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3 Land tenure and irrigation in North Vietnam's mountainous regions

Rights outside the law?

*Emmanuel Pannier*¹

Introduction

In the rural areas of North Vietnam, the category of “village conventions” (*hương ước*) is often used to describe a set of customary rules meant to regulate social relations in the villages (Bui 2016). However, a look into local practices quickly reveals that even if certain customary clauses are practised and carry authoritative weight, many social rules are not a part of these clauses even if they are explicit and significant on a daily basis. Village conventions, which appeared under the Lê dynasty in the 15th century, were initially written by the villagers. Today, nevertheless, they are initiated by the Party-State and its local authorities, which largely define their content. Consequently, alongside the official state laws and these state-regulated customary rights, other forms of social regulation exist, which are locally established, structuring and widespread. These forms of social regulation cover here the rules, standards, conventions, agreements, rights and obligations that organise social relations, guide actions and which effectively “regulate conflict, organise coordination, suppress uncertainty (...)” (Lordon 2011: 63, my translation).

In this setting, the current paper addresses the challenge of categorising forms of social regulation observed within the irrigation system of villages in the mountainous zones of north-west Vietnam. Are they part of the legal system or something else? If they pertain to the judicial system, what kind of rights are they? Can these forms of social regulation all be designated as “customary law”? If not, to which category do they belong?

Our working hypothesis is that the notion of “customary law” is not satisfactory because it tends to consider as a whole a large range of rules, standards, conventions and rights which have distinct statuses, and which do not all fall within the scope of the legal system. Rather than considering these forms of local and non-state social regulation as relating to “customary rights” from the start or, on the contrary, as being systematically outside of the judicial system, the approach we propose consists in identifying their characteristics empirically.

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Then, in defining their status and establishing if, *in fine*, they are a judicial expression, or if they refer to other specific forms of regulation which have their own specificities, possibly linked to the legal system, but not limited to it.

In this perspective, the first two sections are dedicated to a case study in a village in the mountain areas of northern Vietnam. The first section (3.1) explores the diversity of forms of irrigation regulation, while the second one (3.2) presents the dynamics of land tenure rights in order to show how they shape local irrigation rules. The third section (3.3) will propose a theoretical frame to integrate these empirical observations and discuss the definition and classification of these forms of social regulation.

3.1 How irrigation is organised in a rural community in the mountain zones of northern Vietnam

3.1.1 Presenting the case study

The empirical data presented here comes from qualitative fieldwork undertaken in 2015² in a locality in the mountain areas of north-west Vietnam where four different ethnic groups live (Hmong, Dao, Kinh, and Giáy). When observing irrigation practices in the rice-fields of the Piềng Lão village, farmer complaints over water shortages and conflicts between neighbours and relatives over resource-sharing quickly became apparent. These tensions were even more noticeable because, in the rice-fields of more remote villages, conflicts over resource apportioning were almost non-existent, whereas the irrigation system is actually less technically effective. Research was therefore guided by two questions: what are the rules and, more broadly, the forms of social regulation that serve to distribute water to the different villages in the locality? Why, in one of the villages (Piềng Lão), do farmers have difficulties organising themselves to distribute the resource? Examination of the rules regulating water distribution indicates the co-existence of different intertwined rights and regulations, as well as different sets of rules, whose authority depends on the rice-fields involved. How can this situation be explained and how do the different regimes of social regulation that are at play work with each other?

To answer these questions, the research, initially focused on the social management of irrigation, was extended to include the dynamics of agricultural land appropriation. Indeed, among the variety of reasons that explain the diversity of rules and conflicts, the restructuring of agricultural land ownership appeared as a major cause. After three decades of collectivisation, the Vietnamese communist party decided to allocate agricultural lands to households by distributing certificates that granted a set of rights to farmers, the State

2 Research carried out thanks to a Germaine Tillion post-doctoral grant at the “Ecole Française d’Extrême Orient”, Hanoi.

remaining the owner of the land.³ The manner in which these two land tenure regime changes affected local irrigation management will be discussed here.

Three visits were made to the community at key moments of the agricultural calendar and of water-usage (tilling, transplanting, and flowering). Direct observations of practices were combined with immersion work and in-depth interviews. These interviews, which sometimes were informal discussions, mainly covered the general context of the villages, the history of the region, agricultural practices, water-management, and land dynamics. Some documents were also collected, specifically reports on the locality and blueprints of irrigation canals currently under construction in the locality. Though Piềng Láo, the village where I took up residence, was studied more in depth, research was also conducted in another five villages of the locality. Concrete irrigation canals were also navigated upstream up to their source in order to document how they work, follow their trajectory, observe specific usages and identify the types of hydraulic structures taking up the water.

