

**Lam NGUYEN VAN, Quang VU**

*The right to freedom to choose the type of business: The case of  
VietNam*

# Secção I

## Investigação Científica\*

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\* Os artigos presentes nesta secção foram sujeitos a processo de revisão segundo o método *blind peer review* / The articles in this section have undergone a blind peer review process.

## The right to freedom to choose the type of business: The case of VietNam

### O direito à liberdade de escolher o tipo de empresa: O Caso do Vietnam

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**ABSTRACT:** The right to freedom of business is a fundamental right enshrined in the Vietnamese constitution, the ability of subjects to do what they want, choose, and decide for themselves all matters related to business activities that are not prohibited by law. In particular, the content of the freedom to choose the type of business is considered basic and important. However, Vietnamese law only treats freedom of business as a right of enterprises and only recognizes certain types of enterprises that are considered popular, which limits citizens' freedom to choose types of businesses. This paper uses systematization, analysis, explanatory methods, and comparative jurisprudence methods, etc. to analyze theoretical issues and the current legal situation regarding the freedom to choose types of enterprises in Vietnam, propose some solutions to improve the law and effectively enforce the law, ensure the freedom to do business of citizens.

**KEYWORDS:** law on enterprise; business freedom; type of businesses; business law.

**RESUMO:** O direito à liberdade de empresa é um direito fundamental consagrado na Constituição vietnamita, a capacidade de os indivíduos fazerem o que querem, escolherem e decidirem por si próprios todas as questões relacionadas com actividades empresariais que não sejam proibidas por lei. Em particular, o conteúdo da liberdade de escolher o tipo de atividade comercial é considerado básico e importante. No entanto, a legislação vietnamita apenas trata a liberdade de empresa como um direito das empresas e apenas reconhece certos tipos de empresas consideradas populares, o que limita a liberdade dos cidadãos de escolherem os tipos de empresas. O presente estudo utiliza a sistematização, a análise, os métodos explicativos e os métodos de jurisprudência comparada, etc., para analisar as questões teóricas e a situação jurídica atual em matéria de liberdade de escolha dos tipos de empresas no Vietname, propor uma série de soluções para melhorar a lei e aplicar efetivamente a lei, assegurando a liberdade de empresa dos cidadãos.

**PALAVRAS-CHAVE:** direito das empresas; liberdade comercial; tipo de empresas; direito comercial.

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## Introduction

Over the past three decades (since 1986, Vietnam started the process of “DOI MOI” (renewal)), Vietnamese lawmakers have introduced into law popular types of business organizations in the world. It can be said that the introduction of the unified Law on Enterprises in 2005 (and currently Law on Enterprises 2020) replacing the Law on Enterprises 1999 has shown the State's policy in expanding the right to establish investors' businesses and create legal equality for business entities.

The types of businesses prescribed by law in Vietnam today partly meet the practical needs of business life. In general, Business law in Vietnam is “established with a relatively massive system of regulations on various aspects of business activities with adjustments that are increasingly more consistent with the market economy, demonstrating more transparent, fair and reasonable”<sup>3</sup>. Thereby, it has attracted and encouraged investors to contribute capital to establish various types of business organizations with certain types of links and advantages and disadvantages.

However, in addition to the classic and popular types of businesses specified in the current Law on Enterprises, investors are limited in choosing other forms of business organization. This means that in addition to the types recorded and regulated by the Law on Enterprises, investors cannot establish other types of businesses. Furthermore, the Law on Enterprises does not recognize the forms of companies established by investors in practice. Meanwhile, the business practices of capital contribution forms and the nature of association create intersections between existing types of businesses to create advantages, consistent with the practical needs of investors. Reality shows that “companies with all their types, not just limited liability companies and joint stock companies, are a factor that changes the socio-economic face and perception in Vietnam today”<sup>4</sup>.

From the objective needs of economic development, there is a need for capital contribution. At the same time, subjectively, investors want to share the burden of business risks and seek higher profits leading to the birth of different

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<sup>3</sup> VIETNAM CHAMBER OF COMMERCE AND INDUSTRY (VCCI) (2002), *Research report on Building a business legal system to encourage market economic development*, Hanoi, Vietnam.

<sup>4</sup> CUONG, NGO HUY. "Philosophical basis of company establishment contracts", *VNU Scientific Journal: Economics - Law*, Volume XIX, (4), 2003, pp. 1- 8.

types of companies. Therefore, investors have the freedom to choose the types of businesses that suit their abilities and intentions. Law as a record of business life practices, needs to be recognized and regulated diverse types of businesses make it easier for investors to choose, and business freedom is better guaranteed.

In both theoretical and practical aspects, the state's restriction of the freedom to choose the type of business without a legitimate reason greatly affects the constitutional rights of citizens. Especially, when the trend of perfecting the legal system is to ensure and expand citizens' freedom to do business, and along with the State's policy of mobilizing all resources of society for economic development, country economy. "As the law for establishing "inputs" of the market, business law also needs to have unified ideas and concepts on specifically institutionalizing the principle of business freedom, but specifically the freedom of investors to establish businesses"<sup>5</sup>. Therefore, corporate law must be built based on ensuring citizens exercise their rights to freedom of will and freedom of business.

