/or that they have become outsiders once married. Women from patrilineal families, as well as those from rural and mountainous locations, have been identified as facing significant challenges in exercising their land rights. Customary law tends to overrule state law in controlling property and inheritance rights at the local level, the dualistic legal system in Viet Nam is also recognized as constraining women's property rights. The local practice of reconciliation, which focuses on settling a couple's problems in order to maintain harmony, is another barrier that prevents women from using their land rights.

Women's land and property rights obtained via marriage in Vietnam are only valid as long as the marriage is intact. As a result, women's rights must be protected in the context of marital dissolution, particularly to reduce their danger of falling into poverty. In 2015 research conducted in Long An province[470], it was determined that 38% of men and 46%[471] of women agreed that widows would lose ownership of their deceased husband's land/house if they remarried. Given the inherent benefits of preserving women's land rights during marriage and divorce, enhancing women's land rights has immense potential for boosting women's and children's well-being, as evidenced by studies on gender-sensitive land policy change in Vietnam.

To raise such awareness for women, the government should offer much more propagating policies and laws on the exchange of new certificates having both party's title on common land use right to be introduced to the public as an extremely significant social activity. Furthermore, as mass organizations established voluntarily to uphold the law and protect the rights of members, Farmer's Union, Women's Union, and other member organizations of the Vietnam Fatherland Front cannot stand outside this activity.

[469] Menon, van der Meulen Rodgers, and Nguyen, "Women's Land Rights and Children's Human Capital in Vietnam" 18-31.
[470] Long An is a province in southern Vietnam's Mekong Delta region.
[471] CGEP Management Team et al., "Country Gender Equality Profile Vietnam 2021" accessed March 27, 2022.

Propaganda activities on policies and laws on the application of certificates of exchange have attracted active participation and facilitated the promotion of the role of mass organizations in propaganda to raise awareness for their members about equality.

However, to evaluate the feasibility of law dissemination is a job that takes a long time to verify. In fact, the Government of Vietnam has issued decisions to establish a Council for Propaganda and Dissemination of the Law. The Prime Minister signed and proclaimed Decision 21/2021[472] which established the composition, tasks, and powers of the Council for Propaganda and Dissemination of the Law. This decision contains key provisions to increase the quality and effectiveness of the Council's actions in law dissemination and education at all levels, including practical execution of law dissemination and education, the resolution of current challenges and inadequacies in the Council's actual functioning at all levels. Later, the Vietnamese Ministry of Justice issued Official Letter 2232[473] stipulating instructions for departments, ministries, branches, and localities to implement Decision 21/2021. The work of law enforcement has been raised in the awareness of all levels of Party committees, party organizations, and the entire political system.

5.2.2 Prenuptial and antenuptial agreement property: the need for acknowledgement

Prenuptial agreement is a form of matrimonial property established in family laws in many countries. The recognition of the matrimonial agreement property contributes to the equal rights of spouses because they are free to agree on the assets they created before entering the marriage. Recognizing the necessity of this property regime, the 2014 Law on Marriage and Family of Vietnam allows couples to choose between the statutory property regime and the agreed property regime. Compared with the Hungarian legislation on marriage, there are two property regimes that couples are allowed to choose when establishing a cohabitation relationship: the statutory property regime and the property regime as agreed (also known as a marriage contract). As for the marriage contract, couples can agree at any time during the marriage process and the validity of the marriage contract is calculated from the time they are established agreements. This means the couples can make both prenuptial and postnuptial agreement in Hungary, while they just allow to have prenuptial one in Vietnam. Unlike the law of Vietnam, Hungarian law does not limit the time of establishing a marriage contract before the time of marriage. The limitation of the time of establishing a marriage contract under Vietnamese law limits the will to establish the ownership of the couple. This is the regulation that Vietnam law should learn from Hungarian law.

[472] Decision 21/2021/QD-TTg was issued by The Prime Minister to establish a Council for Propaganda and Dissemination of the Law on June 21, 2021.