It is difficult to tell the history of this locality, not only because sources are rare but also because, at the border with China, it has undergone many armed conflicts and population displacements, between peopling and dispersal, leading to discontinuity in the occupation of the territory. Today, the locality is part of the national territory and is inhabited by different ethnic groups distributed across six villages: three central villages inhabited by the Giáy and the Kinh and three more remote villages inhabited by the Dao (Yao). In 2015, the locality had 1998 inhabitants grouped in 456 households, on a total surface area of 2703ha, 330.99ha of which were dedicated to agriculture. In the valley, by means of a terracing system, the inhabitants cultivated wet-rice fields in 141.66ha. On the steep mountainsides, lands were cleared to produce corn, cassava, rain-fed rice, etc., on 50.72ha (see Figure 3.1). The remainder of the mountainsides represented wooded areas (914.74ha), waterways, and residential spaces. Two dams feeding five hydroelectric plants have recently been constructed on the main river flowing through the locality. These constructions greatly affect the amount of water available. Though the population has been compensated for the land expropriated, the impact of these dams on water access remains a serious problem, intensifying the conflicts relating to water distribution.

3.1.2 Forms of social regulation of water irrigation: autonomy, interdependence, and non-formalised collective organisation

The way irrigation is organised and operated directly influences the content of the rules regulating the allocation of resources. Therefore, to understand how

3 “The so-called ‘use rights’ not only included the right to use the land, but also to dispose of its product, to exclude others from using the land, to use the land rights as bank collateral, to pass them on to one’s heirs, and to alienate the rights to third parties” (Sikor 2006: 621).



Figure 3.1 Diversity of crop system

the collective management of irrigation works, the principal characteristics of the system need to be presented. In light of this, it becomes apparent that the system relies on both a great autonomy and a strong interdependence of the users, therefore requiring precise coordination despite a lack of any formal organisation. According to the locality's communist party secretary, the highest post in the local political-administrative structure:

To share the water, the villagers sort it out among themselves. The local authorities cannot intervene at this level. We cannot regulate water distribution in the rice-fields. We can at most urge people to share the water fairly, but we cannot intervene directly in the management. Our role is limited to the construction of the main concrete canals.

This comment echoes the practices observed and reflects the central government's policy on water management in mountain regions. After the 1998 "Law on water resources", the government appears as the sole entity responsible for water management across the country.⁴ In rural areas, the Ministry of Agriculture and Rural Development is officially charged with ensuring the management of irrigation and of the water supply. Governmental decree No. 149/

4 No. 8/1998/QH10, 20 May 1998.

2004/ND-CP recognises the right of individuals to use, without licensing residential use, surface or subterranean waters for agriculture, forest production, aquaculture, small-scale industry, and craft trades. Since the 2000s, after decades where the Ministry of Agriculture and Rural Development was responsible for the management of irrigation and for the water supply, the State initiated in the 2000s a process for decentralising irrigation management which has led to a partial withdrawal of public authorities, a decline in investments in the local development of irrigation, promotion of water-user groups and the creation of a participatory system to ensure local management of the irrigation networks (Fontenelle, Molle, & Turrall 2007).

If large irrigated lowland areas are still subsidised, this is not the case for small areas in the highlands of mountain areas, which regularly find themselves without enough means to carry out maintenance on the networks and to fund the local administration (Jourdain et al. 2011). Whereas local civil servants dedicated to hydraulic management are present in all localities, in practice, in the remote areas of the northern mountains, the irrigation users regulate the distribution of water amongst themselves.

How is this autonomous system of irrigation management carried out in the locality studied? Irrigation depends on two types of aquatic sources: mountain springs and streams and the river *Ngòi Phát* which flows from southwest to northeast (see Figure 3.2). One single rice-producing area can be fed by several



Figure 3.2 Water resources and irrigation system in Piềng Láo village

different sources. Some irrigated areas have concrete canals whereas others depend on a network of earthen ones. There is no pump-station: the entire system is gravity-fed. In 2015, there were eight different main concrete canals built thanks to state funds.

The initial opening and the flow are managed by the users, without formal consultation, according to their needs. The villagers take care of minor repairs: sometimes in a collective manner with or without the involvement of the village chief, sometimes individually. There is neither an irrigation management committee for each village, nor a centralised agency to manage and distribute the water from the primary canal to the different areas. There is neither a planned schedule for opening the floodgates nor a fee system to finance maintenance. Yet the absence of formal collective management does not mean an absence of coordination. At the level of the irrigated sub-spaces, the strong interdependence of the terraces with regards to water access necessitates agreements as well as some form of coordination between the users. The creation of collective irrigation organisations is often explained in the literature by the rarity of the resource although this is not always the case (Aubriot 2004). In the case presented here, coordination mechanisms are necessary above all because individual use of the resource influences and is influenced by its collective use. Indeed, from its intake at the primary canals, water flows from rice-field to rice-field through small earthen canals which cross the rice-fields upstream (see Figures 3.3 and 3.4). Consequently, the availability of water for the plots downstream is highly dependent on the water consumption of the rice-fields upstream. If water is not abundant, as, for example, during droughts, low levels of rain or when the dams for the hydroelectric plants retain the water, there can be shortages downstream. At a collective level, when it is necessary to open irrigation canals at the initial intake at the beginning of the season to plough, or when it is necessary to close the gates at the end of the season for harvesting, all the areas irrigated by the same canal will be affected. Irrigated rice cultivation generally implies a certain degree of interdependence between the farmers