## Literature

### Research on business freedom

The foundation for the formation and development of all types of businesses is the exercise of the freedom of business and will autonomy of investors. In particular, the right to freedom of business is concretized through several rights such as the freedom to establish a business, choose a business line, the right to access the market, the right to equality, and freedom to compete, healthy competition, and guaranteed ownership of corporate assets. Up to now, in Vietnam, there have been many studies on theoretical and practical issues, as well as the content of business freedom of investors. These research works contribute as a basis for recommendations to policymakers and lawmakers towards ensuring and expanding the content of business freedom and improving the business environment in Vietnam. May be mentioned as:

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<sup>5</sup> BA, DONG NGOC. "Structure of the legal system on enterprises in Vietnam", *Journal of State and Law*, (1), 2005, p. 30-33.

Within the scope of research on will autonomy, author Cuong, Ngo Huy<sup>6</sup> said: “The true nature of freedom is choice. Regarding nature, humans have the right to choose the objects they possess because they are the subjects of the world”. The topic is a profound research work on the legal issues of will autonomy and the reception of will autonomy in Vietnamese law. The research has raised theoretical and analytical issues based on domestic and foreign ideas and perspectives on freedom of will. From there, evaluate the current situation and existence of the law in ensuring citizens’ freedom of will. In freedom of will, according to the principle of freedom of contract, investors have complete freedom to agree to create business forms (which includes the freedom to create business organizations). The company’s theoretical issues are always closely linked to the right to freedom of business.

In the doctoral thesis of author Cuong, Bui Ngoc<sup>7</sup>, and published as a monograph in 2004 with the title “Some issues on business freedom in current Vietnamese law”, the author has presented and analyzed the basic and core issues of business freedom in Vietnam, including a system of rights attached to business entities. Specifically: (i) Right to secure ownership of property; (ii) The freedom to establish a business (including the freedom to choose a business line, business location, and business model); (iii) Freedom of contract; (iv) Right to freedom of competition according to law; (v) Right to self-determination in the field of dispute resolution. In addition, the authors also analyzed the current state of Vietnamese law in ensuring business freedom, thereby making recommendations to improve the law to ensure business freedom. This is a comprehensive, systematic study of theoretical and practical issues of business freedom.

Also in his research, author Hai, Bui Xuân<sup>8</sup> believes that a subject's freedom to do business is always limited by the freedom to do business and the legitimate interests of other subjects in society festival. Therefore, the laws of countries around the world take the first criterion of protecting core values, public order, and legitimate interests of the state, other organizations, and

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<sup>6</sup> CUONG, NGO HUY. 2009, *Freedom of will in Vietnamese law*, Special research topic at Hanoi National University, Vietnam, p. 13.

<sup>7</sup> CUONG, BUI NGOC. 2001. *Building and perfecting economic laws to ensure business freedom in our country*, Doctor of Laws thesis at Hanoi Law University, p. 23.

<sup>8</sup> HAI, BUI XUAN. 2001. “Some issues about businesses and laws regulating types of businesses in Vietnam”, *Journal of Legal Sciences*, (3), p. 11-17.

individuals limiting business freedom with the provisions of current law. However, the work has not explained in terms of legal regulations restricting types of businesses that will affect the business freedom of investors.

Sharing the same view that business freedom must be limited by law, author Quy, Mai Hong<sup>9</sup> believes that in a market economy, to carry out business activities, citizens must establish business establishments according to a certain model according to the provisions of law. Freedom to do business within the framework of the law.

Research on the role of law in business freedom, the Vietnam Chamber of Commerce and Industry (2002)<sup>10</sup> believes that the right to do business is considered a core indicator, a decisive factor in both the content and adjustment method of the economic legal system in a market economy. In this sense, the legal system in a market economy acts as a framework for business freedom to be specified, protected, and limited in necessary cases to ensure business freedom and sustainable development, consistent with public interests and minimizing impacts on the business freedom rights of other subjects. The function of the Law on Enterprises is ultimately to encourage all people to invest capital and participate in business. If the State “restricts the freedom of traders to choose forms of investment without a legitimate reason from the community, it is unreasonable”<sup>11</sup>.

### **Research on Freedom to choose the type of business**

In the context of business freedom, the right to choose the type of business is a basic right of investors. Researchers in Vietnam still have different views on whether the law should limit or recognize a variety of business types so that investors can freely choose the appropriate type.

Commenting on the meaning of the law governing business entities, authors Giau, Nguyen Van, Phuc, Nguyen Van, and Cung, Nguyen Dinh<sup>12</sup> believe that the law on business entities has a position as important as the legal

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<sup>9</sup> QUY, MAI HONG (editor). 2012. *Business freedom and the issue of ensuring human rights in Vietnam*, Labor Publishing House.