[473] Official Letter 2232/BTP-PBGDPL was issued by the Vietnamese Ministry of Justice on July 8, 2021,

5.2.3 The need to register a registered partnership for cohabitation in order to secure the rights and obligations arising between the partners

Cohabitation including heterosexual and homosexual ones is not recognized in Vietnam, so the property relationship between the parties, if any, will be applied according to the 2015 Civil Code governing common property between them. To legalize a cohabitation relationship in Vietnam, perhaps the only way is to register the marriage, while some countries allow this relationship to be legalized in the form of a civil union or a registered partnership. Allowing the couple to be civil union or registered partnership will help them better secure their ownership rights once the cohabitation relationship is terminated and serve as an evidence basis for the Court to recognize this relationship. Vietnam should have a clear roadmap in amending relevant laws to protect the equal rights of cohabitation. For example, the Civil Code, the Labour Code, the Law on Gender Equality or the Law on Domestic Violence Prevention should have additional guidance on implementing content related to couples, or in future amendments should include content that protects the equal and legal rights of couples. Accordingly, in parallel with the process of advocating for the drafting of a draft to amend the Law on Marriage and Family, I found that the Law on Marriage and Family should specifically stipulate the rights of same-sex couples to jointly adopt and raise children, the right to joint property, the right to inherit property, and the right to carry out administrative proceedings on behalf of each other, and the right to request the court to terminate the cohabitation agreement. This is consistent with the views of the majority of people, the actual needs of the gay, bisexual and transgender community, as well as the gradual approach to the principle of equality in Vietnamese law.

5.2.4 The need to recognize the legal separation regime in Vietnamese law to ensure transparency in the ownership of spouses during separation

Lawmakers all acknowledge the fact that separation is a social phenomenon that exists in many Vietnamese families. However, there are conflicting views whether this phenomenon should be legalized. If separation is recorded in the Law on Marriage and Family, it will bring the following advantages such as: *1/ The separation agreement will be respected and protected by law*. When the law already has regulations governing separation, the parties' separation agreement will be protected by law. The rights and interests of the parties will be guaranteed when there is an infringement from the other party due to a breach of the agreement. The separation agreement might not need to be announced by the Court, but only needs to be authenticated and confirmed by the

Commune People's Committee (Local Administrative Authority) and recorded in the civil status papers. When a dispute arises, the Commune People's Committee will be the place to conduct conciliation procedures. In the event of unsuccessful conciliation, the Court will intervene. Such a provision will partly help the parties to think carefully before deciding whether to separate or not (to limit the spread of separation due to the absence of intervention from the competent state agency). On the other hand, it also limits the procedural complexity when having to resort to the Court (in case the parties really want to separate). 2/ *An important ground for the Court to accept the divorce*. [474]At present, actual separation is not one of the grounds for the Court to decide whether to agree to a divorce or not. The court will consider the factors to prove that the purpose of marriage is not achieved and irretrievably broken down, which is quite complicated to proof especially in the case of unilateral divorce. This is why divorce-related cases often have to be conciliated many times, consuming both parties' time and effort. Once the parties have reached an agreement on separation beforehand and have decided to proceed to divorce, it will also be easier for the Court to prove that the marriage purpose has not been achieved and there is no need for repeated reconciliation thanks to the Court obtaining the information of the couple's civil status provided by the Commune People's Committee. 3/ *Limit unilateral divorce.* Unilateral divorce often leads to disputes over property and children because the parties have not reached a consensus. If the parties have separated and have had agreements on common property and common children before, when the divorce is happens, the disputes will almost no longer exist, the parties can easily reach a consensus and then the matter of the Court will merely recognize the consent of the parties to the divorce. Considering all of these elements, it is necessary to recognise legal separation in the Law on Marriage and Family, because it helps to ensure the legitimate rights and interests of the parties in the marriage relationship, lays a legal basis to solve existing problems in practice, and orients the formed marriage relationship to the positive side within the legal framework.

5.3 Recommendation

The legislative of Vietnamese responsibility rests with the National Assembly and the enforcement of law rests with the Government. Therefore, on that basis, the National Assembly and the Government continue to perfect the legal regulations on marital property. On the one hand, shortcomings of the matrimonial property law are being considered for possible changes. This amendment can start from the Law on Marriage and Family itself or sub-law documents such as Circulars or Decrees to guide more details to

[474] Doan Thi Ngoc Hai, "Sự Cần Thiết Luật Hóa Chế Định Ly Thân Trong Luật Hôn Nhân và Gia Đình" accessed 10 October 2021.

ensure easier application in practice. It is still necessary to coordinate with mass organizations, including the Vietnam Women's Union,[475] the People's Committee,[476] the Youth Union to support women and children helping them to be more aware of their equal roles and rights in society. The government is currently working on a variety of draft legal papers. Following the Prime Minister's directive, the Government Portal has made the complete text of these drafts available for public feedback from agencies, organizations, and businesses, as well as civilians both inside and outside of Vietnam, via the website as follows: https://chinhphu.vn/du-thao-vbqppl. As a result, it is currently easier to bring personal thoughts on revising the law closer to the legislature.