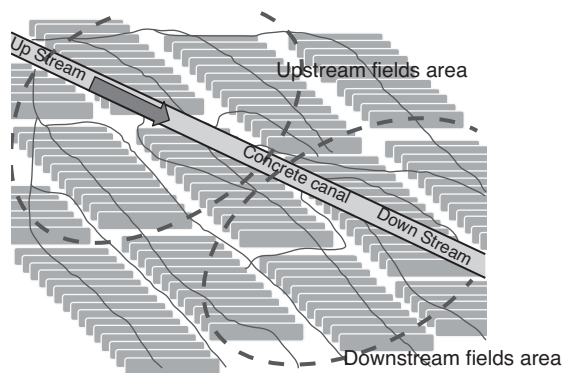


Figure 3.3 Interdependency at irrigated area level

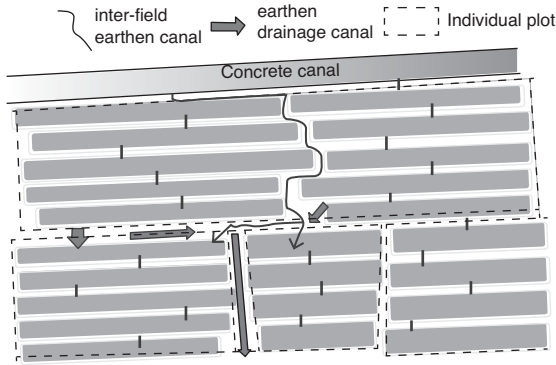


Figure 3.4 Interdependency at the scale of on-farm canal

within the same area, but this interdependence is exacerbated in areas of terraced rice cultivation within a system of largely fragmented landholdings.

Because there is no formal collective management of the resource within the villages, water distribution is carried out through a series of agreements and sub-systems between users of neighbouring plots. The local forms of coordination are governed by three rules on resource usage and sharing recognised by all the villagers.

3.1.2.a *The right of “the fire and the axe”: priority to the first-land clearer*

According to this rule, the person who clears a plot and first uses the water source gets priority to use water. The first people who set up the access to water do not necessarily have the plots closest to the source later because other households can subsequently clear plots further upstream. But “every subsequent development which can affect the first developed access has to be explicitly negotiated with the first developer” (Jourdain et al. 2011: 81, my translation), and any subsequent users need to leave priority to the first comer in terms of water usage. This is the oldest rule among that regulating water access.

3.1.2.b. *The rule “upstream-downstream”: priority to the upstream plots*

The villagers say, “Those who have upstream plots have more rights than the rest” (*ở trên có quyền hơn*). This means that the farmers upstream can use the water *before* those downstream, but, as opposed to the preceding rule, they do not benefit from an exclusive right over water nor from a superior right to manage it. When water is available, they can use it first and then let the resource flow for downstream users.

In the past, this rule was combined with the previous one because, in general, whoever had cleared the first plot had done it upstream. Today, it has become an independent rule and even tends to supplant the preceding rule, in particular in the areas where plots were redistributed after collectivisation and where farmers no

longer exploit the fields which they initially cleared. Nevertheless, where one can still find plots exploited by those who initially cleared them, this “upstream–downstream” rule can be contrary to the above-mentioned rule of “the fire and the axe” if a user upstream was not the first to clear his plot. Under the “upstream–downstream” rule, the latter user has preferential access to the water. Yet those downstream, if they cleared their plots first, can also claim priority access under “the fire and the axe” rule. This contradiction in the regulations is a source of tensions.

If the “upstream–downstream” rule is now considered the dominant rule, it has not been formalised, unlike the preceding rule. This rule belongs to what J.-P. Olivier de Sardan (2008; 2015) calls “practical norms”, and works in combination with the third rule which dictates the apportionment of water.

3.1.2.c. Moral and social obligations of sharing the resource

There is a rule stipulating that when the upstream rice-fields are full, water must continue to flow downstream, and when water is scarce, upstream users have access to it before others but are asked not to use it all up: “we must share. It is not an individual [resource]”, a Dao villager explained once to emphasise that water is a collective resource. Even if during shortage periods the authorities evoke these rules in order to avoid conflicts, they mainly stem from diffuse solidarity obligations which are established, even imposed, by members of the same village, lineage or among relatives. They belong, therefore, to morality and social control and are embedded in a cluster of social sharing obligations that govern social relationships at the local level.