<sup>10</sup> VIETNAM CHAMBER OF COMMERCE AND INDUSTRY (VCCI) (2002), *Research report on Building a business legal system to encourage market economic development*, Hanoi, Vietnam

<sup>11</sup> CUONG, NGO HUY. *Commercial Law textbook: general and traders*, Hanoi National University Publishing House, 2013, pp. 76-79.

<sup>12</sup> GIAU, NGUYEN VAN, PHUC, NGUYEN VAN and CUNG, NGUYEN DINH. *Economic legal institutions in some countries in the world*, Finance Publishing House, 2016.

provisions on natural persons in civil law. Therefore, most legal systems anticipate and recognize a variety of business types. Business forms are established to suit needs, creating conditions and encouraging investors to invest capital in business, thereby promoting the development of the economy. However, the work has not been researched extensively, in detail, and compared between legal systems on different types of businesses.

In his research, author Phat, Nguyen Nhu<sup>13</sup> has the opinion that each type of business has different economic, legal, and business risk characteristics, sometimes opposing each other. Therefore, to reflect the needs of practical business problems, business law needs to recognize and more widely protect many business legal forms. The author focuses on researching the content of business freedom in Vietnamese law, which is thoroughly specified in the Constitution to see the role of law in ensuring the right to choose different types of investor's business.

Author Thuy, Phan Thi Thu<sup>14</sup> provides comments on the role of business from the perspective of investors when choosing a business form to establish because it has a decisive influence on the internal structure, governance regime, and limits of corporate liability. Choosing an organizational form that suits the purpose and business strategy is the top concern of investors when entering the market. Therefore choosing a business form before starting a business is very important, it has a significant impact on the survival and development of the business.

In the textbook author Hai, Bui Xuan<sup>15</sup> focuses on analyzing and arguing the role of law in ensuring business freedom and creating conditions for investors to choose appropriate business models. Besides, in the content of another research work, author Hai, Bui Xuan<sup>16</sup> put forward two practical needs for laws regulating types of businesses, which are: *First*, the law must "design" more diverse types of businesses so that investors have the freedom to choose. *Second*,

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<sup>13</sup> PHAT, NGUYEN NHU. 2016. "The freedom to establish businesses under the Constitution", *Journal of State and Law*, (10) (342), p. 28-32.

<sup>14</sup> THUY, PHAN THI THU. "Legal form of social enterprises: British experience and some suggestions for Vietnam", *VNU Journal of Science: Jurisprudence*, Volume 31, (4), 2015, pp. 56-64.

<sup>15</sup> HAI, BUI XUAN (editor). *Legal textbook on business subjects*, Hong Duc Publishing House - Vietnam Bar Association (1st edition), 2016.

<sup>16</sup> HAI, BUI XUAN. 2001. "Some issues about businesses and laws regulating types of businesses in Vietnam", *Journal of Legal Sciences*, (3), p. 11-17.



the law "recognizes" the types of enterprises in which business life practices arise. The task of the law is to recognize these types and provide legal mechanisms to protect investors and related third parties. Through the above comments of the author, we can see the requirements of the orientation to perfect the legal system regulating types of businesses in Vietnam today.

Author Cuong, Bui Ngoc<sup>17</sup> observes that the isolation of a few types of businesses of course cannot lead to the need for transformation and also does not create conditions for choice. According to this research direction, the legal system requires regulations on diverse types of businesses because investors want to have a relatively wide choice of business types and the ability to easily convert. From the chosen type of business and business method to another type of business and business method, it is necessary to adapt to changes in the economy...This is also the general trend of world legal systems. It can be said that the work has provided a profound and concise analysis of ensuring investors' freedom to choose the type of business.

Sharing the same opinion as above, the author Van, Nguyen Thi Thu<sup>18</sup> commented that the diversity of business types also contributes to the legal protection of businessmen's interests when they invest capital in production and business activities. Although the recommendations have now been added to current law, the theoretical and practical issues researched are very valuable.

According to the Central Institute for Economic Management Research - CIEM and the German Technical Cooperation Organization (GTZ)<sup>19</sup>, the recognition and guarantee of business freedom combined with positive changes in the business legal system have created positive conditions for Vietnam to proactively integrate into the world and regional economy. If we only stop at the types of businesses prescribed in current law, we will not be able to cover the types that may arise in practice, nor will we recognize the types of businesses currently regulated in the laws of countries around the world.

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<sup>17</sup> CUONG, BUI NGOC. 2002. "The role of economic law in ensuring business freedom", *Journal of Legal Sciences*, (7), pp. 25-30.

<sup>18</sup> VAN, NGUYEN THI THU. 2008. *Some issues about companies and perfecting the law on companies in Vietnam today*, National Political Publishing House

<sup>19</sup> CENTRAL INSTITUTE FOR ECONOMIC MANAGEMENT (CIEM) and GERMAN TECHNICAL COOPERATION ORGANIZATION (GTZ). 2006, *Understanding the Enterprise Law 2005*, Hanoi, Vietnam.