Although the current law recognizes the ownership of marital property as equal for both husband and wife, the reality shows that the number of women named on the land use right certificate is still much lower than that of the male spouses. Regarding the 2014 Law on Marriage and Family, if the land use right certificate belongs to the common property of husband and wife but is only in the name of one person, the other person is entitled to request a new re-issuance of the certificate so that both are jointly named. Thus, I think these recommendations should be implemented to improve women's land rights as follow : 1/To keep track on and evaluate the implementation of women's land rights. Successful land access projects have proved the importance of communication in raising citizen expectations, allowing women to profit from joint titling, and reducing the risk of financial loss in the event of inheritance or divorce. To improve communication of women's land rights, a community-based approach should be used, with communes and villages participating. This is especially important in rural and remote areas. 2/ Prioritize and take a more active approach to encouraging the conversion and issue of jointly titled so that women can benefit from the Land Law's rights in practice. 3/ To run efforts to create

[475] The Vietnam Women's Union is a socio-political group that advocates for Vietnamese women's legal and legitimate rights and interests at all levels. The Vietnam Women's Union is dedicated to the advancement of women and gender equality. Information on the Vietnam Women's Union can be found in the following site: http://vwu.vn/introduction.

[476] The people's Committee of the people's elected Council is the executive organ of the people's Council, the State administrative organs at local, responsible to the same level people's councils and State agencies. The people's Committee is responsible for observance of the Constitution, the law, the text of the State bodies and the resolution of the Assembly of the people of the same level to ensure implementation, measures for socio-economic development, strengthen national defense, security and other policies implemented on the area.

The people's Committee to implement state management functionality locally, helping to ensure the consistent management of the State administrative apparatus from central to the base. The people's Council to decide the important measures and guidelines to promote the potential of the local, local development and construction of social-economic, strengthened defense, security, constantly improve the material and spiritual life of the local people, rounding up local's obligation for the country. The people's Council made the right monitor for activity of the people's Council, the people's Committee, the people's courts, the people's Procuratorate at the same level; monitoring of the implementation of the resolutions of the Council; monitoring the compliance with the laws of the State bodies, organizations, social organizations, people's armed units and of the local citizens.

awareness about the procedures involved in altering a land use rights certificates' status, as well as to sensitize stakeholders so that the conversion to jointly titled ones is not stigmatized. Local governments should support families that want to go through this process. 4/ To give financial assistance and programs to assist impoverished households and those living in ethnic minority areas in applying for reissued LURCs that are jointly named. 5/ To ensure that sex-disaggregated, land-related data and official statistics are up to date and accurate.

The Court, without a doubt, plays a vital role in resolving property disputes between spouses in order to protect the parties' interests. As a result, it is vital to establish a Family Court and improve judges' adjudicating abilities. The Family and Juvenile Court in Vietnam was first established in 2014 by the Law on Court Organization. This is a court organized in the model of a specialized court and is a part of the organizational structure in Vietnam, including People's Courts of districts, People's Courts of provinces, and Superior People's Courts. At the present time, two local courts are piloting the Family and Juvenile Court models in People's Courts of provinces and districts (Ho Chi Minh City and Dong Thap province).[477] The Family and Juvenile Court's operations contribute to assuring its specialization, accord with international norms, and focus on the subjects immediately affected by the Court's decisions, namely minors and adolescents. In the current period, it is critical to continue to deploy and replicate the Family and Juvenile Court model.

[477] Lu Thi Hang, "Mô Hình Tòa Gia Đình và Người Chưa Thành Niên ở Việt Nam và Hàn Quốc - Nhìn Từ Góc Độ Luật so Sánh ," accessed March 27, 2022.

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