In fact, none of these three rules for the allotment and distribution of water are formal or written down. The villagers call them “the law of the elders” (*luật các cụ*): they are examples of presumed ancient behaviour, considered legitimate and authoritative. These mechanisms of social regulation are, however, applied neither systematically nor in absolute terms, especially because the first two rules can contradict each other. Generally, these rules are subject to agreements, modifications, and interpretations, depending on the situation. As such, transgressions are frequent. The existing sanctions are detailed further below, ranging from simple neighbour disapproval to the involvement of state authorities.

Even if these three principles can be combined (by twos or threes) or be used in conjunction with other rules (inheritance of land), they can be contradictory depending on the rice cultivation spaces and the way landholdings were acquired (state-redistributed plots or plots acquired through clearing). These forms of irrigation regulation are therefore tightly linked to the transformation of land appropriation regimes endorsed by the central authority. Consequently, if the State is relatively absent from these forms of local organisation of irrigation practices, it has nevertheless modified indirectly their functioning through land policies.

3.2 Land dynamics and its effects on water rights

3.2.1 *Land policies and restructuring of land appropriation regimes*

Mountain territories have known the same succession of land policies as lowland areas (agrarian reform, cooperative system, land redistribution, and issuing of landholding certificates), but their enactment diverged (Sikor 2006). Rights reconfigurations governing land appropriation will not be detailed here (Boissau et al. 2003; Mellac 2010). The objective is to show their impact on irrigation management. Before collectivisation, the majority of non-exploited lands in the area were collective resources (pastures, hunting grounds, wooded and foraging areas, etc.), accessible to all but which could be claimed if cleared for cultivation. The rule of “the fire and the axe” cited above gave a right of use to the first person who cleared a plot of land. This right could be passed on to descendants and could sometimes even last several years after the plot was no longer in use. If the land was not persistently cultivated, the right of use disappeared, and another farmer could obtain the rights if he exploited it again.

If the colonial period did not change the forms of land tenure in the mountains, the new socialist regime set up after independence profoundly changed the land tenure structure in the locality under study. After an agrarian reform (1953–58) aiming to remove the land tenure rights of large landowners, the lowlands, especially in the village of Piêng Lào, were held communally and were collectively managed within agricultural cooperatives. The Giáy populations, living in the least elevated areas and cultivating mainly the valley floors, were largely enrolled in the cooperatives and lost their individual landholding rights on their rice-fields, managed communally after that. The Dao populations inhabiting the highlands were only partially involved in the cooperatives. They essentially managed to keep the right to manage their lands, even though some were encouraged to “come down from the mountains” and work in the cooperatives (Fages 2005). The difference in the treatment of these populations would determine the future land tenure and irrigation management issues.

In the 1980s, following the failure of the cooperative system, the Party-State launched the *đổi mới* politics (Renovation) which aimed to establish what official rhetoric called a “socialist-oriented market economy”. These reforms dissolved in particular the cooperatives and granted the means of production to households. Inhabitants were given agricultural plots and land-tenure certificates, called “red books”, granting farmers the rights to use, sell, exchange, transmit, bequeath, mortgage, and rent the land. In 1996, in accordance with official protocol, the Giáy populations were given, through a lottery and depending on the number of “mouths to feed”, the cooperative lands – rice-fields and the lands for annual crop cultivation (corn, cassava, sugarcane, etc.) – for a duration of 20 years. Through the same mechanism, the Dao were also granted the lands that had been cleared collectively by the cooperative. Nevertheless, the plots that were exploited before the creation of cooperatives, or which were outside the cooperative system, were not redistributed according to the egalitarian principles of

the national politics of the time. After the cooperatives were dissolved, the Dao villagers recovered or kept their lands, for which they received land-tenure certificates. This process, unknown in the delta areas, is widespread in the mountains of northern Vietnam. It has been called “returning to the lands of the ancestors” and testifies to the pervasiveness of local rights. Hence, even if the “red books” issued ratified the rights of use on the formerly collective lands, they also formalised and officialised the rights of use appropriated through the local rules (Boissau et al. 2003).

Finally, since it is now possible, the villagers have also carried out many land transactions, officially or not. Simultaneously, an informal but legal way of transferring the rights of use has been developed: some rented their lands to other households either in exchange for money or against half the harvest. The new land tenure rights are now replacing the ancient rights but only in certain areas, like in Piềng Lão, where all the rice-fields and plots dedicated to annual crop cultivation have been redistributed. They have not, however, completely supplanted pre-existing rights. This sequence of land tenure politics has led to the superposition of diverse forms of land ownership.

3.2.2 How changes to land tenure have affected irrigation

These changes to the modes of land appropriation have had repercussions on irrigation regulation. Today, the allocation and distribution of water follow a combination of ancient rules linked to the right of “the fire and the axe”, rules inherited from the collectivisation period (collective use of resources and facilities, state management of the facilities, and collective maintenance of the canals) and rules established after episodes of land redistribution and commercialisation (sharing water from upstream to downstream, individual management of the canals within the rice-fields, bilateral pragmatic agreements).