Based on a review of research works on the freedom to do business and the freedom to choose the type of businesses, it is seen that domestic legal researchers have focused on comprehensively explaining and solving this problem. Theoretical and practical issues of business freedom. However, the freedom to choose types of businesses is a fundamental right of business freedom that has not been adequately researched by scholars.

### **Methodologies**

The article uses methods of systematization, analysis, interpretation comparative jurisprudence, etc., which are common methods in social science research in general and in legal research in particular to carry out the set contents. Specifically, the methods used are: (i). The systematization method and analysis method are used by the author simultaneously and throughout the entire article to clarify issues within the subject and scope of research of the topic. The overview of the research situation to help systematize published research works and have a comprehensive and complete view of the domestic and foreign research situation on theoretical and practical issues of freedom of business in general and freedom to choose the type of business in particular in Vietnam and some countries around the world. (ii). The author uses the method of interpretation and comparison of jurisprudence to compare the provisions of law in some countries around the world as well as the provisions in the history of Vietnamese law.

In the article, the author also uses the methods of interpretation, analysis, and comparison of jurisprudence to explain the inadequacies of current enterprise law and the need to add new types of enterprises into Vietnamese law to meet the needs of business practice.

### **Results and Discussion**

#### **Theoretical issues about the freedom to choose the type of enterprise**

Originating from the doctrine of natural law, people are naturally born with the right to do their own thing, including the right to freedom of business and the freedom to choose types of businesses. Accordingly, “the right to self-employment is an integrated part and plays an important role in the system of human

freedoms<sup>20</sup>. Business freedom is the ability of a subject to carry out business activities in certain forms to achieve the purpose of seeking profit. Business freedom is a system of interconnected rights that the law must recognize<sup>21</sup>.

In a narrow sense, free enterprise is the right of individuals to establish and operate businesses without interference, obstruction, or harassment from the state<sup>22</sup>. In a broad sense, business freedom is the ability for organizations and individuals to do what they want, to choose, and to decide for themselves all issues related to business activities for the purpose of doing business profitably<sup>23</sup>. Each state has different levels and manifestations of recognizing and ensuring the right to freedom of business, expressed through legal regulations, and is very important to recognize the contents and ensure business freedom is enforced in practice.

In a market economy, legal regulations act as a framework for business freedom to be specified, protected, and limited in necessary cases to ensure sustainable development, consistent with public interests and minimizing impacts on the business freedom rights of other subjects<sup>24</sup>.

From a legal perspective, the right to freedom of business is the right of investors to choose the field of industry to invest capital, freedom to establish a business, freedom to choose the type of business, freedom to determine types of assets contributed as capital to the enterprise, freedom to organize the operating apparatus, ways of organizing and managing the enterprise... to conduct business activities. The right to freedom of business is one of the basic rights of citizens prescribed by the Constitution and detailed in specialized legal regulations.

The content of business freedom includes a system of rights associated with business entities such as: i) The right to secure ownership of property; ii) The freedom to establish a business (which includes the freedom to choose a business line, business location, and business model); iii) Freedom of contract;

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<sup>20</sup> MAURICE COZIAN, ALAIN VIANDIER. *Company organization - Volume 1*, according to the translation of the Institute of Legal Sciences Research - Ministry of Justice of Vietnam, 1989, pp. 125.130.

<sup>21</sup> CUONG, BUI NGOC. *Some issues about business freedom in current Vietnamese law*, National Political Publishing House, Hanoi, Vietnam, 2004.

<sup>22</sup> TERRY MILLER & ANTHONY B. KIM. *Defining Economic Freedom - 2010 Index of Economic Freedom*, The Heritage Foundation & The Wall Street Journal, 2010. Pp. 59.

<sup>23</sup> HAI, BUI XUAN (editor). *Legal textbook on business subjects*, Hong Duc Publishing House - Vietnam Bar Association (1st edition), 2016.

<sup>24</sup> VIETNAM CHAMBER OF COMMERCE AND INDUSTRY (VCCI) (2002), *Research report on Building a business legal system to encourage market economic development*, Hanoi, Vietnam.

iv) Right to freedom of competition according to law; v) Right to self-determination in the field of dispute resolution<sup>25</sup>. This right must be concretized by each State in its national legal regulations. The State not only needs to recognize but also must protect and ensure that citizens' freedom to do business is effectively implemented in real life.

In Vietnam, the Constitution 2013 stipulates that everyone has the right to freely do business in professions that are not prohibited by law. This regulation “demonstrates the openness and encouragement of the State towards the business activities of people and businesses. This is also an important premise for changing state management thinking towards business activities”<sup>26</sup>. Along with the Constitution, two important documents: the Law on Enterprises 2020 and Investment Law 2020, have increasingly guaranteed and expanded the business freedom of investors.

The content of business freedom rights, the freedom to choose the type of business is considered the most basic and core content. Accordingly, investors have the right to choose or create types of businesses with legal characteristics that suit their needs and desires to carry out business activities.

The differences between types of businesses can include: the ability to mobilize capital; owner's responsibility; internal organizational structure; owner's participation in management... Different forms of businesses were born to meet the association needs of investors who wish to seek profits and share risks through business activities. When choosing the type of enterprise, investors consider “the legal form of the enterprise has a decisive influence on the internal structure, governance regime and limits of liability of the enterprise”<sup>27</sup>. Because, in business practice, “there are some people who have capital but the law does not allow them to do business, or some people have capital but do not have business capacity. Besides, there are people with business qualifications who

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<sup>25</sup> CUONG, BUI NGOC. *Some issues about business freedom in current Vietnamese law*, National Political Publishing House, Hanoi, Vietnam, 2004.

<sup>26</sup> VIETNAM CHAMBER OF COMMERCE AND INDUSTRY (VCCI) and WORLD BANK (2017), *Review report: Business conditions and business freedom in Vietnam*, Hanoi, Vietnam.

<sup>27</sup> THUY, PHAN THI THU. "Legal form of social enterprises: British experience and some suggestions for Vietnam", *VNU Journal of Science: Jurisprudence*, Volume 31, (4), 2015, pp. 56-64.

want to start a business but do not have capital. So they met and established joint stock companies”<sup>28</sup>.

Each type has its advantages and disadvantages<sup>29</sup>. Some investors choose this type of business for the obvious reason: “to maintain control of the company by preventing outsiders. Only they have the right to buy back the shares of the founding members”<sup>30</sup>. For job investors choosing a business model is a very important and meaningful job. What business model to follow, whether that organizational model is suitable or not, etc. are issues that investors must always pay attention to and research to come up with the most appropriate answer and choice<sup>31</sup>. The law must recognize many business organization models, especially many types of companies for investors to choose from<sup>32</sup>. Thereby demonstrating the important characteristic of economic law is that it must be predictive, on the one hand, to respond promptly to the development of the economy, and at the same time create orientation and legal basis for choices of types of investor's business.

Investors can create new ways to organize businesses to meet their conditions and needs. Therefore, the law, as a recognition of the reality of business life, is necessary to recognize and regulate the diversity of business types, the easier it is for investors to choose, and the more freedom to do business. Business is better guaranteed. Otherwise, it will limit citizens' basic business rights.

At this point, it can be seen that the freedom to choose types of businesses is understood as the right of investors to freely choose appropriate types of business organizations to create conditions and encourage capital participation in business, thereby promoting the development of the economy.

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<sup>28</sup> TRUONG, DOAN VAN. *Establishment, organization, and operation of joint stock companies*, Science and Technology Publishing House, 1999, pp. 159.

<sup>29</sup> U.S. DEPARTMENT OF STATE (2007), *Fundamentals of Business*, International Information Program Publication, According to Website <https://photos.state.gov/libraries/vietnam/8616/transdoc/transPrinciplesOfEntrepreneurship.pdf>

<sup>30</sup> TRUONG, DOAN VAN. 1999.

<sup>31</sup> TRUNG, TRAN TRI. “Principles of building and implementing regulations on enterprise reorganization according to the provisions of the Enterprise Law”, *VNU Journal of Science, Jurisprudence*, volume 28, 2012, pp. 63-68.

<sup>32</sup> HAI, BUI XUAN (editor). 2016.

### **Current status of freedom to choose the type of enterprise in Vietnamese law**

The types of businesses prescribed by law in Vietnam have met most of the practical needs of investors in business life. However, the creation of companies depends on the will of investors. They choose and respond to their choices. The role of law must be to recognize and predict the types of connections that can form in life. From there, create the legal basis to respect the freedom of business and creativity of investors regarding types of business organizations. Some issues with the current status of freedom to choose types of businesses in current law include:

*First*, types of businesses in Vietnam include Limited Liability Companies with one member, Limited Liability Companies with two or more members, Joint Stock Companies, Partnerships, and Sole Proprietorships. Thus, if according to the principle “citizens have the right to do everything not prohibited by law”, then in cases where the law does not have regulations on a form of businesses, citizens still have the right to do so.

There are no regulations that do not allow citizens the right to choose to establish a type of business that is not specified in the current Law on Enterprises. According to current legal regulations, to establish businesses, investors need to carry out business registration procedures according to the provisions of the law. Business registration agencies and civil servants operate based on the principle of “only doing what is prescribed by law”. If the law does not have regulations, there is no basis to allow establishment. There are conflicts and many different understandings between the principles of implementing the law to ensure investors' business freedom.

*Second*, the Law on Enterprises does not consider the freedom to choose the type of business, first of all, the right of individuals and investors, including the right to create different types of businesses. Therefore, it has not created a legal basis for the birth of new types of businesses and perfecting the law in the direction of diversifying types of businesses in Vietnam.

From a legal perspective, the right to freedom of business is the right of investors to choose the field of industry to invest capital, freedom to establish a business, freedom to choose the type of business, freedom to define and determine the type of assets contributed as capital to the enterprise, freely

organize the operating apparatus, ways of organizing and managing the enterprise... to conduct business activities. Therefore, business freedom is one of the basic rights of citizens prescribed by the Constitution and detailed in the provisions of relevant specialized laws.