In Piềng Lão, however, where the plots were collectivised and then redistributed, farmers no longer exploit the land that they (or their ancestors) cleared. The ancient local rights whereby those who cleared their plots first have precedence in access to water are no longer active even if still latent. The pragmatic rule enforced is the “upstream-downstream” rule with the condition, linked to social and moral obligations of solidarity, that some water is allowed to flow towards the downstream rice-fields. But this condition is not always respected, especially when there are water shortages and since the hydroelectric plants have been installed in the locality. The sharing obligations are also eroded by users external to the village, without kinship or neighbour relations with villagers, who rent or acquire plots, and by whom sharing obligations are considered weak or non-existent. Furthermore, since the owners of upstream plots are not those who first cleared the area because they received their plots through land redistribution, bought or rent them, their “upstream” right to benefit from precedence in accessing water is weakened in a context where the rules enabling priority access to water for the first-clearers are latent. Moreover, certain users also claim rights linked to the upstream plots because they consider

these as belonging to their ancestors, even though the plots were collectively exploited during collectivisation and then sold or redistributed to other households when collectivisation ended.

The tensions linked to water-sharing are concentrated in Piềng Lào, particularly in the cooperative area, where the reconfigured modes of land acquisition had the greatest impact. The disputes are not as frequent or violent in the other villages, especially in the Dao villages, where the local land tenure rights have not been supplanted. This situation highlights the destabilising impact land acquisition policies have had on the social regulation of irrigation practices. Where the farmers recovered the lands of their ancestors, local rules of allocation and distribution of water are coherent and operational, work together and can be applied without one rule contradicting another. In the village where the State has profoundly modified the land tenure system while attempting an egalitarian redistribution of land, the diverse forms of local regulations, lineage laws and ancestral rights over resource access no longer work as a system and can neither ensure fair distribution nor resolve disputes.

3.3 Theoretical discussion on the forms of social regulations

Whether it be for land or irrigation, the observation proposed by Olivier de Sardan in his study on norms in Africa is valid for the Vietnamese case: “on the one hand, norms change (sometimes fast), adapt, hybridise, and are created; on the other hand, norm pluralism is the rule, not the exception” (Olivier de Sardan 2008: 14, my translation). In such a situation, how can one characterise the different forms of irrigation regulations observed? Do they fall within the legal system or outside of it? Which categories can be used to define them? Two analytical frameworks can allow a first assessment of the situation. First the arguments of Alain Testart (2007) will be explored, for whom the law implies enforceable obligations that can lead to a claim, which in turn implies the possible use of *legitimate* (*légitime*) force so that obligations are fulfilled. Second, because Testart’s proposal is not enough to describe reality in its complexity, notably when non-governmental entities generate due obligations within societies that have a State, Etienne Le Roy’s (2007; 2011) theoretical framework will also be explored to better understand what he calls “*the juridical*” (*la juridicité*). This concept allows one to take juridical but non-governmental regulatory mechanisms, which are not to be confused with the law or the legal system, into account.

3.3.1 Obligations, dues and the law: Testart’s approach

In order to define whether regulatory forms are part of the law, Testart (2007) suggests distinguishing between the nature of the obligations: are they legal or of another kind? According to this method, the existence of a State and its laws are not the defining criteria: it is by establishing whether the obligations are *claimable* (*exigible*) that their nature can be defined, and from there the status of

the rules.⁵ When an obligation may be *claimed* or can lead to a claim, that is when an entity can use force to have a right recognised and an obligation enforced, then it is legal. When there is no legitimacy to claim anything at all, it is not a legal obligation, and then belongs to another domain (social, morals, etc.). For Testart, the enforcement of a legal obligation “may be obtained by all legitimate means that exist in a society, including by violence, from the moment it is conducted in forms recognized as legitimate” (Testart 2013: 257). He specifies that to define whether any obligation is legal or not “it is only the presence, or the possibility accepted as legitimate, of a rare mechanism ..., the use of violence, that can rigorously constitute the decisive criterion” (Testart 2007: 152 note 34, my translation). This perspective on what is part of the legal system echoes Christophe Kletzer’s arguments, for whom the law, even in its non-state forms, can be defined as “a normative structure that organises society and enables the use of force or violence” (Kletzer 2018: 6). If, contrary to Testart, Kletzer considers obligations and sanctions of secondary importance, he agrees with the former on the legitimate and permitted use of force as a distinctive criterion of a legal system and on the continuity between state law and forms of state-less law that are separate from morality.

In systems organised around a State, only government agencies and public authorities are theoretically entitled to use violence legitimately and are consequently the only ones that can enforce the law. But in stateless societies, when obligations are *claimable* and as such legitimate physical coercion is a possible means used to enforce these obligations, these obligations are legal and the rules that relate to them are the law. Consequently, depending on the type of society, the means available to assert one’s rights and legally claim an obligation that is due are variable (penalty, certified reports, court appearance, seized goods or belongings, *vendetta*, torture, execution, witchcraft, compensation, reparation, prison sentence, etc.). To determine whether obligations are *claimable*, it is necessary to study the existing sanctions: what happens when someone breaks a rule? Is it possible and socially acceptable to constrain them, force them if necessary, to respect the obligations?