*Third*, from both theoretical and practical aspects, the state's restriction of the freedom to choose the type of enterprise without a legitimate reason greatly affects the constitutional rights of citizens. The exercise of freedom of business and autonomy of investors is the basis for the formation and birth of diverse types of companies. Therefore, "the law on business entities in economic law has as important a position as the legal provisions on natural persons in civil law"<sup>33</sup>. The promulgation of legal documents to concretize the Constitution's provisions on citizens' freedom to do business has shown the state's efforts to respect and ensure the constitutional rights of citizens. Especially when Vietnam's economy is strongly integrating into the world economy, investors want to promote all their resources to contribute to building a developed economy.

*Fourth*, current Vietnamese law does not recognize the forms of companies established by investors in practice, which means that in addition to the types recognized and regulated by the Law on Enterprises, investors cannot establish other types of businesses. Meanwhile, the business practices of capital contribution forms and the nature of association create intersections between existing types of businesses to create advantages, consistent with the practical needs of investors. Reality shows that "companies with all their types, not just limited liability companies and joint stock companies, are a factor that changes the socio-economic face and perception in Vietnam now"<sup>34</sup>.

*Fifth*, that situation is not consistent with the trend of perfecting the legal system to ensure and expand citizens' freedom to do business and with the State's policy of mobilizing all social resources associations for economic development of the country. "As the law for establishing inputs of the market, business law also needs to have unified ideas and concepts on specifically

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<sup>33</sup> GIAU, NGUYEN VAN, PHUC, NGUYEN VAN and CUNG, NGUYEN DINH. *Economic legal institutions in some countries in the world*, Finance Publishing House, 2016, pp. 41.

<sup>34</sup> CUONG, NGO HUY. "Philosophical basis of company establishment contracts", *VNU Journal of Science: Economics - Law*, Volume XIX, (4), 2003, pp. 1- 8.

institutionalizing the principle of business freedom, but specifically the freedom of investors to establish businesses”<sup>35</sup>.

***Some reasons explain the inadequacies in Vietnamese law regarding the freedom to choose types of business***

To explain the cause of the lack of some common types of businesses in the world, we can consider the historical development of company law and the views of lawmakers, specifically:

*Firstly*, based on the historical development of company law in Vietnam

During the French colonial period, the French introduced to Vietnam company laws built based on the practical activities of merchants. However, these types of businesses have not yet taken root in the economic activities and habits of people Vietnamese people were interrupted when Vietnam was divided into two regions, with two different legal systems. The North launched the process of socialist construction after 1954, starting to build a centralized, bureaucratic, subsidized economy. In the South following the Republic of Vietnam regime, the Saigon Commercial Code 1972 has regulations on private equity associations that continue to be recorded from Article 236 to Article 294.

After liberating the country in 1975, the country built an economy in which the State controlled all factors of production and retained the right to decide on the use of factors of production as well as income distribution. In a centralized-planned economy, there are two main economic components: State and collective. “Only socialist economic organizations (state-owned, collective) are allowed to do business, while other economic sectors are restricted and prohibited”<sup>36</sup>. Therefore, various types of companies do not develop and the state does not promulgate the Company Law.

At the Communist Party of Vietnam Congress in 1986, Vietnam began implementing the “DOI MOI” (renewal) process, whereby “building a multi-sector commodity economy under a market mechanism with state regulation has created favorable conditions for companies to be born”<sup>37</sup>. The Company Laws from 1990 to Law on Enterprises 1999 were issued one after another, creating a legal basis

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<sup>35</sup> BA, DONG NGOC. 2005.

<sup>36</sup> CUONG, BUI NGOC. *Some issues about business freedom in current Vietnamese law*, National Political Publishing House, Hanoi, Vietnam, (2004), pp. 89-98.

<sup>37</sup> SCHOOL OF LAW – VIETNAM NATIONAL UNIVERSITY. *Vietnamese economic law textbook* (3rd edition), Hanoi National University Publishing House, 2001.



for various types of businesses to be born and developed. However, these laws are established by the subjective will of lawmakers and do not really stem from practical business needs. The evidence is that the Company Law 1990 only regulates two types of companies: Joint Stock Companies and Limited Liability Companies. By Law on Enterprises 1999, Limited Liability Companies were separated into two types: one member and two or more members, adding two additional types: Partnerships and Sole Proprietorships. However, a single-member Limited Liability Company only allows organizations to have the right to establish, individuals cannot establish. By Law on Enterprises 2005, individuals and organizations were allowed the right to establish single-member Limited Liability Company. The initial type of corporate entity was only loosely regulated in four articles in the Law on Enterprises 1999. Up to now, regulations on corporate governance have not yet reflected the nature of this type of company when lawmakers tried to combine the two types of companies, Partnerships and Simple Syndication Companies into one regulation on Partnerships. The current Law on Enterprises 2020 still maintains these types of businesses.

*Secondly, lawmakers' views on business freedom*

Citizens have the freedom to choose business fields to invest capital, freedom to establish businesses, freedom to choose the type of business, freedom to determine the type of assets to contribute capital to the business, freedom to determine the organization of the operating apparatus, the way of organizing and managing the enterprise... to conduct business activities. Therefore, citizens' rights will be free to choose within the types of businesses prescribed by law.

Citizens' freedom to do business and state management of all types of businesses are still guaranteed and effective. "The problem may stem from the view that the state must intervene and limit freedom of trade because it needs to direct the national economy towards a certain purpose..."<sup>38</sup>. Provisions on freedom of business in Vietnamese law are often the rights of businesses, meaning that if understood this way, freedom of business only arises after investors have chosen the type of business to establish and operate.

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<sup>38</sup> TRIEN, LE TAI, THO, NGUYEN VANG and TAN, NGUYEN. *Interpretation of Vietnamese Commercial Law*, Volume II, Saigon, Vietnam, 1972.

Currently, according to the provisions of Law on Enterprises 2020: Rights of businesses: 1. Freedom to do business in industries and professions that are not prohibited by law. 2. Business autonomy and choice of form of business organization; proactively choose industries, occupations, locations, and forms of business; proactively adjust business scale, industry, and profession. 3. Choose the form and method of mobilizing, allocating, and using capital. 4. Actively search for markets, customers, and sign contracts...<sup>39</sup>.

*Thirdly*, the view is that there is no need to expand new types.

Among the current types of businesses in Vietnam, they are considered to have many advantages, such as Limited Liability Companies (one member and two or more members) and Joint Stock Companies are the two most popular types, chosen by most investors based on the advantages of these types of companies. In other forms, depending on the business line, investors can choose or are required to establish certain types of enterprises such as Partnerships and Sole Proprietorships... Up to now, among business people, everyone is aware that when establishing a business, they can only choose the types of businesses prescribed by law. In other words, investors can choose but are required to establish certain types of businesses in the enterprise law.

In addition, when society and investors do not accept, have no other options, or are chosen by a few, the law does not need to regulate these forms of enterprises, avoiding the bulk and complexity of law when not really necessary.

It can be seen that, in recent years, the process of perfecting legal regulations on various types of businesses has created significant achievements for the economy and society. Enterprise law has been perfected to more closely meet the needs of real life. Because, through business practice, it is seen that these types of companies “have created their own solid position in the system of businesses in Vietnam and affirmed their indispensable role in the development of the social economy”<sup>40</sup>.

However, the restriction on types of businesses is inconsistent with the improvement trend of enterprise law on expanding business freedom and inconsistent with the actual development of the economy. Up to now, the needs

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<sup>39</sup> NATIONAL ASSEMBLY (2014), *Enterprise Law*, Hanoi, Vietnam.

<sup>40</sup> VAN, NGUYEN THI THU. *Some issues about companies and perfecting the law on companies in Vietnam today*, National Political Publishing House, 2008, pp. 142.

posed by the current Law on Enterprises need to continue to be improved in the direction of expanding citizens' freedom to do business in accordance with the rules and integration of the market economy. The development trend of the law is to recognize and adjust the needs of production and business activities of investors in Vietnam.

### ***Some recommendations to improve the law on the freedom to choose the type of businesses in Vietnamese law***

In a market economy, the role of law is to determine the factors and create guarantees for the exercise of business freedom by respecting and recognizing the creativity of investors about types of businesses. One of the characteristics of law is that it must be predictive, on the one hand, to respond promptly to social conditions and create openings for types of business organizations that arise in the practice of law life. Only then can the law be stable and sustainable.

Investors who establish completely autonomous businesses have the right to choose the form and business model that suits their desires and needs. In practical business life, subjects can create different links to meet their conditions, needs, and preferences. "For investors, choosing a business model is a very important and meaningful task. What business model to follow, whether that organizational model is suitable or not, etc. are issues that investors must always pay attention to and research to come up with the most appropriate answer and choice<sup>41</sup>. Therefore, it requires recognition in legal regulations to create a legal basis for the establishment, operation, and resolution of disputes for various types of business organizations when investors choose. So, the law on business needs to change as follows:

*First*, change thinking and techniques for building corporate law. The creation of a company is based on the will of investors when choosing the type of company as prescribed by law, which must be consistent with business reality.

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<sup>41</sup> TRUNG, TRAN TRI. "Principles of building and implementing regulations on enterprise reorganization according to the provisions of the Enterprise Law", *VNU Journal of Science, Jurisprudence*, volume 28, 2012, pp. 63-68.

The law must recognize the more diverse the types of companies, the more investors can choose from to conduct business, and the freedom to do business is better guaranteed. The regulation of diverse types of businesses aims “to ensure business freedom and create conditions for investors to choose an appropriate business model”<sup>42</sup>. It is necessary to develop laws on various types of businesses in a way that promotes the operation and development of the market economy to recognize and expand the rights to will autonomy, freedom of business, and freedom of ownership of citizens.