3.3.1.a Sanctions pertaining to water rights

Not one of the three local rules on water apportioning discussed above is governed by government regulations. They are not written down nor registered under village conventions and breaching any of these rules is not subject to criminal proceedings. Villagers verify irrigation rule compliance through a mechanism of mutual control, without any formal organisation or collective entity. The main and most common sanctions in case of rule transgressions

5 The French term “*exigible*” used by Testart will be translated here by “claimable” to refer to an obligation that is both enforceable *by itself* – the fulfillment of the obligation can be required – and create a claim – it is possible and legitimate to require something if the obligation is infringed upon (Testart 2007 and 2013).

pertain to social control: reproach, criticism, contempt or public disapproval. Sanctions are consequently targeted towards the honour, the prestige, and the reputation of those who breach the rules, central values among the villagers' concerns. These obligations are therefore not *claimable* according to Testart's view, but weigh heavily according to local considerations. Nevertheless, certain forms of coercion, even violence, are sometimes legitimate (yet illegal according to the government), notably when a villager has transgressed the rules several times and endangered someone else's harvest. Local mediators can also intervene in order to solve disputes if the conflict between the users is important.⁶ All village chiefs, however, confirmed that they only rarely intervene, and during the survey only one case where a mediation committee intervened was documented. In such cases, mediators make a decision depending on each situation, considering the different existing rules and not the exterior and fixed governmental laws. When the village mediation committee intervened to sort out the dispute concerning a user who had recently cleared a plot upstream of another farmer whose downstream plots had been exploited for generations alongside use of the water source, the committee sided with the individual who cleared the first plots. In this case, the rule of "the fire and the axe" predominated and can be considered part of the law as the obligation entails the right to *claim* compliance with the rule.

It is theoretically possible to appeal to the locality's popular committee, which is the public authority, in cases of a conflict that cannot be internally resolved. Only one case of this sort has been identified: a dispute between two households, coming from two different villages but exploiting adjoining plots, led to a fight and to one individual being hospitalised. The local authority had to intervene but did not rule in favour of either participant: no one was sanctioned and none of the existing rules on water rights were applied. The local authority simply requested that an amicable solution be found. In the end, the hospitalised individual stopped cultivating the land and rented it to other villagers.

In some instances, the use of force to enforce the rules is considered legitimate. In others, the State or local authorities can intervene as referees or can force an individual to respect the rules. Hence, the rules organising irrigation can be considered *claimable* obligations and therefore legal. Notwithstanding, this is very rare. These rules are first and foremost regulated by social and moral obligations and sanctions. If, following Testart, it is useful to distinguish between what is legal and what is not, in reality the same local but non-governmental rule can be governed by several types of obligations with different natures and consequently have multiple statuses: social, moral, and legal.

Testart's approach does not allow an accurate description of these hybrid forms of regulation. Furthermore, in Testart's model, within nation-states, only the central power can legitimately apply violence to enforce legal rules and

6 Village chiefs or members of the villages' mediation committee, constituted of village officials and representatives of local forms of authority, such as heads of lineages or the elder.

obligations. Yet, as in the case presented here, when non-governmental entities have authority to apply rules locally, by force if needed, the fulfilment of obligations may be *claimed* and therefore become “legally” binding, even if in the eyes of the official state-law they are not theoretically legitimate. These situations where non-state obligations can lead to a claim, with a legitimate use of coercion, are relatively frequent. Could it be that, even in societies with a State, what is legal extends beyond the State’s scope? This observation indicates that the distinction between what is *claimable* and what is not can help build a first level of categorisation but is not enough to chart reality and its complexity. Le Roy’s analytical framework may prove useful alongside Testart’s to understand the complexity of social regulatory forms from another perspective.

3.3.2 *The juridical tripod concept according to Le Roy*

Le Roy (2007; 2011) urges us to move beyond modern western-centred conceptions of the law, perceived as autonomous, neutral and regulated by a transcending authority, to propose a perspective which considers the plurality of what is legal. This includes forms of social regulation usually perceived as marginal or informal within classical conceptions of Western law; they are “out-laws”, that is, they lie outside the scope of formal state laws. He therefore suggests we consider more than the “rule of law” (*règle de droit*) as the foundation of what is *juridical* (*juridicité*).