The problem arises for the government must “create a legal basis for citizens to actively mobilize all potential and resources and develop production and business, improve the quality of life of themselves and their families and contribute to rich for the country”<sup>43</sup>. Thereby, creating a stable legal environment for socio-economic development after the Constitution 2013 was promulgated and contributing to perfecting the socialist-oriented market economy institution in our country. Legal regulations “should only recognize and ensure the exercise of citizens’ freedom to do business, instead of rigid, imposing regulations”<sup>44</sup>. Accordingly, the state has the responsibility to “provide necessary protection tools so that people can exercise their freedom”<sup>45</sup>. Ensuring that legal regulations on types of businesses not only must be consistent with the reality of the Vietnamese economy but must also ensure compatibility with the laws of countries around the world, creating conditions to promote the process of international economic integration in the current period.

Enterprise law must be innovated and perfected, to create the premise and basis for sustainable socio-economic development. Along with building the legal environment for production and business activities, market institutions in Vietnam are also gradually formed. Build and perfect the legal system “synchronous,

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<sup>42</sup> HAI, BUI XUAN (editor). 2016.

<sup>43</sup> POLITBURO VIETNAM (2005), *Resolution 48-NQ/TW dated May 24, 2005 on Strategy for building and perfecting the Vietnamese legal system to 2010, orientation to 2020*, section II.3, Hanoi, Vietnam.

<sup>44</sup> QUY, MAI HONG (editor). *Business freedom and the issue of ensuring human rights in Vietnam*, Labor Publishing House, 2012.

<sup>45</sup> NGHIA, PHAM DUY. *Economic Law Textbook*, People's Public Security Publishing House, Hanoi, Vietnam, 2010.

unified, feasible, open, transparent, with a focus on perfecting socialist-oriented market economic institutions”<sup>46</sup>.

*Second*, specify the regulations ensuring freedom of business according to the Constitution 2013. Freedom of business is approached in the direction of “citizens are allowed to do what the law does not prohibit”, the above regulations create favorable conditions giving citizens the right to proactively choose and carry out their business activities that are not prohibited by law. Therefore, specialized laws must concretize the Constitution 2013, ensuring maximum business freedom for all activities of citizens.

*Third*, ensure and expand the freedom to choose types of businesses. Law on Enterprises must be “designed” to be more diverse in types of business organizations so that investors have the freedom to choose the appropriate type for themselves. Types that have been born and recorded in the laws of other countries and the legal history of Vietnam need to be researched and learned from experience to be built and recorded in the law. Originating from the nature of companies and the market economy, the legal system regulating types of companies must be flexible and sustainable to meet the needs and ensure the core rights of people citizens.

Law on Enterprises needs to “recognize” and “recognize” the types of business organizations that arise from the realities of business life (created by investors) to provide a legal mechanism to protect these businesses. investors and related third parties. Especially in the context that Vietnamese law does not recognize the types of business organizations established by investors in reality. Faced with the requirements to innovate the economy and improve the investment environment, the need for the legal system on types of businesses in Vietnam is “to be implemented based on absorbing a selectively with foreign experience, so that Vietnamese law increasingly approaches and eventually integrates with world law”<sup>47</sup>.

In addition to the types of businesses that are considered classic and popular, in reality, many other types of business organizations can arise, which are interactions between existing types of businesses to create advantages, in

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<sup>46</sup> POLITBURO VIETNAM (2005), *Resolution 48-NQ/TW dated May 24, 2005 on Strategy for building and perfecting the Vietnamese legal system to 2010, orientation to 2020*, section II.3, Hanoi, Vietnam.

<sup>47</sup> VAN, NGUYEN THI THU. 2008.

accordance with the needs of investors. The nature of the company is a contract and association agreement based on the will and autonomy of its founding members. Therefore, when members establish an organization, they must bear their own risks during its operation and the state's task is to record and regulate risks that may arise, because that organization benefits society.

Any state and any society must respect and recognize human creativity because only creativity can produce good results and produce many material products. In particular, the creation of new types of businesses as a basis for organizing business activities must be encouraged and developed. Law is the legal basis to protect and enforce the will autonomy and business freedom of investors.

### **Conclusions**

Vietnam's economy is integrating strongly into the world economy, investors want to promote all their resources to contribute to building a developed economy based on guaranteed business freedom the best. However, this is somewhat limited when the right to choose the type of business organization is limited. Therefore, perfecting the Law on Enterprises Vietnam must be based on selectively absorbing legal experience from countries with developed economies. By promoting the basic rights of citizens such as freedom of ownership, autonomy, and freedom of business, the State will create conditions to participate in business activities through regulating diverse types of business activities, will create conditions and ensure investors to freely choose the type of business that suits their needs and certain business orientation.

Current business law in Vietnam cannot stand aside from the normative needs of a market economy with diverse and constantly changing economic relationships. With the birth of new types of business organizations, meeting the connection needs of investors is both a rule and an objective requirement. At that time, the State will best mobilize all resources to develop the economy and society.

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