For him, the juridical is perceived as the “regulatory frame of life within society”: inspired by the historian of institutions Pierre Legendre (1999), he considers that “the real project of the juridical is to establish life (*vitam instituere*)” (Le Roy 2008: 1, my translation). For Le Roy, the mere presence of a sanction, whatever its nature, is enough to render an obligation compulsory and to make a rule enter the realm of the juridical. The law to him is but a specific modality of the juridical, which is not characterised by enforceable obligations, but by the involvement of an external authority (a judge or the administration) and the need to apply formal impersonal and neutral procedures. Le Roy builds the juridical on three dimensions that can be found in all societies but whose place and importance are variable (Le Roy 2007):

- General norms, impersonal and formalised: the law, i.e. the State’s (or a similar transcendental authority’s) legal system
- Models of conduct and behaviour: customs
- Durable systems of provisions inherited from what Pierre Bourdieu (1986) called the *habitus*, that is, ways of being, acting and thinking produced by society.

Among the three rules regulating irrigation, social and moral sharing obligations belong to the third category, but the rules of “the fire and the axe” and of “upstream-downstream” belong to the second category. The expression “*luật của các cụ*” (the law of the elders) conveys well this idea, that long accepted “codes of conduct and behaviour” finally become “laws” (*luật*) despite no

government involvement. This local expression summarises well the ambivalence of these modes of regulation that Le Roy highlights: they pertain to the juridical without being impersonal, generic and transcending, unlike state laws.

Le Roy explains that these distinctions are more heuristic than scientific, but they open the juridical perspective to a plethora of modes of regulation and do not limit it to enacted laws (positive laws) nor to the presence of a State even in state-based societies. Nevertheless, his model remains general and makes it difficult to build precise and detailed distinctions between the diverse rules one encounters empirically, a problem which Testart's proposal partially remedies through the distinction between the types of obligations and sanctions that are at work. Nevertheless, Le Roy's analysis implies a fundamental distinction between two regulatory regimes: impersonal and generic regulatory regimes on the one hand and interpersonal and local regulatory regimes on the other.

3.3.3 Social regulatory regimes: the bonds and the law

In their analysis of the institutional links between governance, growth and social change, Meisel and Ould Aoudia (2008: 435, my translation) emphasise that “the main aspect of long-term institutional change is the transformation of the regulatory regimes of human societies, of systems founded on social bonds, interpersonal links, towards systems based on formalised regulations, separate from people.” The observations presented here on contemporary Vietnamese society indicate the coexistence of these two forms of social regulation rather than a shift from one regime to another. Nevertheless, this distinction, associated with the preceding ones, can help in the attempt to categorise the empirical rules observed.

The regimes of impersonal and generic regulation are characterised by their transcending dimension:

rules have a general reach, in the sense that they are developed and respected at a systemic level (that of the society, the country), they apply to everyone in a way that is anonymous, undifferentiated, separate of people, in short, they are universal.

(Meisel and Ould Aoudia 2008: 435–436, my translation)

They are constituted as institutional organisations separate from those they govern. Theoretically, these forms of mediated regulation do not depend on one-off interpersonal relations, on the social status or rank of those involved nor on the specific situations to be arbitrated. This characteristic implies the intervention of separate institutions and external authorities that ensure that rules are applied as well as the use of “mediation resources” to regulate social relations through anonymous and formal mechanisms enabling “the agents to free themselves at least partially from personal relations”.⁷

7 “I consider a mediation resource all that which enables an exchange without having to use personal chains of relations” (Grossetti 2006: 93, my translation).

Alternatively, interpersonal and local regulatory regimes imply links among those that know each other and the development of obligations that are internal to the group in question, embedded in networks of personal connections and functioning within the limits of a group of long-standing face-to-face relations. Regulation is ensured by the control of everyone by everyone. These social regulatory regimes are founded “more on finding consensus solutions than on fixed norms and clearly defined procedures” (Stamm 2013, my translation). When arbitration is necessary, the tendency is to find an acceptable compromise in light of the particular circumstances and of the different interests at stake (Chauveau 1998). “As a consequence, there is a lot of room for negotiation, and this is at all levels, from the domestic scale to the village or at the level of relations with the administration” (Chauveau et al. 2001: 150, my translation). The rules and their applications are flexible and possibly evolve with each situation. This characteristic brings flexibility to social relations and governance mechanisms, but is also a source of arbitrariness, uncertainty and instability. On the contrary, those regulatory regimes detached from individual relationships favour “anonymity, distance between associates and the autonomy of the individual and the law, but also stability and security in the transactions” as well as, in principle, equal treatment (Le Roy 2008: 16, my translation).

These forms of social regulation that lie *outside* the scope of state law but are still legitimate, are recognised as valid locally, and share the common attribute of being generated internally (see the *principe d'endogenèse*, Le Roy 2011). That is, they develop within the group, from the interactions of its members and can therefore be easily modified by the group itself. In other words, “these modes of governance are not abstract coordinating structures, defined *a priori*, to be applied by the actors depending on their needs. They are social constructs born from concrete interactions (local and global) particular to each situation” (Baron 2007 in Olivier de Sardan 2015). Following J.-D. Reynaud (1989), G. de Terssac explains that the norms and rules at work in this type of regulatory regime are the internal product of the relations between different social agents: “the interaction is regulated and regulates ... [It] produces rules, admittedly of local value and legitimacy, but rules that facilitate communication and social exchanges, collaboration and disputes, arbitrage and compromise” (De Terssac 2012: 8, my translation).

If anthropological works often implicitly or explicitly allude to the self-instituting aspect of interpersonal and local regulatory regimes, other disciplines also echo these arguments. The “commons” of Elinor Ostrom (1990) possess, for example, this indispensable characteristic: to be effective as institutional mechanisms, they need to be fashioned by the individuals they govern. In philosophy, these regulatory forms are close to kinds of “moral precepts” identified by H. Arendt as “the only ones that are not applied from outside the action, by a supposedly higher power or from experiences beyond the scope of the action” (Arendt 1994: 312–313, my translation). Their role is to “counteract the huge risks of the action” (*ibid.*), risks linked to the spontaneity that is inherent to all acts and consequently to the unpredictability they entail. Finally,

these regulatory forms, meant to render human actions more predictable and to provide a certain degree of stability in societies, come close to what Nietzsche (2007: 23) called the “morality of mores”.

In associating these two regimes of social regulation with the distinctions proposed by Testart with regards to the nature of the obligations at play (*claimable* or not) and with the three juridical aspects of Le Roy, the different rules empirically observed can be cross-tabulated for ease of interpretation. On one side are the rules stemming from impersonal regimes and on the other those that are part of interpersonal local regimes. In each category there are rules that carry obligations that are *claimable* or can lead to a claim, belonging to the legal system, as well as rules framed by social or moral obligations, pertaining to customs or *habitus*. Table 3.1 is a possible rendering of this cross-tabulation.

3.4 Conclusion: where does customary law stand?

Where does “customary law” stand in this framework? Is it possible to place all non-governmental regulatory modes whose profiles are defined by their local and interpersonal character within it, or does customary law only represent a subset of these regulatory modes? This case study, framed by Le Roy’s and Testart’s theoretical propositions, indicates that the second option is the most appropriate. The hypothesis is that customary rights specifically concern *elements of “custom”* – understood, as Le Roy suggests, as all the ways of proceeding and behaving in a society – *that are legal* – that is, as Testart advocates, that obligations are *claimable* and that rules can be enforced through a system of sanctions, which include legitimate violence if necessary. “Customary law” can therefore be completely separate from governmental law but can also apply to local and interpersonal rules recognised by the State, like Vietnamese “village conventions”. And if a “customary law” is legal because obligations may be claimed, it is also, most importantly, regulated by social and moral obligations which are anchored locally and embedded in interpersonal relationships.

Table 3.1 Regimes of social regulation

	<i>Impersonal & general regulatory regime</i>	<i>Interpersonal & local regulatory regime</i>
<i>Juridical/Legal obligation</i> It is legitimate to have recourse to certain forms of constraint, including violence, to require someone to assume his or her obligations.	State laws	Local rules with an enforcement procedure = <i>Customary laws</i> ?
<i>Social/moral obligation</i> Social or moral pressures and incentives. Force cannot be used to compel the recalcitrant offender to fulfil his or her obligations.	General norms of the whole society	Local, implicit and widespread norms of a “community” without an enforcement procedure, <i>habitus</i>

Finally, it appears that a customary law is only part of a larger set of what can be called “interpersonal and local regulatory regimes” and which need to be recognised, characterised, and clarified. From an attempt to understand the rules organising irrigation and land tenure, a specific social regulation regime appears, with particular characteristics and functions, which is everywhere, in industrialised capitalist countries as well as in subsistence economies, in ancient times as well as in the new contemporary modes of socio-institutional organisation. Despite mentions of this particular form of social regulation in the anthropological literature, in some philosophical discourses (Arendt 1994, Anspach 2002; Lordon 2015) and in few economists’ work (Ostrom 1990), particularly libertarians and those defending anarchist proposals (Leeson, 2007), it is still poorly conceptualised and formalised as such.

This form of interpersonal and local regulation encompasses a great variety of rules and norms which cannot all be attributed to customary law, yet were not all issued by a government either, even if they are still potentially legal. Emerging from the interactions they regulate, they are poorly mediated: there is little or no intermediate entity between those who set the rules, those to whom they are addressed and those who monitor their implementation. This specificity makes them subject to change, flexible and adaptable to the circumstances of each situation, but also renders them somewhat uncertain and arbitrary. In other words, if one of the functions of this form of social regulation is to stabilise social relations in order to ensure their longevity and reproduction, it does not remove uncertainty entirely: it builds predictable islands in the ocean of uncertainty that characterises human affairs (Arendt 1994: 311). It should be noted that even if these forms of social regulation contribute to establish some order within a group, it may not have been their originally intended outcome when first conceived. Indeed, they organise social relationships but also *signify* them. They should be perceived not only as having a purely social function, but also as the expression of a connection to the world and of an always unique cultural invention (Jaulin 1995).

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